IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK BRANDON CHRISTENSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52466

FILED

AUG 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of lewdness with a child under the age of fourteen years old. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. The district court sentenced appellant Derek Brandon Christensen to serve two consecutive prison terms of 10 years to life.

Christensen contends that he should be allowed to withdraw his plea and obtain a new sentencing hearing for four reasons: (1) his plea was invalid because he was not aware that probation was unavailable; (2) the victim impact statement made by the victim violated his due process rights because she was not sworn; (3) the victim impact statement made by the victim's mother violated his due process rights because she was not sworn, Christensen did not receive notice of her statement, and she mentioned other bad act evidence; and (4) the district court relied on improper evidence at the time of sentencing.

Validity of the guilty plea

First, Christensen contends that his guilty plea was invalid because he was not aware that probation was unavailable. Because

Christensen did not challenge the validity of the guilty plea in the district court, we will not consider his challenge in the first instance on direct appeal. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 3645, 368 (1986) (explaining that "a defendant must raise a challenge to the validity of his or her guilty plea in the district court in the first instance, either by bringing a motion to withdraw the guilty plea, or by initiating a post-conviction proceeding").

Victim impact statements

Second, Christensen contends that the victim impact statement made by the victim violated his due process rights because she was not sworn before testifying. As this court held in Buschauer v. State, 106 Nev. 890, 893-94, 804 P.2d 1046, 1048 (1990), when a witness gives an oral victim impact statement at sentencing and the statement is limited to the facts of the crime, the impact on the victim, and the need for restitution, the witness must be sworn before testifying, but the defendant is not entitled to prior notice of the contents of the impact statement and generally is not entitled to cross-examine the witness regarding the impact statement. Although defense counsel requested that the victim be sworn, the district court declined to do so. This was error under Buschauer. But we conclude that the error was harmless because there is no indication that the district court based its sentencing decision on that unsworn impact statement. See Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994) (recognizing that the erroneous admission of victim impact statements is subject to harmless-error analysis), vacated on other grounds on rehearing, 114 Nev. 299, 956 P.2d 88 (1998); Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) ("The district court is capable of listening to the victim's feelings without being subjected to an

overwhelming influence by the victim in making its sentencing decision."). Accordingly, we conclude that Christensen is not entitled to a new sentencing hearing based on this issue.

Third, Christensen contends that the victim impact statement made by the victim's mother violated his due process rights because (1) she was not sworn before making the statement, (2) Christensen was not provided with notice of her testimony, and (3) she mentioned other bad act evidence. As this court held in Buschauer, when a witness gives an oral victim impact statement at sentencing and the impact statement refers to any specific prior acts of the defendant, the witness must be sworn and the defendant must be given prior notice of the other acts that the statement will address and be given an opportunity to cross-examine the witness. 106 Nev. at 894, 804 P.2d at 1048. Here, the impact statement by the victim's mother addressed the effects of the crime and the possible sentence to be imposed. But she also stated that she had heard rumors that Christensen had also engaged in inappropriate conduct with another child. Given the scope of the statement, we conclude that it was error for the witness not to be sworn and for the prosecutor not to provide notice of the witness's testimony. However, we further conclude that these errors were harmless because the sentencing judge specifically stated that he was not relying on the statement in imposing sentence. Lane, 110 Nev. at 1166, 881 P.2d at 1365; see also Buschauer, 106 Nev. at 894, 804 P.2d at 1049 (indicating that when a defendant has not been given prior notice of an impact statement that will address other acts, "the defendant will be entitled to a continuance to rebut the impact statement, unless the court can disclaim any reliance on the prior acts in imposing sentence").

Accordingly, Christensen is not entitled to a new sentencing hearing based on this issue.

Evidence considered in sentencing

Fourth, Christensen contends that the district court relied on improper evidence at the time of sentencing. In particular, Christensen complains that the prosecutor made false and inflammatory remarks during the sentencing hearing when arguing that this was not an isolated incident but rather a "full-blown affair with a ten-year-old girl over a period of six months," that Christensen "pushed the victim down when he wanted to have sex with her," and by referring to excerpts from the presentence investigation report stating that Christensen had called the victim a vulgar name several times. According to Christensen, these comments caused the district court to deviate from the presentence investigation report's recommendation of concurrent prison terms.

This court has consistently afforded the district court wide discretion in its sentencing decision. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court therefore 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).

Christensen failed to object to any of the prosecutor's statements and only now contends that they were false. We therefore review for plain error under NRS 178.602, which requires that the error be plain from a casual inspection of the record and that the error affected the defendant's substantial rights. See Green v. State, 119 Nev. 542, 545, 80

P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). As a result of Christensen's failure to object so that the support for the prosecutor's comments could be fleshed out in the district court, the record does not reveal that the comments were false or based on impalpable or highly suspect evidence. Moreover, Christensen has not demonstrated that his substantial rights were affected given the district court's broad discretion to impose consecutive or concurrent sentences. See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 302-03, 429 P.2d 549, 552 (1967). Because Christensen has not demonstrated plain error in the district court's consideration of the prosecutor's comments, we conclude that a new sentencing hearing is not warranted based on this claim.

Having considered Christensen's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Washoe County Alternate Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk