

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASEY ALAN JOHNS

Appellant,

v.

STATE OF NEVADA

Respondent.

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CASE NO. 83064

Appeal from a Judgment of Conviction After Jury Verdict
in Case CR20-10DC-0552
Tenth Judicial District Court of the State of Nevada, Churchill County
Honorable Thomas L. Stockard, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed pursuant to that rule. These representations are made so that the justice of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Victoria T. Oldenburg, Esq.
2. Publicly held Companies Associated: None
3. Law firm appearing in the Court(s) Below:

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DATED this 4th day of April, 2022.

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction pursuant to a jury verdict. 8 Appellant's Appendix (AA) 5 at 780. A Notice of Appeal was filed on June 11, 2021. 5 AA 784. This Court has appellate jurisdiction pursuant to NRAP 4(b)(1)(A).

ROUTING STATEMENT

This case is not presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(2) as it is a direct appeal of a jury verdict that involves the conviction of a category A felony.

STATEMENT OF THE ISSUES

- A. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF COUNT 1 OF THE AMENDED INFORMATION – BURGLARY WITH POSSESSION OF A DEADLY WEAPON?
- B. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF COUNT 3 OF THE AMENDED INFORMATION – BATTERY UPON A POLICE OFFICER?
- C. DID THE DISTRICT COURT IMPOSE AN UNDULY AND UNFAIRLY EXCESSIVE SENTENCE IN VIOLATION OF APPELLANT'S EIGHTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 6 OF THE NEVADA CONSTITUTION WHICH PROHIBITS THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT?

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STATEMENT OF THE CASE

On May 27, 2020, the State filed a five count Information against Appellant. 1 AA 001. The State charged Appellant with: Count 1 - Burglary with Possession of a Firearm or Deadly Weapon; Count 2 - Battery With a Deadly Weapon Causing Substantial Bodily Harm to Victim; Count 3 - Battery By a Prisoner in Lawful Custody or Confinement; Count 4 – Home Invasion With Possession of Firearm or Deadly Weapon, and; Count 5 – Obtaining or Possessing Credit Card or Debit Card, or Identifying Description of Credit Card, Credit Account or Debit Card Without Consent. 1 AA 001. On June 20, 2020, at an in-person court hearing, Appellant was arraigned and plead not guilty on all counts. *Id.* On May 5, 2021, the State filed a First Amended Information setting forth the same charges as in the original Information. 1 AA 108.

After a four-day jury trial, Appellant was found guilty on all counts. 5 AA 750-754. The district court sentenced Appellant to a term of 24 to 60 months on Count 1; a term of 72 to 180 months on Count 2, consecutive to Count 1; a term of 12 to 32 months on Count 3, consecutive to Count 1 and 2; a term of 32 to 96 months on Count 4, consecutive to Count 1, 2 and 3, and; a term of 12 to 32 months on Count 5, consecutive to Counts 1, 2, 3 and 4. 5 AA 780. Appellant's aggregate sentence is 152 to 400 months (12 years 8 months to 33 years 4 months). In addition, the district court ordered Counts 1 through 5 to run consecutive to the sentence imposed in

District Court Case No. 20-10DC-0186 (according to the Nevada Department of Corrections, Appellant was sentenced to 21 to 56 months for Attempted Burglary).¹

Id. Therefore, Appellant is serving an aggregate sentence of 173 to 456 months (14 years 5 months to 38 years). On June 11, 2020, Appellant timely filed a Notice of Appeal. 5 AA 784.

STATEMENT OF FACTS

A. First Amended Information

In Count 1 of the Amended Information, Appellant was charged with Burglary With Possession of a Firearm or Deadly Weapon. Specifically, the State alleged Appellant entered the Budget Inn, 60 South Allen Road, Fallon, Nevada, Room #135, with a knife with the intent to commit a battery. 1 AA 108, 109:1-13. In Count 2, Appellant was charged with Battery With a Deadly Weapon Causing Substantial Bodily Harm to Victim. Specifically, the State alleged the Appellant cut Michael Malone in the hand with a knife causing prolonged physical pain and/or causing impairment of the function of Michael Malone's hand. *Id.* at 109:16-24. In Count 3, Appellant was charged with Battery by a Prisoner in Lawful Custody or Confinement. Specifically, the State alleged that Appellant, after being placed under arrest and while in lawful custody, kicked Officer Kevin Grimes in the leg. *Id.* at 110:1-8. In Count 4, Appellant was charged with Home Invasion with Possession

¹ See NDOC Inmate Search (nv.gov), Casey Allan Johns, Inmate No. 1098321.

of A Firearm or Deadly Weapon. Specifically, the State alleged Appellant forcefully entered Room 132 with a knife, causing damage to the entry door and/or doorframe. *Id.* at 110:10-18. In Count 5, Appellant was charged with Obtaining or Possessing Credit Card or Debit Card, or Identifying Description of Credit Card, Credit Account or Debit Card Without Consent. Specifically, the State alleged Appellant obtained credit cards belonging to Brandie West-Castillo without her consent. *Id.* at 110:20-28, 111:1-3.

B. Trial Testimony²

1. Testimony of Ms. Gower

Ms. Gower rented Budget Inn Room 132 and testified she was not in her room on April 16, 2020 around 1:00 p.m. 2 AA 265, 23:24. When she returned from work that day, late afternoon, she noticed damage to the door, that it had been broken in, something happened to the door and that there were blood stains on the cement up to her door. She stated that nothing in her room had been touched, the room was not disturbed or damaged, and that nothing was nothing missing. 2 AA 268-266. She did not see any blood in her room. 2 AA 269.

² The trial testimony presented in the Statement of Facts is that which Appellant counsel believes is relevant to the issues on appeal.

2. *Testimony of Deanne Douglas*³

Ms. Deanne Douglas had been living for several months in Room 135 at the Budget Inn. 2 AA 274. On April 16, 2020 she was with Michael Malone in her room which was located at the end of the building closest to a field, on the first floor of the building. At around 1:00 p.m. Mr. Malone was helping her load her things in his truck. 2 AA 274-275. She was in the bathroom and heard a slam. 2 AA 276, 2 AA 289. She came out and noticed Appellant walking outside near the window. 2 AA 289, 296. She went over to the table, which is located where you enter the room, and, by the time Appellant got to the entrance of the room she had already gotten her backpack, which was on a chair under the window, and removed her knife and held it by her side. 2 AA 278, 280, 290, 293, 296. The door was wide open. 2 AA 288-289. It appeared from Ms. Douglas' testimony that the first time Appellant came to the room he did not enter the room but was standing at the entrance of the door asking for his girlfriend (Corey). 2 AA 288, 291. She testified Appellant was acting erratic, jumping up and down, and moving back and forth as if he were looking for something. 2 AA 278. She introduced herself and told him to leave. 2 AA 278-279, 289. Appellant continued to ask for his girlfriend, telling them to let his

³ Ms. Douglas' testimony was difficult to decipher in certain areas as to the sequence of events. Counsel's presentation of the testimony is a good faith effort to accurately depict such events.

girlfriend out, looked inside the room, ducked to look under the bed, and was also looking towards the bathroom. 2 AA 278, 296.

Ms. Douglas testified Appellant "stepped out twice." 2 AA 299. The first time he was standing at the entrance of the room and left and came back. 2 AA 291. She testified he stepped out before Mr. Malone was cut and went outside, and that is when Appellant got the weapon and then came back in. 2 AA 299. She testified that when he was in the room his feet were fully on the wood floor, maybe 2 feet into the room. 2 AA 295.

Appellant did not immediately lunge at Mr. Malone. 2 AA 290. Mr. Malone was standing at the end of the bed, which was about 3 to 4 feet from the door. 2 AA 288. Mr. Malone moved and stood in between Appellant and Ms. Douglas, facing Appellant with his hands and palms up as Appellant stood in the doorway. 2 AA 279, 280. Appellant was again saying he was looking for Corey; Ms. Douglas and Mr. Malone were talking to him, for several minutes, trying to get him to leave. 2 AA 292, 293. Thereafter, Mr. Malone looked back and his hand was cut by Appellant, causing him to bleed profusely. 2 AA 281. Ms. Douglas retrieved towels to wrap around his hand. 2 AA 281. She stated Appellant said she better call 911 as Mr. Malone was probably going to bleed out. 2 AA 282. She testified Appellant stepped back far enough to where she let go of Mr. Malone and kicked the door shut; She stated Appellant was not quite out the door but her kick on the door was enough

to shut it and shove him out; she then locked the door and called 911.⁴ 2 AA 282. She stated that after Mr. Malone was cut Appellant said he would slice her throat if she did not let his girlfriend come out or let him see her. 2 AA 284-285, 297. She testified that Appellant went out front and when, several minutes later, the police arrived Appellant was still in the front, packing back and forth, like he was waiting for the police. 2 AA 284.

3. *Testimony of Mike Malone*

Mr. Malone testified he was at Ms. Douglas' room on April 16, 2020 at around 1:00 p.m. to help her take some of her belongings to storage and then take her on a trip to Winnemucca for a couple of days. 2 AA 305, 308. He testified he had backed his truck towards her room, was loading things into the truck and the door to the room was open. 2 AA 308, 309. When he first saw Appellant he was standing near the door, looked out, and saw him coming through the field towards the Budget Inn agitated and yelling someone's name. 2 A 309-210, 337-339. Mr. Malone testified that when he heard Appellant's voice he walked to the door, and as Appellant got closer he put his hands up and said, "not here, dude." 2 AA 311, 346. As Appellant walked by Room 135 he put his head to the side kind of like looking into the room, and proceeded to walk away towards the other rooms, to the right. 2 AA 311. Mr.

⁴ In her police statement Ms. Douglas stated she called 911 and then Mr. Jones then walked back outside. 2 AA 299.

Malone then heard some banging, and, while in the room, saw Appellant walk past the window. 2 AA 312, 339. Mr. Malone went to grab the door, which was open, and tried to shut it but was not able to as Appellant put his foot over the threshold so he could not shut the door; Appellant was described as agitated and fixated on Ms. Douglas as she was yelling at Appellant to get out of the room and that she was not Corey. 2 AA 312-313-316. Mr. Malone stated it appeared like Appellant was looking for someone and continued to look agitated. 2 AA 313, 340. At first Appellant had one foot, approximately two and a half feet, on the flooring inside the room and the other foot was still on the outside of the door. 2 AA 313-314. 340. Appellant then took his other foot and stepped into the room. *Id.* At that time Mr. Malone was still at the door but then got in front of him and put his hands up, shoulder level, palms facing Appellant, letting him know this is the barrier and so that he would not come any further, still thinking the situation would diffuse itself. 2 AA 314-315. At some point he saw something in Appellant's hand that looked like the tip of a pair of scissors or something. 2 AA 317. Mr. Malone looked over his shoulder to see if there was anything he would trip over if he had to back up and then his hand was sliced and he started bleeding profusely. 2 AA 316-318. Mr. Malone stated that once Appellant was in the room it was about 30 seconds before he stabbed him. 2 AA 340-341. He stated the Ms. Douglas grabbed a towel from the bathroom and gave it to him to compress the wound, and Appellant walked away

over to the end of the parking lot and sat down on a log. Ms. Douglas then called 911. 2 AA 318-319. When the officers arrived Mr. Malone told them to take care of Appellant, and that he was not going to do anything. 2 AA 320. Mr. Malone then testified as to the extent of his injuries, that his nerves and an artery were cut, his need to have surgery, and the residual effects of the injury which have affected his ability to write, his work, and day to day activities. 2 AA 326-334.

4. Testimony of Police Officer Kevin Grimes

On April 16, 2020, Officer Grimes was a Police Officer with the Fallon Police Department. 4 AA 438. Officer Grimes testified that when he arrived Appellant was standing outside of the hotel room and was then asked by Officer Groom to sit on a log near the room. 4 AA 440. Appellant was detained, placed in handcuffs, and was cooperative. 4 AA 445, 509. He stated Appellant was making excited utterance and calling out for someone named Corey, for Corey to get up, that we are going to be okay, and he appeared to be cooperative. 4 AA 445, 507. Appellant had involuntary movements of his hands (twitching his hands) which was indicative of someone on a stimulant and he appeared to be under the influence of a controlled substance. 4 AA 445, 507. Ultimately the decision was made to place Appellant under arrest. 4 AA 444, 445. Officer Grimes stated that, due to COVID precautions, he placed a face mask on Appellant but because they were easy to pull down over the face he placed a spit hood over the mask to hold it in place; at that time Appellant

was calm and cooperative. 4 AA 446, 511. Officer Grimes described the spit hood as the same thing as the paper masks but that it goes all the way about the head, with a mesh portion on top so you can still see, and it prevents body fluid from being ejected from the mouth. 4 AA 447. Appellant was still sitting on the log when the spit hood was placed on his face and was calm and fairly cooperative. 4 AA 446. With Officer Grimes directing Appellant's movement, the officers stood him on his feet and as they were getting ready to walk him to their car he started twisting away and trying to get free from their grip so he and Officer Shine took him down to the dirt ground, flat on his stomach. 4 AA 447, 453, 454, 455, 512, 513. He continued to thrash his body around and kick his legs. 4 AA 455. He calmed down and Officer Grimes and Officer Shien went down to the ground to pick him back up again; they were able to stand him back up but he started kicking his legs again so he and Officer Shine took him to the ground a second time. 4 AA 455, 512. He and Officer Shine were still on either side of him and Officer Groom and Officer Uglaki were behind him. 4 AA 453, 456, 514. They were eventually able to carry him to the car.⁵ 4 AA 456. Afterwards, Officer Groom noticed a foot print on Officer Grimes' pants. 4

⁵ The body cam, Exhibit 28 admitted at trial, indicates the officers carried Appellant's upper and lower body by holding onto his arms and legs, such that his upper body was facing the ground; it appeared he was then moved somewhat upright in order to place him into the vehicle. The body cam video did not show Officer Grimes being kicked in the leg by Appellant.

AA 514. Prior to that time Officer Grimes was not aware of being kicked. 4 AA 514-515. Officer Grimes looked at his uniform and saw a shoe imprint, made with dust, on his left leg on the inside of the shin area, but he did not feel anything when the shoe impression was made. 4 AA 456-457, 514. When he inspected his body there were no scratches, bruises, or marks on his leg. 4 AA 457, 458, 515 He stated he did not recall the specific moment in time when he was kicked. 4 AA 468, 516. He testified he believed he had been kicked by Appellant because of the angle of the footprint on his pants and the tread of the shoeprint as compared to Appellant's shoe. 4 AA 458-460.

When they took Appellant to the hospital Officer Grimes requested a mental health hold on Appellant due to the signs of impairment he was exhibiting. 4 AA 516. Although Officer Grimes was aware that Appellant was under the influence of a controlled substance, Officer Grimes did not request any type of drug test when Appellant was taken to the hospital. 4 AA 516-517.

Officer Grimes also testified as to the Budget Inn's surveillance video of Room 132 observing that Appellant kicked in the door of the room. 4 AA 448.

5. *Testimony of Detective Sergeant John Frandsen.*

Detective Frandsen with the Fallon Police Department self-responded to the Budget Inn on April 16, 2020 when he heard the call of a stabbing at the Budget Inn and that it involved Appellant. 4 AA 528-529. Detective Frandsen generally testified as to

evidence taken at the scene. He also testified as to the Budget Inn video surveillance in which he observed Appellant striking the window of Room 132 with a knife and kicking in the door, entering the room for approximately 15 seconds, and then exiting and walking towards Room 135. 4 AA 563-567.

Officer Frandsen testified that when he arrived Appellant was in handcuffs, sitting on the ground and being relatively cooperative and not combative, but was verbal but not verbally abusive to the officers. 4 AA 596-697. Officer Frandsen testified that during the struggle to get Appellant into the patrol car one of his shoes

SUMMARY OF THE ARGUMENT

Insufficient evidence existed to convict Appellant on Counts 1 and 3; Burglary with Possession of a Firearm and Battery by a Prisoner in Lawful Custody or Confinement. Therefore, Appellant's conviction on Counts 1 and 3 should be reversed. In addition, Appellant's aggregate sentence of 12 years 8 months to 33 years 4 months is unreasonably disproportionate to the offenses committed; the sentence shocks the conscious and is unduly harsh under the circumstance of the case. Such cruel and unusual punishment, in violation of Appellant's constitutional rights, warrants that this case be remanded to the district court for a new sentencing hearing.

LEGAL ARGUMENT

A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF COUNTY ONE OF THE

AMENDED INFORMATION – BURGLARY WITH POSSESSION OF A DEADLY WEAPON.

1. Legal Authorities

Evidence is sufficient if, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Thompson v. State*, 125 Nev. 807, 816, 221 P.3d 708, 715 (2009). The verdict of a jury will not be overturned when substantial evidence exists to support it, and even circumstantial evidence alone can sustain a conviction. *Id.*; *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Thompson*, 125 Nev. at 816, 221 P.3d at 715. It is for the jury to determine the degree of weight and credibility to give to witness testimony and other trial evidence. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, (1981). If there is truly insufficient evidence a defendant must be acquitted. *State v. Purcell*, 110 Nev. 1389, 1396, 887 P.2d 276, 279 (1994).

2. Argument

NRS 205.060 requires that a person entering a dwelling have the requisite specific intent to commit an offense, including battery. Specific intent can rarely be proven by a defendant's direct state of mind, but can be inferred from the individualized, external circumstances of the crime. *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

There was not substantial evidence for a reasonable jury to infer, beyond a reasonable doubt, that Appellant entered Room 135 with the specific intent to cut Mr. Malone. From the onset of Appellant's appearance in the field near the Budget Inn and then at the Budget Inn, the substantial evidence shows that Appellant was looking for his girlfriend, Corey. Appellant was in a significantly impaired and agitated state, and, as observed by trained law enforcement, on a controlled substance, perhaps a stimulant. Appellant's mental condition was serious enough for Officer Grimes to request a mental health hold when he took Appellant to the hospital. During his impaired and agitated state of mind he was continually calling and looking for Corey; he first walked by Room 135 and stood in the open doorway asking for her and looking into the room believing she was there. When Mr. Malone said "not here, dude" he continued to Room 132 and kicked in the door – not for the purpose of stealing anything but clearly looking for someone as he was in and out of Room 132 in 15 seconds. When he returned to Room 138 and stepped in, still in an intoxicated and agitated state, he was still looking and calling for Corey and had a conversation with Mr. Malone that lasted several minutes, according to Ms. Douglas.

While it is not clear why, after Appellant stepped into Room 135 a second time asking for his girlfriend and talking to Mr. Malone, Appellant cut Mr. Malone's palm as Mr. Malone turned around to look behind him, the battery alone is not in and of itself enough to establish that Appellant stepped into the room for the sole

purpose of cutting Mr. Malone. Based upon the individualized circumstances that day, including Appellant's intoxicated and agitated state of mind, the substantial evidence showed that during the time Appellant first stood at the doorway of Room 135, and the second time when he stepped into Room 135, it was for the purpose of finding his girlfriend Corey, who he believed, in his significantly impaired mental state, to be in that room. Therefore, there was insufficient evidence to establish, beyond a reasonable doubt, that Appellant entered Room 135 with the specific intent of committing a battery upon Mr. Malone and Appellant's conviction for violating NRS 205.060 should be overturned.

B. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF COUNT 3 OF THE AMENDED INFORMATION – BATTERY UPON A POLICE OFFICER.

1. Legal Authorities

Evidence is sufficient if, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Thompson v. State*, 125 Nev. 807, 816, 221 P.3d 708, 715 (2009). The verdict of a jury will not be overturned when substantial evidence exists to support it, and even circumstantial evidence alone can sustain a conviction. *Id.*; *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Thompson*, 125 Nev. at 816, 221 P.3d at 715. It is for the jury

to determine the degree of weight and credibility to give to witness testimony and other trial evidence. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, (1981). If there is truly insufficient evidence a defendant must be acquitted. *State v. Purcell*, 110 Nev. 1389, 1396, 887 P.2d 276, 279 (1994).

2. Legal Argument.

Pursuant to NRS 200.481(1)(a), a "Battery" means any willful and unlawful use of force or violence upon the person of another, as opposed to accidental or inadvertent. There was not substantial evidence for a reasonable jury to infer, beyond a reasonable doubt, that Appellant willfully kicked Officer Grimes. The testimony of Officer Grimes and the video cam establishes there was a struggle to take Appellant to the patrol car and Appellant was thrashing around kicking his legs to avoid being dragged to the patrol car. Appellant was taken, face down, to the dirt ground not once but twice by Officer Grimes. Appellant was eventually carried by four officers, face down, with two Officers at his arms and two at his legs, to the patrol car. Officer Grimes never felt being kicked and was not aware he may have been kicked until he saw a dusty foot impression on his pants. No one saw Officer Grimes being kicked and the cam worn by Officer Grimes did not show him being kicked. There was no physical evidence of contact to Officer Grimes leg other than a dusty footprint on Officer Grimes' lower pantleg. Given the struggle, Appellant's foot could have easily, and accidentally and inadvertently, come into contact with

Officer Grimes when officer Grimes was leaning over when he took Appellant to the dirt ground or when he was leaning over to stand Appellant back up, rather than being the result of a willful kick.

Therefore, there was insufficient evidence to establish, beyond a reasonable doubt, that Appellant willfully kicked Officer Grimes. Appellant's conviction for battery upon an officer in violation of NRS 200.481(2)(f) should be overturned.

C. THE DISTRICT COURT IMPOSED AN UNDULY AND UNFAIRLY EXCESSIVE SENTENCE IN VIOLATION OF APPELLANT'S EIGHTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 6 OF THE NEVADA CONSTITUTION WHICH PROHIBITS THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT.

1. Standard of Review.

A defendant's challenge of a sentence will be reviewed for an abuse of discretion on appeal. *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

2. Legal Authorities.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. A sentence within the statutory limits is not cruel and unusual punishment unless the sentence is so unreasonably disproportionate to the offense as to shock the conscience. *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996), quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979). The Eighth Amendment does not require strict proportionality between the crime

and sentence but forbids an extreme sentence that is grossly disproportional to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991).

The discretion afforded a district court in imposing a sentence enables the sentencing judge to consider a wide, largely unlimited variety of information to ensure that the punishment fits not only the crime, but also the individual defendant. *Norwood v. State*, 112 Nev. 438, 915 P.2d 277, 278 (1996); *Martinez v. State*, 114 Nev. 735, 961 P.2d 143, 145 (1998).

3. Argument

The largest sentence Appellant received was on Count 2, battery with a deadly weapon causing substantial bodily harm. Appellant received a sentence of 6 to 15 years. There is no doubt Mr. Malone's injury is substantial and permanent. However, the district court ran the sentences on Counts 1, 3, 4 and 5 consecutive, giving Appellant a total of 12 years 8 months to 33 years 4 months, for the additional offenses of possessing credits cards that Appellant did not use, battery of Officer Grimes when no one saw Appellant kick Officer Grimes during the scuffle and there was no visible indication of contact on his leg, home invasion where no one was home and threatened and nothing was taken or disturbed, and burglary where the battery to the victim was punished by the sentence imposed in Count 2.

Given the mitigating circumstances, in that Appellant was clearly on a controlled substance and in an impaired mental state, an appropriate and fair

sentence would have been to run Appellant's sentences concurrent. Appellant's aggregate sentence is unreasonably disproportionate to the offenses committed which shocks the conscious and is unduly harsh under the circumstance of the case. in violation of Appellant's constitutional rights. Therefore the facts warrant that this case be remanded to the district court for a new sentencing hearing.

CONCLUSION

Insufficient evidence existed to convict Appellant on Counts 1 and 3; Burglary with Possession of a Firearm and Battery by a Prisoner in Lawful Custody or Confinement. Therefore, Appellant's conviction on Counts 1 and 3 should be reversed. In addition, Appellant's aggregate sentence of 12 years 8 months to 33 years 4 months is unreasonably disproportionate to the offenses committed; the sentence shocks the conscious and is unduly harsh under the circumstance of the case. Such cruel and unusual punishment, in violation of Appellant's constitutional rights, warrants that this case be remanded to the district court for a new sentencing hearing.

DATED this 4th day of April, 2022.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and it contains 5,417 words.

3. Finally, I certify that I have read the 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 4th day of April, 2022.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

Electronically

I hereby certify that on this date the foregoing document was filed electronically with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Aaron D. Ford
Nevada Attorney General

Priscilla Baker, Deputy District Attorney
Churchill County District Attorney

Via USPS

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DATED this 4th day of April, 2022.

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