

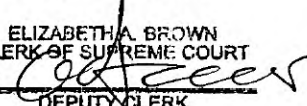
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACOB DANIEL GOSSELIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83674-COA

FILED

SEP 09 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jacob Daniel Gosselin appeals from a judgment of conviction entered pursuant to a guilty plea of attempted murder with the use of a deadly weapon and conspiracy to commit robbery. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

First, Gosselin argues that his conviction violates his right to due process because the State engaged in vindictive prosecution. Gosselin contends that the State vindictively decided to charge him only after he rejected an offer to testify against his codefendant and chose to exercise his Fifth Amendment right against self-incrimination.

Gosselin did not raise this issue in the district court. Thus, Gosselin is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018). To demonstrate plain error, Gosselin must show “(1) there was error; (2) the error is plain, meaning that it is clear under the current law from a casual inspection of the record; and (3) the error affected [his] substantial rights.” *Id.* at 50, 412 P.3d at 48 (internal quotation marks omitted).

“A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or

statutory right.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000). “[T]o establish a claim of vindictive prosecution the defendant must make an initial showing that charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness.” *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982).

However, “the link of vindictiveness cannot be inferred simply because the prosecutor’s actions followed the exercise of a right, or because they would not have been taken but for exercise of a defense right.” *Id.* “Rather, the appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights.” *Id.* at 1169. Moreover, “a prosecutor who, in the plea negotiation context, threatens enhanced charges to induce a defendant’s cooperation as an informant may carry out that threat if the defendant declines to cooperate.” *United States v. Kent*, 649 F.3d 906, 914 (9th Cir. 2011).

During a hearing in this matter, the State explained that Gosselin was initially cooperative and aided the police in their investigation of this matter. The State intended not to charge Gosselin because it wished for him to testify against his codefendant. The State believed Gosselin’s codefendant to be more culpable in the crimes, and Gosselin’s anticipated testimony would have been significant in the State’s case against the codefendant. Gosselin subsequently informed the State that he planned to invoke his Fifth Amendment right against self-incrimination, and therefore, the State would not have been able to call Gosselin as a witness in its case against his codefendant. Because Gosselin declined to cooperate with the

State in the case against his codefendant, the State decided to bring charges against Gosselin. After Gosselin was charged, the parties reached an agreement for a reduction in Gosselin's charges in exchange for Gosselin's testimony against his codefendant.

It is not plain from the record that the State brought charges against Gosselin solely to punish him for the exercise of his rights. Based on a casual inspection of the record, Gosselin failed to show that there was a realistic or reasonable likelihood that the State decided to charge him due to a hostility or a punitive animus towards him because he exercised his right against self-incrimination. Accordingly, we conclude Gosselin is not entitled to relief based on this claim.

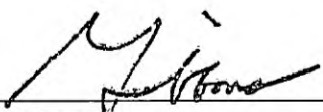
Second, Gosselin argues that his sentence constitutes cruel and unusual punishment. Gosselin contends that his sentence was excessive because his charges resulted from vindictive prosecution, he was not charged or held in custody for a year after the shooting, he provided helpful information concerning his codefendant, and he had less involvement in the commission of the crime than his codefendant.

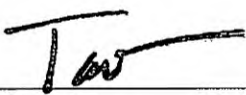
Regardless of its severity, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 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).

At the sentencing hearing, the district court listened to the arguments of the parties and Gosselin's request for probation. The district court noted that Gosselin had a significant criminal history and also noted the severity of the offense. The district court also found that the victim would not have been killed if Gosselin had not provided a firearm to his codefendant. The district court declined to place Gosselin on probation and imposed an aggregate sentence of 8 to 40 years in prison.

The sentence imposed is within the parameters provided by the relevant statutes, *see* NRS 193.153(1)(a)(1); NRS 193.165(1); NRS 199.480(1)(a); NRS 200.030(4); NRS 200.380(2), and Gosselin does not allege that those statutes are unconstitutional. Additionally, it was within the district court's discretion to decline to place Gosselin on probation. *See* NRS 176A.100(1)(c). We conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk