IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ADAM JAY EISENHAUER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85390-COA

ORDER OF AFFIRMANCE

Adam Jay Eisenhauer appeals from a judgment of conviction, entered pursuant to an *Alford*[1] plea, of sexual assault on a child under the age of 16 years and attempt to commit lewdness with a child under the age of 14 years. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

First, Eisenhauer argues the district court abused its discretion by imposing the maximum sentence on the attempted lewdness count and running it consecutively to the sexual assault count. Eisenhauer also contends that his sentence amounts to cruel and unusual punishment.

The district court has wide discretion in its sentencing decision, *see Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), including whether to impose consecutive sentences, *see* NRS 176.035(1); *Pitmon v. State*, 131 Nev. 123, 128-29, 352 P.3d 655, 659 (Ct. App. 2015). Generally, this court will not interfere with a sentence imposed by the district court

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

that falls within the parameters of relevant sentencing statutes "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); *see Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). Regardless of its severity, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

The district court imposed consecutive prison sentences of 25 years to life for the sexual assault count and 8 to 20 years for the attempted lewdness count. The sentences imposed are within the parameters provided by the relevant statutes. *See* NRS 176.035(1); NRS 193.153(1)(a)(1) (formerly NRS 193.330); NRS 200.366(3)(b); NRS 201.230(2). And Eisenhauer does not allege that those statutes are unconstitutional or that the district court relied on impalpable or highly suspect evidence. We have considered the sentences and the crimes, and we conclude the sentences imposed are not grossly disproportionate to the crimes, the sentences do not

constitute cruel and unusual punishment, and the district court did not abuse its discretion when imposing sentence.[2]

Second, Eisenhauer argues the district court abused its discretion by failing to make findings related to the victim's statement, which was attached to the presentence investigation report and parts of which were read aloud by the State at the sentencing hearing. Eisenhauer contends that the statement's sophisticated language, including accurate spelling, punctuation, and grammar, supports the conclusion that the statement was written by someone other than the victim. Eisenhauer avers that if the words in the statement are not the victim's, even if it is signed by her, it does not qualify as a victim-impact statement under existing law.[3]

Eisenhauer cites no authority in support of his proposition that a victim cannot receive any assistance in drafting a victim impact

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[2]Eisenhauer asks this court to reconsider and overrule precedent to conform to his sentencing arguments regarding the objective of penal sanctions. This court cannot overrule Nevada Supreme Court precedent. *See People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (Ct. App. 2007), *as modified* (Aug. 15, 2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of the California Supreme Court." (quotation marks and internal punctuation omitted)); *see also Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (observing stare decisis "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court").

[3]Notably, Eisenhauer does not contend that the purported author is not a "victim" under existing law. *See generally Aparicio v. State*, 137 Nev. 616, 496 P.3d 592 (2021) (discussing the definitions of "victim" and setting out the steps the district court must follow when a defendant objects to the representation of someone as a victim).

statement. And the record contains no evidence suggesting the statement was written by anyone other than the victim. In addition, Eisenhauer does not argue that the statement contains information founded on facts supported only by impalpable or highly suspect evidence. Finally, Eisenhauer did not ask the district court not to consider the statement but rather, after an unrecorded bench conference, asked the district court to consider in its sentencing decision that the statement appeared on its face to be more sophisticated than would be expected of someone of the victim's age and experience.[4] Eisenhauer points to nothing in the record that suggests the court failed to consider the statement in the manner he requested. In light of these circumstances, we conclude the district court did not abuse its discretion by considering the victim's statement at sentencing and, thus, Eisenhauer is not entitled to relief based on this claim.

Third, Eisenhauer argues the district court abused its discretion by punishing him twice for offenses arising from a single course of conduct. Because Eisenhauer did not challenge below the court's ability to impose sentences for both counts, he is not entitled to relief absent a

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[4]Eisenhauer argues the district court abused its discretion by not refusing to consider the victim's statement. As indicated above, Eisenhauer did not ask the district court not to consider the statement, and he does not argue on appeal that it was plain error for the district court to consider the statement. We thus conclude he has forfeited this claim, and we decline to review it on appeal. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018); *Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (stating it is the appellant's burden to demonstrate plain error).

demonstration of plain error. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. To prevail on plain error review, Eisenhauer must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected his substantial rights. *Id.* "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

Because Eisenhauer's case was resolved pursuant to a plea agreement, the record is limited. The charging document alleged Eisenhauer committed sexual assault by penetrating the minor victim's mouth with his penis and committed attempted lewdness by attempting to have the minor victim touch his testicles with the intent of arousing, appealing to, or gratifying Eisenhauer's lust, passions, or sexual desires. Eisenhauer's plea agreement provided that he may be sentenced for both the sexual assault and lewdness counts and that the sentences may be run consecutively. Eisenhauer fails to demonstrate error that is plain from a casual inspection of the record. *Cf. Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) (considering whether a lewdness charge was redundant to a sexual assault charge and holding they were not because "separate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions even though the acts were the result of a single encounter and all occurred within a relatively short time" (internal quotation marks omitted)); *see also Townsend v. State*, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987) (providing that the defendant's actions constituting lewdness were separate from his actions constituting sexual

assault even though both occurred during a single encounter because the defendant stopped the lewdness act "before proceeding further").

Moreover, Eisenhauer was originally charged with 10 felony counts. He fails to demonstrate that his resulting sentence constitutes a grossly unfair outcome where he agreed to enter an *Alford* plea to two felony counts despite the possibility of being sentenced consecutively. Therefore, Eisenhauer fails to demonstrate plain error that affected his substantial rights, and we conclude he is not entitled to relief based on this claim.[5]

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[5]Because Eisenhauer fails to demonstrate that a casual inspection of the record yields the conclusion that he was punished twice for a single course of conduct, we need not address his invitation to extend the application of the "continuing conduct" doctrine to his case.

cc: Hon. Thomas L. Stockard, District Judge
Churchill County Public Defender
Attorney General/Carson City
Churchill County District Attorney/Fallon
Churchill County Clerk