IN THE SUPREME COURT OF THE STATE OF NEVADA

REX ALVIN LAND,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 83360

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF ISSUES[1]

Whether the district court abused its discretion by imposing consecutive sentences in this case when the offenses involved separate victims and where Appellant Rex Alvin Land (hereinafter, "Land") had a history of similar offenses, the sentences were within the statutory bounds, and were not based on impalpable or highly suspect information?

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[1] The State agrees with Appellant Rex Alvin Land's Statement of Jurisdiction, Routing Statement, and Statement of the Case; therefore, those matters will not be repeated herein. NRAP 28(b).

II. STATEMENT OF FACTS

A. The Offenses.[2]

On November 2, 2020, police were called to a retirement home in Washoe County based on a report that Land entered Carol Marshall's residence and exposed himself to her. Joint Appendix ("JA"), 1-2; PSI, pgs. 6-7. Ms. Marshall left the rear door of her residence open for fresh air when she heard Land making noise outside. PSI, pg. 7. Land entered approximately 10 feet into the residence and stated something to the effect of, "you look so beautiful," as he removed his erect penis from his pants. *Id.* Ms. Marshall screamed and attacked Land as she pushed him out of her door and locked it behind him. *Id.*

While police were in route to respond to Ms. Marshall's report, Land made his way to another residence in the community belonging to Patricia Pierce. JA, 2; PSI, pgs. 6-7. Land knocked on Ms. Pierce's window, which prompted her to look outside. PSI, pg. 7. Ms. Pierce observed Land raise his shirt and rub his stomach. *Id.* As Land pulled down his pants, Ms.

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[2] These facts are primarily taken from the Offense Synopsis in the Presentence Investigation Report ("PSI"), which the State is contemporaneously moving to transmit. The pagination referenced herein is from the original document.

Pierce looked away, so she did not observe his genitals. *Id.* Land then went to her front door and attempted to open it. *Id.*

When officers arrived on scene, Land was observed outside Ms. Pierce's unit "manipulating his crotch." PSI, pg. 6. An officer placed a spotlight on Land, who then closed the front of his pants and attempted to walk away. *Id.* Land ignored officers' commands to stop and ran toward a parked truck, where he was ultimately arrested. *Id.* A records check revealed that Land was a registered sex offender out of California. *Id.*

B. The Negotiations, Pleas, and Sentencing.

The parties entered into negotiations in this case, which resulted in a plea to one offense for each victim. Land pleaded guilty to Count I, residential burglary, a category B felony, for entering Ms. Marshall's home with the intent to commit open or gross lewdness and/or indecent or obscene exposure. JA 1-2, 5-6, 18. Land also pleaded guilty to Count II, attempted open or gross lewdness, subsequent offense, a category E felony, for his attempt to expose himself to Ms. Pierce through her window, after having been convicted of Indecent Exposure on or about September 14, 2007, in South Lake Tahoe. *Id.* at 2, 5-6, 18. The parties agreed to be free to argue for the appropriate sentence, including whether the two sentences should run concurrent or consecutive. *Id.* at 7, 12-13.

Land was referred for a sexual risk assessment evaluation, which scored him a 4 out of 5, or above average risk for sexual reoffending.[3] Risk Assessment, pg. 4. Land did not argue for concurrent sentences on the two offenses. *Id.* at 38-39. Instead, Land argued for a suspended sentence on Count I, the burglary offense, and the minimum sentence of 12 to 36 months in prison on Count II, the attempted lewdness offense, and that he be released into a treatment program during the probationary period. JA, 39.

The State argued for maximum consecutive sentences. *Id.* at 39-45. The State highlighted the facts of each offense and Land's criminal history, which involved three prior convictions for offenses of a similar type involving indecent exposure, and Land's "abysmal" compliance with registration. *Id.* at 42-43. The State acknowledged Land's intoxication as potentially lowering his inhibitions, but argued that his conduct was no accident. *Id.* at 43-44. Particularly concerning to the State was the fact that even after his initial encounter with Ms. Marshall, Land persisted in the

[3] The State is contemporaneously moving to transmit the sex offense Risk Assessment Evaluation ("Risk Assessment") performed by Dr. John Moulton for the Court's review. The pagination cited herein conforms with the original document.

conduct and endeavored to make entry into Ms. Pierce's home after attempting to expose himself to her. *Id.*

The victims did not attend the sentencing hearing. *Id.* at 45. However, Ms. Marshall prepared a victim impact statement for the Division of Parole and Probation, which the Division filed prior to sentencing.[4] Ms. Marshall explained that the incident had "a profound effect" on her, which has required her to see a mental health counselor. Ms. Marshall had been the victim of stalking and sexual abuse as a child and explained that "[w]hen this defendant walked into my apartment and exposed himself, it brought up memories of the childhood indecent, and I was terrified." Ms. Marshall "now keep[s] a knife hidden near [her] door, and [her] outside lights are on 24/7." She further explained the profound impact of Land's actions by noting that she "panic[s]" every time she hears a noise outside and that she has "been unable to get a full night's sleep since this incident."

Before imposing its sentence, the district court noted that in its view all of the necessary competing "influences" were involved in the case. JA, 45. Specifically, the court noted the State's interest for public safety, the

[4] The State is contemporaneously moving to transmit the victim impact statement filed by the Division of Parole and Probation. Ms. Marshall's statement is a single page in length and the basis for the rest of the facts contained in this paragraph.

defense attorney's "zealous[]" advocacy, Land's own "articulate[]" advocacy, the Division's "neutral[ ] disclos[ure]" of "Land's life and history," Dr. Moulton's Risk Assessment, and the "meaningful information" provided by Ms. Marshall. *Id.* at 45-46. The district court found that through the competing influences, it was "fully informed." *Id.* at 46.

The district court did not follow either party's recommendation in this case. For Count I, the court imposed a minimum of 48 months and a maximum of 128 months in prison, with 253 days for credit time served. *Id.* at 46. For Count II, the court imposed a minimum of 12 months to a maximum of 30 months in prison. *Id.* The court ran the offenses consecutively, which amounted to an aggregate sentence of 60 months to 150 months in prison, along with other required fines and fees. *Id.* at 46-47; *see also id.* at 49-50. This appeal followed.

III. SUMMARY OF ARGUMENT

The district court acted well within its discretion when it imposed consecutive sentences in this case, particularly where Land himself made a recommendation that implicitly required the district court to impose consecutive sentences. In addition, the sentences imposed were within the bounds of the relevant statutes and the sentences were not based on impalpable or highly suspect information. Nevada law does not require or

suggest that courts should analyze concurrent or consecutive sentences by the same transaction or occurrence analysis that is advanced by Land. This case involved two separate victims and Land has a history of similar offenses. Land has not shown that the district court abused its discretion by sentencing him consecutively for his offenses. Therefore, the judgment of conviction should be affirmed.

IV. ARGUMENT

A. Standard of Review.

The Nevada Supreme Court has consistently afforded district courts wide discretion in their sentencing decisions. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987). 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).

B. The district court did not abuse its sentencing discretion here.

In this case, Land concedes that the sentences imposed are within the sentencing range of the applicable statutes. Opening Brief ("OB"), pg. 11. Land also concedes that the district court did not rely on extrinsic matters or suspect information when it imposed its sentence. *Id.* Instead, Land

contends that the district court abused its discretion by imposing consecutive sentences in this case. Land's assignment of error is misplaced in several respects.

Initially, as Land concedes, he did not argue for concurrent sentences below. OB, pg. 12-13. Land's suggested sentencing structure contemplated that the sentences run consecutively because he argued for incarceration for a period of time on Count II and then for the court to impose a period of supervised probation on Count I. *Id.*; *see also* JA, 38-39. While the district court certainly retained discretion to impose any sentence it determined appropriate within the bounds of the applicable statutes, this Court should not find error in the district court's decision to sentence consecutively when Land implicitly conceded such a sentence was appropriate in his recommendation. *See Jones v. State*, 95 Nev. 613, 618, 600 P.2d 247, 250 (1979) ("Given his participation in the alleged error, [appellant] is estopped to raise any objection on appeal").

Land appears to contend that the district court should have sentenced him concurrently because the charges arose from the same transaction or occurrence. OB, pg. 12, n. 4. The same transaction or occurrence concept applies when the issue of whether multiple offenses may be joined in the same information or indictment, not to sentencing determinations. *See*

NRS 173.115(1). Land's suggestion that the charges arose from the same act or occurrence is also inconsistent with the record. His acts occurred on the same day and in the same residential living complex, but were directed at two separate victims, at separate residences, and occurred independent of each other. Thus, they are not of the same transaction or occurrence, and instead amount to charges arising more from a common plan or scheme. *See* NRS 173.115(1)(b).

Even if these offenses are considered arising out of the same act or occurrence, Land's suggestion that transactionally related offenses should presumptively receive concurrent sentences is misplaced and at odds with Nevada precedent. Indeed, separate acts of sexual assault against a single victim in a single encounter can form the basis for separate charges. *See e.g., Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) ("separate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions *even though the acts were the result of a single encounter and all occurred within a relatively short time*") (citations omitted and *emphasis added*). Land's flawed logic is more apparent when cases involving multiple victims are considered. The Nevada Supreme Court has long held that multiple victims give rise to multiple charges and permit consecutive sentences, even if the charges

arise from the same criminal act. *See e.g., Woods v. State*, 114 Nev. 468, 478, 958 P.2d 91 (1998) (a driving under the influence case where defendant caused an accident killing two people and the court upheld consecutive sentences in part because "multiple victims give rise to multiple offenses"). Thus, even if the offenses did arise from one transaction or occurrence, Land's contention that he should have received concurrent sentences does not find support in Nevada precedent.

Moreover, in *Pitmon v. State*, the Court of Appeals observed:

> ... it strikes the court that an ordinary person who chooses to commit two offenses and is convicted of both should reasonably anticipate the possibility, and perhaps even the likelihood, that he or she will have to serve consecutive sentences for each crime. To conclude otherwise would be to effectively reward defendants who commit multiple offenses and require that they be sentenced as if they had only committed one. Nothing in the Due Process Clause demands that defendants who commit multiple crimes must receive the same sentence as defendants who commit only one.
>
> 131 Nev. 1334, 130, 352 P.3d 655, 660 (Nev. App. 2015) (citations omitted).

Land attempts to distinguish this case from *Pitmon*, but upon closer inspection the case undermines his position. The *Pitmon* case involved multiple victims and sexual offenses. 352 P.3d at 657. The defendant in *Pitmon* was determined to be a "high" risk to reoffend. *Id.* The defendant was sentenced to maximum consecutive sentences. *Id.* In *Pitmon*, the Court of Appeals rejected the defendant's argument that he should have

received concurrent sentences. *Id.* at 660. This Court should do the same here. The concept quoted above from *Pitmon* is particularly applicable here, where Land separately victimized two elderly women in the same residential living facility on the same evening. A concurrent sentence under these circumstances would certainly reward Land for pursuing a second victim when the first successfully fought him off and effectively diminish and ignore the terror experienced by one of victims.

Land argues that his recommendation or a concurrent sentence would have satisfied the goals of sentencing more than what was imposed by the district court. Land's reliance on sentencing considerations here is of no consequence. The district court's sentencing decision is not evaluated *de novo* by this Court, it is evaluated for an abuse of discretion. Land has not shown that the district court's decision was arbitrary or capricious or beyond the bounds of law or reason. *See e.g., Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (defining an abuse of discretion).

NRS 176.035 provides the district court with discretion to sentence multiple offenses consecutively. As the district court noted, it considered all of the competing interests in the case when determining the appropriate sentence. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 476, 490 (2009) ("Possession 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."). In other words, it gave due consideration to all of the issues presented and the competing interests.[5] It did not adopt either party's recommendation and did not impose the maximum sentence argued for by the State, which supports a finding that it considered all of the material presented and made a decision with its independent judgment and after balancing the competing interests. In this case, Land had a criminal history involving three prior indecent exposure cases, and exposed/ attempted to expose himself to two separate victims in this case. Perhaps, most alarming, was that Land entered Ms. Marshall's residence before exposing himself and then, after he was forcefully removed, he pursued a second victim and attempted to enter her residence. Under these facts, consecutive sentences do not offend the bounds of law or reason. Land has failed to show that the district court

[5] A few times throughout Land's brief he references the district court's decision not to name the offenses before pronouncing sentence. At one point, Land notes that it is hard to know what to make of the district court's decision in that regard. OB, pg. 12, n. 5. Yet, the district court explained that chose not to say the names of the offenses and continued, "I think that everything as to all of those influences that should be said has been said." JA, 46. In other words, there is nothing to make of the district court's decision not to repeat the nature of the offenses because it explained itself and evidently felt that it did not need to repeat the nature of the offenses after what had been discussed during the sentencing hearing.

abused its discretion in this case and, therefore, the judgment of conviction should be affirmed. *See Silks*, 92 Nev. at 94, 545 P.2d at 1161.

V. CONCLUSION

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

DATED: January 3, 2022.

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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: January 3, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 3, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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