IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERTO JIMENEZ GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74794-COA

ORDER OF AFFIRMANCE

Roberto Jimenez Gonzalez appeals from a judgment of conviction entered pursuant to an *Alford*[1] plea of attempted lewdness with a child under the age of 14. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

First, Gonzalez argues the district court erred by failing to conduct a hearing concerning his competency to enter an *Alford* plea. Gonzalez asserts he informed the district court that he suffers from a slight case of Alzheimer's disease, cannot read or write English well, and struggled to understand the proceedings due to his poor hearing, and, for those reasons, his competency should have been evaluated.

NRS 178.405 requires the district court to suspend the trial-level proceedings and conduct a competency hearing if a doubt arises as to the defendant's competence to stand trial. A competency hearing is required only if a reasonable doubt exists as to the defendant's competence

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

and the district court has discretion to determine whether such a reasonable doubt exists. *See Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983). "A bare allegation of incompetence is not sufficient to raise a reasonable doubt." *Martin v. State*, 96 Nev. 324, 325, 608 P.2d 502, 503 (1980).

During the plea canvass, Gonzalez informed the district court that he did not read English well, but acknowledged his attorney had helped him understand the written plea agreement. Gonzalez also informed the district court that he was only taking prescription medication for his heart, but stated "I've got sort of Alzheimer's." The district court asked Gonzalez to inform it if there was anything he did not understand and Gonzalez agreed to do so. The district court reviewed the terms of the plea agreement and the waiver of rights. Gonzalez stated he understood the terms, his trial and appellate rights, and wished to enter an *Alford* plea. The district court then accepted Gonzalez' *Alford* plea.

At the sentencing hearing, the parties discussed Gonzalez' difficulty hearing and explained that he had been provided headphones to aid his hearing during sentencing. Gonzalez informed the district court that he could hear okay at that hearing and his counsel had helped him understand everything. Given the record containing Gonzalez' statements in which he informed the district court that he understood the proceedings, we conclude Gonzalez does not demonstrate the district court erred by not

conducting a competency hearing. Therefore, Gonzalez is not entitled to relief.[2]

Second, Gonzalez argues the State breached the spirit of the plea negotiations by making extensive argument during the sentencing hearing concerning the crime. Gonzalez did not preserve this claim for appeal. "When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain." *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 487 (2005) (internal quotation marks omitted). "A plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea." *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). We review an unpreserved allegation that the State breached a plea agreement for plain error. *See id.* at 387 n.3, 990 P.2d at 1260 n.3. In conducting plain error analysis, we must determine whether there was error and whether the error was plain from the record. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Our review of the record reveals Gonzalez fails to demonstrate plain error because he did not show either the terms or the spirit of the plea

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[2]Gonzalez also asserts that his *Alford* plea was invalid given his age and health issues, and he asks this court to overrule *Bryant v. State*, 102 Nev. 268, 721 P.2d 364, (1986), in order to permit him to raise challenges to the validity of his plea on direct appeal in the first instance. However, *Bryant* was correctly decided. Gonzalez' challenge to the validity of his plea does not clearly appear on the record and does not rest on purely legal grounds and, therefore, we decline to address Gonzalez' claim in the first instance on direct appeal. *See O'Guinn v. State*, 118 Nev. 849, 851–52, 59 P.3d 488, 489–90 (2002).

agreement was violated. In the written plea agreement, the State agreed to recommend probation so long as a psychosexual evaluation did not determine Gonzalez to be a high risk to reoffend. The agreement further stated "[a]t sentencing, both sides will retain the right to argue the facts and circumstances in regards to the underlying sentence." At the sentencing hearing, the State urged the district court to place Gonzalez on probation and argued a suspended sentence of 8 to 20 years was appropriate to hold him accountable for his actions. In light of the written plea agreement and the record of the sentencing hearing, we conclude Gonzalez fails to demonstrate the State breached the plea agreement. Therefore, we conclude Gonzalez fails to demonstrate plain error in this regard.

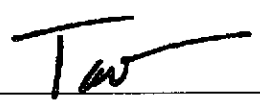
Third, Gonzalez argues his sentence constitutes cruel and unusual punishment given his advanced age, health issues, lack of criminal history, and limited ability to read and write. Regardless of its severity, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute 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 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).

The district court imposed a term of 48 to 120 months in prison, which was within the parameters provided by the relevant statutes, *see* NRS 193.330(1)(a)(1); NRS 201.230(2), and Gonzalez does not allege that

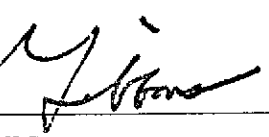
the statutes are unconstitutional. In addition, the district court's decision to decline to place Gonzalez on probation was within its discretion. *See* NRS 176A.100(1)(c); *see also* NRS 176A.110(1)(a). We conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment.

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

_____, A.C.J.
Douglas



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
Daniel E. Martinez
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk