IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN CHRISTOPHER GREEN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 84087

RESPONDENT'S ANSWERING BRIEF

JOHN L. ARRASCADA
Washoe County Public Defender

JOHN REESE PETTY
Chief Deputy Public Defender
350 South Center Street, 5th floor
Reno, Nevada 89501

ATTORNEYS FOR APPELLANT

CHRISTOPHER J. HICKS
Washoe County District Attorney

MARILEE CATE
Appellate Deputy
One South Sierra Street
Reno, Nevada 89501

ATTORNEYS FOR RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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Appellant,

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF ISSUES[1]

When the district court's sentence was within the statutory range and not based on suspect or impalpable information, but instead was based on Green's extensive criminal history and the violent circumstances of this crime, whether the district court abused its discretion by sentencing the Appellant John Christopher Green (hereinafter, "Green") to the maximum sentence?

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[1] The State agrees with Appellant John Christopher Green's Jurisdictional Statement, Routing Statement, and Statement of the Case. These matters will not be repeated herein. NRAP 28(b).

II. STATEMENT OF FACTS

A. The offense.[2]

On August 6, 2012, Sparks Police Department Officers responded to a local motel on a report of a family disturbance between a male subject, later identified as Green, and his girlfriend, Elizabeth Kinkle. When officers arrived, Green was no longer on the scene. However, Ms. Kinkle reported that the incident began in their room when Green attempted to wake her up by hitting and poking her in the head. When Ms. Kinkle did not respond to Green's questions, Green straddled her on the bed and would not let her leave for about 10 minutes. During that time, Green stated, "yeah bitch you ain't calling the police this time bitch, now what?" Ms. Kinkle had her cell phone and $194.00 under her pillow, which Green took while she was attempting to get away.

After about 10 minutes of struggling to get away, Ms. Kinkle convinced Green that she was hungry, but Green insisted on leaving with her. Before exiting the room, Green said, "I am going with you, you better

[2] Because this case is the result of a plea, many of the facts surrounding the offense fall outside of the record. The offense facts set forth herein are found on page 10 of the Presentence Investigation Report ("PSI"), which the State is contemporaneously moving to transmit. The pagination cited herein conforms with the original document.

not go out there and start yelling for someone to help your sorry ass." The hotel manager was near the door when Green and Ms. Kinkle exited their room. Ms. Kinkle requested that the manager call the police. Several other witnesses were outside, so Ms. Kinkle attempted to regain possession of her cell phone and money. However, Green grabbed Ms. Kinkle and shoved her against the door to their room with such force that the door reopened. Green shoved the victim again and caused her to fall to the ground in the room. Moments later someone knocked on the door. When Green exited to speak with the individual, Ms. Kinkle locked him outside the door. Green took Ms. Kinkle's money and phone and left the premises.

Officers were able to confirm Ms. Kinkle's version of events through video surveillance, but were unable to locate Green that day. Officers returned to the motel the following day. They observed Green exiting from Ms. Kinkle's room and ultimately arrested Green.

B. The negotiations and the district court's sentence.

The parties entered into negotiations, where Green agreed to plead guilty to attempted Robbery in exchange for the State's agreement to dismiss all other charges arising from the incident. Joint Appendix ("JA"), 1-2, 6, 11, 14. The parties agreed to be free to argue for the appropriate

sentence. *Id.* at 6, 11. Green entered his guilty plea pursuant to negotiations on December 7, 2021. *Id.* at 9, 15.

The district court began the sentencing hearing by noting that the sentencing range was one to ten years and discussing what the court did to prepare for the sentencing hearing. *Id.* at 22-23. The district court reviewed "the whole file" and Green's substance abuse evaluation. *Id.* at 23. The district court began by acknowledging some mitigating information about Green. First, that Green had been accepted into two programs—one with the Salvation Army and the other with the Reno-Sparks Gospel Mission. *Id.* Second, that Green had been "working on" his "substance abuse and anger management issues" while he was in jail. *Id.*

The district court then addressed the victim and other facts about Green's history. The district court noted that Green was in a dating relationship with the victim at the time off the offense, the victim was present for sentencing, and was seeking $194.00 in restitution. *Id.* Then, the district court addressed Green's continued drug abuse and criminal history. The district court said, "I am aware that you have been abusing drugs, sadly, for close to 40 years. I am aware that you have a 33-year criminal history." *Id.* The district court concluded its remarks by explaining that it would consider these facts and counsel's arguments to

fashion a fair and just sentence. *Id.* The district court then turned to Green's counsel for corrections to the PSI and sentencing arguments. *Id.* at 24.

Green's counsel argued for probation. Green acknowledged his history of bad choices. *Id.* at 29 ("I am who I am. And my choices are bad, to date."). However, Green explained that he did not want to continue with that lifestyle. *Id.* at 29-30.

The State argued for 36 to 120 months in prison. *Id.* at 31. The State pointed to a significant period of time where Green was clean and sober as one of the reasons it was not recommending the maximum sentence. *Id.* However, the State highlighted Green's criminal history and the violence in this case as reasons to sentence Green to prison. *Id.* The State summarized that Green was "a bully" using some type of controlled substance and represented a danger to the community because he has a history of violence when he is using controlled substances. *Id.*

Ms. Kinkle made a victim impact statement. She noted that Green tore her rotator cuff, and she would be going for surgery the following day. *Id.* at 34, 38. Ms. Kinkle suggested that prison might not be a punishment for Green, since he has family and friends there. *Id.* at 40, 41. Ms. Kinkle

asked the district court to make Green complete a program and order him to pay her restitution. *Id.* at 41.

Before imposing its sentence, the district court found that "[t]here's two Mr. Greens… the sober Mr. Green, who seems very articulate, hard-working, obviously bright, and has a certain charisma… [and] there's the Mr. Green, though, that hurts people, usually when he's high." *Id.* at 44. The district court found that Ms. Kinkle had "the unfortunate results of seeing the other Mr. Green" and that "something very bad happened this day. A crime was committed, and someone was hurt." *Id.* The district court again reflected on Green's lengthy criminal history—33 years—and his "tragic[]" abuse of "controlled substances and/or alcohol for almost his entire life." *Id.* at 44. The district court concluded by noting that it had considered Green's productivity in jail as mitigation in this case, but found that "it does not excuse what happened here…." *Id.* at 44-45. As a result, the district court sentenced Green to 42 to 120 months in prison. *Id.* at 45-46, 50-51. This appeal followed.

III. SUMMARY OF ARGUMENT

Green's sentence is within the statutory range and the district court did not consider impalpable or highly suspect evidence at sentencing. Green has significant criminal history and a history of violence. The

offense at issue here was violent and resulted in serious injury to the victim. The district court acted within its discretion when it sentenced Green to the maximum sentence allowed by law.

IV. ARGUMENT

Green points to non-binding precedent—the federal sentencing guidelines—to argue that the district court abused its sentencing discretion here and imposed a greater than necessary sentence. Green also argues that the district court erred because, even though he did not object, the State's sentencing argument did not address the crime he pled guilty to because it focused on Green's past criminal history and the physical injury suffered by the victim in this case. Green's arguments are misplaced.

Initially, Green's contention regarding the State's sentencing argument is without merit. Because Green did not object to the State's sentencing argument, this issue should be deemed waived or, at the very least, evaluated under a plain error standard. *See Rodriguez v. State*, 134 Nev. 780, 781, 431 P.3d 45, 46 (2018) (reviewing for plain error affecting substantial rights when the defendant failed to lodge a contemporaneous objection or argument on a sentencing issue). Green is correct that he pled guilty to attempted Robbery, but that crime, as charged, made his violent conduct relevant. He was charged with taking property from Ms. Kinkle

"against her will, *and by means of force or violence* or fear of immediate or future injury to her person, *to wit, said defendant did strike* [Ms. Kinkle] and attempt to take money and a cell phone from her...." JA, 1-2 (*emphasis added*). Green's use of force and violence and his striking the victim is how he accomplished the crime and were highly relevant to the charge that Green pled guilty to. Nothing in the record suggests that the district court punished Green for a crime he did not commit. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 476, 490 (2009) (explaining that "[p]ossession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment" and allowing the consideration of prior uncharged crimes, so long as the defendant is not punished for offenses he did not commit). Thus, Green has failed to show the prosecutor's argument concerning the facts of the crime at issue created plain error affecting his substantial rights.

Next, Green contends that the district court abused its discretion by sentencing him to the maximum sentence because it was more than what was necessary to accomplish sentencing goals and the district court did not give due consideration to the issues at hand. District courts are afforded wide discretion in their sentencing decision. *See Houk v. State*, 103 Nev.

659, 747 P.2d 1376 (1987). The appellate courts will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Green claims that the district court did not give due consideration to the issues at hand; yet, the record belies this claim. The district court began and ended the sentencing hearing by discussing the various factors and considerations at play in determining a fair and just sentence for Green. JA, 22-23, 43-46. The court referred to Green's potentially mitigating factors at least twice during the hearing, including, his significant and longstanding substance abuse history, Green's acceptance into treatment programs, his period of sobriety, and his work on anger management and substance abuse issues in jail. *See id.* at 22-23, 26, 43-46. The district court commended Green for his "very heartfelt" comments. *Id.* at 30. The district court also noted that the victim's "very emotional and moving" statement was helpful in its sentencing calculus. *Id.* at 42. Put simply, the record demonstrates that the district court carefully considered the record and what the parties presented at sentencing before fashioning its sentence.

As Green concedes, the district court was not bound by the parties' recommendations. Opening Brief, pg. 12. The district court's upward departure from the parties' recommendations does not militate a conclusion that an abuse of discretion occurred here. *See e.g., Fugate v. State*, 2017 WL 2591343, *3, 133 Nev. 1011, 396 P.3d 745, (table) (June 13, 2017) (*unpublished disposition)* (holding that the district court acted within its sentencing discretion when it imposed a different and greater sentence than was contemplated by the plea agreement.). Green's lengthy criminal history and the circumstances of this case support the district court's decision to sentence Green to the maximum sentence allowed by law for attempted Robbery. Green does not contend that his sentence is outside the bounds of the applicable sentencing range. Nor does Green contend that the district court relied on impalpable or highly suspect evidence. Thus, this Court should not interfere with the sentence imposed by the district court. *See Silks*, 92 Nev. at 94, 545 P.2d at 1161.

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V. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the judgment of conviction in this case.

DATED: June 7, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: MARILEE CATE
Appellate Deputy

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 Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 7, 2022.

CHRISTOPHER J. HICKS
Washoe County District Attorney

BY: MARILEE CATE
Appellate Deputy
Nevada State Bar No. 12563
One South Sierra Street
Reno, Nevada 89501
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 7, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

/s/ Tatyana Ducummon
TATYANA DUCUMMON