

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PRESTON WAYNE HELLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68455

FILED

MAR 16 2016

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 three counts of burglary. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

First, appellant Preston Heller claims the district court abused its discretion at sentencing by allowing a person who was not a victim or witness to testify. Specifically, Heller claims the district court abused its discretion by hearing testimony given by his father.

The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will not interfere with the sentence imposed by the district court “[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). The district court may consider “any reliable and relevant evidence at the time of sentencing.” NRS 176.015(6).

We conclude the district court did not abuse its discretion by considering the testimony of Heller’s father at sentencing. Heller’s father

testified he believed his son was manipulative, he needs help, and he received leniency last time and that did not work. He also testified about Heller selling the guns he stole to family members. Finally, he testified he did not believe Heller was a drug addict.¹ This was all relevant evidence to sentencing and Heller has not demonstrated the district court relied on evidence that was impalpable or highly suspect.²

Second, Heller claims the district court abused its discretion by permitting the State to provide opinion testimony regarding drug abuse and mental health issues. Heller fails to demonstrate the district court abused its discretion or the State improperly provided opinion testimony. The State argued, in rebuttal to Heller's argument he is an addict and suffers from mental health issues, Heller never informed the police in this case or his previous case that he used drugs. In his previous presentence investigation report, Heller informed the interviewer he had no history of using drugs and no mental health history. Further, during his interview with the police, Heller told the officers he never took any pills during the burglaries and if he found pills he would discard them with the purses after he took everything else. The State's argument was based on

¹Heller did not object to his father's statement he did not believe Heller was a drug addict. To the extent Heller claims the district court abused its discretion by relying on this statement at sentencing, Heller fails to demonstrate plain error. See *Grey v. State*, 124 Nev. 110, 123, 178 P.3d 154, 163 (2008); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). To the extent Heller challenged his father's mention of selling firearms, these were the underlying facts of the charges in this case and it was not an abuse of discretion to consider them.

²To the extent Heller challenges the State's lack of notice regarding this witness, lack of notice is not a proper ground for an appeal. See NRS 176.015(4).

admissible evidence in response to Heller's argument in mitigation and the State can argue facts and inferences based on evidence.

Third, Heller claims the district court abused its discretion by permitting the State to comment on Heller's silence. Specifically, the State argued Heller's silence in response to an officer's statement, "I know you're not a user," was an admission Heller did not use drugs. Heller failed to contemporaneously object; therefore, we review for plain error.

Heller fails to demonstrate the district court abused its discretion or the State erred by commenting on Heller's silence in response to the officer's statement. Heller waived his right to silence prior to talking to the officers; therefore, he failed to demonstrate it was error to consider his silence in regards to the statement or that consideration of the silence affected his substantial rights. *See Grey*, 124 Nev. at 123, 178 P.3d at 163; *Green*, 119 Nev. at 545, 80 P.3d at 95.

Finally, Heller claims the district court abused its discretion by not aggregating the consecutive prison terms as required by NRS 176.035(1).³ Heller did not preserve this claim of error for appellate review; therefore, no relief would be warranted absent a demonstration of plain error.

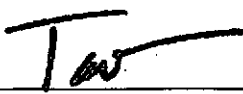
Here, the record reveals the district court failed to pronounce the minimum and maximum aggregate terms of imprisonment as required by statute. However, because Heller has not shown the error was prejudicial, we conclude the error is not reversible plain error and Heller

³NRS 176.035(1) provides in relevant part, "For offenses committed on or after July 1, 2014, if the court imposes the sentences to run consecutively, the court must pronounce the minimum and maximum aggregate terms of imprisonment pursuant to subsection 2."

is not entitled to relief. *Green*, 119 Nev. at 545, 80 P.3d at 95 (“[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.”).

Having concluded Heller is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. David A. Hardy, District Judge
Trotter Law Offices, LLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk