IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER PIGEON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 67083

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

SANDRA L. STEWART, ESQ.
Attorney at Law
Nevada Bar #006834
140 Rancho Maria Street
Las Vegas, Nevada 89148
(702) 363-4656

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER PIGEON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 67083

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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT ERRED IN FINDING PIGEON COMPETENT TO STAND TRIAL
II. WHETHER THE DISTRICT COURT ERRED IN FINDING PIGEON WAS COMPETENT TO REPRESENT HIMSELF
III. WHETHER SUFFICIENT EVIDENCE SUPPORTS PIGEON'S CONVICTIONS
IV. WHETHER PIGEON'S CONVICTIONS VIOLATE DOUBLE JEOPARDY AND/OR ARE REDUNDANT
V. WHETHER PIGEON'S TREATMENT AS A HABITUAL OFFENDER IS CRUEL AND UNUSUAL PUNISHMENT
VI. WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION IN SENTENCING PIGEON AS A HABITUAL CRIMINAL
VII. WHETHER PROSECUROTIAL MISCONDUCT OCCURRED THAT WARRANTS REVERSAL

STATEMENT OF THE CASE

On June 5, 2013, the Grand Jury returned a true bill and the State filed an Indictment charging Christopher Pigeon with "two counts of prohibited acts by sex offender, one count attempt first degree kidnapping, one count aggravated stalking, one count luring child with the intent to engage in sexual contact, one burglary, one open and gross lewdness, and one lawful contact with child gross misdemeanor." I AA 177; 179-83. Pigeon was arraigned and pleaded not guilty on June 12, 2013. I AA 193.

On July 8, 2013, the District Court heard a status check on Pigeon's competency, and referred the matter to Competency Court. I AA 198. On August 2, 2013, the Competency Court found Pigeon not competent and remanded him to the Division of Mental Health Development Services pursuant to NRS 178.425. II AA 217-18. On December 13, 2013, Pigeon was returned from Lake's Crossing and found competent to proceed with adjudication. II AA 227. However, counsel indicated that there would be a challenge to the competency finding, and the Court ordered a hearing on the matter. II AA 227.

On March 21, 2014, the Court held a hearing wherein Dr. Bradley and Dr. Harder testified. II AA 271. The Court ordered the matter continued pending decision. II AA 271. On April 4, 2014, after taking the matter under advisement,

the Court found Pigeon competent and transferred the case back to the originating court. II AA 310.

On April 23, 2014, the District Court heard Pigeon's motion to represent himself, canvassed Pigeon pursuant to Faretta v. California, 422 U.S. 806 (1975), and granted Pigeon's motions to withdraw counsel and ordered that Pigeon would proceed in pro per status. II AA 313.

On July 31, 2014, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. II AA 393. On August 4, 2014, the State filed an Amended Indictment charging Pigeon with Attempt First Degree Kidnapping (Category B Felony NRS 193.330 200.320); Aggravated Stalking (Category B Felony NRS 200.575); Luring Children With The Intent To Engage In Sexual Conduct (Category B Felony 201.560): Burglary (Category B Felony NRS 205.060); Open Or Gross Lewdness (Category D Felony 201.210); Unlawful Contact With Child (Gross Misdemeanor NRS 207.260); and two counts of Prohibited Acts By Sex Offender (Category D Felony NRS 179D.470 179D.550 179D). II 396-401.

On August 4, 2014, trial was set to begin. II AA 402. Before proceeding, the Court again canvassed Pigeon regarding the State's intent to seek habitual criminal treatment, and whether Pigeon still wished to represent himself. II AA 402-03. Pigeon stated that he understood the consequences and risks, but still did not want a lawyer appointed. II AA 402. The bifurcated jury trial began on August 4, 2013,

and the jury returned verdicts of guilty as to Counts 1-6 on August 5, 2014. The second portion of the trial, regarding Counts 7-8, was held thereafter, and the jury returned verdicts of guilty on those counts the same day. II AA 761-62.

On December 1, 2014, the District Court heard and granted the State's request for a no contact order. II AA 785. Pigeon had sent a Christmas card to the victim in this case and her family, and the Court ordered that Pigeon have no further contact with the victim or her family, and imposed an order authorizing the Clark County Detention Center to intercept and inspect all Pigeon's outgoing mail to prevent any further communications. II AA 785, 786-90. The written order was filed on December 1, 2014. II AA 792-93.

On December 10, 2014, the Court sentenced Pigeon, in addition to fees, as follows: under the Large Habitual Criminal statute as to Counts 1, 2, 3, 4, 5, 7 and 8; in Count 1 - to life in the Nevada Department of Corrections (NDC) without the possibility of parole; Count 2 - to life in the NDC without the possibility of parole; Count 3 - to life in the NDC without the possibility of parole; Count 4 - to life in the NDC without the possibility of parole; Count 5 - to life in the NDC without the possibility of parole; Count 6 - sentenced to Clark County Detention Center (CCDC) for 364 days; Count 7 - to life in the NDC without the possibility of parole; Count 8 - to life in the NDC without the possibility of parole; Counts 1, 2, 3, 4, 5, 7 and 8 to run concurrent with 573 days credit for time served. II AA 799-800. The Judgment

of Conviction was filed on December 23, 2014. IV AA 849-50. This appeal followed.

STATEMENT OF THE FACTS

In May 2013, C.C.[1] was 12 years old and attended Hyde Park Middle School. III AA 514-15. It is a magnet school, so she would take the city bus to school in the mornings. III AA 515. The bus would pick her up near her home, and she would get off to transfer at the transit center in Downtown Las Vegas. III AA 517. C.C. would ride the bus alone. III AA 517.

On May 15, 2013, C.C. noticed a man at the transit center who made her uncomfortable because he was looking at her. III AA 518. He got on the same bus that she did, and he got off at the same stop that she did. III AA 518. C.C. would often go to the CJ's Mini Mart before school, and she did on that day. III AA 518-19. She noticed that the man followed her into CJ's Mini Mart that day. III AA 519.[2] She did not initiate any contact or conversation with the man that morning, but he continued to look at her while in the store. III AA 520. She bought a pack of gum and immediately left the store. III AA 520. She was in a rush that day, so she did not notice whether the man followed her to school. III AA 520. C.C. thought it was

[1] For purposes of protecting C.C.'s identity, the State will refer to C.C. by her initials, C.C., throughout the brief.

[2] In court, C.C. identified Pigeon as the man who followed her. III AA 520.

strange that the man followed her, and it caused her to become concerned or worried. III AA 522.

The next day, on May 16, 2013, C.C. noticed the same man looking at her at the transit center again. III AA 522. Again, she did not initiate any contact with him, but tried to avoid him because he concerned her. III AA 522. C.C. was not planning on going to CJ's that morning, and was taking a different route to go straight to school. III AA 525. At that point, Pigeon confronted C.C., blocked her way, and grabbed her hand or wrist while telling her she looked nice or she was beautiful and that he loved her. III AA 525, IV AA 670. She told him to leave her alone, and she ran to CJ's because she felt unsafe and knew there would be people there. III AA 525-27. Despite her telling him to leave her alone, Pigeon followed her into CJ's and sat at the slot machines. III AA 526-27.

On May 17, 2013, C.C. again saw the same man at the transit center. III AA 529. Again he boarded the same bus she did, looked at her while on the bus, and got off at the same stop she did. III AA 529-30. Again he followed her into CJ's, where he again told her that she looked nice. III AA 531. He followed her out of the store, and she walked quickly to try to get to school. III AA 532. She was afraid and creeped out. III AA 532.

The store clerk initially reported that the interaction was suspicious, and Detective Lafreniere responded and viewed video surveillance on May 17, 2013. III

AA 556. The surveillance footage led him to identify Pigeon as the man who had been following C.C. in the store. III AA 556-60. Additionally, the footage showed Pigeon masturbating in the store on May 15, 2013.

Lafreniere went from the store to Hyde Park at around school dismissal time hoping to see Pigeon. III AA 562. When he arrived, he saw Pigeon sitting at a park across from the school, "affixed" on the school and rocking back and forth while shaking his legs. III AA 563-64. As Lafreniere observed, he saw Pigeon get off the bench and walk onto school grounds and actually enter the gated area of the school. III AA 564. He was stopped by a school employee, and Lafreniere made contact and escorted him to the police station. III AA 564. There, he interviewed Pigeon, who made a recorded voluntary statement. III AA 564-65. A redacted version of the statement was played for the jury and admitted at trial. III AA 552, 565.

C.C.'s grandmother, who is her legal guardian, testified that C.C. took the city bus to school in the mornings. III AA 511. She testified that she did not know Pigeon before police contacted her about the incidents underlying this case, and that she never gave him permission to speak to, touch, or take C.C. anywhere. III AA 513. She also did not give him permission to spend time with C.C. III AA 513. She testified that C.C. was upset by the incidents with Pigeon and was scared afterward. III AA 514-15.

Pigeon testified at trial. IV AA 657. Pigeon testified to the following:

> I don't often talk to young girls, but I find this particular girl very nice, bright, interesting. *I thought she was a nice specimen.* I like her being slimmer. I just sort of fell in the first stages of love with her and was trying to get to know her over the summer. There were only two weeks before school was out so I was really trying to get to – get her to let me meet her mom or her dad or maybe I could have come over for dinner or something over the summer. It would have been nice.
>
> My intention was to marry her if I could have met her mom and she would have agreed. So I really had good intentions, I'd say. I mean, obviously I was somewhat sexually attracted to her.

IV AA 663 (emphasis added). Inter alia, Pigeon said that on May 17, 2013, he was at the park after school waiting to see C.C. to try to say hello. IV AA 667. He eventually entered the school, because he "was going to look in the hallway briefly to see if [C.C.] might not be there." IV AA 667. Pigeon admitted that he never met her family, but he did want to marry and have sex with C.C. with parental permission. IV AA 668. He testified that he found her sexually attractive. IV AA 668. He also testified that he still loved C.C., he was happy to see her again in court, he would like to see her again, and he would like to have a relationship with her. IV AA 670-71.

SUMMARY OF THE ARGUMENT

As a preliminary matter, the State notes that the decisions of the federal district court and panels of the federal circuit courts of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th

Cir.1970), cert. denied, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 140 (1971). Similarly, this Court is not bound by the decisions of state courts outside Nevada. Accordingly, where Pigeon has cited to irrelevant and non-binding cases, the State asks that this Court disregard Pigeon's assertions where relevant Nevada authority is available and appropriate. The State will therefore not address each instance of such citation to inapplicable authority individually, but relies upon this blanket statement instead. For example, the State notes that Pigeon has improperly cited to Ninth Circuit case law for the standard of review for each issue. Rather than address it individually in the State's response to each issue, the State will simply refer the Court to the proper authority.

Pigeon was not only legally competent to go to trial, but he was also competent to make the choice to represent himself. Sufficient evidence supports the jury's verdict on each of the counts in this case, and the charges are not redundant. Moreover, Pigeon's sentence is not cruel or unusual, and he was properly sentenced under the habitual criminal statute. Finally, the State did not commit prosecutorial misconduct during closing arguments.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN FINDING PIGEON COMPETENT TO STAND TRIAL

A defendant is competent if he has sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding and has a rational

as well as factual understanding of the proceedings against him. Means v. State, 120 Nev. 1001, 1017, 103 P.3d 25, 35 (2004); Melchor-Gloria v. State, 99 Nev. 174, 179, 660 P.2d 109, 113 (1983)(*citing* Dusky v. United States, 362 U.S. 402 (1960)). Alleged mental illness, even if verified, does not necessarily render a defendant legally incompetent. See Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 712 (1995); Calambro v. Second Jud. Dist. Ct., 114 Nev. 961, 971, 964 P.2d 794, 801 (1998). When a reasonable doubt exists as to a defendant's competency, a hearing is statutorily and constitutionally required. Morales v. State, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000); Melchor-Gloria v. State, *supra*, 99 Nev. at 179 (*citing* Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972)); Warden v. Conner, 93 Nev. 209, 210-211, 562 P.2d 483 (1977) (Even though court failed to halt proceedings and hold competency hearing, where it was obvious that judge's review of evaluations left no doubt as to defendant's competency and court thoroughly canvassed defendant, plea was valid.); NRS 178.400 – NRS 178.440). "The doubt mentioned in NRS. 178.405 means doubt in the mind of the trial court, rather than counsel or others." Williams v. State, 85 Nev. 169, 174, 451 P.2d 848, 852 (1969). The trial court has discretion to determine whether such a doubt has been raised. Melchor-Gloria v. State, *supra*, 99 Nev. at 179. "A district court's determination of competency after a competency evaluation is a question of fact that is entitled to deference on review. Such a determination will not be overturned if it is supported by substantial evidence."

Calvin v. State, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006).[3] Furthermore, "The trial court resolves conflicting evidence at a competency hearing, and this court will sustain the trial court's findings when substantial evidence supports them." Calambro v. Second Jud. Dist. Ct., 114 Nev. 961, 971, 964 P.2d 794, 800 (1998) (*citing* Ogden v. State, 96 Nev. 697, 615 P.2d 251 (1980).

At the outset, the State notes that Pigeon's anecdote regarding a movie character is unpersuasive and irrelevant, especially without citation to authority to support claims regarding the interaction between schizophrenia and genius. Appellant's Opening Brief ("AOB") at 11-12. Similarly, Pigeon's references to what the appellant believes or comprehends without citation to the record for support is an improper distraction from the facts of this case. NRAP 28(a)(9)(A).[4]

[3] The State notes that the standard of review advocated by Pigeon is inapplicable here because it is supported by non-binding federal case law. AOB at 10, citing United States v. Friedman, 366 F.3d 975, 980 (9th Cir. 2004). Pigeon offers no authority to support his insinuation that the Court's competency finding is deficient because the Court did not include a detailed findings of fact as a part of the order. AOB at 10. Instead, applicable Nevada case law states that the determination of competency itself is a question of fact which is entitled to deference. Calvin, 122 Nev. 1182, 147 P.3d 1099.

[4] To the extent that Pigeon briefly argues in connection with this issue that he should be re-evaluated for competency through extensive psychological testing by a doctor or facility unaffiliated with Lake's Crossing, Pigeon provides no support for such a claim. AOB at 9, 17. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Moreover, Pigeon *was* evaluated by an independent doctor, Dr. Harder, and the Court heard testimony from that doctor at the hearing. See *infra*.

Pigeon was found competent by three evaluators to proceed with adjudication. II AA 229, 294. Pigeon's attorney challenged the findings, and at the competency hearing in this case, Dr. Bradley testified that he evaluated Pigeon while he was at Lake's Crossing regarding prior cases in 2009 and in 2001, then again regarding this case in 2013. II AA 276-77; 284-85. In 2009 and 2011, Pigeon exhibited delusional grandiosity. II AA 278. In 2013, Pigeon exhibited grandiosity, but not of the delusional sort. Id. Instead, it was more the type of "boastfulness" exhibited by someone who is narcissistic. II AA 278-280. In 2013, Pigeon also exhibited the type of non-delusional paranoia and mistrust that is often seen in individuals who have been through the criminal justice system several times. II AA 278-280.

In 2009 and 2011, Pigeon was discharged as competent while taking two anti-psychotic medications. II AA 285. Dr. Bradley testified that Pigeon was unwilling to take any anti-psychotic medications, but he did take the medication prescribed for depression. II AA 280. He further explained, "although I recommended that he re-start an anti-psychotic medication, because in general people with schizophrenia do better if they're on maintenance therapy, I didn't push the issue just because he was not exhibiting overt psychotic symptoms." II AA 285. Accordingly, Dr. Bradley explained that although Pigeon needed the medications in order to reach levels of competency during his previous two Lakes Crossing stays, in 2013 medication was unnecessary because of Pigeon's condition and exhibition of symptoms at that time.

Dr. Bradley thoroughly explained the process by which he evaluates a patient's competency, the same process he used while evaluating Pigeon, which is consistent with Nevada legal requirements. II AA 282-83; 285-86; N.R.S. 178.400. Dr. Bradley discussed with Pigeon such issues as the legal process, his understanding of the court system, the charges, the allegations in the case, and his flexibility in discussing his approach to the case, and Dr. Bradley found him to be competent. II AA 281-83, 285-86.

Dr. Harder testified that Pigeon believed he was better than everyone else but did not exhibit paranoia. II AA 291. He also testified that Pigeon's belief that C.C. liked him was delusional, which could interfere with helping with defense. II AA 292-93. Yet Dr. Harder admitted that he spent an hour or less with Pigeon, and that Lake's Crossing had more time to evaluate Pigeon. II AA 293-94. Furthermore, Dr. Harder stated that Pigeon was not incompetent "on the basis of understanding the court process." II AA 294. Despite his testimony that Pigeon's belief regarding C.C. was delusional, Pigeon exhibited no hallucinations and was able to point out weaknesses in the case, including potential weaknesses in the charges and the "missing" video.[5] II AA 295-96. Dr. Harder also thought that Pigeon couldn't testify without incriminating himself, but admitted that is true of many defendants.

[5] The unavailable video footage will be discussed more fully, *infra*.

II AA 295.[6] When asked by defense counsel, Dr. Harder responded that he was not familiar with Lake's Crossing's mission statement, but agreed that their "goal is to restore people to competency." II AA 298. Accordingly, the Court was made aware of any potential bias that evaluators from Lake's Crossing may have, and it is within the Court's discretion to assess the credibility of witnesses at an evidentiary hearing. Ybarra v. State, 127 Nev. ___, ___, 247 P.3d 269, 276-77 (2011) ("Matters of credibility in this area remain, however, within the district court's discretion."); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) (observing that on remand for evidentiary hearing "the district court will be better able to judge credibility"); See generally Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000) ("The trier of fact determines the weight and credibility to give conflicting testimony.").

Although true that Pigeon's testimony at trial was likely unfavorable, it is also true that defendants' testimony is often unfavorable. Furthermore, Pigeon cites no

[6] Pigeon asserts that Dr. Harder testified that Pigeon "was capable of understanding the court process but that his delusions would keep him from understanding that what he did was wrong or how to keep from incriminating himself." AOB at 13. In support of this assertion, Pigeon cites to II AA 294, but Dr. Harder made no such assertion on that page of his testimony. Dr. Harder did testify there that Pigeon fully understood the court process and was a bright man, but that there were "other issues." II AA 294. Dr. Harder did not make the specific finding that Pigeon could not understand what he did was wrong or that he was incapable of incriminating himself, only that it might be difficult for him not to incriminate himself like it would be for many defendants, as explained *supra*.

case law in support of his apparent proposition that in order to be competent, a defendant must not make incriminating or unfavorable statements during his testimony or during his own self-representation. Both Dr. Bradley and Dr. Harder testified that Pigeon understood the court proceedings, the court process, and the charges. II AA 281-83, 285-86; 294-95. Dr. Harder, though called by the defense, testified that Pigeon was even able to point out legal weaknesses in his case. II AA 295-96. Accordingly, Pigeon was competent to stand trial. NRS 178.400.

Based upon the foregoing, although Dr. Harder disagreed with the finding of competency made by all three evaluators at Lake's Crossing, the District Court's finding that Pigeon was competent to stand trial is supported by substantial evidence. Dr. Bradley had spent significantly more time with Pigeon in 2013, and had previously evaluated him on two other occasions. Dr. Bradley was in a better position to make a conclusion as to Pigeon's competency, and the District Court did not abuse its discretion in finding his expert opinion credible.

II
THE DISTRICT COURT DID NOT ERR IN FINDING PIGEON WAS COMPETENT TO REPRESENT HIMSELF

This Court has held that "the competency to stand trial is the same competency needed to waive the right to counsel. Once a defendant is deemed competent, the next inquiry is whether the waiver of counsel is knowing, voluntary and intelligent." Hymon v. State, 121 Nev. 200, 212, 111 P.3d 1092, 1101 (2005). "When a defendant

seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted." Id. (internal quotations and citation omitted).

The relevant inquiry regarding whether a defendant knowingly and voluntarily waived his right to representation by counsel is whether the "defendant made his decision with a clear comprehension of the attendant risks. Trial judges must determine whether defendants waive their right to counsel with a full understanding of the disadvantages." Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996). Although a defendant who is deemed competent to stand trial will generally be competent to waive the right to counsel, see Hymon, 121 Nev. at 212, 111 P.3d at 1101, the United States Supreme Court has held that "the Constitution permits States to insist upon representation by counsel for those competent to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Indiana v. Edwards, 554 U.S. 164, 178, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). This Court has held that the "only question is whether the defendant 'competently and intelligently' chose self-representation, not whether he was able to 'competently and intelligently' represent himself." Id. (emphasis in original). The Court will "give deference to the district court's decision to allow the defendant to waive his right to counsel. Through face-to-face interaction in the courtroom, the trial judges are much

more competent to judge a defendant's understanding than this court. The cold record is a poor substitute for demeanor observation." Hymon, 121 Nev. at 213, 111 P.3d at 1101 (*citing* Graves, 112 Nev. at 124, 912 P.2d at 238).

Pigeon was deemed competent to stand trial. The record supports the District Court's conclusion that there was no indication that Pigeon was unable to conduct the trial proceedings as a result of severe mental illness. Trial counsel represented that he had provided Pigeon with the Faretta materials and that Pigeon has previously gone through Faretta canvasses twice before in Nevada. II AA 315. Pigeon had previously represented himself in a trial. II AA 318, 322. The District Court conducted the required Faretta canvass, and repeatedly warned Pigeon of the risks associated with representing himself at trial. II AA 315-24. During the canvass, trial counsel represented "Christopher's very intelligent. He has thought about this a lot. We have butted heads numerous times about strategy which is why he's a little frustrated." II AA 322. Pigeon answered the District Court's questions coherently and appropriately, and agreed that he understood the nature and severity of the crimes charged and that he had read all of the applicable statutes and gone through the discovery. II AA 319, 322. Pigeon agreed that he understood the consequences if he decided to testify on his own behalf. II AA 318. He also agreed that he understood that his dual role as attorney and accused could diminish his defense. II AA 323.

At the end of the canvass, the District Court acknowledged that Pigeon had been found competent by Competency Court, and found "specifically that you are competent to waive your constitutional right to be represented by an attorney… that you are waiving your right to counsel freely, voluntarily, and knowingly and has a full appreciation and an understanding of the waiver and its consequences." II AA 323-24. Throughout the hearing, at no time did trial counsel object or suggest that although Pigeon was found competent to stand trial, he was not competent to represent himself. Pigeon made the choice to represent himself with a full understanding of the risks and disadvantages of so doing. The District Court did not err in finding that Pigeon knowingly, and voluntarily chose to represent himself.

III
SUFFICIENT EVIDENCE SUPPORTS PIGEON'S CONVICTIONS

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing 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." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). "Where

there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972), cert. denied, 429 U.S. 895, 97 S.Ct. 257 (1976) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S.Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, this Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (*citing* Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976). The State produced sufficient evidence to support the jury's verdicts.

A. Open and Gross Lewdness

Pigeon was charged with Count 5: Open or Gross Lewdness (NRS 201.210) because he masturbated in the CJ's Mini Mart after having previously been convicted of the same offense in 2006, 2010, and 2012. II AA 398. In order to be convicted, the jury was instructed that the crime encompassed indecent, obscene, or vulgar acts of a sexual nature which Pigeon knew was likely to be seen by C.C. IV AA 747. Additionally, although such an act could take place in a private location, the act must have been committed in an open, as opposed to secret, manner. IV AA 747.

At trial, Detective Jason Lafreniere testified that when he responded to CJ's Mini Mart, he viewed video surveillance footage through the surveillance system for May 15, 2013, which showed Pigeon reach into his pocket and masturbate while looking at C.C. III AA 561.

1. Admission of Lafreniere's statements about the video footage

On appeal, Pigeon challenges the admission of Lafreniere's statements regarding what he saw on the surveillance footage based upon the unavailability of the video recording, and supports his argument with NRS 52.235. Below, Pigeon objected that "the tape isn't even in existence. And there were no witnesses that claimed anything in the store that hasn't already been purported by those same witnesses," and the District Court allowed the State to lay a foundation. III AA 557. After the State did so, Pigeon objected for hearsay, and the objection was overruled. III AA 558-59. Yet NRS Chapter 52 deals with documentary and other physical evidence, not with hearsay, which is covered by NRS Chapter 51. Pigeon "cannot change [his] theory underlying an assignment of error on appeal." Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). A claim not raised in the district court is not properly raised for the first time on appeal. McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999); Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

While this Court may address constitutional issues raised for the first time on appeal, "it will not do so unless the record is developed sufficiently both to demonstrate that fundamental rights are, in fact, implicated and to provide an adequate basis for review." Wilkins v. State, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980). Where an appellant fails to preserve an issue on appeal, this Court reviews

the issue for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). For this Court to grant relief based on an unpreserved claim, Lopez must demonstrate that: (1) there was an error; (2) that the error is plain; and (3) that the error affected his substantial rights. NRS 178.602; Green, 119 Nev. at 545, 80 P.3d at 95. To show that an error affected his substantial rights, Lopez must demonstrate "actual prejudice or a miscarriage of justice." Green, 119 Nev. at 545, 80 P.3d at 95.

Should this Court decide to address Pigeon's unpreserved claim, it is without merit even under the standard advocated by Pigeon. Pigeon claims thart "in order for the defendant to prevail on having such evidence excluded, he must first show that the evidence has been lost and that the loss is chargeable to the State." AOB at 22. Yet here, the record is abundantly clear that the unavailability of the video footage was not the fault of the State. Lafreniere requested that the police department's forensic analyst make a copy of the surveillance footage at the store. III AA 557. A disc was made, and Lafreniere attempted to access the information on the disc at a later point, but was unable to do so. III AA 557. The video would not open or play on Lafreniere's computer, and neither his sergeant nor the video analyst were able to open the video, either. III AA 557-58. After discovering that the video had not saved properly to the disc, Lafreniere requested another copy of the video footage from the store, but it was too late because the system had automatically recorded over the pertinent dates and times. III AA 558. Lafreniere

specifically testified that it was not anything that the police did that made the disc unreadable, but it simply did not properly copy from the store to the disc. III AA 558. Accordingly, the record is clear that the fact that the video footage was not available at trial was due to no fault of the State, and Pigeon's claim fails under the standard he advocates.

2. The State produced sufficient evidence

At trial, Detective Jason Lafreniere testified that he viewed video surveillance footage through the surveillance system at CJ's Mini Mart for May 15, 2013, for the period of time at about 7:17 am. III AA 559-60. Lafreniere testified that on the surveillance footage he saw C.C. enter the store, Pigeon enter the store shortly thereafter, and then saw Pigeon reach into his pocket and masturbate while looking at C.C.. III AA 561. Additionally, the jury heard the taped interview of Pigeon by Lafreniere, which was admitted at trial. III AA 565. During that interview, Pigeon admitted that he was sometimes aroused while on the bus with C.C., and his penis would be erect. III AA 566. During the interview, Pigeon initially denied touching himself in the store, but when confronted by the fact that Lafreniere had seen it on video, he admitted that he may have "adjusted himself." III AA 577. On cross examination, Pigeon pointed out that it was strange that none of the other witnesses mentioned seeing Pigeon masturbate in the store, and accused Lafreniere of lying. III AA 571-72.

Although no other witnesses testified to seeing Pigeon masturbate in the store, that is not required in order to uphold the jury's verdict. The jury was properly instructed that it was required to find that Pigeon, while in the presence of C.C. or other employees or patrons of the store engaged in the act knowing it was "likely to be observed." IV AA 747. Pigeon masturbated in a public convenience store while looking at C.C., so he was clearly in her presence.[7] Whether someone actually did see him do so at the time is irrelevant. It is clear that it was likely that C.C., a store employee, or another patron would see him do so, especially considering that the incident took place between 7-7:30 am, when many patrons would stop in on their way to school or work.

Based upon the foregoing, the jury assessed Lafreniere's credibility and found his testimony credible. It is clear that "after reviewing 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." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

B. Aggravated Stalking

Pigeon concedes that he is guilty of stalking C.C., but he argues that although properly instructed, the jury improperly found that the stalking was aggravated.

[7] Pigeon alleges that he was behind store shelving at the time, but he does not cite to the record for this proposition. AOB at 24.

AOB at 24-25. The jury was instructed that "a person who commits the crime of stalking and in conjunction therewith threatens the person with the intent to cause the person to be placed in reasonable fear of death or substantial bodily harm commits the crime of aggravated stalking." IV AA 743. Pigeon argues that there is no evidence to show that he threatened C.C. AOB at 25.

While following C.C., Pigeon confronted her, blocked her way, and grabbed her hand or wrist while telling her she was beautiful and that he loved her. III AA 525, IV AA 670. C.C. testified that she was afraid, and that she ran away because she felt unsafe. III AA 525-27. Nonetheless, despite her telling him to leave her alone, Pigeon chased C.C. into CJ's. III AA 526-27. Pigeon threatened C.C. by grabbing her, blocking her way, and chasing after her. She was reasonably afraid for her safety. When taken in the light most favorable to the State, a rational trier of fact could have found Pigeon guilty of aggravated stalking.

C. <u>Luring a Child</u>

Pigeon argues that the evidence does not support the conviction because Pigeon didn't actually "lure" C.C. anywhere. AOB at 26. Yet the law does not require that Pigeon actually convinced C.C. to go anywhere with him, or that C.C. did actually go with Pigeon. Instead the jury was properly instructed that, to summarize, all that is required was that Pigeon knowingly contact or communicate with or attempt to contact or communicate with C.C. with the intent to persuade,

lure, or transport her to another location without the permission of her guardian with the intent to engage in sexual conduct. IV AA 744. Pigeon concedes that he followed C.C. and spoke to her to tell her that she looked nice. AOB at 26. The jury also heard that Pigeon admitted that he was sometimes aroused while on the bus with C.C., and his penis would be erect. III AA 566. The jury also heard that Pigeon masturbated in a convenience store while looking at C.C. III AA 561. Pigeon said that he wanted to have sex with C.C. with parental permission. I AA 29. Yet Pigeon had never made any attempt to contact C.C.'s parents, despite being in love with her. I AA 29-30. Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Pigeon followed and contacted C.C., telling her that she was pretty, with the intent to take her somewhere private in order to initiate a sexual relationship without her parents' permission.

D. <u>Attempted First Degree Kidnapping</u>

Pigeon was charged with one count of Attempt First Degree Kidnapping in that between May 15 and May 17, 2013, he attempted to kidnap C.C. with the intent to keep her from her guardian or with the intent to perpetrate upon her any unlawful act by following and/or chasing and/or grabbing and/or touching C.C. with the intent to begin a sexual relationship with her. II AA 397. The jury was instructed that

> any person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine him from his parents, guardians, or any other person with legal custody of the minor, or with the intent

> to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree.

III AA 741. The jury was further instructed that

> The elements of an attempt to commit a crime are:
> 1) The intent to commit the crime
> 2) Performance of some act towards its commission; and
> 3) failure to consummate its commission.

III AA 742. Pigeon claims that there was "absolutely no evidence that PIGEON intended to kidnap" C.C. "or that he did anything toward accomplishing such an act." AOB at 28. This is a vast misstatement of the record.

Pigeon relies upon Burkhart v. State, 107 Nev. 797, 820 P.2d 757 (1991), as support for his argument that insufficient evidence supports his conviction. However, the case involves a different crime, Attempted Second Degree Kidnapping, that involves different elements and was pleaded differently than in the instant case. Id. There, the issue was whether the defendant "seized" the victim and attempted to entice him away from his parents when

> Appellant was apprehended in the Ormsby House Casino after making three brief contacts with the alleged victim, Mathew. During each of these contacts, Mathew was standing in plain view in a casino hallway within a few feet of his parents. Mathew showed no distress from these contacts, and his parents, who were close enough to see and hear what was happening, did not intervene except finally to notify security after the third contact. During the third contact, it appears that appellant may have momentarily grabbed a jacket that Mathew was wearing.

Id., 107 Nev. at 797-98, 820 P.2d at 757. Not only is Burkhart distinguishable in that it relates to a different crime, but the facts are distinguishable as well. Whereas there the defendant made three brief contacts with the victim in a short amount of time with his parents standing only feet away, here Pigeon followed C.C. from the bus to a convenience store to school for three days. III AA 518-32. Although in Burkhart the victim showed no distress, here, C.C. explained that she was afraid. III AA 532. Additionally, here, C.C.'s guardians were not within feet or even nearby like the facts in Burkhart. Instead, she was alone and vulnerable on her way to school on a public bus. III AA 515-17. Pigeon actually grabbed her arm at one point and blocked her path. III AA 525, IV AA 670. She told him to leave her alone, and she ran to CJ's because she felt unsafe and knew there would be people there. III AA 525-27. Despite her telling him to leave her alone, Pigeon followed her into CJ's. III AA 526-27.

Furthermore, although Pigeon has failed to relay the following facts in his brief, on Friday of the week in question, at around dismissal time, Pigeon was sitting at a park across from the school, "affixed" on the school and rocking back and forth while shaking his legs. III AA 563-64; IV AA 667. He was excited about something, and he was waiting for C.C. Pigeon then got off the bench and walked onto school grounds and actually entered the gated area of the school. III AA 564. He said he entered the school because he was looking for C.C. IV AA 667. He was stopped by

a school employee, and Lafreniere made contact and escorted him to the police station. III AA 564.

A reasonable jury could have inferred and believed that, after escalating his behavior toward C.C. between Wednesday and Friday morning, Pigeon waited for C.C. after school on Friday with the intent to kidnap her to have sex with her. It was clear from his testimony and his behavior that he was obsessed with C.C., and he wanted to have a sexual relationship with her. He had been following her for a couple of months. IV AA 662. He also said that he wanted to get to know her before school was out for the summer, which was coming up soon. IV AA 663, I AA 59. A reasonable jury could have believed that Pigeon was worried that he would not see C.C. again if he did not make a move before summer vacation, and that he saw that Friday as his opportunity to initiate the sexual relationship with C.C. that he wanted.

Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Pigeon had the intent to kidnap C.C. for the purposes of having sex with her, that he took steps toward committing the crime, and that if the school employee and the police had not stopped him, he would have actually kidnapped C.C. Accordingly, the conviction should be affirmed.

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E. Burglary

Pigeon was charged in Count 4 with Burglary, and the State alleged that on May 15, 2013, May 16, 2013, and/or May 17, 2013, he willfully, unlawfully, and feloniously entered CJ's with intent to commit Battery and/or Kidnapping and/or Luring a Minor. II AA 398. The State argued at closing that Pigeon entered CJ's with the intent to further engage in conduct with C.C. after grabbing her arm, that he intended to grab her, and additionally that he entered CJ's with the intent to commit the kidnapping and luring discussed above. IV AA 677. The jury found that Pigeon committed the attempted kidnapping and luring a child, so it is reasonable that the jury also believed that Pigeon entered CJ's with the intent to do so. Specifically, on the morning of May 17, 2013, the same Friday that Pigeon waited for C.C. after school, he followed her into CJ's, where he again told her that she looked nice. III AA 531. His course of conduct leading up to that day and on that day indicated that he planned to act on his obsession with C.C., and that he would take any opportunity to do so that became available. Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Pigeon's comment to C.C. that she looked nice that Friday was meant to entice her into engaging with him in sexual conduct, and that if she would not be enticed, he would kidnap her for that purpose. Further, a rational trier of fact could have found that Pigeon entered CJ's with that intent. Accordingly, the conviction should be affirmed.

For the foregoing reasons, it is clear that sufficient evidence supports the jury's verdict, and this Court should affirm Pigeon's Judgment of Conviction.

IV
PIGEON'S CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY AND ARE NOT REDUNDANT

The prohibition against double jeopardy "protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Byars v. State, 130 Nev. ___, ___, 336 P.3d 939, 948 (2014); Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002); Peck v. State, 116 Nev. 840, 847, 7 P.3d 470, 475 (2000)(*citing* State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998)); see also Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996). The facts of Defendant's case do not fit within any of those three categories.

The State charged Pigeon with two counts of Prohibited Acts by a Sex Offender. II AA 399. The first was for failing to update his address and information on January 7, 2013, 48 hours after moving from 200 South 8th Street. II AA 399. It is as simple as: "He didn't tell Metro he moved out." IV AA 711. The Second charge was for failing to update his information for the last month after moving to either St. Vincent's or the storage unit, between April 22 and May 17, 2013. II AA 399, IV AA 711.

Detective Juarez testified Pigeon had last updated his registration with authorities in December 2012, and updated his address to 200 South 8th Street. IV AA 699, 701-02. He also testified that on January 28, 2013, he conducted a scheduled check of Pigeon's residence to verify his address, and Pigeon was no longer residing at that location. IV AA 699-700. He conducted a comprehensive investigation and was unable to locate Pigeon. IV AA 701. In April 2013, the investigative leads were exhausted, and his unit submitted a warrant for his arrest. IV AA 701.

Wayne Frantz, an employee of the Bargain Motel located at 200 South 8th Street, testified that Pigeon rented a unit there from December 5, 2012, to January 5, 2013. IV AA 707. Pigeon did not renew his lease and never returned to the motel after leaving on January 5, 2012. IV AA 707-08. David Dena, an employee of the Edwards Self Storage where Pigeon rented his storage unit, testified that Pigeon rented a unit there. IV AA 709-10.

Pigeon admitted during his voluntary statement to police that he no longer lived at the 200 South 8th Street address and that he lived at St. Vincent's homeless shelter. I AA 48-49. He also admitted that he sometimes lived in his storage unit, but "a while back" he was told he could no longer stay there. II AA 65-66. Accordingly, Pigeon admitted to living at a minimum of two addresses after leaving the last address at which he had registered. Pigeon did not notify authorities within

48 hours of leaving the 200 South 8th Street address as required by law. He additionally failed to update the proper authorities of his change of address after living in two locations thereafter. In other words, after leaving his last registered address, Pigeon lived in at least two locations and failed to register either address with authorities as required by law. Therefore, both charges are supported.

Pigeon improperly argued during closing that the "statute does not say you have to register when you're homeless." IV AA 712. In fact, NRS 179D.470(3) states: "any sex offender who has no fixed residence shall at least every 30 days notify the local law enforcement agency in whose jurisdiction the sex offender resides if there are any changes in the address of any dwelling that is providing the sex offender temporary shelter or any changes in location where the sex offender habitually sleeps."

Pigeon also argues that in addition to violating the Double Jeopardy Clause, the two convictions are redundant. Pigeon cites a Nevada case for the proposition that a defendant is not subject to multiple convictions for the same conduct, however, this court has disapproved of the "same conduct" theory, Byars v. State, 130 Nev. at ___, 336 P.3d at 949 (*citing* Jackson v. State, 128 Nev. ___, ___ , 291 P.3d 1274, 1282 (2012) (naming Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751-52 (2003), Skiba v. State, 114 Nev. 612, 616, 959 P.2d 959, 961 (1998), and Albitre v. State, 103 Nev. 281, 283-84, 738 P.2d 1307, 1309 (1987), and overruling these cases

and their progeny). Nonetheless, it is clear that the "statutory language" does not indicate "one rather than multiple criminal violations was contemplated," Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005), because the legislature imposed strict deadlines and a continuing responsibility of the sex offender to update his or her information if pertinent information changes. NRS 179D.470. "The threshold issue is whether [the defendant] committed a single act or four individual acts that are punishable as separate violations." Wilson, 121 Nev. at 356, 114 P.3d at 293. Under NRS 179D.470, each time a sex offender fails to update his or her information with the appropriate authorities upon a change of address or location, a new offense is committed, and the crimes are not redundant. Here, Pigeon missed the 48 hour deadline within which to update authorities that he had moved, he failed to notify authorities that he was living at his storage unit, and he failed to notify authorities that he was living at St. Vincent's. Accordingly, both convictions must stand.

V
PIGEON'S TREATMENT AS A HABITUAL OFFENDER IS NOT CRUEL AND UNUSUAL PUNISHMENT

When considering whether a sentence is cruel and unusual, this Court has held that

> The Eighth Amendment of the United States Constitution "forbids [an] extreme sentence[] that [is] 'grossly disproportionate' to the crime." Despite its harshness, "[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.'"

Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004), *overruled on other grounds by* Knipes v. State, 124 Nev. Adv. Rep. 79, 192 P.3d 1178 (2008) (citations omitted). Here, as in Allred, Pigeon was sentenced within the parameters of the relevant statutes, and Pigeon has not challenged the constitutionality of those statutes. Here, as in Allred, the District Court disregarded the recommendation provided by P&P, considered the severity of the crime and the harm caused, and imposed a sentence within the statutory guidelines. Thus, Pigeon's sentence, like that imposed in Allred, does not shock the conscience and is not cruel and unusual. Furthermore, this Court has upheld the use of the habitual criminal statute; for example, this Court held that a sentence of life in prison with the possibility of parole after 10 years is not disproportionate to the crime of burglary, and does not shock the conscience. White v. State, 105 Nev. 121, 771 P.2d 152, (1989), overruled in part, Hightower v. State, 123 Nev. 55, 154 P.3d 639 (2007).

Pigeon argues that the sentence "shocks the conscience" because Pigeon was sentenced to life sentences without the possibility of parole "for following a girl on three separate occasions, speaking to her one time to tell her she was pretty, and lightly touching her on the hand." AOB at 33. In reality, Pigeon was sentenced as a large habitual offender based on his prior record and the instant offenses, each of which is serious. The State argued at sentencing:

> Mr. Pigeon has a life of crime. And not only that, a life of sexually-based crime. The psychosexual evaluation came back as a pure high risk to reoffend. … That's extremely rare, first of all. … The question is really what to do with Mr. Pigeon. He's someone who is not going to stop and he showed the Court that he's not going to stop what he's doing.

IV AA 808. His criminal history began in 1997 with a felony conviction for forgery. IV AA 809, 811. In a 2010 case, Pigeon was sentenced to prison for masturbating in public in a McDonalds and at the Bellagio Hotel. IV AA 809. Pigeon was also convicted of felony Open or Gross Lewdness in 2012. IV AA 415. The State argued that his conduct was becoming progressively worse, and that in this case Pigeon was actually stalking a 12-year-old girl and was only stopped because the store clerk noticed it was suspicious and alerted authorities. IV AA 809.

On appeal, Pigeon does not challenge that his prior convictions support habitual criminal treatment, but only argues that the punishment does not fit the instant offenses because, despite the fact that Pigeon was convicted by a jury for several serious offenses, he apparently "did nothing" to C.C.. AOB at 35. Given Pigeon's prior criminal history and the seriousness of the offenses for which he was convicted in this case, the sentence imposed is not so grossly disproportionate to the crime and Pigeon's history of recidivism as to constitute cruel and unusual punishment. See Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion).

To the extent that Pigeon claims that the sentence is improper because the sentencing judge was "prejudiced" against Pigeon for "representing himself – and saying crazy things," this accusation is without merit. AOB at 35. Pigeon supports this baseless claim with no citation to the record or relevant caselaw whatsoever. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Instead, the record is clear that the sentencing judge did not abuse his discretion in sentencing Pigeon, which will be addressed more fully *infra*. Pigeon's sentence was carefully considered by the sentencing judge, and is not cruel and unusual.

VI
THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING PIGEON AS A HABITUAL CRIMINAL

This Court reviews a district court's sentencing determination for an abuse of discretion. Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). It is well-established that the district court has wide discretion in its sentencing decision, see, e.g., Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). "A district court is vested with wide discretion regarding sentencing, but this court will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence." Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (*citing* Renard v. State, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978); Silks v. State, 92 Nev. 91, 94,

545 P.2d 1159, 1161 (1976)). For example, in reaching its sentencing decision, a district court may not rely on bald assertions of uncharged bad acts that are "unsupported by any evidence whatsoever." Goodson v. State, 98 Nev. 493, 496, 654 P.2d 1006, 1007 (1982)).

In rendering its sentence, the district court may "consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." 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. A sentencing judge may consider, for example, prior felony convictions and any underlying charges that were ultimately dismissed in the case in question. See id. Furthermore, "[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 v. State, 109 Nev. 5, 7, 846 P.2d 278, 280 (1993) (quoting People v. Mockel, 226 Cal.App.3d 581, 276 Cal.Rptr. 559, 563 (1990)).

Although true that "The sentencing court may enhance each primary offense pursuant to one enhancement statute. Imposition of consecutive enhancements applied to a primary offense is inconsistent with the application of the habitual

offender statute and the permissible uses of enhancement under NRS 193.165 and NRS 193.167," Barrett v. State, 105 Nev. 361, 365, 775 P.2d 1276, 1278 (1989), here the instant *primary offenses* were not enhanced before application of the habitual criminal statute.

In addition, this Court found that the statute enhancing subsequent DUI convictions and the habitual criminal statute "are compatible, and neither statute precludes the application of one to the other." Lader v. Warden, 121 Nev. 682, 684, 120 P.3d 1164, 1165 (2005). The same logic applies here. It is clear that the District Court did not err in sentencing Pigeon under the habitual criminal statute.

Pigeon additionally alleges that the prior convictions used to support the habitual criminal finding were nonviolent and remote in time, and thus the sentencing court abused its discretion. This claim was not preserved below, and therefore is subject to plain error review, if any.

This Court has previously held that a defendant's three prior convictions between 7 and 20 years old were not stale, and although two of the convictions were for non-violent crimes, the trial court did not err in convicting the defendant as a habitual offender. Tanksley v. State, 113 Nev. 997, 946 P.2d 148 (1997). Yet where the prior convictions used to support the finding of habitual criminal treatment were between 23 and almost 30 years old and were for nonviolent crimes, it was an abuse of discretion for the district court to adjudge defendant a habitual criminal and to

impose the maximum sentence. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990). Here, Pigeon's oldest felony conviction was from a 1997 offense with a judgment of conviction of 2000, but his most recent conviction at the time of the 2013 instant offenses was from late 2012. IV AA 829-838.

Additionally, it is clear from the record that the sentencing judge was seriously concerned about Pigeon's likelihood of reoffending, his risk to the community, and, in particular, the way in which Pigeon referred to C.C. in this case. IV AA 825-25, 823. Specifically, the sentencing judge noted that Pigeon admitted that he was still interested in C.C., and the judge stated, "And I wrote this down and I kept my notes. I have never kept notes on a case. You said she was a nice specimen." IV AA 823. It is clear that the judge found the facts of the case particularly disturbing, and, when combined with Pigeon's prior history of sexually-related offenses and his evaluation as a high risk to reoffend, the judge felt that the only appropriate sentence was one of life without parole. IV AA 825-26. Although Pigeon attempts to minimize the facts of the offenses for which he was previously convicted, in addition to the previous forgery felony conviction, he was convicted of Open or Gross Lewdness, a Category D felony, in Nevada in 2006 and again in 2012. IV AA 835-38. Accordingly, the sentencing court did not abuse its discretion in sentencing Pigeon to habitual criminal treatment. Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

VII
NO PROSECUROTIAL MISCONDUCT OCCURRED THAT WARRANTS REVERSAL

With regard to a claim of prosecutorial misconduct that is not of a constitutional nature, the standard of review is harmless error. Valdez v. State, 124 Nev. 1172, 1188-1189 (2008). In determining claims of prosecutorial misconduct, a two-step analysis is used to first determine if the prosecutor's conduct was improper, and if so, a determination whether the improper conduct warrants reversal. Id. The State notes additionally that this issue was not preserved below.

Defendant asserts that prosecutorial misconduct occurred during closing argument when the State said "As the Judge just instructed you, it would have been illegal for Christopher Pigeon, a 50 year old man, to marry [C.C.], a 12 year old little girl." IV AA 674. It is clear that the State intended the reference to be in the context of the evidence presented, that C.C.'s guardian did not provide such consent nor had it been sought.

This is particularly clear considering that the State specifically referred the jury to the previously relayed Jury Instruction 13, which stated "A person less than 16 years of age may marry only if the person has the consent of: (a) Either parent; or (b) Such person's legal guardian, and such person also obtains authorization from a district court." The jury was properly instructed pursuant to NRS 122.025. "[T]his

court generally presumes that juries follow district court orders and instructions." Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006).

It is clear from a more careful consideration of the record in context that the State did not commit misconduct in making the aforementioned statement. Nonetheless, even if it was, which the State does not concede, any such error would be harmless where the jury was properly instructed regarding the legal requirements for marriage of an individual under the age of 16. Accordingly, reversal is not warranted.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 13th day of May, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 10,609 words.
3. **Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 13th day of May, 2015.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 13, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

SANDRA L. STEWART, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

/s/ E.Davis
Employee, Clark County
District Attorney's Office

SSO/Elizabeth Anderlik/ed