

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS RYAN FLOYD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 85156-COA

FILED

DEC 26 2023

ELIZABETH A. BROWN  
CLERK OF THE COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Nicholas Ryan Floyd appeals from a judgment of conviction, entered pursuant to a guilty plea, of attempted sexual assault; child abuse, neglect, or endangerment resulting in substantial bodily harm; and second-degree kidnapping. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Floyd argues the district court abused its discretion in imposing his sentence because it relied upon several representations made by the State that are unsupported by the record. The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Generally, this court will not interfere with a sentence imposed by the district court 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).<sup>1</sup>

As an initial matter, the State argues Floyd waived his right to a direct appeal. The State refers to the guilty plea agreement, which states that Floyd unconditionally waived his “right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4).” However, Floyd waived his right to appeal his conviction, not his sentence. *See Aldape v. State*, 139 Nev., Adv. Op. 42, 535 P.3d 1184, 1189-90 (2023) (holding an appellant did not waive their right to appeal their “sentence or the probation conditions associated with [their] sentence” under an identical waiver clause). Because Floyd argues the district court abused its discretion in imposing his sentence, we conclude that Floyd has not waived his right to the instant appeal, and we consider his claims in turn.

First, Floyd argues the State erroneously represented that he knew the victim—who was 14 years old—was highly intoxicated and took advantage of her inebriation to sexually assault her. At the sentencing hearing, the State argued that the victim was severely intoxicated and that Floyd knew the victim was intoxicated. The State’s representation was supported by the record. In her grand jury testimony, the victim stated that her level of intoxication was a nine or ten on a scale of one to ten and that “everybody in that camp area” knew she was intoxicated because they had

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<sup>1</sup>Floyd did not contemporaneously object to the State’s representations at the sentencing hearing. However, the State does not contend that Floyd’s claims are subject to plain error review, *see Sullivan v. State*, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999), and we conclude that Floyd’s claims fail under either standard.

seen her throw up. The victim also stated that (1) Floyd “had” her arm and took her to his tent against her will, (2) Floyd sexually assaulted her in the tent, and (3) she blacked out multiple times during the course of the assault. The record also indicates that Floyd’s daughter told the police that “[e]veryone there knew that [the victim] was drinking.” Therefore, Floyd fails to demonstrate the State’s argument was supported only by impalpable or highly suspect evidence.

Second, Floyd argues the State erroneously represented that he tried to accost the victim when she was sick earlier that evening and that a person in charge of taking care of the victim, A. Taylor, told him to “stay away from” the victim. At the sentencing hearing, the State argued that Floyd tried to follow Ms. Taylor and the victim when Ms. Taylor took the victim to the lake to clean the victim off but Ms. Taylor told Floyd to “stay away from” the victim.

The State did not contend that Floyd accosted the victim when Ms. Taylor brought the victim to the lake. Moreover, the State’s representation that Floyd tried to follow Ms. Taylor and the victim to the lake is supported by the record. In her grand jury testimony, the victim stated that Floyd told Ms. Taylor that he would take the victim to the water to rinse off and that Ms. Taylor “told him no, that she had it but he just kept following us into the water.” Although the record does not indicate that Ms. Taylor told Floyd to “stay away from” the victim, there is no indication that this representation prejudiced Floyd. The district court stated that it had reviewed the State’s sentencing memorandum, which referred to the aforementioned grand jury testimony, and did not state that Ms. Taylor had told Floyd to “stay away from” the victim. The district court also stated that its sentencing decision was based on the totality of the circumstances,

including Floyd's prior criminal history, the crimes committed, and the victim impact statements. Therefore, Floyd fails to demonstrate prejudice resulting from consideration of any information or accusations founded on facts supported only by impalpable or highly suspect evidence.

Third, Floyd argues the State erroneously represented that he "violently 'dragged'" the victim into his tent against her will to assault her. At the sentencing hearing, the State represented on multiple occasions that Floyd had "dragged" the victim into his tent where he sexually assaulted her.

The State did not contend that Floyd dragged the victim to his tent violently. And the State's representation was otherwise supported by the record. In her grand jury testimony, the victim stated that Floyd "had my arm and he was taking me to his tent and I told him I didn't want to go in there" and that Floyd brought her into the tent and sexually assaulted her. The record also indicates that the victim's cousin informed the police that Floyd "pulled" the victim into the tent. Although the victim and the victim's cousin did not use the term "dragged," the record indicates that Floyd pulled or otherwise led the victim to his tent against her will. Therefore, Floyd fails to demonstrate the State's argument was supported only by impalpable or highly suspect evidence.

Fourth, Floyd argues the State erroneously represented that the sexual assault left the victim scratched and bruised. Floyd contends that the victim's injuries were not caused by the sexual assault but from the victim falling over and tripping earlier. At the sentencing hearing, the State argued that Floyd had "left a child scratched and bruised after holding her down and raping her."

The State's representation that the sexual assault left the victim bruised and scratched may reasonably be inferred from the victim's grand jury testimony. After discussing the nature of the assault, the State asked the victim whether she had any injuries, and the victim stated she had bruises and scratches on her legs but did not recall if she had any injuries to her shoulders. Nothing in the victim's testimony indicated that the injuries to the victim's legs were from anything other than the assault, and Floyd does not cite any evidence demonstrating that these specific injuries were from anything other than the assault.<sup>2</sup> Therefore, Floyd fails to demonstrate the State's argument was supported only by impalpable or highly suspect evidence.

Lastly, Floyd argues the State erroneously represented that he had pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and that the State used this mistaken fact to argue that he did not accept responsibility for his actions. At the sentencing hearing, the State argued that Floyd had entered an *Alford* plea and had refused to accept responsibility for his actions.

The State's representation that Floyd had entered an *Alford* plea is not supported by the record; the guilty plea agreement and judgment


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<sup>2</sup>Floyd refers to (1) a statement from the defendant's daughter, in which she told law enforcement that, the day after the assault, she saw the victim had a scrape on her left knee and scratches on her right arm and that she assumed the victim's injuries were from falling; and (2) a statement from another person who was not present when the assault occurred indicating they had merely heard the victim had fallen and hurt her knee. These statements do not clearly address the aforementioned injuries to the victim's legs and do not clearly contradict the victim's testimony. Thus, they do not render the victim's grand jury testimony impalpable or highly suspect.

of conviction indicate Floyd pleaded guilty. However, there is no indication in the record that this representation prejudiced Floyd. During his allocution, Floyd stated that he pleaded guilty and that he took full responsibility for his actions. Floyd also apologized to the victim and to the families involved. And as previously stated, the district court based its sentencing decision upon the totality of the circumstances, including Floyd's prior criminal history, the crimes committed, and the victim impact statements. Therefore, Floyd fails to demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.

Having considered the sentence and the crime, we conclude the district court did not abuse its discretion in sentencing Floyd. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Joseph Hardy, Jr., District Judge  
Legal Resource Group  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk