

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RIKKI KLEIN-LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68374

FILED

JAN 21 2016

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of involuntary manslaughter. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Defense counsel misconduct

Appellant Rikki Klein-Lopez claims he was deprived of his due process right to a fair sentencing by the argument made by codefendant's counsel. Klein-Lopez asserts codefendant's counsel committed misconduct by portraying him as being equally or more culpable than codefendant, asserting both defendants deserved equal punishment, and arguing if Klein-Lopez received probation then codefendant should also receive probation. And Klein-Lopez cites to *People v. Estrada*, 63 Cal. App. 4th 1090, 1096 (1998), for the proposition that misconduct by codefendant's counsel can violate a defendant's constitutional rights.

Klein-Lopez did not object to codefendant's counsel's arguments and we conclude he has not demonstrated plain error because counsel's arguments did not "so infect[] the proceedings with unfairness

as to result in a denial of due process.” *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005); *see Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unpreserved claims of misconduct for plain error).

Abuse of discretion at sentencing

Klein-Lopez claims the district court abused its discretion by rejecting his stipulated sentence. He asserts that he did not batter or attempt to batter the victim and he accepted responsibility for the involuntary manslaughter based on his vicarious liability, whereas his codefendant committed the battery that caused the victim’s death. And he argues given his and his codefendant’s disparate liability in this crime, the court abused its discretion by imposing a sentence similar to the sentence imposed on his codefendant.

We review a district court’s sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The court’s sentencing discretion is not bound by the terms of a plea agreement. *See generally Van Buskirk v. State*, 102 Nev. 241, 244, 720 P.2d 1215, 1217 (1986). And the court is not required to follow the sentencing recommendations of the State or Division of Parole and Probation. *See Collins v. State*, 88 Nev. 168, 171, 494 P.2d 956, 957 (1972).

Here, the district court rejected the parties’ stipulation to probation and sentenced Klein-Lopez to a prison term of 16 to 40 months. The court sentenced the codefendant to a prison term of 19 to 48 months. In reaching its sentencing decision, the court determined that Klein-Lopez

played a large role in the victim's death. The court specifically referred to the surveillance video, which depicts Klein-Lopez acting in concert with his codefendant when they approached the victim, pointing and shouting at the victim as he lay mortally injured, and celebrating and reenacting the incident later in an elevator. We conclude the court did not abuse its discretion at sentencing.

Cruel and unusual punishment


Klein-Lopez claims his sentence to a prison term of 16 to 40 months for standing nearby when someone else battered the victim constitutes cruel and unusual punishment.


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 that 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).

Here, Klein-Lopez was adjudicated guilty of involuntary manslaughter based on his guilty plea. His sentence falls within the parameters provided by the relevant statutes. *See* NRS 193.130(2)(d); NRS 200.090. And he does not allege those statutes are unconstitutional.

We conclude his sentence is not so grossly disproportionate to the crime as to constitute cruel and unusual punishment.

Having concluded Klein-Lopez is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Kerry Louise Earley, District Judge
The Law Office of David R. Fischer
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk