IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK J. MENDOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53355

FILED

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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Sixty-nine-year-old Rita Kremberg was stabbed to death. She was discovered lying face down on the bedroom floor of her apartment, naked from the waist down. An off-white liquid was found on her pubic area. An autopsy revealed a grouping of 18 stab wounds to Kremberg's left chest and breast, injuring her left lung and heart. Her throat had been slit and she had sustained fractures to the first four ribs on her left side and bruising on several areas of her body, including her right inner thigh, that was consistent with being held down and having her legs forcibly opened. There were defensive wounds on Kremberg's shoulders, upper arms, and hands. Fingerprint and DNA evidence led police to appellant Frederick Mendoza. His fingerprints were found on a bottle of brandy in Kremberg's apartment, and his DNA was discovered under Kremberg's fingernails and in the substance found on her pubic area.

Mendoza's DNA, along with Kremberg's DNA, was found on the murder weapon (a steak knife). When questioned by police almost one month after the killing, Mendoza denied knowing Kremberg or having been in her apartment.

Mendoza was charged with first-degree murder and sexual assault, both with enhancements based on the use of a deadly weapon and the victim's age. The State also filed a notice of intent to seek the death penalty. After jury selection was completed, Mendoza pleaded guilty to both charges and the case proceeded to the penalty phase before the impaneled jury.

At the penalty hearing, the prosecution's evidence in aggravation primarily related to the circumstances of the crime, as support for a nonconsensual-sexual-penetration aggravating circumstance under NRS 200.033(13), and the facts and circumstances related to Mendoza's 1978 conviction for battery with the intent to commit rape, as support for a prior-violent-felony-conviction aggravating circumstance under NRS 200.033(2). The prosecution also presented victim-impact testimony, including two letters from Kremberg's family members and other testimony describing Kremberg as a "kind and very good soul," generous, caring, compassionate, loyal, and a devoted daughter to her parents while they were alive. She loved to listen to jazz, loved her dog, and was very close to her cousins, who expressed that they would miss her terribly.

Mendoza's mitigation case focused primarily on his military service and the trauma that he suffered because of it. He presented two expert witnesses (a psychologist and a psychiatrist) who testified about his

military service (based on military and VA records) and his subsequent diagnosis of posttraumatic stress disorder (PTSD), as well as his childhood, which was marred by familial dysfunction and abuse.

Mendoza enlisted in the Marine Corps in 1967 as a basic rifleman and served a one-year tour of duty in Vietnam. While serving in Vietnam, Mendoza participated in long range patrols through the jungle, where his unit was attacked several times and he experienced sniper attacks. He received several medals and ribbons, most significantly, the Republic of Vietnam Cross of Gallantry, awarded for bravery in combat, and the Combat Operation Ribbon, signifying that he performed satisfactorily under enemy fire in ground combat operations. After returning from Vietnam, Mendoza drank excessively, developed nightmares and intrusive thoughts of Vietnam, and got into bar fights. At some point, he also began using methamphetamine. He attempted suicide twice. Eventually, Mendoza was diagnosed with PTSD and was granted a 100 percent disability from the Department of Veteran Affairs, which is uncommon for a mental condition. Mendoza made a statement in allocution, telling the jury his actions were bad and that he was very sorry.

The jury found the two alleged aggravating circumstances and one or more jurors found eight mitigating circumstances. The jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mendoza to death. Thereafter, the district court sentenced Mendoza for the sexual assault and entered a judgment of conviction. This appeal followed.

Mendoza challenges several matters relating to jury selection, prosecutorial misconduct, victim-impact evidence, and the "equal and exact justice" instruction and raises ineffective-assistance-of-counsel claims. For the reasons explained below, we affirm the judgment of conviction.

Jury selection

Mendoza argues that his death sentence is invalid due to the prosecution's discriminatory use of peremptory challenges and comments during voir dire implying that Mendoza's advanced age rendered the sentencing option of life without the possibility of parole a viable alternative for those jurors unwilling to consider a sentence allowing for parole. We conclude that Mendoza's claims lack merit.

Discriminatory use of peremptory challenges

Mendoza complains that the prosecution exercised four peremptory challenges in a discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). However, he preserved review in only two instances by asserting a Batson challenge below.[1]

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[1]As to the two unpreserved Batson challenges, the "failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below," Pantano v. State, 122 Nev. 782, 795 n.28, 138 P.3d 477, 485 n.28 (2006), unless the defendant demonstrates plain error. Lamb v. State, 127 Nev. ___, ___, 251 P.3d 700, 709 (2011). Here, the State's exercise of peremptory challenges against the two jurors at issue was not such an unmistakable error as to be "apparent from a casual inspection of the record." Dieudonne v. State, 127

continued on next page . . .

A Batson challenge requires the district court to employ a "three-step analysis: 1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination." Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006); see Purkett v. Elem, 514 U.S. 765, 767 (1995); Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

The parties do not dispute the first two steps; they focus on the third step. With "step three, the persuasiveness of the State's explanation is relevant," and the district court must decide if the opponent of the challenge "has met the burden of proving purposeful discrimination." Ford, 122 Nev. at 404, 132 P.3d at 578. At step three, "[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." Id. One form of circumstantial evidence that is probative of the prosecutor's intent is comparative juror analysis, which requires the court to consider "the similarity of answers to voir dire questions given by [minority] prospective jurors who were struck by the prosecutors and answers by [nonminority]

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Nev. ___, ___, 245 P.3d 1202, 1205 (2011). Because Mendoza failed to demonstrate plain error, we reject his claim.

prospective jurors who were not struck" and any "disparate questioning by the prosecutors of [minority] and [nonminority] prospective jurors." Id. at 405, 132 P.3d at 578-79; see also Miller-El v. Dretke, 545 U.S. 231, 241 (2005); People v. Lenix, 187 P.3d 946, 960-61 (Cal. 2008) (describing comparative juror analysis as circumstantial evidence relevant to issue of intentional discrimination). "'The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.'" Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)).

Mendoza objected to the prosecution's peremptory challenges of jurors 77 and 84, arguing that the prosecution dismissed the jurors because they, like Mendoza, were Hispanic. The prosecution conceded that, upon Mendoza's objection, the burden shifted to the State to advance race-neutral reasons for these peremptory challenges. After the State proffered its reasons for the peremptory challenges, the district court inquired whether the defense had anything further. Defense counsel responded in the negative. The district court then concluded that the prosecution had provided race-neutral reasons for its exercise of peremptory challenges against jurors 77 and 84 and denied Mendoza's Batson challenges.

On appeal, Mendoza argues that the district court erred by denying his Batson objections, focusing on the voir dire record and comparative juror analysis to argue that the prosecution's reasons for the peremptory challenges of jurors 77 and 84 were pretext for intentional discrimination.

We note that in the district court Mendoza did not express any concerns about the plausibility of the prosecution's reasons for the peremptory challenges or rely on comparative juror analysis as evidence of the prosecution's discriminatory intent in exercising the peremptory challenges. He now argues that a comparative juror analysis is appropriate on appeal when the record does not show that the district court performed that analysis. We faced a similar circumstance recently in Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011), where the defendant raised comparative juror analysis for the first time on appeal to show purposeful discrimination. We addressed the matter "out of an abundance of caution" because it was unclear whether we were obligated to conduct a comparative juror analysis for the first time on appeal. Id. at ___ n.17, 263 P.3d at 258 n.17. Keeping in mind our observation in Nunnery about the difficulties in conducting comparative analysis for the first time on appeal, id.,[2] we consider Mendoza's analysis in resolving his Batson claims as to jurors 77 and 84.

Juror 77

The prosecution offered two reasons for challenging juror 77. First, the prosecution explained that she was young—26 years old—and that in the prosecutor's experience trying capital cases, a person "with

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[2]This case and Nunnery are distinguishable from our recent decision in Hawkins v. State, 127 Nev. ___, ___, 256 P.3d 965, 966 (2011). In Hawkins, the defendant offered no evidence or argument at trial or on appeal regarding comparative juror analysis or disparate questioning. Id. at ___, 256 P.3d at 967-68.

limited life experiences [has] a tougher time imposing a sentence of death." Second, the prosecutor explained that the juror had revealed during voir dire that her husband had been questioned by the police about a murder charge and the prosecutor therefore thought that she would be concerned that the defendant, like her husband, may have been wrongfully accused. Mendoza contends that these reasons were pretext for intentional discrimination because they are not supported by the record or are implausible and a comparison to other jurors shows purposeful discrimination. We disagree.

As to the age-based justification, juror 77's youth and lack of life experiences are race-neutral reasons for the peremptory challenge, and Mendoza's arguments that those reasons are pretext for discrimination lack merit. Based on the demographic information Mendoza presented on appeal, he argues that Hispanics are more likely to be young than white non-Hispanics and therefore more likely to be excluded under the prosecutor's approach, which suggests that the prosecutor used age as a pretext to discriminate against Hispanic jurors. As Mendoza did not present that information below, it is difficult to conclude that the prosecution was aware of it and used age merely as a pretext to discriminate. Rather, the prosecution challenged all jurors under the age of 30 in the group from which the trial jury was selected, which resulted in the removal of a white male and three Hispanic females. The youngest juror on the trial jury was 34 years old. Because the prosecution was consistent in challenging jurors based on age, we cannot say from this record that age, or life experience, was a pretext for racial discrimination.

As to juror 77's contacts with law enforcement, Mendoza interprets the prosecutor's statement as expressing concern that the juror was biased against law enforcement and argues that the voir dire record supports the conclusion that the juror's contact with law enforcement through the murder investigation involving her husband was benign and she expressed no bias against police officers as a result of the investigation. We view the prosecutor's statements as ambiguous. Mendoza's interpretation is a fair reading and would be troubling, if true. But the prosecutor's statements could also reflect a concern about juror 77's possible view that Mendoza was wrongfully accused. Because Mendoza did not challenge the prosecutor's explanation below, we cannot conclude based on the cold record that this ambiguity demonstrates that the prosecutor's reason was a pretext for racial discrimination.

Using comparative juror analysis, Mendoza argues that other nonminority jurors indicated in their questionnaires that they had more substantial contact with law enforcement than juror 77, but the prosecution did not question them about that contact or remove them because of it. We conclude that his comparative juror analysis is flawed. Of the 13 other jurors he identifies as having had similar contact with law enforcement, two of them were not subject to individual voir dire, apparently because they were not present. The remaining 11 were passed for cause and made it into the pool from which the trial jury was selected. Of those 11 jurors, 3 were removed by the defense and 2 were removed by the prosecution. Thus, 6 of the jurors whom Mendoza claims were comparable to juror 77 regarding law enforcement contact remained on the trial jury. A close look at the voir dire and jury questionnaires of each

of those jurors supports a conclusion that their contacts with law enforcement are not comparable to juror 77's personal involvement in the investigation of her boyfriend/spouse on a serious criminal offense. As such, the prosecution's failure to use peremptory challenges to remove these jurors does not evince intentional discrimination in the peremptory challenge of juror 77.

Juror 84

The prosecutor offered five reasons for the peremptory challenge of juror 84, who identified herself as "multi" race on her juror questionnaire: (1) the juror's youth (28 years old); (2) the juror had lived in Clark County for only two years; (3) her husband was attempting to "clear[ ] up a rape investigation from the record"; (4) the juror checked all the conditions listed in a jury questionnaire query about knowing people with addictions, mental problems, anger management issues, and past traumatic experiences; and (5) the juror answered a question about whether the police are more trustworthy than one who has been arrested and charged with a crime by explaining that she thought she was being asked a leading question.

Mendoza argues that the prosecutor's reasons for removing this juror are spurious and nothing more than pretext for intentional discrimination. First, he raises the same challenge to the age-based reason as he did with respect to juror 77, but, as we concluded above, that reason does not show intentional discrimination under the circumstances here. Second, he contends that the prosecution merely speculated that juror 84 had no ties to the community because she had lived in Clark

County only two years. Considering the record, that justification is racially neutral and there is no support for concluding that it was a pretext for racial discrimination. Third, as with juror 77, Mendoza dismisses the prosecution's reliance on juror 84's husband's attempts to clear a rape investigation from his record because she expressed no bias against law enforcement. However, the prosecution's concern here is consistent with its concern about juror 77 and is facially race neutral. Finally, Mendoza asserts that other jurors answered the jury questionnaire query about knowing anyone with particular traits or problems by checking all conditions listed; therefore, this justification was pretextual. Considering the prosecution's challenge of a nonminority who answered this question the same as juror 84 and given the defense's failure to challenge the prosecution's explanation below, we conclude that the prosecutor's justification in this regard is race neutral and Mendoza has not demonstrated that it was merely a pretext for intentional discrimination.

Voir dire taint

Mendoza argues that the jury was tainted during voir dire by the prosecutor's response to juror 24 who initially stated that she could not consider a sentencing option for first-degree murder that included parole. Juror 24 was questioned extensively about her views and eventually modified her position somewhat by stating that she could consider all four sentencing options but that she would not consider a sentence including parole for very long. Mendoza challenged juror 24 for cause. The prosecutor attempted to rehabilitate the juror by suggesting that because

of Mendoza's age, it would be unlikely that he would ever be paroled even if he received a sentence allowing for parole. After the prosecutor's remark, juror 24 stated that she could consider all available punishments "now that [the prosecutor] pointed out [Mendoza's] age—the age factor, yes." Although juror 24 was excused for cause, Mendoza contends that the voir dire involving the juror tainted the jury pool because it showed the remaining prospective jurors that they would be qualified to serve if they pretended to consider a sentence of life with the possibility of parole based on the assumption that Mendoza would likely die before becoming eligible for parole even if, like juror 24, they did not believe that such a penalty would ever be appropriate. We disagree.

Other than his bare claim, Mendoza points to no evidence in the record suggesting that any juror actually seated was influenced by the voir dire of juror 24 to pretend that they could consider a sentence that would allow for parole. In fact, the record suggests that the jurors were not so influenced. Much of the voir dire conducted after juror 24 included inquiry about the four possible sentencing options, and several jurors who were questioned after juror 24 stated that a life sentence without the possibility of parole or death were the only appropriate sentences for first-degree murder. Clearly those jurors had not been influenced to modify their views about their ability to consider a sentence with parole based on Mendoza's age. And nothing in the record suggests that any other juror was prejudicially influenced by the challenged voir dire.

Prosecutorial misconduct

Pointing to six instances in the prosecutor's closing argument and cross-examination of a witness, Mendoza argues that his sentence is invalid due prosecutorial misconduct.

First, Mendoza argues that the prosecutor's comment that her grandfather was mentally affected by war but successfully integrated into society implied that Mendoza should not rely on PTSD to mitigate his wrongful behavior, related facts not in evidence, violated the Eighth Amendment's requirement for individualized sentencing, unconstitutionally minimized the effect of mitigation, and constituted an expression of the prosecutor's personal opinion. Because Mendoza did not object, we review for plain error, Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008), which he fails to show. The prosecutor's argument was essentially that the jury should not be persuaded by Mendoza's PTSD because others, her grandfather for example, have suffered the effects of war but did not commit sexual assault and murder. We conclude that the prosecutor's message did not disparage or minimize the role of mitigation, discourage individualized sentencing, or express a personal opinion. However, in relating her grandfather's experience, the prosecutor introduced facts not admitted into evidence and therefore, Mendoza established error that is plain from the record in that regard. See Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) ("A prosecutor may not argue facts or inferences not supported by the evidence."). Nevertheless, he failed to demonstrate that the error affected his substantial rights considering that one or more jurors found as

mitigating circumstances that he suffered from PTSD and committed the murder while under the influence of a mental or emotional disturbance.

Second, Mendoza argues that the prosecutor improperly elicited evidence during cross-examination of Mendoza's mental health experts that rape is an event that could trigger PTSD, thus suggesting that Mendoza's 1978 assault victim suffered from PTSD as a result of the attack in an effort to create sympathy for the victim even though there was no evidence that she suffered from PTSD. The defense objected to the cross-examination, and the district court determined that the prosecution could not argue that the prior victim suffered PTSD because there was no such evidence. The prosecution complied with that ruling and did not argue that the prior victim suffered from PTSD. The cross-examination was improper for two reasons. First, this court has repeatedly held that evidence concerning the impact to victims of a prior crime alleged as an aggravating circumstance is irrelevant and inadmissible in a capital penalty hearing. Kaczmarek v. State, 120 Nev. 314, 341, 91 P.3d 16, 34-35 (2004); Sherman v. State, 114 Nev. 998, 1014, 965 P.3d 903, 914 (1998). Clearly, the purpose of the challenged evidence was to suggest that the prior victim suffered from PTSD because of Mendoza's violence against her. Second, even if such evidence were generally admissible, it is irrelevant here as nothing in the record remotely implied that the prior victim had PTSD as a result of any traumatic event, much less because of Mendoza's attack on her. Nevertheless, we conclude that the error was harmless because the prosecution did not stress the inference during cross-examination or highlight it during closing argument and compelling evidence supports the death sentence, including the brutality of the

murder and Mendoza's prior violent crime.[3] See NRS 178.598; Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (stating that harmless-error inquiry with regard to nonconstitutional error is "whether error 'had substantial and injurious effect or influence in determining the jury's verdict'" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)), modified in part by Mclellan v. State, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008).

Third, Mendoza contends that the prosecutor improperly asserted during closing argument that the victim should be the focus of the penalty hearing rather than him. In particular, he challenges a lengthy statement by the prosecutor in which the prosecutor commented that juries hear much about defendants in penalty hearings, and while that evidence is important, it is also important to remember the victim, who in this case was a 69-year-old woman who had no children, parents, or husband, died without dignity and her loved ones around her, and "was left to die fending off an attacker who was 6'3" tall, 275 pounds, and armed with a steak knife." Mendoza contends that those statements interfered with the jury's constitutional duty to impose an individualized

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[3]Mendoza complains that this error, when cumulated with other constitutional errors that occurred during sentencing, warrants reversal of his death sentence. While his trial was not free from error, any error in admitting evidence that rape can cause PTSD, considered cumulatively with any other errors identified in this order, does not warrant relief. See Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (setting forth factors to consider in cumulative error analysis).

sentence, the prosecutor expressed his own opinion based on other penalty hearings, and it disparaged his mitigation presentation by describing it as the type of mitigation that the defense presents in every case.

Because Mendoza did not object, we review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477. We conclude that the challenged argument falls within the parameters of permissible argument, Payne v. Tennessee, 501 U.S. 808, 825 (1991) (acknowledging the relevance of prosecutor's argument or evidence related to victim's personal characteristics or emotional impact of crime on victim's family as it relates to sentencing); see also Kaczmarek, 120 Nev. at 338, 91 P.3d at 33, and that nothing in the prosecutor's argument improperly diverted the focus of the penalty hearing from Mendoza or entreated the jury to abandon its duty to impose an individualized sentence. To the extent the prosecutor relied on his prior experiences or expressed his opinion about the typical scope of mitigation evidence, any error in this regard did not affect Mendoza's substantial rights in light of the brevity of the comments and the substantial evidence supporting the death sentence. Accordingly, we conclude that Mendoza failed to show plain error in this regard.

Fourth, Mendoza contends that the prosecutor denigrated the role of mercy by contrasting mercy with justice, specifically invoking the "equal and exact justice" instruction, and suggesting that the jury not show Mendoza mercy because he showed no mercy to Kremberg. He also complains that in arguing to the jury that nothing can make Kremberg whole after Mendoza's violence against her, the prosecutor trivialized and distorted the jury's sentencing decision, as "no sentence can make a homicide victim 'whole.'" Because Mendoza failed to object, this claim is

reviewed for plain error affecting his substantial rights. Valdez, 124 Nev. at 1190, 196 P.3d at 477.

We have held that it is improper for a prosecutor to argue that a defendant is "deserving of the same sympathy and compassion and mercy that he extended to [the victims]." Thomas v. State, 120 Nev. 37, 48-49, 83 P.3d 818, 826 (2004) (internal quotations omitted). Here, the prosecutor did not explicitly argue that Mendoza deserved the same mercy he showed his victim; instead, the prosecutor argued that Mendoza showed no mercy to his victim. The comments in context convey the point that mercy is not the sole consideration in determining the sentence but that justice must be considered as well and that Mendoza's brutal attack on Kremberg, along with his previous attack on another woman, justified a death sentence. However, the jury could infer from the prosecutor's argument that Mendoza is undeserving of mercy because he did not show mercy to his victim. To that extent, the prosecutor's argument would be improper. But even viewed in that light, we conclude that the argument did not affect Mendoza's substantial rights considering the significant evidence supporting his death sentence.

As to the remaining portion of the argument, the prosecutor's statements essentially asked the jury to balance mercy with justice and that in this instance Mendoza's crimes did not warrant mercy. The prosecutor in no way suggested that mercy should not be considered, just that it was inappropriate here. Consequently, Mendoza failed to demonstrate plain error.

Fifth, Mendoza asserts that the prosecutor improperly condemned the defense argument that the death penalty should be

reserved for "the worst of the worst" by arguing that no such requirement existed and that Kremberg and Mendoza's prior assault victim would undoubtedly consider Mendoza to be the worst of the worst. Because Mendoza failed to object, this claim is reviewed for plain error affecting his substantial rights. Valdez, 124 Nev. at 1190, 196 P.3d at 477. Mendoza failed to show plain error, as the challenged statements merely responded to defense counsel's argument that the death penalty is reserved for the worst of the worst and that Mendoza did not fit that category of defendants. And considering the context in which they were made, the prosecutor's reference to the victims' probable view that Mendoza was the worst of the worst simply highlighted the gravity of Mendoza's violence against his victims.

Finally, Mendoza claims that the prosecutor misstated the evidence by arguing that the defense experts acknowledged that Mendoza's PTSD did not cause the crime when the experts testified that they were not tasked with providing an opinion on whether PTSD had a causal relationship to the offense and did not opine on that point. Although the record supports Mendoza's representation that the experts were not tasked with providing an opinion as to whether PTSD caused Mendoza to commit the charged offenses, one of the experts testified that PTSD did not cause Mendoza to commit the crimes. Based on that testimony, we conclude that the prosecutor's argument that Mendoza's experts acknowledged that Mendoza's PTSD did not cause him to commit murder was not a misstatement, at least as to one of his experts, and therefore was not improper. To the extent the challenged argument does

not accurately reflect the testimony of Mendoza's other expert, we conclude that any error did not affect Mendoza's substantial rights.

Right of confrontation

The State relied on Mendoza's 1978 conviction for battery with intent to commit rape to establish one of the two aggravating circumstances. He contends that the district court erred by admitting testimony concerning a police statement from the victim in that case. A police detective described the contents of the statement and explained details of the investigation. The testimony included details of the victim's allegations that Mendoza sexually assaulted and beat her.

Relying primarily on Melendez-Diaz v. Massachusetts, Mendoza argues that the district court erred by admitting evidence of the conviction and other documents, including the victim's statement, that explained the circumstances of the crime. 557 U.S. ___, ___, 129 S. Ct. 2527, 2530-32 (2009) (holding that introduction of sworn certificates in lieu of live testimony to prove seized evidence was cocaine violated defendant's Sixth Amendment confrontation right and that under Crawford v. Washington, 541 U.S. 36 (2004), certificates were testimonial and, absent showing that analysts were unavailable to testify at trial or that defendant had prior opportunity to cross-examine them, defendant had right to confront them at trial). Mendoza's reliance on Melendez-Diaz is misplaced as that case concerned evidence used to prove the defendant's guilt whereas the issue in this case involves a capital penalty hearing. We have recognized that hearsay is admissible in a capital penalty hearing as long as the evidence is reliable, relevant, and not unduly prejudicial. E.g.,

Summers v. State, 122 Nev. 1326, 1332 & n.17, 148 P.3d 778, 783 & n.17 (2006); Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000). And this court specifically has held that the Sixth Amendment right to confrontation and Crawford do not apply to capital penalty hearings. E.g., Thomas v. State, 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006); Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006); Summers, 122 Nev. at 1333, 148 P.3d at 783.

Mendoza acknowledges this court's prior decisions that neither the Confrontation Clause nor Crawford apply to evidence admitted at a capital penalty hearing but argues that they are not controlling because they do not take into account the differences between the two stages of the penalty hearing—death eligibility and selection. Mendoza argues that Ring v. Arizona, 536 U.S. 584 (2002), and this court's decision in Johnson v. State, 118 Nev. 787, 802-03, 59 P.3d 450, 460 (2002) (stating that findings of at least one aggravating circumstance and no mitigating circumstances sufficient to outweigh aggravating circumstances renders defendant death eligible), overruled on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011), require that death eligibility satisfy the strictures of the Sixth Amendment right to a jury trial. Therefore, he argues, the death eligibility decision must be made in a proceeding that comports with Crawford.

Contrary to Mendoza's assertions, it is clear that this court considered the different phases of a capital penalty hearing when deciding that the Confrontation Clause and Crawford do not apply to evidence admitted in such a hearing in Summers. 122 Nev. at 1332-33, 148 P.3d at 783 (majority opinion); id. at 1337-41, 148 P.3d at 786-88 (Rose, C.J.,

joined by Maupin and Douglas, JJ., concurring in part and dissenting in part). Mendoza has not identified any controlling authority decided since Summers that extends the Confrontation Clause and Crawford to capital penalty hearings, and we have found none. Therefore, we reject Mendoza's contention that Crawford applies in this instance and conclude that the district court did not err by admitting the challenged evidence.

Even assuming that the hearsay rule and Crawford should apply to the eligibility phase of a capital penalty hearing, Mendoza is not entitled to relief. Here, the relevant eligibility determination required a finding that Mendoza had a prior conviction for a violent felony. The 1978 judgment of conviction alone established this aggravating circumstance beyond a reasonable doubt because it shows that he was convicted of battery with intent to commit rape, which, based on its statutory elements, see 1977 Nev. Stat., ch. 598, § 8, at 1628 (defining "battery" as "any willful and unlawful use of force or violence upon the person of another"), is a "felony involving the use or threat of violence to the person of another" under NRS 200.033(2)(b). See Thomas v. State, 122 Nev. 1361, 1375, 148 P.3d 727, 736, (2006). Mendoza's hearsay challenge to the 1978 judgment of conviction lacks merit because, pursuant to NRS 51.295(1), the judgment of conviction is not inadmissible under the hearsay rule. His confrontation argument also lacks merit because the judgment of conviction is not testimonial evidence. See Crawford, 541 U.S. at 68 (holding that Confrontation Clause precludes admission of testimonial evidence when witness is unavailable and defendant did not have prior opportunity to cross-examine witness). Although a judgment of conviction may be used as evidence at a later trial for various reasons, its purpose is

to memorialize a defendant's conviction, crime, and sentence, see NRS 176.105(1) (setting forth contents required for valid judgment of conviction), not to gather evidence for or establish a fact to be proved at a later trial; it would be clear to any objective witness that the judgment of conviction was not prepared for use at a later trial. See Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006) (explaining that whether statement is testimonial depends on totality of circumstances surrounding its making to determine whether statement would lead objective witness reasonably to believe that statement would be available for use at later trial). In contrast to the judgment of conviction, the prior victim's statement to police and the police report are likely hearsay and testimonial. But even so, Mendoza would not be entitled to relief because that evidence was not necessary to the jury's eligibility determination; it was relevant and admissible for purposes of the selection phase because it shows Mendoza's character and penchant for committing violent crimes, which are appropriate considerations in the selection phase of a capital penalty hearing, see Browning v. State, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008).

"Equal and exact justice" instruction

Mendoza argues that the "equal and exact justice" instruction mischaracterized the jury's duty in sentencing, which, according to him, does not require the jury to do "equal and exact justice," and imposed an objective standard in determining the sentence rather than promoting individualized sentencing. Because he did not object to the instruction, we review his claim for plain error affecting his substantial rights. See NRS

178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). We have consistently upheld this instruction, although not against a challenge similar to what Mendoza argues here. See, e.g., Thomas, 120 Nev. at 46, 83 P.3d at 824; Daniel v. State, 119 Nev. 498, 522, 78 P.3d 890, 906 (2003); Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). However, we conclude that he fails to demonstrate plain error as the challenged language, considered in context of the entire instruction, merely reminded jurors to be fair and contemplative of the defense's and the prosecution's positions.

Ineffective-assistance-of-counsel claims

Mendoza raises a number of ineffective-assistance-of-counsel claims, including allegations that counsel (1) misadvised him to plead guilty based on a belief that the jury would impose a lighter sentence if he accepted responsibility for the crimes, (2) should have objected to two of the prosecution's peremptory challenges under Batson, (3) failed to adequately prepare for the penalty hearing, and (4) failed to object to prosecutorial misconduct.

"[W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary." Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) (footnote omitted). Mendoza argues that the evidence of ineffectiveness is so apparent from the record that no evidentiary hearing is necessary for this court to resolve his claims. We disagree. No alleged deficiency about which Mendoza complains is so apparent from the record

that we could conclude that an evidentiary hearing is unnecessary or is otherwise sufficiently developed on the record for review on direct appeal. Rather, those claims are best raised in a timely post-conviction petition for a writ of habeas corpus in the first instance. See Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981) (declining to consider ineffective-assistance claim even though record suggested ineffective assistance because of possibility that counsel could rationalize his performance at evidentiary hearing). Accordingly, we decline Mendoza's invitation to consider his ineffective-assistance-of-counsel claims at this time.

Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravating circumstances found, (2) the verdict was rendered under the influence of passion, prejudice or any arbitrary factor, and (3) the death sentence is excessive. First, sufficient evidence supports the two aggravating circumstances found—(1) Mendoza had a prior conviction for a felony involving the use or threat of violence (1978 conviction for battery with the intent to commit rape) and (2) he subjected the victim to nonconsensual sexual penetration during the commission of the murder. Second, nothing in the record indicates that the jury reached its verdict under the influence of passion, prejudice, or any arbitrary factor. In fact, the finding of eight mitigating circumstances, centered on Mendoza's military service, emotional and mental problems, history of substance abuse, acceptance of responsibility, and age, reflects a deliberate and thoughtful jury. And third, despite Mendoza's credible case in mitigation,

we conclude that the death sentence was not excessive considering the crime (Mendoza viciously stabbed 69-year-old Kremberg 18 times and sexually assaulted her) and Mendoza's prior history of violence. See Dennis v. State, 116 Nev. 10-75, 1085, 13 P.3d 434, 440 (2000) (explaining that in considering whether a death sentence is excessive for purposes of mandatory review under NRS 177.055(2), this court asks whether "the crime and defendant before [the court] on appeal [are] of the class or kind that warrants the imposition of death?").

Having considered Mendoza's contentions and conducted the review required by NRS 177.055(2), we conclude that no relief is warranted. We therefore

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Cherry

_____, J.
Douglas

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Christiansen Law Offices
Robert M. Draskovich, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk