BRENDAN DUNCKLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

/

No. 52383

RESPONDENT'S ANSWERING BRIEF

DAVID C. O'MARA
311 E. Liberty Street
Reno, Nevada 89501

ATTORNEY FOR APPELLANT

RICHARD A. GAMMICK
District Attorney

GARY H. HATLESTAD
Chief Appellate Deputy
P.O. Box 30083
Reno, Nevada 89520-3083

ATTORNEYS FOR RESPONDENT

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_____/

RESPONDENT'S ANSWERING BRIEF

I. INTRODUCTION

Dunckley entered a negotiated plea to one count of lewdness with a child under the age of fourteen years and one count of attempted sexual assault. Probation was available for each offense if, after an appropriate evaluation, it was determined that Dunckley would not represent a high risk to reoffend. AA, pp. 12-13, 20-21, 24. In anticipation of the sentencing hearing, Robert Stuyvesant, a licenced therapist, evaluated Dunckley, and he concluded Dunckley "does not represent a high risk to reoffend sexually based on current standards of assessment." *Id.*, p. 86. Nevertheless, Mr. Stuyvesant concluded Dunckley did represent a "moderate" risk to reoffend, noting that one of the two counts involved a stranger, "and creates high risk for reoffense opportunity, as there is evidence that his modus operandi is not limited to acting out sexually against only individuals he is familiar with." *Id.*, pp. 85-86. Despite Mr. Stuyvesant's report, Dunckley's voluntary attendance in sex offender group counseling sessions (AA, p. 90), a letter written by a co-worker (AA, p. 89), and comments from his mother (AA, pp. 39-40), the District Judge, the Honorable Connie Steinheimer declined to suspend the sentence. Judge Steinheimer even declined to follow the Department's 24 to 60 month recommendation on Count II (AA, p. 72), and sentenced Dunckley to serve a sentence of life with the possibility of parole after 10 years on the lewdness count, and 24 to 120 months in prison on the attempt count; the sentences were

ordered to run concurrently. *Id.*, pp. 59-60. This appeal follows.

II. ARGUMENT

Dunckley contends that his sentences, albeit concurrent, are excessive, and, consequently, his case should not only be reversed and remanded but remanded with instructions to Judge Steinheimer, or another District Judge, to re-sentence him to probation. Opening Brief, p. 9, lines 10-12. This contention lacks merit.

A. Dunckley's Sentence is Not Excessive

Despite Dunckley's claim to the contrary, his sentence is not excessive. Obviously, Dunckley's sentence is within the range of punishments allowed by the governing statutes. Moreover, the sentence does not rest on highly suspect or impalpable evidence. *Accord, Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159 (1976). Furthermore, while Dunckley's sentence of life after 10 years, with concurrent 2 to 12 year sentence, is fairly long, it is not so long as to shock the conscience. *See Lloyd v. State*, 94 Nev. 167, 170, 576 P.2d 740 (1979). Instead, the sentence imposed by Judge Steinheimer is consistent with her perception of Dunckley's just deserts and the punitive attitude of the community in which she serves. *Accord Sims v. State*, 107 Nev. 438, 440, 814 P.2d 63 (1991).

For example, while it is true that Mr. Stuyvesant concluded Dunckley did not present a high risk for reoffending, Mr. Stuyvesant did not conclude Dunckley represented a low risk; it is not, so to speak, a zero sum game; instead, Stuyvesant concluded Dunckley posed a moderate risk, which is apparently a mean between the two extremes.

The other noteworthy concerns involve the following: there were two separate victims, the events were separated by seven years, and Dunckley's latest victim was a stranger. Clearly, Dunckley's conduct was not isolated; rather, it was brazen and it was escalating. Even Mr. Stuyvesant, who also noted Dunckley's "promiscuous and impulsive sexual life style . . . [and] . . . being indiscriminate in regard to victim selection," found these circumstances alarming and worrisome. AA, pp. 85-86. Indeed, it was precisely these factors that Judge Steinheimer homed

in on when she announced the sentence. *Id.*, p. 59.

On the other hand, and despite Mr. Stuyvesant's report, which cut both ways, Dunckley did present some mitigating evidence that may have justified leniency. The problem here, however, is that the evidence is mitigating in name, not in effect.

For example, the favorable character letter written by his co-worker, Leslie Deach, only speaks to Dunckley's work performance and the way he interacts with adults in a work place environment, not children. AA, p. 89. For all intents and purposes, Ms. Deach's letter is beside the point. But what Ms. Deach's letter really does is reveal, if only by implication, that she really did not know this fellow, a fellow with a dark side that he was quite capable of concealing. Likewise, as Mr. Stuyvesant suggests, it is not when Dunckley is in the workplace, confronting the kind of pressures, distractions and time constraints common to chefs in a high volume kitchen, that are worrisome. Rather, it is when Dunckley is left to his own devices, that is, where sexual opportunities abound and his promiscuous sexual life style has free reign, that make him an appropriate candidate for incarceration.

Likewise, while Dunckley's mother-in-law, Ms. McFerren, spoke eloquently for him, even her comments are not completely mitigating in effect. Rather, while Ms. McFerren spoke in glowing terms of a supportive father and husband, AA, pp. 39-40, these comments cannot be squared with his conduct, conduct negating Ms. McFerren's description, conduct, which over time, revealed Dunckley's true character as a settled disposition toward sexually deviant behavior, conduct suggesting he is neither a good father or a good husband.

In short, Dunckley's sentence was lawful, and, under the circumstances, an appropriate sentence. If Dunckley's mitigating evidence served any purpose, it was in justifying Judge Steinheimer's decision to run the two sentences concurrently. The thought that this Court should remand "with instructions" to put Dunckley on probation is just silly. These were serious crimes committed by a recidivist, and they call for serious punishment.

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B. Judge Steinheimer Did Not Ignore the Law in Declining to Suspend Dunckley's Sentence and Placing Him on Probation

At the close of the sentencing hearing, Judge Steinheimer said the following:

> Mr Dunckley, perhaps your plea [for probation] would have more resonance with me with regard to the issue you had with the friend of the family [Count I: Lewdness with a Child], even though it was a very young girl and even though you argue you thought she was 17, I have heard that many times. That argument for treatment if it was an isolated incident may well resonate with me.
>
> However, the latest victim. I'm talking about the victim in between you are not charged with. I'm very concerned with your latest victim [Count II: Attempted Sexual Assault]. I agree with Mrs. Viloria. I don't think that the sentence is [sic] recommended by the Division is appropriate given your behavior.
>
> You picked someone up you didn't know, and you committed a sexual assault on her.
>
> I know you pled to something that allows for a lesser offense, but it does not allow for probation.

AA, p. 59. (Emphasis added).

Dunckley contends that a new sentencing hearing with instructions is warranted because Judge Steinheimer, in declining to impose probation, operated on the mistaken belief that probation was not available for his crimes, a mistake which, he contends, is evident from Judge Steinheimer's comments, when, in fact, under the laws existing at the time, probation was available.[1] Presumably, if Judge Steinheimer knew probation could have been imposed, she would have imposed it. Hence, Dunckley seeks a remand with instructions to impose probation.

Dunckley's argument rests entirely on his interpretation of the words highlighted above: "I know you pled to something that allows for a lesser offense, but it does not allow for probation." Frankly, Judge Steinheimer could have been clearer, and her use of the word "it" in the excerpted

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[1] *See* 1997 Statutes of Nevada, pp. 2504-5, which listed lewdness with a child, Count I herein, under subsection (j) as a probationable offense. The Legislature repealed that subsection in 2003, which is three years after the crimes alleged here occurred. *See* 2003 Statutes of Nevada, p. 2828. NRS 176A.110(1), (3)(a), which covers Count II, attempted sexual assault, has always made probation available upon certification.

sentence does not help matters. For example, does "it" refer to "something," or does "it" refer to attempted sexual assault, the lesser offense, or does "it" refer to sexual assault, the crime referenced in the preceding sentence, or does "it" refer more broadly to the facts of the case, which do not "allow" for probation? Likewise, her use of the phrase "pled to something that allows for a lesser offense" is not user friendly. Pled to something that is a lesser offense, in the sense that attempted sexual assault is a lesser offense compared to sexual assault, would make the sentence more intelligible, just as pled to something that allows for a lesser sentence would be more coherent. Ultimately, Judge Steinheimer's lack of clarity may call for a limited remand.

Dunckley, of course, contends that Judge Steinheimer was clear enough—attempted sexual assault is not a probationable offense—but his arguments for reversal on that theory are not convincing.

Obviously, if Judge Steinheimer meant that "it," the offense, attempted sexual assault, was more nefarious than the lewdness charge because it was committed upon a stranger, by a recidivist, who poses a moderate risk of reoffending, and "it" does not "allow" for probation, then her comment is unremarkable and should not detain the Court long. In other words, Judge Steinheimer's comment, in context, a context that mentions explicitly Dunckley's "argument for treatment" respecting Count I, AA, p. 59, lines 5-10, suggests the facts, taken as a whole, do not justify imposing a suspended sentence. If that is what Judge Steinheimer meant, as it seems to be, then Dunckley's argument is meritless. And he is intent on discounting that kind of parsing of the comments even though it is apt. Naturally, it is important for Dunckley to construe Judge Steinheimer's remarks as addressing something other than the facts of the case.

As Dunckley would have it, Judge Steinheimer, in declining to impose probation, was either mistaken about its availability, forgot about it, or simply ignored it. Of the three, the latter is the most promising possibility for him, but then the question is merely relocated—why did she ignore the law, if that is what she did? We will consider these alternatives in order.

First, despite Dunckley's claim to the contrary, the record shows that Judge Steinheimer

was fully aware that probation was available if Dunckley was certified as not representing a high risk of reoffending. This topic came up both in the guilty plea memorandum (AA, pp. 11-12), at the change of plea hearing (AA, pp. 20-21, 24, 26, 29), in the Department's presentence report (AA, pp. 65, 66, 71), and at the sentencing hearing (AA, pp. 36, 42). Consequently, insofar as Dunckley contends that Judge Steinheimer's mistaken belief was the result of simple ignorance, that contention is repelled by the record.[2]

By the same token, it seems very unlikely that Judge Steinheimer forgot about the availability of probation. As noted, the topic came up many times, and probation and its viability, not its availability, was virtually the only topic discussed by the lawyers in their arguments at the sentencing hearing. Furthermore, in her comments immediately after Dunckley's allocution, AA, 59, lines 5-17, and immediately preceding her decision against probation, *id.*, lines 18-19, Judge Steinheimer commented explicitly on Dunckley's "plea" for probation and treatment. The State is very skeptical about the prospect that Judge Steinheimer, in a matter of 10 lines of the transcript, forgot probation was available.

With ignorance and forgetfulness out of the equation, there is little left over. Dunckley's default argument is garden variety judicial error. In other words, Judge Steinheimer erred because she ignored the law, as if to say she acted like she had no discretion on the question of probation, which, of course, is wrong.

As noted above, Judge Steinheimer could have been clearer. But the context in which she made her remarks suggests that she did not ignore anything, particularly the facts of the cases and Dunckley's character. Rather, the context of the comments suggests that she was well aware that probation was available, but probation was not justified on these facts.

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[2]Insofar as Dunckley suggests that the Department misled Judge Steinheimer by virtue of its failure to note that probation was available, an omission called, of all things, "mendacious," Opening Brief, p. 8, lines 8-17, that claim is also repelled by the presentence report itself, which clearly indicates that, owing to a variety of legitimate considerations, Dunckley was not viewed as an appropriate candidate for community supervision, i.e., probation. AA, p. 71.

Accordingly, the Court should either affirm Dunckley's sentences, or otherwise remand so that Judge Steinheimer can clarify her ruling. In either event, the Court should not reverse the sentence or reverse and remand with instructions.

III. CONCLUSION

Based on the above arguments and points and authorities cited in support thereof, the State respectfully urges the Court affirm Dunckley's sentence.

DATED: January 16, 2009.

RICHARD A. GAMMICK
District Attorney

By 
GARY H. HATLESTAD
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of January, 2009.

GARY H. HATLESTAD
Chief Appellate Deputy
Nevada Bar No. 1525
Washoe County District Attorney
P.O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3200

CERTIFICATE OF SERVICE

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

David C. O'Mara, Esq.
311 E. Liberty Street
Reno, NV 89501

DATED: January 20, 2009.

Dawn Gluchert