IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN HAROLD MCCULLOUGH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69684

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of battery with intent to commit a sexual assault, battery with strangulation, and assault with the use of a deadly weapon. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Appellant John Harold McCullough claims the district court abused its discretion at sentencing and his sentence constitutes cruel and unusual punishment because the district court did not properly account for his failing health when imposing sentence. We disagree.

The district court imposed a prison term of life with the possibility of parole after 90 months for battery with intent to commit a sexual assault, a consecutive prison term of 24 to 60 months for battery with strangulation, and a consecutive prison term of 24 to 60 months for assault with a deadly weapon, for an aggregate prison term of life with the possibility of parole after 138 months. The sentence imposed is within the parameters provided by the relevant statutes, *see* NRS 193.130(2)(c); NRS 200.400(4)(b); NRS 200.471(2)(b); NRS 200.481(2)(b), and McCullough does not allege that those statutes are unconstitutional. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996). The record does not

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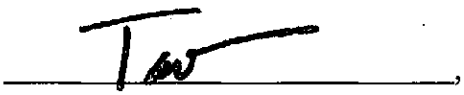
support McCullough's assertion that the district court considered his failing health as an aggregating factor when imposing sentence. Instead, it is clear the district court based its sentencing decision on the brutality of the crimes committed. Given the brutality of the crimes committed, we conclude the sentence is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment, *see Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion), and the district court did not abuse its discretion when imposing sentence, *see Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Therefore, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Jim C. Shirley, District Judge
Pershing County Public Defender
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk