

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDUARDO JUAREZ LEON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70274

**FILED**

NOV 18 2016

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *Amical*  
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of assault with the use of a deadly weapon. First Judicial District Court, Carson City; James Todd Russell, Judge.

First, appellant Eduardo Juarez Leon argues the State committed prosecutorial misconduct by improperly discussing information involving previously dismissed charges during the sentencing hearing and for failing to provide notice the State would discuss such information. Leon asserts the procedural protections applicable when a victim testifies regarding the prior bad acts of a defendant at sentencing should also apply to situations where a prosecutor makes allegations regarding a defendant's prior bad acts at sentencing. *See Buschauer v. State*, 106 Nev. 890, 894, 804 P.2d 1046, 1049 (1990).

Even assuming *Buschauer* applies to situations where a prosecutor makes allegations regarding a defendant's prior bad acts at sentencing, the district court specifically declined to consider information relating to the dismissed charges. Therefore, Leon cannot demonstrate prejudice stemming from introduction of this information or any failure to

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provide Leon notice of the State's intent to discuss this information. *See id.*; *see also Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (explaining prosecutorial-misconduct claims are analyzed for harmless error); *Deveroux v. State*, 96 Nev. 388, 390, 610 P.2d 722, 723 (1980) ("Unless the record reveals prejudice resulting from the introduction of objectionable material, we will not interfere with the sentence imposed."). Therefore, Leon is not entitled to relief for this claim.

Second, Leon argues the district court abused its discretion by imposing consecutive terms rather than concurrent terms and in declining to impose a term of probation rather than a prison sentence. Leon asserts the district court failed to consider Leon's substance abuse issues when imposing sentence and heard impalpable evidence regarding Leon's previously dismissed cases. We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). A sentencing "court is privileged to consider facts and circumstances which clearly would not be admissible at trial." *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). However, we "will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

The district court heard argument regarding Leon's problems with substance abuse, but stated it concluded consecutive prison terms, rather than terms of probation, were appropriate because Leon had previously failed to successfully complete probation. In addition and as stated previously, the district court specifically asserted it would not consider information related to the previously dismissed cases when imposing sentence. The district court imposed consecutive terms of 19 to

48 months in prison, which was within the parameters of the relevant statute. *See* NRS 200.471(2)(b). The decision to decline to impose a term of probation and to sentence Leon to consecutive prison terms was within the district court's discretion, and Leon fails to demonstrate the district court's exercise of its discretion was improper. *See* NRS 176A.100(1)(c); *see also* NRS 176.035(1); *Pitmon v. State*, 131 Nev. \_\_\_, \_\_\_ 352 P.3d 655, 659 (Ct. App. 2015). Therefore, we conclude Leon is not entitled to relief for this claim.


Third, Leon argues the district court committed plain error by imposing a domestic violence fee. "While failure to object generally precludes appellate review, we have discretion to address any errors that were plain and that affected the defendant's substantial rights." *Dieudonne v. State*, 127 Nev. 1, 4–5, 245 P.3d 1202, 1205 (2011). "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record." *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks omitted). "[T]he defendant must show that an error was prejudicial in order to establish that it affected substantial rights." *Id.* (internal quotation marks omitted).


Leon pleaded guilty to two counts of assault with a deadly weapon and the information contains no allegations he committed acts of domestic violence as defined by NRS 33.018. *See generally Cassinelli v. State*, 131 Nev. \_\_\_, \_\_\_, 357 P.3d 349, 355 (Ct. App. 2015) (stating "[t]he prosecutor has discretion to resolve a criminal charge, including whether to add language to an information or indictment alleging that the crime itself constitutes domestic violence," which removes ambiguity regarding whether the underlying facts of the crime constitute domestic violence). Under these circumstances, it is plain from the record that Leon was not


convicted of an offense constituting domestic violence and he was prejudiced by imposition of a domestic violence fee. We conclude the district court committed plain error by imposing the domestic violence fee. Accordingly, we reverse the imposition of the domestic violence fee and instruct the district court to enter an amended judgment of conviction that removes the domestic violence fee.

Having concluded Leon is only entitled to the relief described herein, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. James Todd Russell, District Judge  
State Public Defender/Carson City  
Attorney General/Carson City  
Carson City District Attorney  
Carson City Clerk