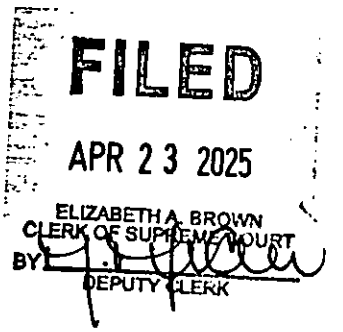
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES ALAN EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88410-COA



ORDER OF AFFIRMANCE

Charles Alan Evans appeals from a judgment of conviction, entered pursuant to a no contest plea, of driving under the influence with two prior convictions within the last seven years. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Evans argues the State breached the plea agreement by arguing for a sentence that exceeded one to six years in prison. Evans did not object when the State argued for a sentence that exceeded one to six years in prison and thus we review this claim for plain error. *Sullivan v. State*, 115 Nev. 383, 387 n.3, 990 P.2d 1258, 1260 n.3 (1999). To demonstrate plain error, an appellant must show that: "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49. "When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea

bargain." *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 487 (2005) (internal quotation marks omitted).

Evans pleaded no contest; he was granted probation and sent to a diversion program. Shortly after entering the program, Evans committed violations of the conditions of his program and absconded. The plea agreement provided that if "I am not accepted for treatment or do not successfully complete the treatment or do not comply with the conditions ordered by the court I will be punished by 1 to 6 years in prison and a fine of not less than $2000 or more than $5000." Evans argues this clause required the State to ask for a sentence of one to six years in prison and the State breached the plea agreement by asking for a sentence of 28 to 72 months in prison.

Evans does not demonstrate error plain from the record affecting his substantial rights. The only promise made by the State in the plea agreement was that it would not oppose a diversion program. Evans argues that the State drafted the plea agreement and that the terms should be construed against the State. The State argues it did not draft the plea agreement, and Evans concedes it is not clear who drafted the plea agreement. Because it is not clear who drafted the plea agreement, we decline to construe any ambiguity in the terms of the plea agreement against the State. *See Aldape v. State*, 139 Nev., Adv. Op. 42, 535 P.3d 1184, 1188 (2023) (stating that contract principles apply to plea agreements and ambiguities are construed against the drafter). Therefore, we conclude Evans fails to demonstrate the State breached the plea agreement and he is not entitled to relief on this claim.

Evans also argues the district court erred at sentencing because it relied on a presentence investigation report (PSI) that was more than five

years old. Evans argues the PSI should have been updated and should have contained information that he had not committed any new crimes while he absconded, he quit drinking, and he had medical issues. Evans did not object to the use of the PSI at sentencing nor did he request an updated PSI. Thus, we review for plain error.

> NRS 176.135(3)(b) states:
>
> > [I]f a defendant is convicted of a felony other than a sexual offense, the presentence investigation and report must be made before the imposition of sentence or the granting of probation unless . . . [s]uch an investigation and report on the defendant has been made by the Division within the 5 years immediately preceding the date *initially* set for sentencing on the most recent offense.

(Emphasis added.) The PSI was prepared within five years of the date initially set for sentencing. Thus, a new PSI was not required, and Evans fails to demonstrate error plain from the record.[1] Further, Evans fails to demonstrate his substantial rights were violated. Evans was given an opportunity to present the sentencing court with the evidence he contends

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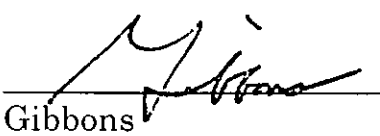
[1]Evans cites to an unpublished supreme court case, *Collier v. State*, No. 68326, 2016 WL 796992 (Nev. Feb. 26, 2016) (Order Affirming and Remanding), where the Nevada Supreme Court remanded for a new PSI. However, that case is distinguishable. Quoting NRS 176.135(3), the supreme court concluded that the PSI did not need to be updated for sentencing purposes and did not remand for resentencing. Instead, the supreme court concluded it was necessary to update the PSI because it was going to be forwarded to the prison, where it would be used for prison or parole purposes, and because both parties requested the updated PSI. As noted above, Evans did not request an updated PSI in the district court, and Evans limits his argument regarding the PSI on appeal to sentencing error and does not argue the PSI needs to be updated for prison or parole purposes.

should have been added to the PSI. To the extent Evans argues the district court cut off his argument regarding his medical issues, this occurred after the district court announced its sentence and after the district court had given Evans an opportunity to present that information. Therefore, we conclude Evans fails to demonstrate the district court plainly erred by relying on the PSI.

Finally, Evans argues he is entitled to relief based on cumulative error. Evans has not demonstrated any errors to cumulate. Therefore, he is not entitled to relief on this claim. *See Chaparro v. State*, 137 Nev. 665, 673-74, 497 P.3d 1187, 1195 (2021) (holding a claim of cumulative error lacked merit where there were no errors to cumulate); *see also United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Michael Montero, District Judge
Nevada State Public Defender's Office
Matt Stermitz Law, LLC
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk