

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HAROLD ERIK GROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65980

FILED

AUG 27 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 entered pursuant to a guilty plea of Possession of a Financial Forgery Laboratory, a violation of NRS 205.46513. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Appellant Harold Eric Gross pleaded guilty to Possession of a Financial Forgery Laboratory, a violation of NRS 205.46513. Under the plea agreement, the State agreed to recommend a minimum sentence of no more than five years, but remained free to argue an appropriate maximum sentence. After Gross pleaded guilty, he represented to the district court that he suffered from substance abuse problems and requested release for treatment at a Salvation Army drug program pending sentencing. The district court granted Gross' request.

Gross failed to complete his treatment at the Salvation Army drug program, absconding instead to New Mexico. While Gross was in New Mexico, Gross made a number of telephone calls to his wife, the co-defendant in this case, who remained in custody during Gross' release for treatment. Because Gross' wife was in custody, the telephone conversations between Gross and his wife were monitored and recorded.

Eventually, a U.S. Marshals task force located Gross in New Mexico, resulting in his arrest and extradition to Nevada for sentencing.

At sentencing, Gross argued in mitigation he left the Salvation Army drug program due to a chronic medical condition, and he always intended to return to Nevada for sentencing. Gross further claimed he failed to appear for a presentence interview because the Division of Parole and Probation did not arrange an appointment. Gross admitted, however, that after leaving the Salvation Army drug program, he never contacted the Division of Parole and Probation to advise them of his whereabouts or scheduled an appointment for a presentence interview.

In rebuttal, the State asserted Gross materially breached the plea agreement by absconding prior to sentencing, and, therefore, the State could argue for a longer sentence than the one the parties originally contemplated in the plea agreement. During its rebuttal, the State relied on information gleaned from the recorded telephone conversations between Gross and his wife.¹ Those recordings, the State argued, belied Gross' argument he left the Salvation Army drug program due to a chronic medical condition, but intended to return to Nevada. Instead, the State argued the recordings revealed Gross did not intend to return to Nevada so long as he faced a potential 20-year sentence.

The State also advised the district court that although Gross was not charged with additional crimes, the recordings revealed Gross tried to establish another forgery operation while he was in New Mexico. After Gross indicated the State did not disclose information regarding

¹The State asserted Gross and his wife appeared to talk in "code" in the recordings, suggesting they both were aware the government was listening to their calls.

additional crimes, the district court advised it would not consider that information in sentencing Gross.

The State recommended an 8-to-20-year sentence for Gross. But, in accordance with the original plea bargain and the parameters of NRS 205.46513(2), the district court sentenced Gross to a maximum term of 20 years with parole eligibility after 5 years. This appeal followed.

On appeal, we consider three of Gross' arguments. First, Gross argues the prosecutor engaged in misconduct warranting reversal by failing to disclose the recorded telephone conversations. Second, Gross asserts the information gleaned from the recorded telephone conversations constitutes hearsay, and, therefore, the prosecutor committed misconduct by introducing that information at sentencing. Third, Gross contends the prosecutor committed misconduct when he introduced the information from the recorded telephone conversations because he acted as an improper witness. We discuss each of these arguments in turn.

But, first, we address the legal standard for determining whether prosecutorial misconduct warrants reversal. In evaluating claims of prosecutorial misconduct, this Court engages in a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 477 (2008). 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 Gross did not object at sentencing, we review his claims for plain error. *See id.* at 1190, 196 P.3d at 477.

Failure to disclose the recorded telephone conversations

Gross argues the prosecutor engaged in misconduct warranting reversal by failing to disclose the recorded telephone conversations. Specifically, Gross contends the Washoe County District

Attorney's Office maintains an open file policy, and, therefore, the prosecutor was subject to an ongoing duty to disclose evidence, including inculpatory evidence, following entry of Gross' plea.²

If a prosecutor professes to have an open file policy, then the office is subject to a duty to disclose all evidence—whether inculpatory or exculpatory—to the defendant. *McKee v. State*, 112 Nev. 642, 648, 917 P.2d 940, 944 (1996) (“a prosecutor, as the agent of the State, is held to a high ethical standard and must abide by the promises he makes.”). Thus, whether the prosecutor in the present case committed prosecutorial misconduct by failing to disclose the recorded telephone conversations depends on whether the prosecutor maintained an open file policy.

Our review of the record reveals the parties entered into a “Request, Stipulation and Order Re Pre-Preliminary Hearing and Pre-Trial Reciprocal Discovery” (the “Agreement”). Under the Agreement, Gross requested discovery prior to the preliminary hearing as set forth in

²Gross also appears to assert the prosecutor withheld the recorded telephone conversations in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). But, we see no basis in the record to conclude the recorded telephone conversations are favorable to Gross or material—particularly where the district court stated it would not consider the prosecutor's allegations regarding additional crimes and sentenced Gross according to the plea agreement. See *Mazzan v. Warden*, 116 Nev. 48, 67, 74, 993 P.2d 25, 37, 41 (2000). Moreover, Gross presents no analysis or authority for his argument. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (recognizing arguments not cogently argued or supported by relevant authority need not be considered on appeal).

NRS 171.1965³ and pre-trial discovery as set forth in NRS 174.235-.295.⁴ The Agreement imposes a continuing duty to disclose, but the duty is limited to requested discovery items. Because the plain language of the Agreement only provided for ongoing reciprocal discovery through trial, it did not entitle Gross to “open file discovery” following entry of plea.

Although Gross did not otherwise make an open file request, Gross also contends the Washoe County District Attorney’s Office has an open file policy that “is common knowledge to the Washoe County defense bar.” This court is not a fact-finding court, but rather, a reviewing court. *See Brass v. State*, 129 Nev. ___, ___, 306 P.3d 393, 395 (2013) (holding the supreme court is not a fact-finding court and concluding the district court is best suited to make a factual determination). As such, we cannot make a factual determination as to whether the Washoe County District Attorney’s Office maintains a general open file policy. Because the record does not indicate the Washoe County District Attorney’s Office had an open file policy, and because the Agreement does not provide for “open file discovery” following enter of plea, we conclude the prosecutor did not

³NRS 171.1965(1) requires a prosecuting attorney to disclose certain items “*not less than five judicial days before a preliminary hearing.*” (emphasis added).

⁴Taken together, those statutes require disclosure of certain items “*not less than 30 days before trial,*” NRS 174.285 (emphasis added), and impose a continuing duty to disclose those items *before or during* trial. NRS 174.295 (emphasis added). We note under the Agreement, the parties waived the time limit set forth in NRS 174.285, but, given the plain language of the Agreement and NRS 174.295, that waiver does not change our analysis.

engage in prosecutorial misconduct by failing to provide the defendant with the recorded telephone conversations prior to sentencing.

Hearsay


Gross argues because the information gleaned from the recorded telephone conversations constituted hearsay, the prosecutor engaged in misconduct by introducing the information at sentencing. We disagree. First, the prosecutor was merely responding to Gross' mitigation argument, and Gross did not object. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unpreserved claims of prosecutorial misconduct for plain error). Second, the prosecutor offered Gross' recorded statements against Gross, and, therefore, the statements do not constitute hearsay. *See* NRS 51.035(3). Third, hearsay is permissible at sentencing. *See* NRS 47.020(3)(c) (exempting sentencing hearings from the rules of evidence).


Improper witness

Finally, Gross contends the prosecutor's introducing the contents of the recorded telephone conversations at sentencing amounted to prosecutorial misconduct because the prosecutor acted as a witness. The prosecutor did not testify at sentencing, and, therefore, did not act as a witness. *See* NRS 50.035(1); *Black's Law Dictionary* 1838 (10th ed. 2014) (a witness is "[s]omeone who gives testimony under oath or affirmation"). Instead, the prosecutor introduced admissible evidence in response to Gross' argument in mitigation. *See* NRS 51.035(3); *Silks v. State*, 92 Nev. 91, 94-95, 545 P.2d 1159, 1161 (1976) ("[t]he sentencing proceeding is not a second trial and the court is privileged to consider facts and circumstances which clearly would not be admissible at trial."). The prosecutor could permissibly argue facts and inferences based on evidence. *See Thomas v. State*, 120 Nev. 37, 48, 83 P.3d 818, 826 (2004).

Accordingly, we conclude Gross failed to demonstrate plain error or any error. Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Scott N. Freeman, District Judge
Douglas A. Nutton
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk