IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRITTANY MICHELLE PAUGH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67294

FILED

APR 14 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 pursuant to a no contest plea. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant Brittany Paugh pleaded no contest to abuse, neglect or endangerment of a child causing substantial bodily harm[1] under NRS 200.508(1)(a)(2), a category B felony. She appeals two district court decisions regarding an earlier plea agreement that the court ultimately rescinded, and also alleges the district court made several errors during sentencing. We do not recount the facts here except as necessary to our disposition.

Paugh advances two primary arguments against the district court's orders regarding the earlier plea agreement. First, she argues the district court erred by refusing to strike surplus language from the plea agreement, and second, the district court erred by refusing to proceed with

[1]The crime as listed in the information and judgment of conviction included the language "preceding death," but that language was mere surplusage and did not affect the sentence.

sentencing under the original plea agreement or order specific performance of that agreement.

We conclude Paugh's arguments are without merit. As an initial matter, the district court correctly concluded the earlier plea agreement failed to state a crime under NRS 200.508(1)(a)(2). That agreement listed the crime as "Abuse, Neglect or Endangerment of a Child Causing Death." Yet NRS 200.508(1)(a)(2), which governs crimes causing substantial bodily harm to a child, does not mention death. Given that other statutes, namely NRS 200.030, expressly address death resulting from child abuse, a common-sense reading of NRS 200.508(1)(a)(2) suggests "substantial bodily harm" under that statute does not encompass crimes charging the defendant with causing the victim's death.[2] *See Sparks v. State*, 121 Nev. 107, 110-11, 110 P.3d 486, 488 (2005) (noting this court must give effect to legislative intent where that intent is clearly discernable from the statute's plain language). Because there is no such crime as "Abuse, Neglect or Endangerment of a Child Causing Death" under NRS 200.508(1)(a)(2), the district court did not err in refusing to proceed with the plea agreement as written.

Paugh argues, however, the district court should have struck the "causing death" language and thereafter specifically enforced the agreement. We disagree. The State objected to striking that language in the information and memorandum of plea agreement, and there is no

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[2]Legislative history supports this interpretation, as the Legislature did not mention death when addressing the various types of physical and mental harm that would fall under this statute. *See generally* Hearing on S.B. 546 Before the Nevada Senate Committee on Judiciary, 71st Leg. (Nev., April 5, 2001); Hearing on S.B. 546 Before the Nevada Senate Committee on Judiciary, 71st Leg. (Nev., May 17 2001).

Nevada law that requires the district court to strike language in the plea agreements over the objection of a party.[3] Nor was specific performance appropriate where the State did not wish to proceed under a modified agreement, and enforcing the agreement with the "causing death" language would have bound the judge to an outcome he considered unsuitable. *See Van Buskirk v. State*, 102 Nev. 241, 244, 720 P.2d 1215, 1216-17 (1986) (discussing when it is appropriate to order specific performance or withdraw a plea). Further, Paugh has not shown she detrimentally relied on the plea agreement or suffered any prejudice. *See State v. Crockett*, 110 Nev. 838, 843-44, 877 P.2d 1077, 1079-80 (1994) (holding a defendant's detrimental reliance on a plea bargain may require the district court to enforce the bargain). To the contrary, Paugh regained her right to a preliminary hearing, the State did not gain any unfair advantage, and Paugh entered into a more favorable plea agreement. Under the circumstances of this case, withdrawing the plea and remanding the case for a preliminary hearing was appropriate.[4]

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[3]Paugh mischaracterizes *State v. Benigas*, 95 Nev. 358, 360, 594 P.2d 724, 724 (1979) as requiring the court to strike surplus language from an information, but that case only notes a party "may" petition the court to strike language. Moreover, NRS 173.085, governing a court's ability to strike surplus language, is permissive and does not require a court to strike incorrect language from an information. Although surplusage might render an information invalid if the case proceeds and the language proves prejudicial to the defendant, *see, e.g., Hulett v. Sheriff, Clark County*, 91 Nev. 139, 141, 532 P.2d 607, 608 (1975), here the case was remanded and the subsequent information did not include the "causing death" language.

[4]We have considered Paugh's additional arguments and conclude they are without merit. We also conclude any error was harmless in this case as Paugh eventually entered into a more favorable plea agreement.

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We next consider whether the district court erred at sentencing such that would require reversal of the sentence and remand for re-sentencing by a different judge. District courts have wide discretion in sentencing decisions, although we will reverse a sentence that "is supported *solely* by impalpable and highly suspect evidence." *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996); *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We conclude the district court did not err in the present case.

Paugh first asserts the district court impermissibly treated her no contest plea as an admission of factual guilt, but this argument is belied both by the record and by the law, which allows a court to treat a defendant who pleads guilty as if the defendant were actually guilty. *See State v. Gomes*, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996). The court's statement that the no contest plea was "the end of the issue [of Paugh's guilt or innocence]" was, therefore, neither incorrect nor impermissible.

Nor did the district court violate *Brake v. State*, 113 Nev. 579, 939 P.2d 1029 (1997), by noting Paugh appeared to minimize her responsibility. *Brake* prevents a district court from condemning a defendant's lack of remorse where the defendant maintains his or her innocence and expressing remorse would be incriminating. 113 Nev. at 585, 939 P.2d at 1033. *Brake* is distinguishable where, as here, the defendant pleads no contest and professes remorse. *See McConnell v. State*, 120 Nev. 1043, 1059-60, 102 P.3d 606, 618 (2004). Nor does the record suggest the judge improperly closed his mind to the evidence, *see*

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*...continued*
*See* NRS 178.598 (requiring this court to disregard errors that do not affect the appellant's substantial rights).

*Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998), as the judge initially stated "I'm not in a position to [judge] because I haven't heard anything yet," both parties presented arguments at sentencing, and the record supports that Paugh did, at times, downplay the effect of her actions.

Furthermore, the district court did not err under *Stockmeier* by overruling Paugh's objection to the "non-accidental head injury" language in the pre-sentencing investigation report. In sentencing a defendant, a district court may not rely on "impalpable or highly suspect evidence," *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976), nor allow a pre-sentencing investigation report to include information that is based on such evidence. *Stockmeier v. State, Bd. of Parole Com'rs*, 127 Nev. ___, ___, 255 P.3d 209, 213 (2011). Here, however, the State offered expert testimony explaining the victim suffered a non-accidental head injury that resulted when Paugh pushed the victim into a door. Thus, *Stockmeier* does not bar this language.

Paugh's claim that the district court improperly considered Paugh's pregnancy as an aggravating factor is also belied by the record, as the judge clearly stated he gave no weight at all to the pregnancy. We need not consider Paugh's remaining arguments, as Paugh failed to adequately brief them.[5] *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (this court need not consider arguments that are not

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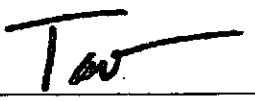
[5]We note Paugh argues the district court erred by admitting and considering the presentence investigation report, but presents no argument or analysis on this issue, instead referring this court to the record for those arguments and authorities. Incorporating arguments by reference to briefs or legal memoranda submitted to the district court is expressly prohibited by NRAP 28(e)(2).

adequately briefed or cogently argued). And, as Paugh failed to show error, the doctrine of cumulative error does not apply. *See, e.g., Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (setting forth the cumulative error doctrine). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. James E. Wilson, District Judge
Martin H. Wiener
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk