IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SEAN RYAN TOM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80719-COA

FILED

FEB 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Sean Ryan Tom appeals from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a minor under sixteen years of age. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Fourteen-year-old A.L. spent a weekend at Sean Ryan Tom's apartment. One night, Tom and A.L. took multiple shots of vodka and smoked marijuana, which Tom offered. A.L. subsequently went to sleep on Tom's couch and awoke to Tom putting his fingers in her vagina. Fearing for her safety, A.L. did not scream or cry, but only whimpered. A.L. went months without telling her parents what happened, but after she told her mother what Tom did, A.L. and her family confronted Tom at his apartment. A.L. and her mother testified that during the confrontation Tom stated several times that he "fucked up." A.L. and her family then reported what Tom did to the police.

The State charged Tom with three counts of sexual assault of a minor under sixteen years of age, the first two for sexual intercourse and the last for digital penetration. After a five-day trial, the jury found Tom not guilty of the first two counts, but guilty of the third.

After the verdict, Tom asserts that he attempted to contact his trial attorney multiple times to file a motion for a new trial and motion for acquittal notwithstanding verdict (the post-trial motions), but the attorney

never responded. Tom alleges that he then hired a new attorney, but by the time his new attorney sought an extension to file these motions, the statutory period had expired. The district court subsequently denied his request for an extension of time due to its untimeliness. The district court sentenced Tom to the mandatory punishment set forth under NRS 200.366(3)(b) of life with the possibility of parole after 25 years. This appeal followed.

Tom advances three arguments on appeal. First, he contends the district court abused its discretion when it denied his request for an extension of time to file his post-trial motions because the untimeliness was due to his former counsel's ineffective assistance. Second, Tom argues there was insufficient evidence to support his guilty verdict because he alleges the only piece of evidence supporting it is A.L.'s testimony. Finally, he avers imposing a 25 years to life sentence pursuant to NRS 200.366(3)(b) constitutes cruel and unusual punishment in violation of the United States Constitution and Article 1, Section 6 of the Nevada Constitution for various reasons. We disagree with his arguments and address them in turn.

First, Tom maintains his trial attorney's ineffective assistance was the reason he failed to meet the seven-day statutory deadline for filing his post-trial motions. Tom avers his trial attorney was ineffective because (1) his representation "fell below an objective standard of reasonableness" and (2) his deficient performance prejudiced Tom. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). As to the first prong, Tom contends it was unreasonable for his trial attorney not to file the post-trial motions after Tom expressly requested him to do so, not to explain his unwillingness or inability to file them, or respond to his new attorney's inquiries regarding Tom's case. As to the second prong, Tom argues his trial

attorney's deficient performance prejudiced him because it nullified the district court's ability to evaluate his motions on the merits.[1]

Further, Tom argues the district court abused its discretion when it denied his request for an extension of time to file his post-trial motions by citing to state and federal precedent indicating that a court must accept a defendant's untimely notice of appeal if her or his attorney failed to file it against the defendant's express direction. Tom contends the same rule applies to his post-trial motions because, just like postconviction appeals, they deal with post-verdict relief, require assistance of counsel, and share similar timeliness issues. Tom maintains he showed good cause pursuant to the Eighth Judicial District Court Rule (EDCR) 3.20(a) to allow the district court to consider his late motions. Tom cites to state and federal precedent to suggest that overcoming a procedural default in a habeas corpus petition by showing good cause applies to his untimely filed post-trial motions.

"[T]he district court enjoys discretion in granting or denying motions for new trials." *State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993). "[T]his court will not set aside a district court['s] new trial ruling absent an abuse of discretion." *Id.* "[W]e understand that district courts hesitate to grant new trials in criminal matters and do so cautiously, only when it is absolutely necessary." *Id.*

If a defendant's motion for a new trial is based on something other than a matter of law or newly discovered evidence, it must be filed

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[1]We do not address what seems to be an ineffective assistance of counsel claim because Tom expressly asserts he does not raise this issue as a separate claim, but *only* to show he has good cause to overcome the statutorily imposed seven-day deadline.

within seven days after the verdict or finding of guilt or within a timeframe the district court sees fit during the seven-day period. NRS 176.515(4). The district court cannot consider the merits of a motion for a new trial if the defendant files it late. *Ross v. Giacomo*, 97 Nev. 550, 553, 635 P.2d 298, 300 (1981), *abrogated on other grounds by Winston Prod. Co., Inc. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006); *see also DePasquale v. State*, 106 Nev. 843, 851, 803 P.2d 218, 223 (1990). Further, a defendant must file a motion for judgment of acquittal notwithstanding the verdict within seven days after the district court discharges the jury. NRS 175.381(2). The district court must deny this motion if the defendant files it late. *Ross*, 97 Nev. at 553, 635 P.2d at 300; *see also Davis v. State*, Docket No. 72054, at *2 (Order of Affirmance, Nov. 15, 2017).

We conclude that the district court did not abuse its discretion when it denied Tom's post-trial motions and request for an extension of time because Tom filed these motions late. The exceptions Tom wants to use to overcome the statutorily imposed deadlines set forth under NRS 176.515(4) and NRS 175.381(2) do not apply to post-trial motions. First, Nevada law does not support the argument that courts should apply postconviction appeal rules to post-trial motions prior to sentencing. *See generally* NRAP 1(a) (explaining that the NRAP "govern[s] procedure in the Supreme Court of Nevada and the Nevada Court of Appeals").[2] In fact, arguments pertaining to ineffectiveness of counsel may only be raised through collateral postconviction habeas corpus proceedings and cannot be raised in

[2]Because NRS 176.515(4) and NRS 175.381(2) state that the defendant "must" file these post-trial motions within seven days, we opt not to adopt an exception for good cause or for the application of appellate rules to post-trial motions.

a post-trial motion or on direct appeal from a judgment of conviction. *See Franklin v. State*, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), *disapproved of on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999).

Second, we have found no precedent in Nevada supporting the argument that a showing of good cause can supersede the deadline in NRS 176.515(4) or NRS 175.381(2). Though statutes permit good cause to overcome the procedural hurdles of an untimely filed habeas corpus petition, these statutes do not apply to post-trial motions or direct appeals. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, neither NRS 176.515(4) nor NRS 175.381(2) provide exceptions to their filing deadlines the way statutes governing habeas corpus petitions do. *Compare* 176.515(4), *and* NRS 175.381(2), *with* NRS 34.726(1), NRS 34.810(1)(b), *and* NRS 34.810(3).

Third, Nevada law does not support the argument that EDCR 3.20(a) can supersede NRS 176.515(4) or NRS 175.381(2). In fact, EDCR 3.20 begins by deferring to Nevada law. *See* EDCR 3.20(a) ("*Unless otherwise provided by law* or by these rules, all motions must be served and filed not less than 15 days before the date set for trial." (emphasis added)).

Next, Tom argues there was insufficient evidence to support the conviction because the only piece of evidence supporting it is A.L.'s testimony. He also avers the State provided no physical evidence or medical reports to substantiate its claims of sexual assault. Further, Tom contends much of the evidence supporting his conviction conflicted with other evidence. He points to Tiana's (Tom's girlfriend) testimony that after asking A.L. if Tom had sexually assaulted her, A.L. responded negatively with a smirk on her face. Tom also argues that while A.L. testified she and Tom

took shots of vodka on the night of the sexual assault, Tiana testified she did not see Tom or A.L. drink any alcohol. He also avers that although A.L. testified that everyone was asleep when Tom sexually assaulted her, Tiana testified she was awake all night, save for five minutes. As a result, Tom argues it is difficult to imagine Tiana not seeing or hearing him sexually assaulting A.L.

Additionally, Tom maintains A.L. had a motive to lie because she was jealous that Tom's daughter had many toys and a nice bedroom while A.L.'s parents could not provide her the same lifestyle. Finally, Tom argues the jury's inconsistent verdict supports the idea that evidence presented at trial does not support Tom's conviction.[3]

When reviewing a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the prosecution and determines whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). This court will not disturb the jury's verdict on appeal where substantial evidence supports it. *McNair v.*

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[3]Tom has failed to support with relevant authority how an alleged inconsistent jury verdict helps show that evidence at trial does not support his conviction. The argument in Tom's brief consists, in its entirety, of three sentences supported by no citations to any authority. As a result, we need not address this argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that this court need not address an appellant's argument if it is not supported with relevant authority). In any event, an inconsistent verdict is not a basis for reversal. *See, e.g., Bollinger v. State*, 111 Nev. 1110, 1117, 901 P.2d 671, 675 (1995) (recognizing inconsistent verdicts as a form of clemency); *see also United States v. Powell*, 469 U.S. 57, 64-68 (1984) (holding that there is no reason to vacate a conviction because the defendant's verdicts were inconsistent).

State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

Circumstantial evidence alone is sufficient to uphold a conviction. *Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003). Further, the uncorroborated testimony of a victim alone is enough to sustain a sexual assault conviction. *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007). The victim must simply "testify with some particularity regarding the incident in order to uphold the charge." *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992) (emphasis omitted).

Here, sufficient evidence supports the jury's verdict. A.L. gave specific detail regarding the sexual assault. She recounted the date when she was at Tom's apartment, the people who were present, what the members of the group were doing throughout the night, the number of vodka shots Tom offered her, and where each member of the group was in the apartment. A.L. also testified that after falling asleep on Tom's couch, she awoke to him inserting his fingers in her vagina. She also remembers whimpering and crying silently while Tom penetrated her vagina.

Further, the testimonies of A.L.'s family members also support the conviction. Tammy, A.L.'s mother, testified that A.L.'s mood and behavior changed after the sexual assault: A.L. became very hateful and angry. She also testified that after she confronted Tom about the sexual assault, he told her that he "fucked up," he never denied the sexual assault, and he was crying. Sydney, A.L.'s sister, testified being at Tom's apartment the night of the sexual assault and waking up to Tiana screaming that Tom and A.L. "had sex." She also testified that she consistently observed A.L.

leave areas Tom was in after the sexual assault. Juliana, A.L.'s older sister, testified that when A.L.'s family confronted Tom about the sexual assault, Tom's demeanor changed from being visibly excited to being worried. She also testified that Tom responded to their accusations of sexually assaulting A.L. by saying "it was a mistake" and that "it was a fuckup." Tracy, A.L.'s cousin, testified that A.L.'s parents told her that A.L.'s mood and behavior changed after the sexual assault. She also testified that A.L. told her about the three locations where Tom penetrated her vagina.

Moreover, other trial testimony also supports the conviction. Though Tom argues A.L.'s testimony was not credible, his witness's testimony had many credibility issues. For example, while Tiana testified Tom had not smoked marijuana the night of the sexual assault, Detective Lange testified Tom informed him he had done so. Also contrary to Tiana's testimony, Detective Lange testified that Tom told him he had bought vodka and drank half the bottle on the night of the sexual assault. By discrediting Tiana, Detective Lange's testimony also helped corroborate part of A.L.'s testimony.

The record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. Tom's argument that the jury verdict cannot stand because A.L.'s testimony is the only evidence that supports it is untrue and unpersuasive. A victim's uncorroborated testimony can sustain a jury's verdict. The State went further than that and corroborated key parts of A.L.'s testimony with testimony from her family and Detective Lange. Further, A.L. did more than testify with *some* particularity about the sexual assault; she testified with specific detail about the events leading up to Tom's sexual assault of her, the sexual assault itself, and her exchanges with various people she

confided in afterward. In addition, Tom's argument that Tiana's testimony shows A.L. is not credible is also unpersuasive. Detective Lange exposed inconsistencies in Tiana's testimony, which Tom failed to discredit. Therefore, because substantial evidence supports the jury's verdict, we will not disturb it.

Finally, Tom avers that the district court's imposition of a 25 years to life sentence pursuant to NRS 200.366(3)(b) constitutes cruel and unusual punishment in violation of the United States Constitution and Article 1, Section 6 of the Nevada Constitution for four reasons. First, Tom had no history of sexual deviancy. Second, Tom penetrated A.L.'s vagina with his fingers for an extremely short amount of time. Third, evidence in the record is inconsistent and does not show A.L. was harmed. Fourth, the crime that the jury convicted Tom of is less severe than other offenses in the same category but incurs the same sentence.

Further, Tom contends NRS 176.033 requires the district court to use its broad discretion in sentencing to make its determinations based on "the gravity of the particular offense and of the character of the individual defendant," NRS 176.033(1)(a); 1995 Nev. Stat., ch. 443, § 205, at 1248, and the district court failed to do so. In addition, Tom maintains Nevada precedent allows the district court to depart from a statute's mandatory penalty if it is so unreasonable or disproportionate to the crime "as to shock the conscience." *Allred v. State*, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004), *limited on other grounds by Knipes v. State*, 124 Nev.

927, 192 P.3d 1178 (2008). Tom argues his sentence is cruel and unusual punishment by citing to an Oregon case he maintains is analogous to his.[4]

The Nevada Supreme Court has consistently afforded the district court wide discretion in its sentencing decision and will not overrule it unless there is an abuse of discretion. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Therefore, we will refrain from interfering with the district court's sentence "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

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, 1001 (1991) (Kennedy, J., concurring in part) (plurality opinion) (explaining that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence," but "forbids only extreme sentences that are grossly disproportionate to the crime" (internal quotation marks omitted)). "[A] punishment is 'excessive' and unconstitutional if it

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[4]Tom explains that in *State v. Rodriguez*, the Supreme Court of Oregon reviewed a trial court ruling that a 75-month mandatory sentence for first-degree sexual abuse "shock[ed] the moral sense" and violated the state constitution. 217 P.3d 659, 679-80 (Or. 2009). As a result, the trial court lessened the sentence to 16 and 17 months, respective to each defendant tried, and the supreme court affirmed. *Id.* at 680. We decline to follow *Rodriguez*.

(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Pickard v. State*, 94 Nev. 681, 684, 585 P.2d 1342, 1344 (1978) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

We conclude that the district court did not abuse its discretion when it sentenced Tom to life in prison with the possibility of parole after 25 years for three reasons. First, the record does not reflect the district court considered information founded on impalpable or highly suspect evidence. As conveyed in the previous section, plenty of testimony shows there was substantial evidence to convict Tom of sexual assault. The record does not show the district court considered any other information when it imposed its sentence.

Second, the sentence imposed is within the parameters provided by NRS 200.366(3)(b). The appellate courts have not struck down this statute as unconstitutional, and Tom has not shown it should be now. The district court considered both the gravity of digitally penetrating a fourteen-year-old girl's vagina and Tom's character; it then sentenced Tom to 25 years to life in prison for inserting his fingers into A.L.'s vagina. That this is his first conviction of sexual assault, that he only penetrated A.L.'s vagina for a short amount of time, that the record may not show A.L. was harmed despite her testifying what Tom did "hurt," or that he suggests digital penetration is less severe than sexual intercourse is not sufficient to show his sentence "shocks the conscience."

Third, Tom has failed to show that NRS 200.366(3)(b)'s mandatory sentence is excessive. Tom has not shown this statute does not contribute to acceptable goals of punishment such that it purposelessly and

needlessly imposes pain and suffering. He also has not shown the statute's mandatory sentence is grossly out of proportion to having digitally penetrated a fourteen-year-old girl's vagina against her will. There is no precedent in Nevada that supports Tom's argument that his sentence is disproportionate to digital penetration simply because this is his first sexual assault conviction or that digital penetration is less severe than sexual intercourse. We also emphasize that the Legislature specifically passed legislation that makes no distinction between sexual assault based on digital penetration versus intercourse. Thus, having considered the sentence and the crime, we conclude the district court's sentence is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. XXIII
Sgro & Roger
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk