IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA DOUGLAS COUNSIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85858

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a no contest plea, of child sexual abuse or exploitation causing substantial mental harm, child under 14. First Judicial District Court, Carson City; James E. Wilson, Judge.

Joshua Counsil was charged with sexually abusing his nieces, E.D. and L.S., over a seven-year period. After a preliminary hearing, Counsil was arraigned, and the case was scheduled for a jury trial. In the Scheduling and Pretrial Order, the district court set motion deadlines as follows: "[a]ll other motions are to be filed not less than 15 days before the trial; oppositions filed not less than 10 days before the trial and reply briefs and requests to submit filed no less than 7 days before the trial."

Counsil filed several motions well before the scheduled trial date, including a motion to dismiss certain counts. When over a month passed without any response from the State, Counsil filed a request to submit the unopposed motions for decision. At a subsequent hearing, the State asserted that the deadline for the oppositions from the original scheduling order, 10 days before trial, had yet to run and indicated it planned to oppose Counsil's motions. The district court set a new trial date but failed to clarify whether the deadlines for the oppositions given in the original scheduling order had also changed.

A few weeks later and several months before the new trial date, the district court granted Counsil's still unopposed motions to dismiss and for a Qualified Protective Order (QPO) to obtain medical records, including mental health records. The following day, the State moved for reconsideration, arguing it complied with the scheduling order in good faith based on its understanding that, with the new trial date, the deadline for filing oppositions had not yet run. The district court granted the State's motions for reconsideration. After the motions were fully briefed, the court denied both motions.

Counsil's trial date was moved several times due to the pandemic and other issues. Before trial, Counsil entered into an agreement under which he pleaded no contest to one count of Child Sexual Abuse or Exploitation Causing Substantial Mental Harm, Child Under 14. The plea agreement reserved Counsil's right to challenge on appeal any of the court's decisions on pretrial motions in this case. The plea agreement also provided the parties were "free to argue for any legally appropriate sentence," including probation, if Counsil was certified as not representing a high risk to reoffend. Counsil's evaluations returned as a moderate and high-moderate risk to reoffend. Counsil's attorney argued for probation; however, the district court sentenced Counsil to life imprisonment with the possibility of parole after 15 years. This appeal followed.

On appeal, Counsil raises several arguments: first, that the district court abused its discretion in reconsidering its order granting his motion to dismiss; second, that the district court abused its discretion in reconsidering the order granting the QPO; third, that the State should be barred from proceeding on the dismissed counts because the State acted with conscious indifference to his procedural rights; fourth, that the district

court erred in denying his right to present a complete defense by not allowing him (1) access to the minor victim's medical records and (2) to properly contest alleged hearsay statements; fifth, that the district court erred by failing to disqualify the Carson City District Attorney's Office; and sixth, that the district court erred in sentencing him to life in prison instead of probation. Finally, Counsil argues that cumulative error warrants reversal. We consider each of Counsil's arguments in turn.

The district court appropriately exercised its discretion in granting reconsideration of the motion to dismiss based on a misunderstanding of the scheduling order, and in granting reconsideration of Counsil's motion for a qualified protective order to obtain medical records of the victim

We generally review a district court's decision on a motion for reconsideration for an abuse of discretion. *Saticoy Bay, LLC v. Thornburg Mortg. Secs. Tr. 2007-3*, 138 Nev. 335, 343, 510 P.3d 139, 146 (2022). Reconsideration may be appropriate where the court's decision is clearly erroneous or where a party introduces substantially different evidence. *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortg. & Equity Trust v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)). We should consider both factual and legal error when determining whether reconsideration was appropriate.

With regard to the scheduling order, the parties differ in their interpretation and disagree whether the due dates changed when the trial date was adjusted. The district court adjusted the trial date while the motions were pending. The scheduling order provided for a due date of ten

days before trial, however, the district court did not change the scheduling order or clarify the due date of any oppositions when the trial date changed. While the State would have been prudent to clarify the appropriate deadline, we conclude the district court did not abuse its discretion by granting reconsideration given the two valid interpretations of the scheduling order.

With respect to the qualified protective order, similarly, we conclude that the district court's order granting reconsideration of the QPO motion was not clearly erroneous because of the confusion regarding the scheduling order. With respect to the factual basis for denying the motion, the district court weighed the privacy rights of a young victim with the alleged need Counsil claimed to have relating to these records. Legally, the district court's decision to deny the QPO was in line with the precedent this court has established to protect a victim's privacy rights in sexual assault cases. *See Abbott v. State*, 122 Nev. 715, 724, 138 P.3d 462, 469 (2006) (determining the standard for ensuring fair trial rights while considering victim-witness privacy). We conclude that reconsidering and denying the QPO was not clearly erroneous.

The State is not barred from proceeding against Counsil on the dismissed counts because the district court properly granted reconsideration

When charges against a defendant are dismissed due to the "willful failure of the prosecutor to comply with important procedural rules," a new proceeding on the same offenses is barred. *Maes v. Sheriff, Clark Cnty.*, 86 Nev. 317, 319, 468 P.2d 332, 333 (1970). "Willful" refers to both "intentional derelictions on the part of the prosecution" and "situations where there has been conscious indifference to rules of procedure affecting a defendant's rights." *McNair v. Sheriff, Clark Cnty.*, 89 Nev. 434, 438, 514

P.2d 1175, 1177 (1973) (quoting *State v. Austin*, 87 Nev. 81, 83, 482 P.2d 284, 285 (1971), for the second quotation defining "willful").

Here, though the district court judge did not clarify if rescheduling the jury trial also meant extending the filing deadline, the plain language of the scheduling order allowed for oppositions ten days prior to the trial. The lack of clarity caused confusion between the parties and the grant of reconsideration was proper. As the confusion does not appear to stem from willful failure to comply with important procedural rules, the State is not barred from proceeding against Counsil.

Counsil was not prevented from presenting a complete defense

Counsil argues that the district court prevented him from preparing an adequate defense by denying access to the medical records of the minor victims and by scheduling a NRS 51.385 hearing to determine admissibility of child hearsay statements after the jury was to have been empaneled but before opening statements. Although Counsil raises specific arguments about the timing of the hearing, this issue is moot, as a hearing never occurred because Council pleaded guilty shortly before trial.

The State argues that NRS 51.385 is inapplicable here as it only relates to admissibility of statements at trial when minor victims are unavailable to testify. It further argues that arguments regarding admissibility are purely speculative as there is no guarantee as to whether the victims would have testified at trial. The State further argues Counsil was not precluded form preparing a defense in the case because Counsil was unable to show that the medical records of the girls would have contained any impeachment evidence.

This court cannot evaluate the effectiveness or limitations on a defense when the case did not go to trial. *See Goad v. State*, 137 Nev. 167, 199, 488 P.3d 646, 671 (Ct. App. 2021) (Tao, J., concurring in part and

dissenting in part) ("[C]ourts must deal with the real rather than the conjectural, limiting ourselves to evidence for which a strong case has been made to actually exist, not merely hypothetical evidence that might exist in theory but not anywhere in the record we have."). Counsil raises speculative arguments regarding child hearsay, and the record does not clearly establish one way or another whether the children would have testified. Nor can Counsil establish that the timing under the facts presented resulted in prejudice. The record also fails to establish that anything in the medical records would have supported Counsil's defense.

The record does not support relief on the claim regarding disqualification of the Carson City District Attorney's Office

Counsil argues his constitutional rights to a fair trial were denied because the district court denied his motion to disqualify the Carson City District Attorney's Office. Counsil attempted to submit the document he relies on for this argument under seal to this court, we denied the request to file under seal, and Counsil did not subsequently submit those documents. Nothing in the record supports Counsil's argument, so we must necessarily conclude this argument lacks merit. *See Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 600, 172 P.3d 131, 133 (2007).

The district court did not abuse its discretion in sentencing Counsil to life in prison rather than granting probation

Courts have wide discretion in imposing criminal sentences. *Pitmon v. State*, 131 Nev. 123, 126, 352 P.3d 655, 657 (Ct. App. 2015). This court will not disturb a district court's sentencing order on appeal "[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).

Counsil was convicted of child sexual abuse or exploitation causing substantial mental harm to a child under 14 years of age under NRS 200.508(1)(a)(1). This offense is a category A felony, punishable by life imprisonment with the possibility of parole after 15 years. *Id.* However, this offense is one of the few probationable category A felonies. *See* NRS 200.030; NRS 200.320; NRS 200.366; NRS 207.012; NRS 212.189; NRS 453.3325; NRS 453.3385; NRS 484C.130; NRS 484C.440; and NRS 488.425.

Pursuant to the plea agreement, Counsil's attorney argued for probation at the sentencing hearing, and the district court considered Counsil's mitigating factors and aggravating factors. The district court declined to sentence Counsil to probation, opting instead for a prison sentence within the statutory limits. Counsil's sentence of life in prison with the possibility of parole after 15 years was appropriate under both the guilty plea agreement and Nevada's sentencing statutes, and the record does not demonstrate that the district court relied on information or accusations which were based on impalpable or highly suspect evidence. We therefore conclude the district court did not abuse its wide discretion in its sentence and will not disturb the sentencing order on appeal.

There are no errors to cumulate

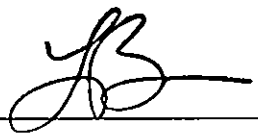
Finally, Counsil argues cumulative error requires reversal. *See Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (providing the

relevant factors to consider for a claim of cumulative error). As we have found no errors, there is nothing to accumulate. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Herndon

_____, J.
Lee



_____, J.
Bell

cc: Hon. James E. Wilson, District Judge
Carson City Public Defender
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk