

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERICH MILTON NOWSCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72255

FILED

SEP 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Erich Milton Nowsch appeals from a judgment of conviction entered pursuant to a guilty plea of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

First, Nowsch claims the district court abused its discretion by denying his motion to withdraw his guilty plea. He argues that he had a fair and just reason because his guilty plea was not entered knowingly, voluntarily, or intelligently. And he asserts that defense counsel did not adequately investigate his mental health history, failed to accurately explain the penalties he faced, and pressured him into accepting the guilty plea negotiation.

The district court appointed alternate counsel, conducted an evidentiary hearing, reviewed "the entire history of this case," and made the following findings. Defense counsel properly investigated and considered Nowsch's mental health issues before recommending the plea negotiation. Defense counsel advised Nowsch of the potential penalties he faced and these penalties were clearly set forth in the written plea agreement and discussed during the plea canvass. And defense counsel did not pressure

Newsch into accepting the guilty plea negotiation. The district court concluded from the totality of the circumstances there was no fair and just reason to grant Newsch's motion.

The record demonstrates the district court applied the correct standard for resolving Newsch's presentence motion to withdraw his guilty plea, *see Stevenson v. State*, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015), and we conclude the district court did not abuse its discretion by denying Newsch's motion, *see State v. Second Judicial Dist. Court (Bernardelli)*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) (The district court's ruling on a presentence motion to withdraw a guilty plea "is discretionary and will not be reversed unless there has been a clear abuse of that discretion.").

Second, Newsch claims the district court erred by ordering him to provide the State with copies of the mental health records he intended to use to support the motion to withdraw his guilty plea. Newsch did not preserve this claim for appeal. We review unpreserved claims for plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks, brackets, and citations omitted). Here, the alleged error does not appear clearly in the record. *See generally* NRS 174.245(1)(b) (requiring the disclosure of results or reports of mental examinations the defense intends to introduce into evidence). Consequently, we conclude Newsch has not demonstrated plain error.

Third, Newsch claims the prosecutor committed misconduct by making extrajudicial statements to the press regarding the information contained in Newsch's mental health records. We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. Newsch objected to the prosecutor's extrajudicial statements during his sentencing hearing, but his objection focused on whether the prosecutor was improperly using the mental health records to paint Newsch as homicidal and suicidal. The district court ruled that both parties were free to present their interpretations of the mental health records during the sentencing hearing. The record does not demonstrate the prosecutor engaged in improper conduct warranting reversal, and we conclude the district court properly ruled on the parties' use of the mental health records. *See Moore v. State*, 116 Nev. 302, 306, 997 P.2d 793, 795 (2000) ("Prosecutors must be free to express their perceptions of the record, evidence, and inferences, properly drawn therefrom.").

Fourth, Newsch claims the district court erred by not striking the State's sentencing memorandum. The record reveals that Newsch argued during his sentencing hearing that the State's sentencing memorandum should be stricken because it contained uninformed arguments based on the State's interpretation of Newsch's mental health records. The district court ruled that both parties were free to present their interpretations of the mental health records during the sentencing hearing and declined to strike the State's sentencing memorandum. We conclude the district court did not abuse its discretion in this regard.

Fifth, Newsch claims the district court erred by denying his request to continue sentencing. We review a district court's decision to

grant or deny a motion for continuance for an abuse of discretion. *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010). “Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made.” *Id.* “However, if a defendant fails to demonstrate that he was prejudiced by the denial of the continuance, then the district court’s decision to deny the continuance is not an abuse of discretion.” *Id.*

Nowsch claims he sought a continuance during his sentencing hearing because it was necessary “to complete the record with mitigation” and counter the State’s sentencing memorandum. However, Nowsch filed a sentencing memorandum in which he discussed the mitigation to be presented at the sentencing hearing and specifically addressed his mental health challenges. He has not shown that additional evidence or a response to the State’s sentencing memorandum would have mitigated his sentence. And we conclude he has not demonstrated prejudice. Accordingly, the district court did not abuse its discretion in this regard.

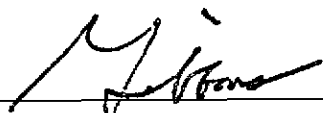
Sixth, Nowsch claims the district court abused its discretion at sentencing by relying upon impalpable evidence regarding his alleged dangerousness and homicidal nature. We review a district court’s sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). 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 sentenced Newsch to life in prison with the possibility of parole after ten years and a consecutive prison term of four to ten years for the use of a deadly weapon. These sentences fall within the parameters of the relevant statutes. See NRS 193.165(1); NRS 200.030(5)(a). The record does not demonstrate that the district court relied solely on impalpable evidence in reaching its sentencing decision. And we conclude that Newsch has failed to demonstrate the district court abused its discretion at sentencing.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Dayvid J. Figler
Law Office of Kristina Wildeveld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk