

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON LEE GALLAGHER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 84603-COA

FILED

MAY 08 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

*AMENDED ORDER VACATING JUDGMENT AND REMANDING<sup>1</sup>*

Brandon Lee Gallagher appeals from a judgment of conviction, entered pursuant to a guilty plea, of felony reckless driving and performance of an act in reckless disregard of persons or property resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Gallagher argues the district court abused its discretion and violated his due process rights by failing to suspend his sentencing hearing and order a competency evaluation. Gallagher contends that he had a psychotic episode during the hearing, that the evidence demonstrates he did not understand the nature of the charges he pleaded guilty to or the nature and purpose of the proceedings, and that he was unable to assist counsel in his defense.

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<sup>1</sup>Having considered Gallagher's petition for rehearing, we agree with Gallagher that this court erred by reviewing for plain error his claim that the district court abused its discretion by failing to allow the victim to speak at the sentencing hearing. Accordingly, we grant Gallagher's petition for rehearing, vacate our November 29, 2022, order of affirmance, and issue this amended order in its place.

A criminal defendant cannot be tried or sentenced while incompetent. *United States v. Dreyer*, 705 F.3d 951, 961 (9th Cir. 2013); *Goad v. State*, 137 Nev. 167, 173, 488 P.3d 646, 654 (Ct. App. 2021); *see also* NRS 178.400(1). “A defendant is competent if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and [if] he has a rational as well as factual understanding of the proceedings against him.” *Goad*, 137 Nev. at 173, 488 P.3d at 654 (internal quotation marks omitted); *see also* NRS 178.400(2). A defendant’s “ability to participate or assist his counsel must be evaluated in light of the type of participation required.” *Dreyer*, 705 F.3d at 961. “At sentencing, the test [of competency] is whether the defendant is able to understand the nature of the proceedings and participate intelligently to the extent participation is called for.” *Id.* (alteration in original) (internal quotation marks omitted).

During his arraignment, the district court asked Gallagher if anyone had ever suggested that he be treated for “mental health or emotional conditions,” to which Gallagher responded in the affirmative. Gallagher then stated this did not affect his ability to understand the proceedings. At the sentencing hearing, Gallagher made a statement to the court in which he acknowledged that he was under the influence of methamphetamine at the time of the accident, that his fiancée was injured in the accident, and that he was the only one taking care of his fiancée as she recovered from her injuries. Gallagher also asked if his fiancée could speak on his behalf.

Defense counsel requested that Gallagher be sentenced to probation. At the end of the hearing, after the district court had imposed prison terms on each count and while the district court was stating

Gallagher's aggregate term of imprisonment, Gallagher became disruptive, expressed dissatisfaction with his sentence, and began making seemingly conspiratorial statements. In particular, Gallagher stated the Mexican Mafia had a "hit out on [him]," that someone had put a "tracking device in [his] nose," and that someone had put "contacts on [his] face." Gallagher also repeatedly stated that he was going to be killed. The district court imposed various fees and granted credit for time served during this disruption.

Gallagher's disruptive behavior did not indicate that Gallagher did not understand the nature of the charges to which he had pleaded guilty or the nature and purpose of the proceedings. Indeed, the fact that Gallagher only became disruptive after the district court began pronouncing its sentence indicates Gallagher understood, and was reacting to, his sentence. Moreover, during the sentencing hearing, Gallagher had participated in his right of allocution and corrected both the court and his counsel regarding certain details of the case. Gallagher fails to demonstrate that his participation was called for at the hearing once the district court announced its sentencing decision.

To the extent Gallagher replies that he needed to be able to assist his counsel with his direct appeal, neither the Nevada Supreme Court nor the United States Supreme Court has held that a criminal defendant must be competent to proceed with a direct appeal. *See People v. Kelly*, 822 P.2d 385, 413 (Cal. 1992) (holding that an "appeal can proceed even if [a] defendant has become incompetent"). Moreover, Gallagher does not allege that he was unable to assist his counsel in preparing his appeal. Therefore, we do not consider this claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that appellate courts will not consider claims

unsupported by cogent argument and relevant authority); *see also Indiana v. Edwards*, 554 U.S. 164, 175 (2008) (“Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.”).

Given this record, Gallagher fails to demonstrate that, at a time when his participation was called for, the district court had been presented with substantial evidence that raised a reasonable doubt as to his competency. We therefore conclude the district court did not abuse its discretion by failing to suspend the sentencing to conduct a competency hearing.

Next, Gallagher argues the district court abused its discretion by failing to allow the victim, his fiancée, to speak at the sentencing hearing. Generally, the district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). However, the district court must afford a victim an opportunity to “[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution” before imposing its sentence. NRS 176.015(3)(b). Gallagher requested that his fiancée speak at the sentencing hearing. Although the district court ultimately recognized Gallagher’s fiancée was the victim, it did not afford her the opportunity to express her views for reasons that are unclear from the record. We thus conclude that the district court abused its discretion.

However, “[t]his court will not vacate a judgment of conviction or sentencing decision unless the error affected the defendant’s substantial rights.” *Aparicio v. State*, 137 Nev. 616, 620, 496 P.3d 592, 596 (2021). “When determining whether a sentencing error is harmless, reviewing courts look to the record . . . to determine whether the district court would

have imposed the same sentence absent the erroneous factor.” *Id.* (internal quotation marks omitted).

Under the unique circumstances of this case, we cannot conclude the district court’s error was harmless. The record indicates the victim was present at the sentencing hearing and that the district court was informed as to the victim’s presence and her desire to speak on Gallagher’s behalf. However, the Division of Parole and Probation was unable to contact the victim prior to the sentencing hearing, and the victim did not otherwise reveal the nature of her potential testimony. Because the record does not reveal what the victim would have stated at the sentencing hearing, it is impracticable for this court to know, with any degree of certitude, whether the district court’s sentencing decision would have been influenced by the victim’s testimony.

Therefore, we vacate Gallagher’s sentence and remand this matter for a new sentencing hearing wherein, in accord with NRS 176.015(3)(b), the victim shall be afforded an opportunity to express her views.<sup>2</sup> If the victim chooses to participate, the district court shall proceed with sentencing, consider the victim’s testimony and any accompanying argument by counsel, and file an amended judgment of conviction. If the victim does not participate, the district court shall file an order reinstating its original judgment of conviction. Accordingly, we

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<sup>2</sup>Gallagher requests a new sentencing hearing before a different judge. In light of the nature of the district court’s error, we conclude that reassignment to a different judge is not necessary. *See, e.g., Martinez v. State*, 114 Nev. 735, 738, 961 P.2d 143, 146 (1998) (stating reassignment is necessary when the sentencing judge relies upon prejudicial matters); *see also Echeverria v. State*, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003) (stating reassignment is necessary when the State breaches a plea agreement).

ORDER the judgment of conviction VACATED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>3</sup>

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Ronald J. Israel, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>3</sup>The Honorable Deborah L. Westbrook did not participate in the decision in this matter.