

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERMIAH DEWIGHT THORNBURG,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 83864

RESPONDENT'S ANSWERING BRIEF

**Appeal From Judgment of Conviction from a Guilty Plea
Eighth Judicial District Court, Clark County**

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ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals because it is a direct appeal from a judgment of conviction based on a plea of guilty. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

1. Thornburg waived his right to an appeal.
2. The district court did not abuse its discretion in assessing extradition costs of \$5,184.00.
3. The district court did not abuse its discretion in ordering an indigent defense civil assessment of \$250.00.

STATEMENT OF THE CASE

On May 26, 2020, the State charged Appellant Jermiah Dewight Thornburg by way of Information with one count of Attempt Sexual Assault with a Minor Under Fourteen Years of Age (Category B Felony – NRS 200.364, 200.366, 193.330 - NOC 50123). 1 AA 1. On June 22, 2020, an Amended Information was filed charging Thornburg with three counts of Lewdness with a Child Under the Age of 14 (Category A Felony - NRS 201.230 - NOC 50975); two counts of Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony - NRS 200.364, 200.366 - NOC 50105); Open or Gross Lewdness in the Presence of a Child or Vulnerable Person (Category D Felony - NRS 201.210 - NOC 58745); and Lewdness with a Child Under the Age of 16 (Category B Felony - NRS 201.230 - NOC 58747). 1 AA 3. On August 24, 2020, a Second Amended Information was filed with the same aforementioned charges. 1 AA 7.

On November 23, 2020, the State filed a Third Amended Information charging Thornburg with Lewdness With a Child Under the Age of Fourteen (Category A Felony - NRS 201.230 - NOC 50975). 1 AA 11. On August 3, 2021, the State filed a Fourth Amended Information Charging Thornburg with Attempt Sexual Assault with a Minor Under Fourteen Years of Age (Category B Felony – NRS 200.364, 200.366, 193.330 - NOC 50123). 1 AA 13. On August 3, 2021, the

State filed a Fifth Amended Information containing the same charge but including the dates of the conduct. 1 AA 15.

On August 10, 2021, Thornburg plead guilty to a single charge of Attempt Sexual Assault with a Minor Under Fourteen Years of Age. 1 AA 27. The parties stipulated to an eight-to-twenty-year sentence in the Nevada Department of Corrections (“NDOC”). 1 AA 17. Further, the State would dismiss Case No. 18F02416X and would not oppose concurrent sentencing with Thornburg’s federal case. In addition, the parties stipulated that Thornburg’s credit for time served would be calculated from April 15, 2020. 1 AA 17–18.

On October 21, 2021, Thornburg was sentenced to a maximum of twenty years and a minimum of eight years in the NDOC with five hundred sixty days credit for time served. 1 AA 40. Thornburg was ordered to pay the standard \$25.00 Administrative Assessment Fee, \$3.00 DNA Collection Fee, and \$250.00 Indigent Defense Fee, as well as a \$5,184.00 Extradition Fee. 1 AA 40–41.

The Judgment of Conviction was filed on November 1, 2021. 1 AA 42.

On November 15, 2021, Thornburg filed a Motion to Clarify and/or Amend Judgment of Conviction requesting that the district court amend his Judgment of Conviction to reflect that the instant case was to run concurrent with his federal case. 1 AA 45. On November 23, 2021, the Motion was granted. 1 AA 68.

On November 24, 2021, Thornburg filed a Notice of Appeal. 1 AA 69. An Amended Judgment of Conviction was filed on December 27, 2021. 1 AA 72. On December 27, 2021, Thornburg filed an Amended Notice of Appeal. 1 AA 74. The State's response follows.

STATEMENT OF THE FACTS

Thornburg's Presentence Investigation Report ("PSI") summarized the underlying facts of the crime as follows:

On July 12, 2017, Child Protective Services received a call of a sexual assault by a mandated report, details of the call stated the victim was 16 years old and she had been sexually abused by the defendant, Jeremiah Dewight Thornburg from the time she was 12 to 14 years old. Detectives contacted the victim, and an interview was completed at the Southern Nevada Children's Assessment Center on January 18, 2018.

The victim stated Mr. Thornburg is her brother, a registered sex offender; he "performed sexual acts on me." The first incident the victim described occurred when she was 12 years old. She was visiting her father; however, her father and her stepmother left her alone with Mr. Thornburg. Mr. Thornburg made a comment about her behind (buttocks) and then asked her to choke him, so she did. They were in Mr. Thornburg's bedroom and he was sitting down, while the victim stood in front of him. As she choked him Mr. Thornburg began touching her private area (vagina) using his hand over her clothing. The victim described the touching as "gliding" and stated it made her feel uncomfortable, weird, and disgusting. The victim did not tell anyone and kept her distance from Mr. Thornburg until her father and stepmother came home.

The second incident the victim described occurred when she was 12 or 13 years old. She stayed the night with Mr. Thornburg at his girlfriend's home. All three of them slept in the master bedroom and Mr. Thornburg's girlfriend slept between the victim and Mr. Thornburg. The victim woke up to Mr. Thornburg touching her and Mr. Thornburg's girlfriend was no longer there. Mr. Thornburg was touching the victim's vagina with his fingers over her clothing. Mr. Thornburg asked the victim if she wanted to play a game and she responded, "sure." Mr. Thornburg grabbed the victim's legs, wrapped them around himself and began to grind his "genital area" against the victim's vagina. The victim was laying on the bed and Mr. Thornburg was on top of her. The victim told Mr. Thornburg this made her uncomfortable and to get off her, so he did.

The summer of 2014, the victim was 13 years old she described a third incident which occurred at Mr. Thornburg's home. The victim spent the night at Mr. Thornburg's to visit with his children who were closer to her age. Early in the morning Mr. Thornburg engaged in a conversation with the victim while his wife showered, and the other children slept. Mr. Thornburg asked the victim if a boy were to purchase things for her would she do things for him and he asked if she would watch a man masturbate. Mr. Thornburg left the victim in the bathroom and returned a few minutes later with what the victim described as a steel cigar case. Mr. Thornburg made the victim place her hands on the sink and pulled her pajama pants down. Mr. Thornburg placed the cigar case under running water and then shoved it into the victim's vagina. The victim described her vagina feeling cold. Mr. Thornburg was standing behind her with his hand on her hip. The lights were off in the bathroom and the victim was not sure if Mr. Thornburg put his penis in her or if it was the cigar case. The victim believes Mr. Thornburg masturbated; however, she could not see him. Later, Mr. Thornburg's wife took the victim home and Mr. Thornburg hugged the victim and told her he loved her.

Another incident occurred when the victim was 14 years old. The victim was helping Mr. Thornburg move into a new home. An unknown woman came to visit Mr. Thornburg and after she left Mr. Thornburg began watching a pornographic movie in the victim's presence. Mr. Thornburg told the victim to come sit next to him and asked her to hold his hand while he masturbated. The victim described the pornographic movie of a man and woman having sex. She further stated she did not watch while she helped Mr. Thornburg masturbate; however, she believed he did ejaculate. Afterward's, Mr. Thornburg put his pants back on and they went to pick up his children.

In 2015, the victim told Mr. Thornburg's sons about what had occurred, and Mr. Thornburg called her and asked her to tell his sons she was lying. Mr. Thornburg began crying and apologized to the victim. The victim also told her mother and an aunt approximately a year after the incident occurred.

The victim's mother stated while the victim was in junior high school the victim informed her Mr. Thornburg made her feel uncomfortable; however, the victim insisted on going to Mr. Thornburg's home so she could spend time with his sons. After Mr. Thornburg's sons moved out the victim told her Mr. Thornburg penetrated her vagina with his penis while she stayed the night at his home. The victim's mother called and informed the victim's father because she did not know what to do.

A warrant was issued, and Mr. Thornburg was located in federal prison serving a sentence on unrelated charges. On April 15, 2020, Mr. Thornburg was extradited from federal prison and transported to the Clark County Detention Center, where he was booked accordingly.

PSI at 6–7.

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SUMMARY OF THE ARGUMENT

This Court should affirm Thornburg's Judgment of Conviction. First, Thornburg knowingly and voluntarily waived his right to appeal his judgment of conviction when he plead guilty. Because Thornburg's waiver of the right to appeal his conviction necessarily includes a waiver of his right to appeal from his sentencing, this Court should refuse to entertain Thornburg's claims.

Second, Thornburg has failed to demonstrate that the district court abused its discretion by imposing an extradition fee under NRS 179.225, because the record shows that the court properly considered Thornburg's financial situation and reasonably determined that the extradition fee would not prevent him from paying child support.

Finally, Thornburg did not object to the \$250 indigent defense fee below, and the issue is therefore waived. However, even if this Court reviews Thornburg's claim, the record indicates that the district court took Thornburg's financial situation into account when assessing the fee as required by NRS 178.3975(2). Further, Thornburg cannot demonstrate that the fee affects his substantial rights because this Court has determined that under NRS 178.3975, only those who actually become capable of paying the fee will be obligated to do so. Accordingly, Thornburg's Judgment of Conviction should be affirmed.

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ARGUMENT

I. THORNBURG WAIVED HIS RIGHT TO APPEAL

In his guilty plea agreement, Thornburg knowingly and voluntarily waived his right to appeal his conviction, including the right to appeal the extradition fee and indigent defense fee imposed on him at sentencing. 1 AA 21. “A defendant may waive the statutory right to appeal his sentence. However, an express waiver of the right to appeal a sentence is valid only if knowingly and voluntarily made.” United States v. Buchanan, 59 F.3d 914, 917 (9th Cir. 1995). In Buchanan, the defendant was allowed to appeal despite his plea agreement because the district court affirmatively told him he could appeal. Id. at 918. In United States v. Michlin, 34 F.3d 896, 898 (9th Cir. 1994), the defendant was denied an appeal, even where his attorney did not inform him of his waiver, because the plea agreement stated he gave up this right.

Thornburg knowingly and voluntarily made an express waiver of his right to appeal. Under the waiver of rights, Thornburg acknowledged he gave up:

The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies

including a habeas corpus petition pursuant to NRS Chapter 34.

1 AA 21. Thornburg did not specifically reserve any grounds for appeal in writing. Further, NRS 177.015(4) refers to appeals from “a final judgment,” and a final judgment in a criminal case is a judgment of conviction that comports with NRS 176.105. See Slaatte v. State, 129 Nev. 219, 221-22, 298 P.3d 1170, 1171 (2013) (concluding that a judgment of conviction was unappealable where it did not meet the requirements of NRS 176.106 because it was not a final judgment). Because NRS 176.105(1)(c) requires that a judgment of conviction include the sentence, Thornburg’s waiver of the right to appeal his conviction necessarily includes a waiver of his right to appeal from his sentencing. Accordingly, his judgment of conviction should be affirmed.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ASSESSING EXTRADITION COSTS OF \$5,184.00

Even if this Court decides to consider Thornburg’s appeal, his claims fail. Thornburg was in federal custody on another case in Atlanta, Georgia, when he was extradited to Nevada. PSI at 7. Thornburg argues that the district court erred when it ordered him to pay extradition costs despite his inability to pay. AOB at 5.

NRS 179.225(2)-(3) states:

2. If a person is returned to this State pursuant to this chapter or chapter 178 of NRS and is convicted of, or pleads guilty, guilty but mentally ill or nolo contendere to, the criminal charge for which the person was returned or a

lesser criminal charge, **the court shall conduct an investigation of the financial status of the person to determine the ability to make restitution. In conducting the investigation, the court shall determine if the person is able to pay any existing obligations for:**

(a) Child support;

...

3. If the court determines that the person is financially able to pay the obligations described in subsection 2, it shall, in addition to any other sentence it may impose, order the person to make restitution for the expenses incurred by the Office of the Attorney General or other governmental entity in returning the person to this State. **The court shall not order the person to make restitution if payment of restitution will prevent the person from paying any existing obligations described in subsection 2.** Any amount of restitution remaining unpaid constitutes a civil liability arising upon the date of the completion of the sentence.

(emphasis added).

Here, Thornburg cannot demonstrate that the district court abused its discretion by imposing an extradition fee because the court properly considered Thornburg's financial situation and determined that it would not prevent him from paying child support. At sentencing, Thornburg argued that he should not be required to pay extradition costs because he was in arrears on his child support by ten to fifteen thousand dollars. 1 AA 38. In addition, he argued that he was currently incarcerated and therefore, did not have a job. Id. When the court stated that it appeared that he had not been paying child support anyways, he explained that he had been paying \$100 dollars a month in child support prior to being incarcerated

and that he and his family paid \$5,000 to a private attorney to represent him in the present case, but that the lawyer had “walked out” on him. 1 AA 39–40.

In response, the court stated:

THE COURT: I understand. I mean, here’s what I’m going to do, I’m going to impose the extradition charges just because that’s -- it’s only fair that the State gets paid back that. Now, in reality when you get out of prison, I would rather have you pay the money towards the child support and I think that if you’re doing that nobody is going to put you back in prison for not paying the extradition charges, okay? So you do what you can; you pay what you can when you get out.

1 AA 40. After imposing the standard fees as well as the extradition fee, the court again advised Thornburg:

I will impose the \$5,184.00 in extradition charge. But like I said, when you get out you’re going to have a big amount of child support in arrears, just pay on that.

1 AA 41.

Thus, the district court properly considered Thornburg’s financial situation, and made a reasonable determination that in practice, the extradition fee would not prevent him from paying child support in accordance with NRS 179.225(3). 1 AA 39–40. Thus, the district court was acting within its discretion when it decided to impose the extradition fee.

Moreover, Thornburg agreed to pay the extradition costs in his GPA:

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am

pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. **I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.**

1 AA 18 (emphasis added).

In addition, counsel advised him of the restitution he may be ordered to pay:

I, the undersigned, as the attorney for the Defendant named herein and *as* an officer of the court hereby certify that:

. . .

I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

1 AA 23. Thus, Thornburg has not demonstrated that the district court erred when it imposed the extradition fee and he in fact agreed to pay the fee pursuant to his GPA. Accordingly, the district court's decision should be affirmed.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING AN INDIGENT DEFENSE CIVIL ASSESSMENT OF \$250.00.

First, this claim was not presented to the district court below, and so should not be considered for the first time on appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Failure to object below generally precludes appellate consideration of an issue; however, the Nevada Supreme Court may conduct plain-error review. LaChance v. State, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014).

“In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights.” Baker v. State, 131 Nev. 1250 (Nev. App. 2015) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Under plain error review, the defendant has the burden to demonstrate the error affected his substantial rights by causing “actual prejudice or a miscarriage of justice.” Id. (quoting Green, 119 Nev. at 545, 80 P.3d at 95).

Even if reviewed for plain error, Thornburg cannot demonstrate that the district court abused its discretion in ordering the indigent defense fee or that any alleged error affected his substantial rights. NRS 178.3975(1) provides that a ‘court may order a defendant to pay all or any part of the expenses incurred by the county, city or state in providing the defendant with an attorney.’”

NRS 178.3975(2) states:

2. The court shall not order a defendant to make such a payment unless the defendant is or will be able to do so. **In determining the amount and method of payment, the court shall take account of the financial resources of the defendant and the nature of the burden that payment will impose.**

(emphasis added).

The Nevada Supreme Court has held that NRS 178.3975 has adequate safeguards to ensure that only those who actually become capable of repaying the State will ever be obligated to do so. Taylor v. State, 111 Nev. 1253, 1259, 903 P.2d

805, 809 (1995), overruled on other grounds by Gama v. State, 112 Nev. 833, 920 P.2d 1010 (1996). Further, the fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. See id.

Here, the record demonstrates that the district court did take Thornburg's financial situation into account including Thornburg's arguments that he was ten to fifteen thousand dollars in arrears on child support, that he had no job due to his current incarceration, and that he had paid \$5,000 to a private attorney. 1 AA 39–40. Rather than completely waiving the fee, the court reasonably instructed Thornburg to pay what he could when he gets out. 1 AA 40. Thus, the requirements of NRS 178.3975(2) were satisfied. Moreover, Thornburg cannot demonstrate that the fee affects his substantial rights because this Court has determined that under NRS 178.3975, only those who actually become capable of paying the fee will be obligated to do so. Accordingly, Thornburg has neither demonstrated that the court erred, nor that this alleged error affected his substantial rights, and this claim should be denied.

CONCLUSION

Wherefore, the State respectfully requests that Thornburg's Judgment of Conviction be AFFIRMED.

///

Dated this 15th day of June, 2022.

Respectfully submitted,

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BY */s/ John Afshar*

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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 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,366 words and 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of June, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 15, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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