IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH WAYNE MCCLELLAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55372

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingram
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of home invasion while in possession of a deadly weapon and one count of robbery with the use of a deadly weapon. Third Judicial District Court, Churchill County; William Rogers, Judge. The district court sentenced Appellant Kenneth Wayne McClelland to serve prison terms of 72 to 180 months for the home invasion, 72 to 180 months for the robbery, and 50 to 180 months for the deadly weapon enhancement.

McClelland contends that the district court erred by failing to adequately consider and state on the record the factors identified in NRS 193.165(1) in determining the length of sentence to impose for the deadly weapon enhancement. McClelland failed to object to the adequacy of the district court's findings during sentencing and we conclude that he has failed to demonstrate plain error. See Puckett v. United States, 556 U.S.

___, 129 S. Ct. 1423, 1428-29 (2009); Mendoza-Lobos v. State, 125 Nev. ___, ___, 218 P.3d 501, 507 (2009).

McClelland next complains that the district court improperly considered evidence at sentencing that it had previously ruled was inadmissible. This court will reverse a sentence if it is supported solely by highly suspect and impalpable evidence. Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). However, "a sentencing proceeding is not a second trial, and the court is privileged to consider facts and circumstances that would not be admissible at trial." Id. The record reveals that the district court did not rely solely on impalpable or highly suspect evidence. Thus, we conclude that this contention is without merit.

Finally, McClelland contends that his sentence constitutes cruel and unusual punishment because he had no prior felony convictions, he maintained that his codefendant was the primary participant in the crime, he offered extensive mitigation, and his codefendant received a lesser sentence than he did. We disagree. The sentences imposed are within the statutory limits, see NRS 193.165(1); NRS 200.380(2); NRS 205.067(4), and are not so disproportionate to the crimes as to shock the conscience. See Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996). McClelland does not assert that the relevant statutes are unconstitutional. See id. Further, the district court is not required to sentence all offenders convicted of the same crime to the same punishment. Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment and the district court did not abuse its

discretion in imposing McClelland's sentence. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

Having considered McClelland's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. William Rogers, District Judge
Stephen B. Rye
Attorney General/Carson City
Churchill County District Attorney
Churchill County Clerk