

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID ROSALES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73181

FILED

MAY 15 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

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

David Rosales appeals under NRAP 4(c) from a judgment of conviction entered pursuant to an *Alford*<sup>1</sup> plea of attempted sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

First, Rosales argues the district court abused its discretion by denying his presentence motion to withdraw guilty plea without conducting an evidentiary hearing. Rosales asserts it was fair and just to permit him to withdraw his guilty plea because he had not been provided his prescription psychiatric medication for a significant period prior to entry of his plea.

A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and “a district court may grant a defendant’s motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. \_\_\_, \_\_\_, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme

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<sup>1</sup>*North Carolina v. Alford*, 400 U.S. 25 (1970).

Court has disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowingly, voluntarily, and intelligently made, and affirmed that “the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Stevenson*, 131 Nev. at \_\_\_, 354 P.3d at 1281.

The record reveals Rosales orally moved to withdraw his plea, asserting the detention center failed to provide him with psychiatric medication prior to entry of his guilty plea. The court requested Rosales’ initial counsel to investigate his claim and counsel later informed the district court that Rosales’ medical records showed he had not been provided the medication for four or five weeks before he pleaded guilty. Given the potential for a conflict of interest between Rosales and his initial counsel, the district court then appointed substitute counsel to further research Rosales’ claim. Substitute counsel later informed the court that Rosales believed he suffered from withdrawal from the medication, but counsel was unsure as to how withdrawal from the medication would affect Rosales’ understanding of the proceedings. Counsel then stated, given the transcript of Rosales’ plea canvass, counsel did not find a legal basis for withdrawing Rosales’ guilty plea.<sup>2</sup> The district court did not conduct an evidentiary

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<sup>2</sup>We conclude that the substitute counsel’s appointment and statements regarding the validity of Rosales’ motion improperly served to assist the district court, rather than Rosales. *See Ellis v. United States*, 356 U.S. 674, 675 (1958) (appointed counsel improperly “performed essentially the role of amici curiae” where “representation in the role of an advocate is required”); *see also Anders v. California*, 386 U.S. 738, 744 (1967) (“The

hearing, but reviewed the recording of Rosales' plea canvass. The district court found nothing to indicate Rosales was impaired or confused such that he did not understand the proceedings, and it denied the motion.

Although the district court may have reached the correct result under the *Crawford* standard, because the standard for deciding presentence motions to withdraw guilty pleas was altered, we conclude the judgment of conviction must be vacated for consideration of Rosales' motion under the standard set forth in *Stevenson*. Because Rosales' claim was not belied by the record, the district court should conduct an evidentiary hearing regarding Rosales' medication-withdrawal claim, see *Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001), and ascertain whether the circumstances regarding this issue constitute a fair and just reason for Rosales to withdraw his guilty plea, see *Stevenson*, 131 Nev. at \_\_\_, 354 P.3d at 1281. If upon remand the district court determines Rosales failed to demonstrate a fair and just reason for withdrawing his guilty plea, the district court may reinstate the judgment of conviction.

Second, Rosales argues the victim-impact testimony exceeded the scope of NRS 176.015(3) because the mother of two of the victims stated Rosales abused their daughter three times a week for nine years, told the victims he would kill their mother, forced the victims to have sex with each other, and told a victim his mother never loved him. "It is within the district

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constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae."); *DiMartino v. Eighth Judicial Dist. Court*, 119 Nev. 119, 121-22, 66 P.3d 945, 946-47 (2003) (an attorney may not act as an advocate and a witness in the same proceeding). The purpose of the appointment of counsel is to represent the defendant on the motion, not to provide a summary to the district court.

court's sound discretion to admit or exclude evidence, and this court reviews that decision for an abuse of discretion or manifest error." *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (internal quotation marks and footnote omitted). Pursuant to NRS 176.015(3), a victim may express views regarding the defendant's general character, including "some reasonable discussion of prior acts by the defendant." *Buschauer v. State*, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990).


In this matter, the State alleged Rosales committed attempted sexual assault of a minor under the age of 14 by causing three young victims to engage in sexual intercourse with him or with each other between 1999 and 2008. At the sentencing hearing, the mother of two of the victims testified regarding Rosales' sexual abuse of her children over a long period of time, how Rosales committed the acts, and how he convinced the children to engage in those acts. Rosales objected and the district court concluded the challenged statements amounted to proper victim-impact testimony, but reminded the victims' mother of appropriate limitations on victim-impact testimony. Given the allegations against Rosales and the challenged statements, we conclude the district court did not abuse its discretion in admitting this victim-impact testimony.

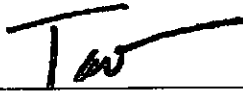
To the extent Rosales also argues the district court abused its discretion when imposing sentence due to the victim-impact testimony, we conclude this claim lacks merit. We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). 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

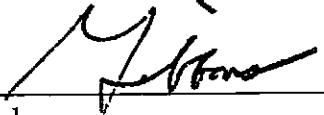
supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

The record reveals the district court listened to the arguments of both parties and the victim-impact testimony. The district court stated its conclusion that Rosales was a danger to the victims in this case and to the community as a whole. For those reasons, the district court stated it imposed the longest available maximum term and imposed a sentence of 72 to 240 months in prison, which falls within the parameters provided by the relevant statutes. See NRS 193.330(1)(a)(1); NRS 200.366(3). Rosales fails to demonstrate the district court relied upon impalpable or highly suspect evidence when imposing sentence. See *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) ("The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision"). Based on the record before this court, we conclude the district court did not abuse its discretion when imposing sentence. Accordingly, we

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

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

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

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

cc: Hon. Valerie Adair, District Judge  
Karen A. Connolly, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk