IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ETHAN CARL MURER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81016-COA

FILED
JAN 25 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ethan Carl Murer appeals from a judgment of conviction, pursuant to a guilty plea, of lewdness with a child under the age of 16 Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

In February of 2020, Murer pleaded guilty to lewdness with a child under the age of 16 (NRS 201.230).[1] Prior to sentencing, the district court received four victim impact letters. All four letters were drafted by persons who qualify as victims under NRS 176.015(5).[2] One of the letters was provided to the Division of Parole and Probation (Division), and it was included in the presentence investigation report (PSI). The State sent the other three letters directly to the district court and Murer's attorney.

At the sentencing hearing, Murer objected to the district court's consideration of the three letters that were sent directly to the court, arguing

[1]We do not recount the facts except as necessary to our disposition.

[2]NRS 176.015(5)(d) defines a "[v]ictim" as "(1) [a] person, including a governmental entity, against whom a crime has been committed; (2) [a] person who has been injured or killed as a direct result of the commission of a crime; and (3) [a] relative of a person described in subparagraph (1) or (2)." Under NRS 176.015(5)(b), a "[r]elative" includes "[a] spouse, parent, grandparent or stepparent," "[a] natural born child, stepchild or adopted child," and siblings. Here, the letters were drafted by the victim, her mother, her stepmother, and her father.

that pursuant to NRS 176.015(3) the statements must be made in person. The district court overruled the objection, noting that it "can consider any evidence that's not highly suspect" during sentencing. Moreover, the district court observed that it was also considering letters that were submitted directly to the court in support of Murer. The district court sentenced Murer to a term of incarceration of 48 to 120 months with 297 days' credit for time served. This appeal followed.

On appeal, Murer argues that the district court abused its discretion when it considered the three victim impact letters that the State submitted directly to the court prior to sentencing. Specifically, Murer avers that pursuant to *Buschauer v. State*, 106 Nev. 890, 804 P.2d 1046 (1990), victim impact statements must either be (1) made orally at the sentencing hearing or (2) submitted in writing and subsequently attached to the PSI.[3] We disagree and therefore affirm.

A district court's sentencing decision is reviewed for an abuse of discretion. *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Thus, this court "will refrain from interfering with sentences imposed in 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.'" *Pitmon v. State*, 131 Nev. 123, 126, 352 P.3d 655, 657 (Ct. App. 2015) (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)).

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[3]We note that Murer specifically relies on *Buschauer* and does not address the other means by which a district court can receive information from victims for sentencing purposes pursuant to NRS 176.015(3)(a) , (stating victims may appear personally, by counsel, or by personal representative) which was adopted after *Buschauer*, and is broader than the holding of the case.

Under NRS 176.015(3), "the court shall afford the victim an opportunity to: (a) [a]ppear personally, by counsel or by personal representative; and (b) [r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." Generally, victim impact statutes are "designed to grant victims expanded rights, rather than to limit the rights of victims." *Randell*, 109 Nev. at 7, 846 P.2d at 280. Although NRS 176.015(3) "grants certain victims of crime the right to express their views before sentencing," it does not restrict the district court's discretion to consider other information and reliable and relevant evidence. *Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995); *see also* NRS 176.015(6) (providing that "[t]his section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing").

Notably, Murer does not appear to be challenging the content of the victim impact statements themselves. Instead, he challenges the method of the State's submission of the letters to the district court, arguing that direct transmission contravenes *Buschauer*. Murer relies specifically on the following language:

> [W]e note that an impact statement may be introduced at sentencing in two ways. First, where a victim cannot or does not wish to appear in court, the statement may be placed in written form in the presentence report pursuant to NRS 176.145. Second, the victim may give an oral statement at the sentencing hearing pursuant to NRS 176.015(3).

Buschauer, 106 Nev. at 893, 804 P.2d at 1048. Thus, Murer's contention is that a sentencing court abuses its discretion if it *receives* victim impact statements in any way other than the two methods articulated in *Buschauer*.

We conclude that *Buschauer* is not so limiting. In that case, the supreme court was addressing a situation in which the victim testified at

the sentencing hearing and the content of the testimony was at issue. The court did not need to rule on the method of transmission of letters since no letters were transmitted. Therefore, the court was merely commenting on what the statute on PSI's said and it was not determining the limits of how letters may be presented to the district court. Moreover, we note that the Legislature has amended NRS 176.015 several times since *Buschauer* was decided, adding new provisions that the parties in *Buschauer* never raised and the supreme court's decision never addressed.

Furthermore it is well-established in Nevada that a district court may consider victim impact information *See* NRS 176.015(3); *Wood*, 111 Nev. at 430, 892 P.2d at 946 (concluding that NRS 176.015 "does not limit in any manner a sentencing court's existing discretion to receive other admissible evidence"); *see also* Nev. Const. art. 1, § 8A (Marsy's Law). Here, the letters at issue were drafted by the victim, her stepmother, and her father, making them unquestionably proper victim impact information, as each letter was written by a person who is recognized as a victim pursuant to NRS 176.015(5).

Though Murer suggests that the victims' letters may have contained improper content, he did not include them as part of the record on appeal and, thus, failed to meet his burden as the appellant. *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Because Murer failed to produce the allegedly questionable letters, we defer to the district court's review of these letters and presume that the information contained therein was proper and supports the district court's sentencing decision. *See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (holding that "the missing portions of the record are presumed to support the district court's decision,

notwithstanding an appellant's bare allegations to the contrary"), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992).

Moreover, although these statements were not included in the PSI, they were provided to the district court in advance of the sentencing hearing, and defense counsel also received copies of the letters prior to sentencing. Further, these were not the only letters directly received by the court for consideration. Indeed, letters in support of Murer were also sent directly to, and considered by, the district court. Because the purpose of NRS 176.015 is to grant victims expanded rights and give them a voice during sentencing, *see, e.g.*, *Wood*, 111 Nev. at 430, 892 P.2d at 946, we conclude that precluding the use of victim statements sent directly to the court would undermine the statute's purpose.

Finally, the record indicates that the district court applied the correct legal standard. At the sentencing hearing the district court paraphrased *Silks*, noting that it "can consider any evidence that's not highly suspect" during sentencing. Thus, based on the record provided, we conclude that the district court constrained itself to considering only relevant and reliable evidence and therefore did not abuse its discretion.[4]

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[4]Assuming *arguendo* that the district court abused its discretion in considering the victim impact letters, Murer cannot establish prejudice. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Because Murer failed to provide this court with the subject letters, nothing in the record reveals, or even suggests, that the district court relied on impalpable or highly suspect evidence in rendering its sentence. Further, the fact that Murer's sentence exceeds the Division's sentencing recommendation is inconsequential. *See Renard v. State*, 94 Nev. 368, 370, 580 P.2d 470, 471 (1978) (explaining that courts may exceed such recommendations). The district court imposed a sentence that was within the sentencing guidelines, and therefore, it did not abuse its discretion.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Mary Kay Holthus, District Judge
Nevada Defense Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk