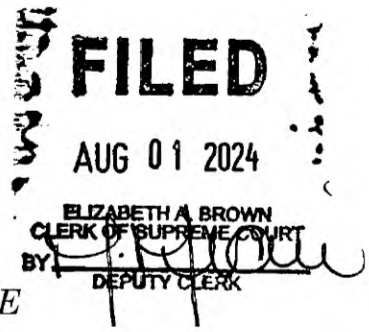
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEREMIAH GRAHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87261-COA



ORDER OF AFFIRMANCE

Jeremiah Graham appeals from a judgment of conviction, entered pursuant to a guilty plea, of two counts of ownership or possession of a firearm by a prohibited person. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

First, Graham argues the district court abused its discretion at sentencing by not granting him probation, imposing more than the minimum possible prison sentence, and failing to take into consideration mitigation evidence. Graham also contends that his sentence amounts to cruel and unusual punishment.

Here, the granting of probation was discretionary. *See* NRS 176A.100(1)(c). It was also within the district court's discretion to impose consecutive sentences. *See* NRS 176.035(1); *Pitmon v. State*, 131 Nev. 123, 128-29, 352 P.3d 655, 659 (Ct. App. 2015); *see also Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987) ("The sentencing judge has wide discretion in imposing a sentence . . . ."). Generally, this court will not interfere with a sentence imposed by the district court that falls within the parameters of relevant sentencing statutes "[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); *see Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). 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 consecutive 28-to-72-month sentences. The sentences imposed are within the parameters provided by the relevant statute, *see* NRS 202.360(1), and Graham does not allege that this statute is unconstitutional. Prior to imposing sentence, the district court listened to the argument of the parties, including argument in mitigation made by Graham, and Graham's allocution. In addition, the district court stated it had read Graham's sentencing memorandum and the letters that were written on his behalf. We have considered the sentence and the crime, and we conclude the sentence imposed is not grossly disproportionate to the crime, it does not constitute cruel and unusual punishment, and the district court did not abuse its discretion by declining to suspend the sentence and place Graham on probation and by declining to impose concurrent sentences. Therefore, Graham is not entitled to relief based on these claims.

Second, Graham argues the district court abused its discretion by considering impalpable or highly suspect evidence at sentencing. Specifically, Graham contends that the district court improperly printed out Graham's criminal history from an unknown source and considered it during sentencing and that the State improperly argued Graham had previously had his probation revoked numerous times. Graham also appears to contend that the State improperly argued his 2003 conviction was a felony despite the fact that it only resulted in a nine-month jail sentence. Graham did not object to these alleged errors below and thus is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). To prevail on plain error review, Graham must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected his substantial rights. *Id.* "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

Regarding Graham's argument that the district court considered information from an unknown source, Graham relies on a single statement by the district court that it "print[ed] out [his] criminal history and looked at it." Graham only speculates about what the district court printed and considered, and there is nothing in the record to demonstrate the district court relied on an improper document or suspect evidence. Rather, the district court went on to make comments about Graham's criminal history that were consistent with the presentence investigation report (PSI). As to Graham's argument about previous probation revocations, the PSI lists only one prior probation revocation, and the record

does not reflect that the district court relied on the State's argument to the contrary. Finally, as to Graham's assertion about his 2003 conviction, the PSI lists the conviction as a felony despite the imposition of a nine-month jail sentence. Additionally, the California statute Graham cites in support of his argument provides that a conviction may be a felony even where a jail sentence is imposed. *See* Cal. Penal Code § 17(a). In light of these circumstances, Graham fails to demonstrate error plain from a casual inspection of the record that affected his substantial rights. Therefore, we conclude Graham is not entitled to relief based on these claims.[1]

Finally, Graham argues his guilty plea was not entered knowingly and voluntarily because the district court misstated the potential punishment he faced during the plea canvass. Unless the error appears clearly in the record, a challenge to the validity of a guilty plea must be raised in the district court in the first instance. *Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994). In determining the validity of a guilty plea, this court looks to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). "A court must be able to conclude from the oral canvass, any written plea memorandum and the circumstances surrounding the execution of the memorandum (i.e., did the defendant read it, have any questions about it, etc.) that the defendant's plea was freely, voluntarily and knowingly made." *Id.* at 1106, 13 P.3d at 448.

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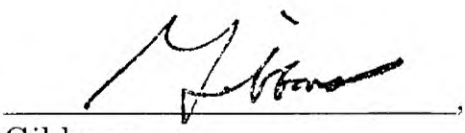
[1]To the extent Graham argues the district court relied on additional suspect evidence for the first time in his reply brief, we need not consider this argument. *See LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014).

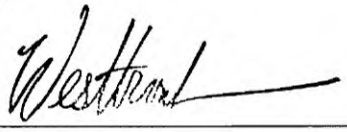
Graham did not move to withdraw his guilty plea, and the written plea memorandum was not included in the record on appeal.[2] Therefore, the purported error is not clear from the record and we do not reach the merits of this claim. For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Bulla



_____, J.
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[2]"The burden to make a proper appellate record rests on appellant." *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); *see also* NRAP 30(b)(3). To the extent Graham contends the district court failed to make the guilty plea memorandum part of the record, Graham had available the procedure outlined in NRAP 10(c) for correcting the record but failed to utilize it.