IN THE SUPREME COURT OF THE STATE OF NEVADA

DUJUAN DON LOOPER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 65608

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None.

5. Procedural history.

On February 22, 2012, the State filed an Amended Information in case C-12-279379, charging Dujuan Don Looper (hereinafter "Appellant") with one count (Count 1) of Second Degree Kidnapping (Category B Felony- NRS 200.310), one

count (Count 2) of Coercion (Category B Felony – NRS 207.190), two counts (Counts 3 and 4) of Child Abuse and Neglect (Category B Felony – NRS 200.508), and two counts (Counts 5 and 6) of Battery Constituting Domestic Violence (Misdemeanor – NRS 200.481, 200.485, 33.018). AA 4-7. On that same day, Defendant was charged in case C-12-279418, by way of another separate Information with one count (Count 1) of Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366), one count (Count 2) of Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230), one count (Count 3) of Use of Minor in Producing Pornography (Category A Felony – NRS 200.700, 200.710, 200.750), and one count (Count 4) of Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, 200.730). AA 1-3.

On February 15, 2013, Defendant consolidated both cases and was charged by way of Second Amended Information in case C-12-279379 with one count (Count 1) of Second Degree Kidnapping (Category B Felony – NRS 200.310, 200.330), one count (Count 2) of Coercion (Category B Felony – NRS 207.190), two counts (Counts 3 and 4) of Child Abuse and Neglect (Category B Felony –NRS 200.508), one count (Count 5) of Battery Constituting Domestic Violence – Strangulation (Category C Felony – NRS 200.481, 200.485, 33.018), one count (Count 6) of Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony –

NRS 200.364, 200.366), one count (Count 7) of Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230), one count (Count 8) of Use of Minor in Producing Pornography (Category A Felony – NRS 200.700, 200.710, 200.750) and one count (Count 9) of Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, 200.730). AA 8-11.

On January 8, 2014, Defendant signed a Guilty Plea Agreement, pleading to one count (Count 1) of Attempt Sexual Assault with a Minor Under Fourteen Years of Age (Category B Felony – NRS 193.330, 200.364, 200.366), one count (Count 2) of Battery Constituting Domestic Violence-Strangulation (Category C Felony – NRS 200.481, 200.485, 33.018) and one count (Count 3) of Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, 200.730). AA 12-19. The State filed a Third Amended Information reflecting the Guilty Plea Agreement. AA 20-22.

On April 28, 2014, Appellant was sentenced to a maximum of two hundred forty months with a minimum parole eligibility of ninety-six months for Count 1, a maximum of sixty months with a minimum parole eligibility of nineteen months for Count 2 to run consecutive with Count 1, and a maximum of seventy-two months with a minimum parole eligibility of nineteen months for Count 3, to run consecutive with Counts 1 and 2. AA 89-90. Appellant received eight hundred and nine days credit for time served AA 90. He also received a special sentence of lifetime

supervision and must register as a sex offender. AA 90. Defendant filed a Notice of Appeal on May 6, 2014. The Judgment of Conviction was filed on May 23, 2014. AA 89-90. Appellant's Fast Track Statement was filed on September 22, 2014.

6. Statement of Facts.

Appellant was dating the victim's mother and was somewhat of a father-figure to her children, including the thirteen-year-old victim (hereinafter "C.T."). AA 66, 72. The mother worked nights, and thus Appellant was left alone with the children. AA 66.

On January 9, 2012, Appellant played a game with the children where they had to take shots of juice, and whoever could drink them the fastest would win the game. AA 9, 67. There is evidence that Appellant procured GHB around the time the crime occurred. AA 67. After drinking the juice shots, C.T. began to feel woozy. AA 9, 67. C.T. had all the indicators of being dosed with GHB: she was sleepy, groggy, and couldn't remember what had happened. AA 67. She lost control of her faculties. AA 67. C.T. was throwing up. AA 74. When she woke up her underwear was down and they were wet, and she fell back asleep. AA 67.

That night, when C.T.'s mother returned home from work, due to her suspicion that Appellant was cheating on her, she looked through his phone. AA 67. On Appellant's phone she found a picture of C.T.'s vagina which she recognized

due to the bedding and her child's pajamas, with Appellant's fingers on C.T.'s genitals. AA 67.

When Appellant was confronted, he took his phone and C.T.'s mother's phone, and put them in the toilet in an attempt to get rid of the picture. AA 67-68. He choked the mother in front of her children until C.T. was able to call the police. AA 68. C.T.'s mother passed out and the last thing she heard were C.T. and her brother screaming "please don't kill my Mom." AA 74. This abuse lasted for hours. AA 74. He also threatened her and told her if he went to jail, he would get right back out and hurt her and her children. AA 75.

By the time police arrived the phones were broken. AA 68. But Appellant had installed iCloud, and thus all the data on his phone was uploaded and could be accessed. AA 68. The picture of the C.T.'s vagina was found. AA 68. Appellant eventually admitted to taking the pictures. AA 68.

C.T. received counseling, and slowly began to remember a sexual assault by Defendant that she had not previously recalled. AA 68. She had several breakdowns, and turned to self-medicating and self-mutilating. AA 76. C.T. attempted suicide by cutting herself an estimated forty times with a knife. AA 76. She has received inpatient treatment three times since the sexual assault, and visits outpatient care regularly including a psychiatrist and a therapist. AA 76-77. C.T. is on various medications and has been to the hospital numerous times. AA 77. The family is

having a hard time paying for the various medical expenses, as the mother does not currently have health insurance. AA 77.

7. Issue(s) on appeal.

I. <u>The District Court Did Not Abuse its Discretion by Sentencing Appellant to the Maximum-Allowable Sentence</u>

8. Legal Argument, including authorities:

I. <u>The District Court Did Not Abuse its Discretion by Sentencing Appellant to the Maximum-Allowable Sentence</u>

The District court did not abuse its discretion by imposing the maximum sentence available based on statute. Appellant claims that his sentence was driven by emotion, and that the Sentencing Judge failed to consider various mitigating factors when making the final determination, and thus his sentence constituted cruel and unusual punishment. Appellant's claim that the Sentencing Judge clearly ignored evidence including the psychological evaluation report is belied by the record. Appellant's contention is that these mitigating factors must have been ignored, but provides no evidence to show this other than to list the mitigating factors and point out that the Department of Parole and Probation recommended a lighter sentence. The claim that the District court's sentence was outside the boundaries of fair play and justice due to an emotional response to the victim impact statements and complete ignorance of the mitigating factors is belied by the record.

The sentencing judge has wide discretion when imposing a sentence. Randall v. State, 109 Nev. 5, 8, 846 P.2d 277, 278, 280 (1993). The Nevada Supreme Court will not disturb a sentence on appeal unless there is a showing of abuse of discretion. Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998). The purpose of this discretion is to allow the sentencing judge to consider all information when determining a suitable punishment that fits both the crime committed and the individual who committed that crime. Id. Abuse of discretion "will be found when the defendant's sentence is prejudiced from consideration of information or accusations founded on impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976). However**,** "[t]he sentencing proceeding is not a second trial and the [sentencing] court is privileged to consider facts and circumstances which clearly would not be admissible at trial." Id. at 93–94, 545 P.2d at 1161. The court has found that any past criminal conduct, even conduct a defendant was never actually charged with, may be considered by the sentencing court. See id. at 94 n. 2, 545 P.2d at 1161 n. 2**.** These assertions may not be unsupported by any evidence whatsoever. Goodson v. State, 98 Nev. 493, 496, 654 P.2d 1006, 1007 (1982).

While Appellant contends that the Sentencing Judge clearly ignored the alleged mitigating factors, the Sentencing Judge states clearly at the Sentencing Hearing that she had received *and* read all relevant documents. The Court stated "I

would also note that I did receive and read the sentencing memorandum submitted by the defense, as well as the psychosexual evaluation that I received." AA 66.

The State explained during the sentencing hearing that Appellant had already received every possible benefit through entering his plea. AA 66. While Appellant claims that his decision not to move forward with a trial spared the victim and thus he should be given lenience, the State was clear with the court that the State only went through with the plea agreement due to the evident trauma the victim has experienced due to Appellant's actions. AA 66. The State told the court that the victim was present for the preliminary hearing and immediately collapsed upon seeing Appellant. AA 66. The State said that negotiations were only entered into due to the devastation the victim would have felt if she had to testify at a trial. AA 66. Appellant was never charged regarding any crimes the victim remembered after her first interview. AA 68.

It is within the Sentencing Judge's discretion to disagree with the psychological evaluator and make a decision based on all the evidence available. According to Appellant's Fast Track Brief, the overall recommendation was that Appellant was at a low-risk for re-offending due to various factors. While Appellant includes in the Appendix that the psychological evaluation will be transmitted to the Court and the District Attorney separately, there has been no motion or order to transmit the report from the district court to the Nevada Supreme Court. AA 29. It

is Appellant's burden to show that the Sentencing Judge abused her discretion, and because the evaluation has not been included in the Appendix, the State cannot further comment on Appellant's claims made regarding any specifics included in the evaluation.

Appellant also failed to include the Presentence Investigation Report in the Appendix, though the recommendation is included in Appellant's Fast Track Statement Procedural History. Appellant contends that the Court's sentence was out of the bounds of fair play and justice, as Parole and Probation recommended a lighter sentence. It is within the Sentencing Judge's discretion to disagree with Parole and Probation's recommendation based on all the evidence at hand. According to Appellant's Fast Track Statement, the Sentencing Judge closely followed Parole and Probation's recommendation, with the exception of making the minimum parole eligibility ninety-six months for Count 1 instead of fifty-three months, and running Count 3 consecutively with Count 2. AA 89-90.

Furthermore, the court elected to follow the State's recommendations on Counts 1 and 2, but actually sentenced Appellant to a lighter sentence than recommended on Count 3. While the State requested a seventy-two month maximum and twenty-four month minimum on Count 3, the court sentenced Appellant to a seventy-two month maximum and nineteen month minimum. AA 66,

87. The court struck a balance between what was recommended by Parole and Probation and the State.

Appellant claims in particular the Judge was noticeably affected upon hearing the statements of the victims. NRS 176.015(3)(b) gives victims the opportunity to testify and "express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." Appellant claims the Sentencing Judge allowed personal feelings to sway the sentencing decision, but points to nowhere in the record to support this claim. This Court has found that "the district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its **sentencing** decision." Randell v. State, 109 Nev. 5, 7, 846 P.2d 278, 280 (1993) (finding that it was not an abuse of discretion for the District court to hear about the victim's wishes for Defendant to feel "every possible torment jail can get them"). "[J]udges spend much of their professional lives separating the wheat from the chaff and have extensive experience in **sentencing**, along with the legal training necessary to determine an appropriate **sentence**." Randell, 109 Nev. at 7, 846 P.2d at 280 (quoting People v. Mockel, 226 Cal.App.3d 581, 276 Cal.Rptr. 559, 563 (1990)).

Appellant contends the Sentencing Judge was noticeably affected when hearing the statements of the victims, and inappropriately reacted. However, this is belied by the record. The mother's statement was very moving, where she detailed

not only the sexual assault, but also how Appellant held her down for hours until she passed out. AA 74. She explained the terrible after-effects of his crimes on herself, her son, and her daughter. AA 72-74, 76-78. She asked for the Defendant to be put in prison for as long as possible so her daughter could have enough time to deal with what happened and become an adult. AA 78. The Court's response to this lengthy and emotional statement was, "[o]kay." AA 79. The Court did not interject, or make any inappropriate comments during or after the mother's testimony. After the grandmother's statement, the court once again responded with, "[o]kay," and did not make any inappropriate comments. AA 84.

C.T. also made a statement, beginning by saying she almost didn't come to speak, but did not want to be terrorized by Appellant anymore. AA 84. She stated after he sexually assaulted her, she felt worthless and didn't care what happened to her. AA 85. She stayed out of her house because it reminded her of what happened. AA 85. And C.T. described wanting to end her own life. AA 85. At one point the court responded to a statement by the victim with an "okay," and allowed the victim to continue. AA 86. That is the only time the court interjected during the statement, except when she told her to go ahead at the beginning. AA 84-88.

At the end of C.T.'s testimony the Court made a statement that does not comport with Appellant's contention that the Sentencing Judge was overly

emotional and reacted unprofessionally by doling out a harsh sentence. The court said:

> Thank you. Right, obviously the crimes that bring us here today are very, very serious. And as we've heard your actions that you chose to take have caused a lot of effects on a whole lot of people. And I hope that you use the time in prison to improve yourself and make sure that nothing like this happens again.

AA 87. The court then imposed the sentence, gave the Appellant eight-hundred and nine days credit for time served, and made no additional commentary. AA 88.

The sentence was not disproportionate to the crime. Appellant attempted to sexually molest a child. He potentially drugged her. He took pictures of her genitals. She is still suffering because of his actions. This sentence for such a heinous and terrible crime does not shock the conscience or offend fundamental notions of human dignity. Instead the child who has been victimized will pay for the rest of her life.

It is clear that Defendant's sentence was not disproportionate to the crime for which it was inflicted.[1] This sentence was a far cry from cruel and unusual punishment. There is nothing in the record to show that the Sentencing Judge was anything but professional, and the record specifically shows she received and read

[1] Appellant relies on Naovarath v. State, 015 Nev. 525, 779 P.2d 944 (1989) to show that the Nevada Supreme Court can determine that a district court judge has abused its discretion and imposed a cruel and unusual sentence. The instant case is drastically different from Noavarath, as in that case a twelve-year-old boy was facing life without parole for killing his abuser.

both the psychological evaluation and the sentencing memorandum. There are no outbursts of emotion or inappropriate comments. The Court's sentence was clearly reasonable considering that the sentence was within that allowed by statute, the recommendations made by the State, recommendation by Probation and Parole, and the nature of the crimes committed.

9. Preservation of the Issue.

The issues were preserved.

VERIFICATION

1. I hereby certify that this Fast Track Response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, contains 2,805 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 9th day of October, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 9th day of October, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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