

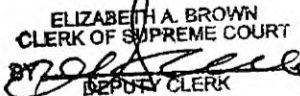
IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAVID MCCLAIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84376

FILED

FEB 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of seven counts of sexual assault on a child under 14 years of age, four counts of sexual assault on a child under 16 years of age with substantial bodily harm, and one count of abuse, neglect, or endangerment of a child. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.¹

Appellant argues the district court erred by adjudicating him guilty of abuse, neglect, or endangerment of a child because the charge was brought outside the statute of limitations. See NRS 171.085 (outlining the statute of limitations for felonies). We have held that “criminal statutes of limitation [are] non-jurisdictional, affirmative defenses” and that “[t]he failure to raise the statute of limitation in the trial court waives the defense.” *Hubbard v. State*, 112 Nev. 946, 948, 920 P.2d 991, 993 (1996). Because appellant did not raise this affirmative defense in the district court, he waived it. And even if this issue is reviewable for plain error despite appellant’s waiver of it, he has not shown error that is plain from a casual inspection of the record. See NRS 178.602; *Valdez v. State*, 124 Nev. 1172,

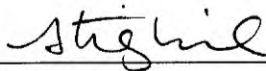
¹Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

1190, 196 P.3d 465, 477 (2008) (outlining plain-error review for unpreserved argument). Given the waiver and the relevant information in the record, appellant is not entitled to relief based upon this claim.


To the extent appellant argues, for the first time on appeal, that the State engaged in vindictive prosecution when it added five counts after appellant obtained postconviction relief and withdrew his guilty plea, he has not shown plain error. “A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000). But “vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant’s exercise of a right.” *Id.*; see also *United States v. Goodwin*, 457 U.S. 368, 381 (1982) (noting that “[i]n the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution” and that “a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision”). Appellant has not shown that the State brought the additional charges against him solely to punish him for withdrawing his guilty plea, particularly where appellant pleaded guilty before a preliminary hearing was held or the victim’s testimony was taken and where the victim testified she had not disclosed all the abuse when she was interviewed by law enforcement. Therefore, appellant is not entitled to relief based upon this claim.

Having concluded appellant's contentions do not warrant relief,
we

ORDER the judgment of conviction AFFIRMED.²

 _____, C.J.

Stiglich

 _____, J.

Lee

 _____, J.

Bell

cc: Hon. Thomas L. Stockard, District Judge
Scott W. Edwards
James David McClain
Attorney General/Carson City
Churchill County District Attorney/Fallon
Churchill County Clerk

²Appellant submitted a pro se document asking for an enlargement of time and mentioning the withdrawal of his court-appointed counsel. We treat the document as a motion to remove counsel and deny it. "A defendant who is appealing from a judgment of conviction may not appear without counsel," NRS 46A(b)(1), and is not entitled to reject court-appointed counsel absent a showing of good cause, *see Thomas v. State*, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978). Appellant's dissatisfaction with counsel's decision about what issues to raise on appeal does not demonstrate good cause as that decision resides within counsel's professional judgment. *See generally Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). If appellant believes that counsel's representation in this appeal rises to the level of ineffective assistance of counsel, he may pursue that claim in a timely filed postconviction petition for a writ of habeas corpus as provided in NRS chapter 34.