IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DION WALTER MASON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88328-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Dion Walter Mason appeals from a judgment of conviction, entered pursuant to a jury verdict, of two counts of sexual assault against a child under the age of 14 years and one count of lewdness with a child under the age of 14 years. Second Judicial District Court, Washoe County; Lynne K. Jones, Chief Judge.

In November 2021, J.C., who was just under 14 years of age, reported that she had been sexually abused twice that same month by Mason, who was then dating and living with her mother. After learning of these accusations, J.C.'s mother immediately confronted Mason, and he admitted to having sex with J.C. twice. Thereafter, Mason, then 27 years old, gave a voluntary statement to Detective Scott Valenti, again admitting to two instances of "[s]exual intercourse" with J.C. Following this interview, Mason was arrested and charged.

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Mason's case remained pending in Sparks Justice Court for nearly two years while his competency was ascertained. After a *Young*[1] hearing, during which Mason expressed dissatisfaction with his original appointed attorneys, the justice court appointed Scott Edwards to represent him. When Mason expressed dissatisfaction with Edwards, the justice court held another *Young* hearing; however, it denied his request to substitute counsel.

Eventually, Mason's case was bound over to the district court on two counts of sexual assault against a child under the age of 14 years and one count of lewdness with a child under the age of 14 years. At his arraignment, Mason informed the district court that he still had a conflict with Edwards. The district court held an additional *Young* hearing and declined to remove Edwards as counsel.

Thereafter, Mason sent multiple written requests to the district court seeking substitute counsel, which the court did not consider. Shortly before trial, at both a status check and a hearing on a motion to confirm trial, Mason orally asked the district court to conduct yet another *Young* hearing regarding Edwards' representation. The district court declined to conduct another *Young* hearing.

The case proceeded to a two-day jury trial. In its case-in-chief, the State presented testimony from J.C., J.C.'s mother, and two Sparks Police Department detectives. The State also admitted and published to the jury a recording of Mason's interview with Detective Valenti. Mason was convicted on all three counts and was sentenced to serve concurrent and consecutive prison terms totaling 70 years to life in the aggregate.

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[1]*Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004).

Mason raises four issues on appeal. First, he argues that the district court abused its discretion by denying his request for substitute counsel. Second, he argues that there was insufficient evidence to support his lewdness conviction. Third, he argues that NRS 200.366(3)(c) is unconstitutional and that his aggregate sentence constitutes cruel and unusual punishment and is disproportionate to the crimes committed. Fourth, he argues that the district court abused its discretion by inquiring about his remorse at sentencing. After review, we affirm Mason's convictions for sexual assault, reverse his lewdness conviction as redundant, and remand this matter to the district court for the entry of an amended judgment of conviction.

The district court did not abuse its discretion by denying Mason's requests to substitute counsel

Mason argues that the district court abused its discretion by denying his requests to substitute counsel. Mason alleges that he repeatedly informed the court of his dissatisfaction with Edwards, their communication deteriorated to the point that both Mason and Edwards "were using foul language" toward each other, and their professional "relationship was non-existent by the time of [the] jury trial." The State responds that Mason did not demonstrate that a genuine conflict existed between him and Edwards and that Mason's right to substitute counsel is not unlimited.

"[W]hen there is a complete collapse of the attorney-client relationship, the refusal to substitute counsel violates a defendant's Sixth Amendment rights." *Garcia v. State*, 121 Nev. 327, 337, 113 P.3d 836, 842 (2005), *holding modified on other grounds by Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006); *see* U.S. Const. amend. VI (guaranteeing a criminal defendant's right to counsel). However, "[a]bsent a showing of

adequate cause, a defendant is not entitled to reject his court-appointed counsel and request substitution of other counsel at public expense." *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004).

We review a district court's denial of a motion for substitution of counsel for an abuse of discretion. *Id.* During such a review, we consider three factors: (1) the extent of the conflict between the defendant and counsel, (2) the adequacy of the district court's inquiry into the alleged conflict, and (3) the timeliness of the defendant's motion. *Id.* at 968, 102 P.3d at 576.

As to the first factor, Mason does not demonstrate that an irreconcilable conflict existed between him and Edwards at the time of his requests. Although Mason repeatedly expressed his dissatisfaction with Edwards' representation, general dissatisfaction with counsel's representation does not constitute an irreconcilable conflict that required appointment of new counsel. *See Gallego v. State*, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001) ("While loss of trust is certainly a factor in assessing good cause, a defendant seeking substitution of assigned counsel must nevertheless afford the court with legitimate reasons for the lack of confidence." (internal quotation marks omitted)), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011).

Mason's allegations of insufficient communication between him and Edwards are likewise unpersuasive. Although Mason complains that he did not have in-person contact with Edwards outside of court, Mason acknowledges that he *did* have communication with Edwards, albeit primarily in writing. *Compare Brinkley v. State*, 101 Nev. 676, 678-79, 708 P.2d 1026, 1028 (1985) (characterizing the appellants' displeasure with

their counsel's lack of communication as "unnoteworthy"), *with Young*, 120 Nev. at 969, 102 P.3d at 576-77 (concluding there was strong evidence of an irreconcilable conflict given the defendant's representations that there had been a complete breakdown in communication "combined with his attorney's flagrant violation of the district court's order to visit [the defendant] on a weekly basis").

To the extent Edwards may have used "foul language" during their communications, Mason identified only one instance of such conduct, and he admittedly provoked the conduct in question. *See Young*, 120 Nev. at 971, 102 P.3d at 578 (noting that a defendant "may not, as a matter of law, create a conflict requiring substitution of appointed counsel"). Although Mason complained that Edwards once called him "a little bitch," Mason admitted that, before Edwards made that statement, Mason had used the same phrase and ordered Edwards to "do as I request." *See Jefferson v. State*, 133 Nev. 874, 879, 410 P.3d 1000, 1004 (Ct. App. 2017) ("When an alleged conflict is initiated by the actions of a defendant, courts are, and ought to be, more suspicious about concluding that a constitutional violation has occurred than when the actions were initiated by the attorney."). Additionally, this single use of profanity does not, by itself, establish a complete collapse of the attorney-client relationship. *See People v. Taylor*, 229 P.3d 12, 39 (Cal. 2010) ("[H]eated words alone do not require substitution of counsel without a showing of an irreconcilable conflict.").

Importantly, the record shows that Edwards demonstrated a willingness to work with Mason, despite his representations that Mason was "threatening and insulting," which supports the district court's finding that the conflict between them was not irreconcilable. *See Gallego*, 117 Nev. at 363, 23 P.3d at 238 (concluding that there was no "absolute breakdown"

in the attorney-client relationship where the defendant "was able to meet and consult with counsel" despite his disagreement with them). Thus, we conclude that Mason has not shown that there was a complete breakdown in the attorney-client relationship.[2]

As to the second factor, the district court afforded Mason ample opportunity to express his concerns at the time of his arraignment, conducted a *Young* hearing, and addressed each concern in a thoughtful and deliberate manner. The district court also asked Edwards for his position on several of Mason's concerns, and Edwards represented that he did not have a conflict, he was able to represent Mason, and he intended to have Mason present for all substantial hearings. Additionally, the district court admonished both Edwards and Mason to work on communicating with each other without anger or rancor. Therefore, we conclude the district court's inquiry into the alleged conflict was adequate under the circumstances. *See Garcia*, 121 Nev. at 339, 113 P.3d at 844 (concluding that the district court's inquiry, albeit limited, was adequate where counsel "addressed the court on

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[2]Mason also claims that certain litigation decisions exemplified the extent of Mason's conflict with Edwards at trial: (1) declining a jury instruction about Mason's right not to testify, (2) presenting no witnesses, and (3) waiving closing argument. However, Mason did not argue at trial that these decisions showed an irreconcilable conflict between him and Edwards; thus, we decline to consider these arguments for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989) ("This court will not consider issues raised for the first time on appeal."). To the extent Mason's argument implies that Edwards was ineffective at the time of trial, we also decline to address that argument on direct appeal. *See Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995) (stating ineffective-assistance-of-counsel claims are "more appropriately raised in a post-conviction proceeding" and "may not be raised on direct appeal, unless there has already been an evidentiary hearing").

the motion [to substitute counsel] and agreed to resolve the issues in due course").

As to the third factor, Mason's request at his arraignment to have a second *Young* hearing regarding Edwards was timely as the hearing occurred prior to his entry of plea and trial being set. *See Young*, 120 Nev. at 970, 102 P.3d at 577 (holding that a motion to substitute counsel was timely when the motion was first filed over three months before trial). However, his subsequent oral requests in the weeks leading up to his trial were untimely such that a substitution of counsel would have caused needless delay. *See Morrison v. State*, 140 Nev., Adv. Op. 24, 548 P.3d 431, 440 (Ct. App. 2024) (holding a request made a week prior to trial was untimely). As to these requests, we note that Mason did not allege any new information that required the court to conduct another full hearing. *See Garcia*, 121 Nev. at 339, 113 P.3d at 844 (concluding that it was unnecessary for the district court to conduct an in camera hearing on the defendant's request to substitute counsel where counsel addressed the defendant's concerns); *see also Young*, 120 Nev. at 971, 102 P.3d at 577-78 (stating that "the district court need not invade the attorney-client privilege unless absolutely necessary"). Accordingly, after considering all three *Young* factors, we conclude that the district court did not abuse its discretion in denying Mason's requests to substitute counsel.

There was insufficient evidence to convict Mason of lewdness

Mason argues that the State presented insufficient evidence to support his lewdness conviction because the alleged lewd act was neither a separate act nor separated temporally from the sexual assault. The State responds that Mason's act of rubbing his penis against J.C.'s genitals was a separate act that ended after she allegedly orgasmed, they switched positions, and Mason penetrated her. We agree with Mason.

When analyzing the sufficiency of the evidence, this court examines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

"The crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand." *Braunstein v. State*, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002); *see also* NRS 201.230(1) (stating acts that constitute the crime of sexual assault cannot constitute the crime of lewdness with a child). To obtain convictions for both crimes, "the State has the burden, at trial, to show that the lewdness was not incidental to the sexual assault—that is, that the lewd and assaultive acts were adequately separate and distinct." *Alfaro v. State*, 139 Nev., Adv. Op. 24, 534 P.3d 138, 146 (2023) (internal quotation marks omitted). "To meet that burden, the State must provide sufficient evidence of separateness such that a rational juror could reasonably find two separate crimes." *Id.*

"Separately charged acts of lewdness with a child and sexual assault can occur as part of a single criminal encounter if the defendant stopped [the lewd] activity before proceeding to the sexual assault." *Id.* (alteration in original) (internal citation and quotation marks omitted). However, "[t]he lewd act cannot . . . be a mere prelude intended to arouse the victim or predispose them to the assault." *Id.* (internal quotation marks omitted). This court will not affirm a lewdness conviction premised upon a "hypertechnical division of what was essentially a single act." *Townsend v. State*, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987) (concluding that the

defendant's act of lubricating the victim's vagina, removing his hand to apply more lubricant to his finger, and then digitally penetrating the victim was a single act of sexual assault).

To support the lewdness charge, the State alleged that Mason had "J.C. rub her genital area against [his] penis" while she sat on top of him. However, the State did not present sufficient evidence of any break between this sexual encounter and the subsequent penetration that would permit the jury to convict Mason of a separate count of lewdness.[3] Mason told Detective Valenti that on both occasions, J.C. got on top of him, he rubbed her genitals against his penis until she orgasmed, they changed positions so J.C. was lying on her back, and then he penetrated her. J.C. testified that Mason "was getting ready to do it" when she was sitting on top of him, and that he penetrated her after she "got up." Yet, neither J.C.'s testimony nor Mason's recorded interview indicated that Mason ever stopped the sexual encounter before penetrating J.C.

Instead, the State argues that the change in positions and an alleged orgasm permitted an additional conviction for lewdness during a single, uninterrupted sexual encounter. This hypertechnical division of a sexual encounter is insufficient to sustain a separate conviction for lewdness. *See id.*; *cf. Ortiz v. State*, 140 Nev., Adv. Op. 23, 545 P.3d 1142, 1147 (2024) (recognizing "that multiple acts of the same type of penetration,

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[3]We note that the jury was properly instructed that "when a *single uninterrupted act* constitutes *both* a sexual assault *and* a lewdness, the Defendant may not be convicted of both crimes," and that "[w]hen an indecent contact is incidental to an act of sexual assault or simply preparatory to an act of sexual penetration, . . . the Defendant may be found guilty of only one count of sexual assault *or* lewdness." (First and fourth emphases added.)

even when performed in multiple sexual positions, are not separate and distinct sexual assaults when the encounter is continuous and there is no break or interruption between the acts" (emphasis added)).

Therefore, we conclude that the State failed to present sufficient evidence that the lewd act was separate and distinct from the sexual assault. *See Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 285 (2004) (concluding that the defendant's uninterrupted "act of rubbing the male victim's penis on the outside of his pants was a prelude to [the sexual assault]"); *Ebeling v. State*, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004) (concluding that the defendant's act of rubbing his penis against the victim's buttocks was incidental to the subsequent anal penetration and was not a separate lewd act). Accordingly, Mason's convictions for sexual assault and lewdness with a child involving the same episode are redundant, and we reverse Mason's conviction for lewdness with a child under the age of 14 years.

Mason's aggregate sentence is not cruel and unusual punishment

Mason argues that NRS 200.366(3)(c), which mandates a sentence of 35 years to life, is unconstitutional and that his aggregate sentence of 70 years to life in prison constitutes cruel and unusual punishment and is disproportionate to the crimes in violation of the federal and state constitutions. U.S. Const. amend. VIII; Nev. Const. art. 1, § 6. In response, the State argues that Mason's sentence is within the statutory guidelines and is neither disproportionate to the crimes nor shocking to the conscience. Although we generally review a district court's sentencing decision for an abuse of discretion, *see Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), we review constitutional challenges de novo, *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008).

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) (Kennedy, J., concurring) (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).

Mason's two consecutive sentences of 35 years to life in prison are within the parameters provided by the relevant statute, *see* NRS 200.366(3)(c), and Mason concedes that the supreme court recently upheld NRS 200.366(3)(c)'s constitutionality in *Mariscal-Ochoa v. State*, 140 Nev., Adv. Op. 42, 550 P.3d 813, 823-24 (2024).[4] Additionally, Mason fails to demonstrate that his consecutive sentences are unreasonably disproportionate to the crimes where he sexually assaulted a child on two separate occasions. *See Mariscal-Ochoa*, 140 Nev., Adv. Op. 42, 550 P.3d at 824 (recognizing that "[s]exual assault of a child is undoubtedly a serious crime" that may be subjected to "harsh punishment"); *see also Alfaro*, 139 Nev., Adv. Op. 24, 534 P.3d at 152 (concluding that the defendant's aggregate sentence of 275 years to life in prison for 7 counts of sexual assault against a child under the age of 14 years and 3 counts of lewdness with a child under the age of 14 years was not unconstitutionally

[4]To the extent Mason requests that this court overrule *Mariscal-Ochoa*, this court cannot overrule supreme court precedent. *See Eivazi v. Eivazi*, 139 Nev., Adv. Op. 44, 537 P.3d 476, 487 n.7 (2023).

disproportionate). Thus, we conclude Mason's aggregate sentence does not constitute cruel and unusual punishment.

Mason forfeited his argument that the district court abused its discretion by inquiring about Mason's remorse at sentencing

Finally, Mason argues that the district court abused its discretion at sentencing by stating, "So, let me ask you this: Do you have remorse for this situation?" Mason did not object to this question below, and he does not argue plain error on appeal. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (stating "all unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension"). Specifically, he does not argue that any alleged errors are "clear under current law from a casual inspection of the record," nor does he argue that those errors affected his substantial rights. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). We thus conclude he has forfeited this claim, and we decline to review it on appeal.[5] *See Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (stating it is the appellant's burden to demonstrate plain error); *see also Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (stating that courts "follow the principle of party presentation" and thus "rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present").

For the foregoing reasons, we

[5]Insofar as Mason has raised other arguments not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for the entry of an amended judgment of conviction consistent with this order.

_____, C.J.
Bulla

_____, J.
Westbrook

GIBBONS, J., concurring:

I agree with the majority in all respects but write separately to further address the sentencing structure imposed by the district court. Mason argues that the statute should be found unconstitutional because its mandatory provisions can result in sentences that are disproportionate to the crime: here two consecutive life sentences, that when aggregated, result in a minimum parole eligibility after 70 years has been served. As pointed out by the majority, the Nevada Supreme Court has already ruled that the statute in question is constitutional, and district courts have considerable discretion in imposing sentences. Nevertheless, Mason argues this sentence should be distinguished because the district court rendered a sentence that effectively is a sentence of life without the possibility of parole despite Mason's relatively young age, because he would be at least 97 years old when first eligible for parole. Here, the district court seemingly based its decision to impose consecutive sentences upon its belief that specific deterrence was needed to deter Mason and protect the victim.

Mason asserted in his opening brief that he did not have any criminal record but suffered from mental health issues. In fact, this case experienced significant pretrial delays while Mason received treatment related to his competency, and the State did not dispute the assertion that Mason had no prior criminal record. However, Mason proffered these arguments not in his challenge to the constitutionality of the sentence, but in his claim that the district court abused its discretion at sentencing by asking him whether he had remorse for committing these crimes. Mason also recited in his brief the victim's impact statement where she concluded that "I think more than 20 years is fair."

The State discussed in its answering brief the potential lifelong harm Mason wreaked on the victim. Specifically, the State contended Mason repeatedly preyed upon a trusting and vulnerable 13-year old girl. The State accordingly asserted the sentence was not cruel and unusual punishment and was constitutional. The State did not specifically address the argument that the sentence imposed by the district court amounted to one of life in prison without the possibility of parole nor the victim's request that 20 years or more in prison was fair. But, a review of the sentencing transcript is revealing.

During the sentencing hearing, Mason's counsel indicated that Mason was one day short of age 30. Therefore he was 27 when the crimes were committed. Counsel asked for concurrent sentences because the offenses happened close in time and so Mason would have some hope that he might be able to rejoin society after 35 years in prison.

The State focused on the impact to the victim and her family and Mason's confession to the police that he was relieved the victim came forward and reported the crimes because the offenses might have continued.

The State interpreted Mason's statement to mean that he would reoffend, and eligibility for parole when Mason was in his sixties would be too early, necessitating specific deterrence. The State did not argue that the crimes involved force, threat or injury, but did argue that Mason abused his position as a father figure and 70 years to life in prison was warranted.

Mason made a statement in allocution that was lengthy and largely nonsensical. Additionally, a psychosexual evaluation was apparently not performed as part of the sentencing process. *See generally* NRS 176.139. The district court interrupted Mason's allocution and asked him: "do you have remorse for this situation?" Mason rambled and never directly answered the question.

When the district court imposed its sentence, it described the mandatory lifetime supervision provision of the sentence. *See* NRS 176.0931(1). The court explained that, under lifetime supervision, Mason would be unable to go certain places if he were ever released from custody and he also would have to register as a sex offender.

The district court noted Mason's age as a mitigating factor but commented that incarcerating him would meet the goals of specific deterrence by keeping him from reoffending and providing a level of safety to the victim. The court recognized that the Legislature had increased the minimum incarceration for this crime (from 20 years to 35 years) and that a sentence for murder might be shorter in some instances. Nevertheless, the court repeated Mason's words that a victim of sexual assault could face a lifelong effect of destruction and devastation. The district court then imposed three life sentences, with counts 1 and 2 for sexual assault to be served consecutively and count 3 for lewdness to be served concurrently.

The sentencing structure for sex offenses is simultaneously simple and complex. For example, the only available penalty the district court could impose for sexual assault in this case was life in prison with parole eligibility after 35 years. The severity of the minimum parole eligibility is based upon one key fact, the victim's age. If a victim was under the age of 14 at the time of the crime, the State need only prove at trial that sexual penetration occurred, and the district court has no choice but to impose a life sentence with 35 years as the minimum time before parole eligibility. NRS 200.366(1)(b); NRS 200.366(3)(c).

However if the victim was 14 or 15 years of age, the State would have to establish an additional element to prove sexual assault, namely that the sexual penetration was against the will of the victim or under conditions in which the perpetrator knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the perpetrator's conduct. *See* NRS 200.366(1)(a). This offense would result in a mandatory life sentence with 25 years as the minimum time for parole eligibility. NRS 200.366(1)(a); NRS 200.366(3)(b). Additionally, sexual assault is always a category A felony, the highest level of offense for sentencing purposes. *See* NRS 200.366(2).

Yet if the sexual penetration of a 14 or 15 years old victim is not against the victim's will, the offense is not sexual assault; rather, it is statutory sexual seduction, a category B felony or a gross misdemeanor. NRS 200.364(10); 200.368(1), (2). The penalty for statutory sexual seduction is 1 to 10 years in prison unless it is a gross misdemeanor based upon the offender's age. NRS 200.368(1), (2).

Additionally, if a defendant is charged with child abuse, which may include sexual assault, NRS 200.508(4)(a); NRS 432B.100(4), there are

several additional sentencing options depending on the nature of the offense. If the child suffers substantial bodily or mental harm, is less than 14 years of age, and the harm was the result of sexual abuse or exploitation, the defendant will be convicted of a category A felony and face a sentence of life in prison with the possibility of parole after 15 years. NRS 200.508(1)(a)(1). If the child is less than 14 years of age but does not suffer substantial bodily or mental harm, a defendant will be convicted of a category B felony, and face 2 to 20 years in prison. NRS 200.508(1)(a)(2).

The Legislature has recognized that substantial bodily harm and the use of force or threatened use of force will result in a more severe penalty for sexual assault. If substantial bodily harm results, the perpetrator can receive a maximum sentence of life without the possibility of parole. NRS 200.366(2)(a)(1), NRS 200.366(3)(a). If a person commits a sexual penetration upon a spouse without consent, the State is required to additionally prove that the assault was committed by force or by the threat of force for the crime to constitute sexual assault. NRS 200.373.

Because the comparison of the penalties for murder and sexual assault was mentioned at Mason's sentencing, I will also briefly describe the penalties for murder. For first-degree murder, the potential penalties include death, NRS 200.030(4)(a); life without the possibility of parole, NRS 200.030(4)(b)(1); life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served, NRS 200.030(4)(b)(2); or a sentence consisting of a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served, NRS 200.030(4)(b)(3). Aggravating circumstances for first-degree murder include a murder committed upon a child less than 14 years of age. NRS 200.033(10). Mitigating circumstances for first-degree murder

include an offender's lack of significant criminal history. NRS 200.035(1). For second-degree murder the penalties are life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, NRS 200.030(5)(a), or for a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served, NRS 200.030(5)(b).

Both the district court, and the State (below and in its answering brief), expressed specific deterrence as a basis for the sentence. Specific deterrence is generally understood to mean that the court will impose a sentence that is aimed at preventing that particular offender from engaging in this criminal conduct again. *See Deterrence, Black's Law Dictionary* (12th ed. 2024) (defining specific deterrence as "[t]he goal of having a particular conviction and sentence discourage the offender from committing crimes in the future"). The district court had stated as much and added that the sentence would provide a level of safety to the victim. The court also noted that Mason volunteered his view that the victim could face (emotional) destruction and devastation as a lifelong effect. The district court then imposed the three life sentences with the two for sexual assault running consecutively. *See* NRS 176.035(1) (authorizing consecutive sentences).

As previously discussed, the district court notified Mason he was subject to lifetime supervision by the Division of Parole and Probation if he were ever to be released from custody, and he would be required to register with law enforcement as a sex offender. *See* NRS 179D.445(2)(a); NRS 179D.460(1), (2) (mandating a sex offender or person convicted of a crime against a child to register with local law enforcement where the crime occurred before release from custody and within 48 hours of presence within

any community); *see also* NRS 179D.151 (listing the extensive contents of a sex offender registration record including potential access to the victim); NRS 179D.475(2)(a); NRS 179D.117(2) (providing for immediate and mandatory community notification to organizations and the public when a perpetrator of a crime against a child involving sexual assault resides there). The conditions of lifetime supervision are extensive and include no contact with the victim and potentially electronic monitoring. *See* NRS 213.1243; NRS 213.1245; NRS 213.1255; *see also* NRS 176A.410 (providing a comprehensive list of restrictions on sex offenders placed on probation).

What was not mentioned by the parties or the district court was NRS 200.378(2), which provides for a temporary or extended order to protect a victim of sexual assault from an offender. Specifically, the court may order as part of the sentence, or as condition of release, that a person convicted of sexual assault to stay away from the home, school, business or place of employment of the victim, and to refrain from contacting, intimidating, threatening, or otherwise interfering with the victim, or a member of the family or household of the victim, and to comply with any other restriction the court deems necessary to protect the victim or any other person for up to three years. NRS 200.378(2)(a)-(c); NRS 200.3782(3). The statute also criminalizes conduct in violation of an extended order of protection as a category C felony and imposes bail restrictions on certain persons arrested for violating the order. NRS 200.378(5)(b), NRS 200.378(7). Law enforcement, the victim, and the state criminal history repository must be given a copy of the order. NRS 200.3783; NRS 200.3784(2); NRS 200.37835. These statutes provide an excellent additional layer of protection and all district courts should consider applying them in sexual assault cases if requested by the victim.

Here, the parties and the district court only briefly discussed whether specific deterrence required two consecutive life sentences when Mason apparently had no prior criminal record. And they did not analyze whether parole conditions, lifetime supervision with restrictions, sex offender registration, and community notification of Mason's presence would likely secure the victim's safety if Mason was in his sixties when released from prison.

Sexual assault victims certainly deserve the greatest level of protection. *See* NRS 178A.290 (providing legal rights to sexual assault victims established within the Sexual Assault Survivors' Bill of Rights including protection from the defendant and to be heard at sentencing and other proceedings); NRS 217.290 (providing for medical treatment and counseling for victims of sexual assault). Each situation, however, is unique. For example, was there any indication here that Mason would contact the victim if he were to be released from prison after serving at least 35 years and risk a violation of his lifetime supervision condition of no contact with the victim? Or would he violate an extended order of protection under NRS 200.378(2) (if an order were to be entered), and face a new felony charge?

I note that NRS 200.378(6)(a)-(c) provides that an order of protection must be in writing, personally served on the defendant, and contain a warning that the violator will be immediately arrested and face criminal penalties for a violation. In other words, would these particular statutory protections help achieve the goal of specific deterrence and safety for the victim and her family, or was Mason's total separation from society for the remainder of his life the only realistic way to guarantee peace and safety for the victim? Similarly, did Mason's personal characteristics and

history, along with the nature of his crimes, suggest that the penalty here should exceed that imposed for almost all crimes but the most egregious murders? District courts should carefully consider these personalized factors during sentencing.

Finally, I note again that Mason argues that the district court abused its discretion at sentencing by inquiring of him whether he had remorse for committing these crimes. He does not argue that the district court misinterpreted his comments to show a lack of remorse as the court did not make a finding on this issue. It is not clear that Mason felt remorse because he neither directly answered the court's question nor apologized to the victim who was in the courtroom. However, he did admit to the police that he committed these crimes and he was relieved he was arrested, thereby acknowledging that his conduct was harmful and needed to stop. Also, he commented to the district court that the victim could suffer lifelong adverse effects, thus again recognizing he caused significant harm. Because remorse was a sentencing consideration for the district court, I mention it here along with specific deterrence and victim safety. I urge courts to always consider all these factors when deciding whether consecutive sentences are appropriate and proportionate for the crimes committed by that particular offender. *See* NRS 176.0131(1) (stating that the Legislature finds and declares that the public policy of Nevada includes sentencing that embodies "fairness, consistency, proportionality and opportunity").

_____, J.
Gibbons

cc: Hon. Lynne K. Jones, Chief Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk