

IN THE SUPREME COURT OF THE STATE OF NEVADA

ART SILVA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53680

**FILED**

**AUG 25 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of battery with a deadly weapon. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. The district court sentenced appellant Art Silva to serve a prison term of 72 to 180 months.

Silva contends that he was denied his due process right to a fair sentencing hearing as a result of prosecutorial misconduct. Silva claims that the prosecutor improperly belittled him by characterizing him as a "savage animal." Silva asserts that the prosecutor deceived the sentencing court by implying that he "initiated and/or participated in the initial battery upon the victim and caused the victim's most debilitating injury." And Silva argues that the prosecutor's comments enraged the sentencing court to the extent that he received "a harsher term of imprisonment than warranted." Silva objected to being characterized as a "savage animal," but he did not object to the prosecutor's remaining comments.

A prosecutor has committed misconduct when his "statements so infected the proceedings with unfairness as to result in a denial of due

process.” Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). We consider such statements in context and will not lightly overturn a conviction on the basis of the prosecutor’s comments alone. Id.

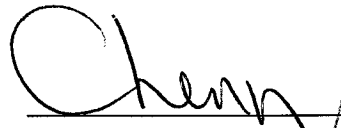
If the prosecutor’s statements have been preserved for appeal, we will review the alleged misconduct under the harmless error standard. Valdez v. State, 124 Nev. \_\_\_, \_\_\_, 196 P.3d 465, 476 (2008). Harmless error review is a two-step analysis where we first determine whether the conduct was improper and, if so, then determine whether the conduct warrants reversal. Id. If the conduct is not of constitutional dimension, we will reverse only if it substantially affected the district court’s sentencing decision. See id. If the prosecutor’s statements have not been preserved for appeal, appellate review is generally precluded. Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007). However, we may review the alleged misconduct for plain error. Valdez, 124 Nev. at \_\_\_, 196 P.3d at 477; see NRS 178.602. Under the plain error standard, we determine “whether there was an error, whether the error was plain or clear, and whether the error affected the defendant’s substantial rights.” Anderson, 121 Nev. at 516, 118 P.3d at 187 (internal quotation marks and citation omitted). “[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.” Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

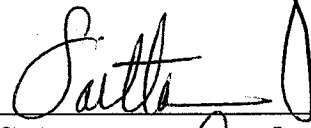
We will not interfere with a sentencing determination when the sentence is legal, within the statutory limits, and not supported solely by impalpable and highly suspect evidence. See Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

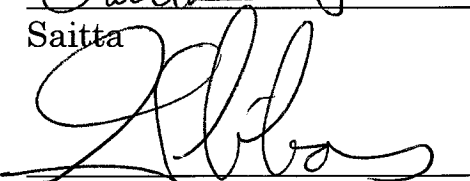
The prosecutor’s characterization of Silva as a “savage animal” constitutes misconduct. See Barron v. State, 105 Nev. 767, 780, 783 P.2d

444, 452 (1989) (providing that a prosecutor has a “duty not to ridicule or belittle the defendant or his case”); McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) (“Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct.”). However, we conclude that this comment does not rise to a level that would require reversal. We have reviewed the prosecutor’s remaining comments and conclude that they do not constitute plain error. We note that the sentence imposed by the district court is legal and falls within the parameters provided by the relevant statute. See NRS 200.481(2)(e)(2). And we observe that the record on appeal clearly indicates that the district court relied on more than just the prosecutor’s comments to reach its sentencing determination. Under these circumstances, we conclude that Silva is not entitled to relief, and we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Patrick Flanagan, District Judge  
Law Office of Tammy M. Riggs, P.L.L.C.  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk