IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CLARK A/K/A MICHAEL ALLAN CLARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48647

FILED

JAN 30 2009

TRACIE K. LINDEMAN
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 two counts of sexual assault of a minor under the age of 16 and one count of preventing or dissuading a witness or victim from testifying and/or producing evidence. Eighth Judicial District Court, Clark County; David B. Barker, Judge, Eighth Judicial District Court, Clark County; Elizabeth Halverson, Judge. Appellant Michael Clark was sentenced to serve two concurrent life sentences in prison with the possibility of parole after 20 years for sexual assault of a minor under the age of 16 and 12 months in prison for preventing or dissuading a witness or victim from testifying, to be served concurrently to the sexual assault.

Clark raises eight issues on appeal. First, Clark contends that the district court erred by denying his motion for self-representation. Specifically, he argues that his motion was timely and that the district court erred by denying his motion on the basis that he did not understand the charges against him or his possible defenses. In addition, he argues that because the district court denied his motion, he was unable to cross-

examine witnesses, present the defense he wanted, testify fully, call the victim's aunt as a witness, be present during bench conferences, and make objections for the record.

Clark made two separate motions for self-representation. The first came on the second day of trial. This oral motion was made after jury selection but prior to opening statements. Clark requested that he be allowed to make the opening and closing statements and to cross-examine the victim and the victim's mother. He requested that his counsel cross-examine the remaining witnesses. The district court denied the motion as untimely and because Clark was requesting a hybrid form of representation. The second motion for self-representation occurred on the third day of trial. In this written motion, Clark requested that he be allowed to conduct the entire trial. Clark argued that counsel misrepresented facts in the opening statement and was not asking all of the questions that Clark wanted asked of witnesses. The district court conducted a canvass pursuant to Faretta v. California, 422 U.S. 806 (1975), and determined that Clark did not understand the charges against him, the possible defenses, or the evidentiary rules. The district court also found that the request was untimely. Therefore, the district court denied Clark's request.

A defendant has a Sixth Amendment right to conduct his own defense. Id. at 818-19. A district court may not deny a defendant's request to represent himself "'solely because the court considers the defendant to lack reasonable legal skills or because of the inherent inconvenience often caused by pro se litigants.'" Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997) (quoting Lyons v. State, 106 Nev.

438, 444 n.1, 796 P.2d 210, 217 n.1 (1990), abrogated on other grounds by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001)). However, a district court may deny a defendant's request where "'[1] his request is untimely, [2] the request is equivocal, [3] the request is made solely for the purpose of delay, [4] the defendant abuses his right by disrupting the judicial process, or [5] the defendant is incompetent to waive his right to counsel.'" Id. (quoting Lyons, 106 Nev. at 443-44, 796 P.2d at 213)). "District courts have discretion to deny self-representation requests when they are made in an untimely fashion." Harris v. State, 113 Nev. 799, 803, 942 P.2d 151, 154 (1997). In addition, this court has rejected forms of "hybrid representation," where a defendant and counsel share courtroom responsibilities. See Wheby v. Warden, 95 Nev. 567, 568-69, 598 P.2d 1152, 1153 (1979), overruled on other grounds by Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988). "[A]lthough a criminal defendant may have both a right of self-representation and a right to assistance of counsel, this does not mean that a defendant is 'entitled to have his case presented in court both by himself and by counsel.'" Id. at 568-69, 598 P.3d 1153 (quoting Miller v. State, 86 Nev. 503, 506, 471 P.2d 213, 215 (1970)).

Clark's claim lacks merit. His first request for self-representation was improper as his request was for hybrid representation. As noted above, we have rejected hybrid representation, and the district court did not err in denying this request. His second request for self-representation was untimely as it was made on the third day of trial after several witnesses had testified. To the extent that the district court denied Clark's demand for self-representation based on his lack of legal knowledge, Faretta held that lack of legal knowledge is not an adequate

ground for denial of a request for self-representation. 422 U.S. at 836; see also Gallego v. State, 117 Nev. 348, 356, 23 P.3d 227, 233 (2001) (finding that defendant can choose self-representation "even though the accused lacks the skill and experience of a lawyer"). However, the district court properly denied the request as untimely. See Lyons, 106 Nev. at 445, 796 P.2d at 214 (holding that district court has greater discretion to deny motion for self-representation when made during trial than if request had been made shortly before or on first day of trial).

Because the district court did not err by denying Clark's claim for self-representation, his claim that he was prejudiced also lacks merit. Counsel "'has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop.'" Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (quoting Wainright v. Sykes, 433 U.S. 72, 93 (1997) (Burger, C.J., concurring). Therefore, Clark's claims that he should have been able to dictate to counsel what witnesses to call, questions to ask witnesses, objections to be made, and the defense to assert were properly denied by the district court.

In connection with his motion for self-representation, Clark contends that the district court did not adequately inquire into the conflict between Clark and counsel. Clark apparently disagreed with counsel respecting what questions to ask witnesses. In particular, he argues that the district court should have reviewed the questions that Clark wanted counsel to ask witness Carol Hopkins. The record reveals that the district court held extensive hearings to determine why Clark wanted to represent himself. Clark was given the opportunity to explain his difficulty with the way that counsel was handling his defense, and while the district court did

not allow Clark to enter his questions into the record, Clark was able to explain the substance of his questions for the record. Moreover, the district court inquired of both counsel and Clark whether the relationship between the two of them had deteriorated to the point that counsel could no longer adequately represent Clark. Counsel responded that he could still zealously represent Clark. And Clark stated that he believed that counsel was competent to handle his case. Accordingly, we conclude that the district court adequately inquired into the conflict between Clark and counsel.

Second, Clark argues that the district court erred by not allowing Clark to use his final peremptory challenge to dismiss juror nine over counsel's strategic decision not to peremptorily challenge that juror. Specifically, Clark contends that juror nine was biased because he stated that if he were Clark, he would not want him on the jury if Clark did not testify. Therefore, Clark argues that he was compelled to testify against his wishes because of the bias stated by juror nine.

Clark failed to include a transcript of the jury selection proceeding. The burden is on the appellant to provide an adequate record enabling this court to review assignments of error. Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). However, the district court stated at trial that juror nine had been properly rehabilitated. In particular, the district court noted that juror nine stated that he understood the law that a defendant does not have to testify and that it cannot be used against him. Juror nine also stated that he could apply that law in this case. Therefore,

the district court left juror nine on the jury panel. Counsel stated that he did not use the last peremptory challenge on this juror because the next potential juror had a child who had been a victim of sexual assault. Counsel stated that he could not be sure that the district court would remove this juror for cause and did not want her empaneled on the jury. "[W]ith few exceptions, the means of representation, i.e., trial tactics, remain within counsel's control." Rhyne, 118 Nev. at 8, 38 P.3d at 168 (Defendant has control over certain fundamental objectives, such as whether to employ defense of not guilty by reason of insanity). Accordingly, whether to use a peremptory challenge is counsel's decision, and the district court did not err in denying Clark's request to use his last peremptory challenge.

In a related claim, Clark argues that the district court should have allowed him to be present at a bench conference regarding juror nine. In support of this contention, Clark cites to Snyder v. Massachusetts, 291 U.S. 97 (1934), for the proposition that a defendant has the right to be present during the "summoning (sic) up of counsel." Id. at 106, 109. Clark misquotes this case, as Snyder actually states that a defendant has the right to be present during the "summing up of counsel." That is, a defendant has a right to be present during opening and closing arguments. Therefore, the district court did not err in denying Clark's request to be present at the bench conference.

Third, Clark contends that the district court erred by refusing to compel the victim's aunt to testify and refusing to allow Clark's investigator to read into evidence a statement written by the victim's aunt. Specifically, Clark argues that he was entitled to compulsory

process and that the district court should have held a hearing to determine whether the victim's aunt was medically unable or incompetent to testify. He also argues that the statement prepared by the aunt should have been read into evidence because the statement was reliable as the aunt had no reason to lie to help her niece's alleged rapist.

Clark subpoenaed the victim's aunt to testify on his behalf. On the day before she was scheduled to testify, the victim's mother presented a note from a doctor stating that the aunt should not be compelled to testify because it would be harmful to her health and because, as the result of several strokes, her mental competency was questionable. After trial that day, Clark's investigator interviewed the aunt. She wrote out a statement for the investigator indicating that two years ago she had stated to Clark that "[the victim] makes up things about people; about everybody, makes up stories about everybody." At trial the next day, Clark expressed his desire that the aunt testify or, in the alternative, that her statement be read to the jury. Counsel told the district court that he no longer wished to pursue having the aunt testify because he determined that the doctor's assessment of the aunt was correct, the aunt was difficult to understand, and she was not mentally competent to testify. Moreover, two years ago Clark was in prison when the alleged communication took place, calling into question the aunt's credibility respecting her statement to Clark. In addition to finding that the witness was not reliable or competent to testify, the district court ruled that the evidence was improper character evidence and hearsay.

The determination of whether to admit evidence is within the sound discretion of the district court and that determination will not be

disturbed on appeal unless manifestly wrong. Keeney v. State, 109 Nev. 220, 228, 850 P.2d 311, 316 (1993), overruled on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000); see Rowland v. State, 118 Nev. 31, 43, 39 P.3d 114, 121-22 (2002). Generally, hearsay is inadmissible unless it falls within one of the exceptions to the general rule. NRS 51.065. Pursuant to NRS 51.315, "[a] statement is not excluded by the hearsay rule if: (a) [i]ts nature and the special circumstances under which it was made offer strong assurances of accuracy; and (b) [t]he declarant is unavailable as a witness."

We conclude that the district court did not abuse its discretion in denying Clark's request to compel the aunt to testify. The district court reviewed the doctor's note provided by the victim's mother and counsel conceded that the physical and mental condition of the aunt was questionable. Moreover, counsel determined that he would not pursue calling the aunt as a witness because her credibility was questionable; this decision was counsel's responsibility. See Rhyne, 118 Nev. at 8, 38 P.3d at 167. Therefore, we conclude that the district court did not err in this regard.

Further, the district court did not abuse its discretion by denying Clark's request to read the aunt's statement to the jury. The statement was not made under circumstances that assured the accuracy of the statement given the aunt's physical and mental condition at the time she wrote it. Therefore, the written statement was inadmissible hearsay, and the district court did not err in refusing to admit it.

Fourth, Clark argues that there was insufficient evidence to convict him of sexual assault of a minor under age of 16. Specifically, he

contends that the victim's behavior after the incident was inconsistent with that of a sexual assault victim, circumstantial evidence and DNA evidence were lacking, and there were several inconsistencies between the victim's testimony and other witnesses' accounts.

Our review of the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). We have repeatedly held that the uncorroborated testimony of a victim is sufficient to uphold a conviction for sexual assault. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005); State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996). The victim testified that Clark pushed her down on the bed and held her down while he assaulted her. Clark's DNA was found on her neck or shoulder where the victim alleged that Clark kissed her. No DNA was found in the victim's vagina, but the DNA expert testified that the lab only tests for DNA if it finds sperm and no sperm was found. In addition, although the victim's aunt testified that she may have heard the victim moan "oh baby," the State presented evidence that it may have been Clark who made this statement or that the aunt may have been mistaken about what she heard. Counsel vigorously cross-examined the victim regarding these inconsistencies and highlighted them during closing argument. "[W]here there is conflicting testimony presented at a criminal trial, it is within the province of the jury to determine the weight and credibility of the testimony." Deeds v. State, 97 Nev. 216, 217, 626, P.2d 271, 272

(1981). While the evidence presented was not overwhelming, the State presented sufficient evidence that Clark was guilty of sexual assault.

Fifth, Clark argues that the district court violated the privileges and immunities clause because he was not sentenced by the trial jury. Specifically, Clark contends that other states allow defendants to be sentenced by juries for crimes other than first-degree murder and that because Nevada does not allow it, Nevada and the district court violated the Privileges and Immunities Clause. U.S. Const. art. IV, § 2, cl. 1. The Privileges and Immunities Clause prohibits discrimination against non-state residents and "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948). That Clause, however, does not require that laws passed in one state apply to all states, as Clark suggests. Nor does the Privileges and Immunities Clause suggest that individual states are not free to craft their own criminal sentencing schemes. Therefore, Clark's claim lacks merit.

Sixth, Clark argues that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. Clark contends that life sentences are cruel and unusual punishment in general and especially under the "circumstances of this case." Clark concedes that this court has found life imprisonment constitutional. The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence but forbids only an extreme sentence that is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991). 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.'" Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996)). This court has consistently afforded the district court wide discretion in its sentencing decisions. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will refrain from interfering with the sentence imposed "[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).

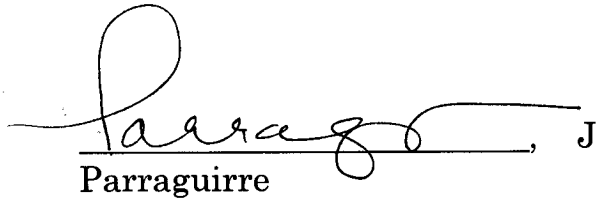
In the instant case, Clark does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statute. See NRS 200.366(3)(b) (2005) (providing for sentence of life in prison with possibility of parole after 20 years). Finally, we conclude that the sentence is not so unreasonably disproportionate to the offense as to shock the conscience. Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

Seventh, Clark alleges that his counsel was ineffective for a host of reasons. Claims of ineffective assistance of counsel are appropriately raised in a timely post-conviction petition for a writ of habeas corpus filed in the district court in the first instance. See Pellegrini v. State, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001). Therefore, we decline to consider these claims here.

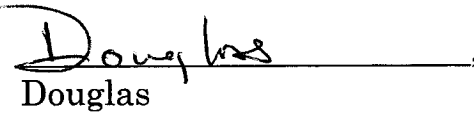
Finally, Clark asserts that the cumulative effect of the claimed errors denied him a fair trial, requiring reversal. "If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction." Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (1996). We conclude that any error, considered individually or cumulatively, does not warrant relief.

Having considered Clark's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 23, District Judge
Hon. David B. Barker, District Judge
Bret O. Whipple
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk