IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY BENJAMIN CASTRO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68516

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of child abuse, neglect, or endangerment with substantial bodily harm. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Appellant Anthony Castro claims his prison sentence of 5 to 20 years constitutes cruel and unusual punishment because it is so disproportionate to his crime "that it shocks the conscience and offends the fundamental notions of human dignity."

Regardless of its severity, a sentence that is 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).

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Here, the sentence imposed is within the parameters provided by the relevant statutes, *see* NRS 200.508(1)(a)(2), and Castro does not allege that those statutes are unconstitutional. We conclude the sentence imposed is not so grossly disproportionate to the crime as to constitute cruel and unusual punishment.

Castro also claims the district court abused its discretion by deviating from the State's sentencing recommendation and relying upon a presentence investigation report (PSI) that was based on an incorrect psychological evaluation.

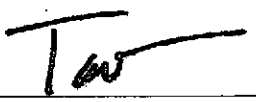
We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348; 213 P.3d 476, 490 (2009). A sentencing "court is privileged to consider facts and circumstances which clearly would not be admissible at trial." *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). However, we "will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Furthermore, the district 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 record reveals the district court knew the first PSI was based on a faulty psychological evaluation and continued sentencing so that a second PSI, based on a new psychological evaluation, could be prepared. The district court declined to follow the State's sentencing recommendation of 4 to 10 years after noting the new PSI indicated Castro was a moderate risk to reoffend, viewing the photographs of the victim's injuries, and observing there was no excuse for a grown man to beat a

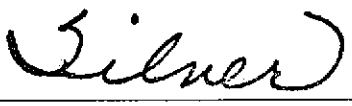
three-year-old baby. Given this record, we conclude the district court did not abuse its discretion at sentencing.

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

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Silver

cc: Hon. Carolyn Ellsworth, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk