IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS ANTHONY NAVARRETTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64033

FILED

APR 15 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to an *Alford* plea,[1] of one count each of robbery, first-degree murder with use of a deadly weapon, and first-degree kidnapping with use of a deadly weapon. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Prior to trial, appellant Nicholas Navarrette filed a motion to suppress statements that he made to detectives of the Las Vegas Metropolitan Police Department (LVMPD). Following a hearing on the matter, the district court entered an order denying Navarrette's motion to suppress. Thereafter, the Navarrette brought a motion for reconsideration, which the district court granted. Before the district court held a *Jackson v. Denno* hearing,[2] Navarrette entered into an *Alford* plea after signing a guilty plea agreement. The district court then sentenced Navarrette as follows: (1) as to the first-degree murder count, to a term of life without the possibility of parole with a consecutive term of 12-240 months for the deadly weapon enhancement; (2) as to the robbery count, to

[1]*See North Carolina v. Alford*, 400 U.S. 25 (1970).

[2]*See Jackson v. Denno*, 378 U.S. 368 (1963).

a term of 40-180 months running concurrent with the first-degree murder count; and (3) as to the kidnapping count, to a term of life with the possibility of parole with a consecutive term of 12-180 months for the deadly weapon enhancement, such sentence running consecutive to the robbery count. This appeal followed.

First, Navarrette challenges his conviction, contending that the district court erred by denying his motion to suppress. The right to appeal from a judgment of conviction based on an *Alford* plea is limited. *See* NRS 177.015(4); *see also Davis v. State*, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999). Upon entering an *Alford* plea, a defendant generally waives the right to challenge events occurring prior to entry of the plea. *See Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 164 (1975) ("[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. . . . [A criminal defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to entry of the guilty plea.") (first alteration in original) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). NRS 174.035(3) provides an exception wherein a defendant may, with the consent of the district court and the district attorney, reserve in writing the right to appeal an adverse determination on a specified pretrial motion.

Navarrette does not contend, and the record does not indicate, that he reserved, in writing, the right to appeal the above issues prior to entering his *Alford* plea. Therefore, we decline to consider the merits of Navarrette's arguments at this point, as he waived his claims upon entering his *Alford* plea.

Second, Navarrette contends that the district court abused its discretion by admitting his allegedly coerced confession at sentencing. We

disagree. As discussed above, Navarrette entered into an *Alford* plea in which Navarrette waived his right to appeal this issue. Navarrette's *Alford* plea provided as follows:

> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:
>
> . . .
>
> 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).

Moreover, "the decision to admit evidence at a penalty hearing is left to the discretion of the trial judge." *Nunnery v. State*, 127 Nev. ____, ____, 263 P.3d 235, 249 (2011). Because Navarrette failed to raise a contemporaneous objection at sentencing, we review this issue for plain error. Under that standard, "an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 477 (2008). During a penalty hearing, the district court may hear evidence concerning "aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence." NRS 175.552(3). "Other matter" evidence includes evidence of the defendant's "character,

record, and the circumstances of the offense." *Nunnery v. State*, 127 Nev. at ____, 263 P.3d at 249 (2011).

At sentencing, Navarrette argued first regarding mitigation, and provided the court with a slide show. While presenting the slide show, Navarrette argued he should receive leniency for the following reasons: (1) he was under the influence of methamphetamine during the crime; (2) he received a $500,000 settlement based on sexual abuse he suffered as a child, and therefore, this crime was "inexplicable"; (3) Geoffrey Grove, the victim's ex-fiancé and codefendant, fired the fatal gunshots; and (4) he was not present when Grove shot the victim.

In an effort to rebut Navarrette's arguments, the prosecutor requested that the district court admit Navarrette's confession.[3] Naverrette did not object to the prosecutor's request. After the district court admitted the confession, the State proceeded to argue the facts of the confession in rebutting Navarrette's contentions that mitigating circumstances existed. Specifically, the State noted Navarrette's familiarity with the victim, his role in helping Grove surreptitiously access the victim's home, his irritation with Grove's inability to kill the victim quickly, and his active participation in the victim's strangulation. Navarrette, in rebuttal, told the district court:

> In terms of [Navarrette] being the prime mover certainly he assisted. Certainly he had a major role to play but his goal could not have been to rob her. He had all the money that he needed. Ms. Hamzaj wasn't his paramour. . . . Mr. Navarrette

[3]At Navarrette's plea hearing, the State moved for the district court to mark Navarrette's confession, and to review the confession prior to sentencing. Navarrette did not object.

> was not the one who had been jilted. Mr. Grove was. That's the motivation. . . . While I think it's certainly true Mr. Grove had intentions when he went there. *Those were not [Navarrette's] intentions.* I'll submit it.

(Emphasis added).

Navarrette's arguments sought to distance him from the crime, and therefore, it appears that the State used Navarrette's confession to rebut his contentions of mitigation, and to further support its request that Navarrette receive the maximum sentence of life without the possibility of parole. Because the district court may hear evidence during a penalty hearing concerning aggravating and mitigating circumstances as well as other matters relevant to the sentence, we conclude that Navarrette failed to demonstrate that the district court committed plain error by admitting Navarrette's confession during sentencing.

Third, Navarrette contends that several instances of prosecutorial misconduct at sentencing denied him due process. Specifically, Navarrette contends that the State made inflammatory arguments, introduced inadmissible victim impact evidence, and improperly provided an expert opinion. In evaluating claims of prosecutorial misconduct, this Court engages in a two-step analysis. *Valdez*, 124 Nev. at 1189, 196 P.3d at 477. First, the Court determines whether the prosecutor's conduct was improper. *Id.* Second, if the prosecutor's conduct was improper, the Court considers whether the improper conduct warrants reversal. *Id.* Because Navarrette did not object, we review these claims for plain error. *Id.* at 1190, 196 P.3d at 477.

Navarrette claims that the prosecutor committed misconduct by making inflammatory arguments. For example, Navarrette cites the following two statements as examples of inflammatory arguments:

> That at the time that Grove and Navarrette decided to go over to Shpresa Hamzaj's home they knew several things. . . . They knew when they went over that they had no intention of leaving there with her alive. They couldn't because they both knew her. . . .
>
> But there is no question that this defendant, the defendant that counsel just asked for mercy of the court was irritated at his codefendant because he couldn't kill her quickly in an efficient manner that he felt was appropriate.

During a penalty hearing, the State may present evidence for three purposes: (1) to establish an aggravating factor, (2) to rebut a mitigating factor, or (3) to aid the court in determining an appropriate sentence. *Thomas v. State*, 122 Nev. 1361, 1368, 148 P.3d 727, 732 (2006). Evidence of a defendant's "character, record, and the circumstances of the offense" is relevant to determining an appropriate sentence. *Nunnery v. State*, 127 Nev. ____, ____, 263 P.3d 235, 249 (2011). Prosecutors cannot make arguments that serve no other purpose than to "encourage[] the jury to impose a sentence under the influence of passion." *Hollaway v. State*, 116 Nev. 732, 743, 6 P.3d 987, 994 (2000). Further, the record must support a prosecutor's arguments. *Thomas v. State*, 120 Nev. 37, 47-48, 83 P.3d 818, 825-26 (2004).

Here, the arguments that Navarrette cites as inflammatory are permissible inferences drawn from statements that Navarrette made to detectives.[4] *See Klein v. State*, 105 Nev. 880, 884, 784 P.2d 970, 973

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[4]Navarrette argues that the prosecutor contradicted the State's previous position that Navarrette went to the victim's home with the intention of robbing the victim. However, intent to rob the victim is not inconsistent with knowledge that it would be necessary to murder the victim given the victim's familiarity with Navarrette and Grove.

(1989) (a prosecutor may argue the evidence and "suggest reasonable inferences that might be drawn from that evidence."). As the prosecutor's arguments were supported by the record and relevant to a determination of an appropriate sentence, the district court could consider the arguments. Therefore, we find that the prosecutor's conduct was not improper.

Navarrette also contends that the State committed prosecutorial misconduct by improperly submitting expert opinion evidence that was not supported by the record. At sentencing, counsel for Navarrette detailed Navarrette's difficult childhood, including the instances of sexual abuse that Navarrette suffered while a ward of St. Jude's Ranch. In arguing for leniency, Navarrette asserted that, "the inexplicable part of this crime" was that he was financially secure because he received a large civil settlement. In response, the prosecutor acknowledged the mitigating nature of Navarrette's background, and made the following statement:

> But what I find ironic is no one else that were plaintiffs that received the settlement stands before this Court in the same situation as Mr. Navarrette does. And thus I would suggest that the abuse while real is certainly not an explanation for what you're about to hear as to some of the -- what I think are relevant facts to consider in the decisions you have this morning.

Navarrette asserts that by making this statement, the prosecutor improperly testified as an expert regarding matters not supported by the record. But, this statement does not constitute an expert opinion. *See* NRS 50.275; BLACK'S LAW DICTIONARY 1267 (10th ed. 2014) (An expert opinion is "[a]n opinion offered by a witness whose knowledge, skill, experience, training, and education qualify the witness to help a fact-

finder understand the evidence or decide a factual dispute."). The prosecutor merely proffered an argument to rebut the evidence concerning the mitigating circumstances presented by Navarrette. *See Thomas v. State*, 122 Nev. 1361, 1368, 148 P.3d 727, 732 (2006) (providing that the State is entitled to rebut "evidence relating to [a defendant's] character, childhood, mental impairments, etc."). Navarrette, therefore, failed to demonstrate the prosecutor's conduct was improper.

Navarrette further argues that the prosecutor engaged in misconduct by failing to provide sufficient notice of victim impact evidence under SCR 250(4)(f), and by proffering inadmissible victim impact evidence.

Pursuant to SCR 250(4)(f), the State must file a notice of all evidence to be used in the penalty phase of a capital murder trial no later than 15 days before the commencement of trial. *Mason v. State*, 118 Nev. 554, 561-62, 51 P.3d 521, 525-26 (2002). Because Navarrette's *Alford* plea precluded imposition of the death penalty, the notice requirement set forth in SCR 250(4)(f) is inapplicable to the present case. SCR 250(1) ("The provisions of this rule apply only in cases in which the death penalty is or may be sought or has been imposed . . . .").

NRS 176.015(3) provides that sentencing courts shall provide victims an opportunity to "reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." Where a victim is injured or killed as a direct result of the commission of a crime, the victim's family members may also provide such victim impact evidence. NRS 176.015(5)(d). In addition, the prosecutor may comment on the victim impact evidence provided by the surviving members of the victim's family. *Domingues v. State*, 112 Nev.

683, 699, 917 P.2d 1364, 1375 (1996); *Homick v. State*, 108 Nev. 127, 137, 825 P.2d 600, 606 (1992).

Here, the victim's family submitted letters for the district court's consideration, and the prosecutor commented on the victim impact evidence during his argument. The evidence and argument presented at sentencing served the legitimate purpose of assisting the district court in determining an appropriate sentence. *See Thomas v. State*, 122 Nev. 1361, 1368, 148 P.3d 727, 732 (2006). As such, Navarrette failed to demonstrate that the prosecutor's argument was improper.[5]

Fourth, Navarrette contends that the district court violated his due process rights by imposing a sentence based on passion and prejudice, and failing to specify the aggravating and mitigating factors used in determining the sentence. "A district court is vested with wide discretion regarding sentencing" and "few limitations are imposed on a judge's right to consider evidence in imposing a sentence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). However, "this court will reverse a sentence if it is supported solely by impalpable and highly suspect evidence." *Id.*

Here, the district court listened to oral arguments, viewed Navarrette's slide show, reviewed the presentence investigation report and letters from the victim's family, and considered all of the evidence in the case. Thereafter, the district court sentenced Navarrette in

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[5]Navarrette also contends that he did not receive sufficient notice of the victim impact evidence pursuant to NRS 175.552. However, the State provided notice that it would introduce victim impact evidence from Navarrette's family in its Notice of Evidence in Support of Aggravating Circumstances on October 25, 2012—nearly nine months before the commencement of the penalty hearing.

accordance with the parameters provided by the relevant statutes. *See* NRS 193.165(1); NRS 200.030(4); NRS 200.320(1); NRS 200.380(2). Nothing in the record indicates that the district court based its decision on impalpable and highly suspect evidence. Moreover, Navarrette failed to cite any legal authority supporting his contention that a district court must specifically set forth the aggravating and mitigating circumstances supporting a sentence when the State was not seeking the death penalty. Therefore, we conclude the district court did not abuse its discretion in imposing Navarrette's sentence.

Although Navarrette does not raise the issue on appeal, we note that the district court failed to state, on the record, that it had considered the factors enumerated in NRS 193.165(1) prior to imposing the sentences for the deadly weapon enhancements. *Mendoza-Lobos v. State*, 125 Nev. 634, 643, 218 P.3d 501, 507 (2009). Notwithstanding the district court's failure to make findings regarding the deadly weapon enhancements, the record provides sufficient support for the sentence. As such, we conclude the error does not warrant relief. *See id.* at 644, 218 P.3d at 507 (district court's failure to make findings did not affect the sentencing decision, and thus, there was no plain error).

Fifth, Navarrette argues that the cumulative effect of errors denied him a fair trial, and therefore, warrants reversal. Absent a showing that the cumulative effect of errors violated a defendant's constitutional right to a fair trial, this Court will not reverse a district court based on cumulative error. *Rose v. State*, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007). In evaluating whether a claim of cumulative error warrants reversal, this Court considers the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and

(3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). We have found only one error. Without a finding of multiple errors, the doctrine of cumulative error is inapplicable. *United States v. Sager*, 227 F.3d 1138, 1149 (2000) ("One error is not cumulative error"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Jessie Elizabeth Walsh, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk