IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EMILIO LIONEL MENDOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 90056-COA

FILED

SEP 16 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Emilio Lionel Mendoza appeals from a judgment of conviction, entered pursuant to a guilty plea, of driving under the influence of alcohol, resulting in death. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

First, Mendoza argues the district court plainly erred in its sentencing decision by considering letters from both victims and non-victims that contained prejudicial and suspect evidence. The State attached to its sentencing memorandum letters from the victim's mother, brother, and sister; a man who described himself as a father to the victim; and three of the victim's friends. Mendoza contends the letters from those other than the victim's mother, brother, and sister were improper because they were not written by individuals who qualified as victims under NRS 176.015(5)(d). Mendoza likewise contends the letters were intended to inflame the passions of the court and contained suspect evidence by: (1) describing social media videos that depicted Mendoza and his friends as gang members with open alcohol bottles in their vehicles; (2) criticizing

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Mendoza's release on bail; (3) inaccurately stating he was driving over 100 mph at the time of the collision; (4) describing him as a coward, a poor excuse for a human being, and a heinous human; (5) describing his past criminal history and alleging he had criminal tendencies; (6) describing his failure to express remorse; and (7) describing the grief the author of the letter felt.

During sentencing, Mendoza challenged some of the factual assertions in the letters, arguing he was not affiliated with a gang, the data retrieved from his vehicle showed he was traveling 88 mph at the time of impact, he had no significant criminal history, and he was remorseful. However, Mendoza neither objected to the status of the letters' authors nor the content of any of the letters. Instead, during sentencing, counsel for Mendoza stated: "Similarly, there's some of the letters that were articulated by the state so that the record is clear, they're not properly defined under the Victim Impact Statements statute and but [sic] we would waive that as well."

In light of Mendoza's seemingly intentional decision not to challenge the district court's consideration of the letters, we decline to review this issue on appeal. *See Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 50 (2018) (declining to "correct[ ] the error under these circumstances" because appellant's decision not to object appeared intentional and because doing so "would encourage defendants who are aware their rights are being violated to do nothing to prevent it, knowing that they can obtain a new trial as a matter of law in the event they are convicted"); *see also Turner v. State*, 136 Nev. 545, 550-51, 473 P.3d 438, 445 (2020) (discussing the

doctrines of invited error, waiver, and forfeiture and warning against correcting errors on appeal for the reasons discussed in *Jeremias*); *LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014) (providing that a party "will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit" (quotation marks omitted)).

Second, Mendoza argues the district court plainly erred by considering victim impact testimony from the victim's mother and brother because the State failed to provide notice of their testimony containing prior bads acts and because they were not sworn in prior to giving their testimony. As Mendoza concedes, the content of the letters and the testimony was largely the same, with the victim's mother and brother appearing to simply read their previously submitted letters aloud in court. Mendoza appeared to make an intentional decision not to oppose their testimony by choosing not to object to both the letters and the testimony. Indeed, Mendoza stated during sentencing, "And while there was no proper notice of the Zoom testimony [of the victim's mother and brother], we have no objection to that your honor."

Even reviewing this claim for plain error, *see Jeremias*, 134 Nev. at 50, 412 P.3d at 48-49, we conclude Mendoza is not entitled to relief. To demonstrate plain error, an appellant must show there was an error, the error was plain or clear under current law from a casual inspection of the record, and the error affected appellant's substantial rights. *Id.* at 50, 412 P.3d at 48. NRS 176.015(3)(b) allows a victim to present, at sentencing, a statement that "[r]easonably express[es] any views concerning the crime,

the person responsible, the impact of the crime on the victim and the need for restitution." "Since an assessment of character usually turns in part on prior acts, this language permits some reasonable discussion of prior acts by the defendant." *Buschauer v. State*, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990). "Where a victim impact statement refers only to 'the facts of the crime, the impact on the victim, and the need for restitution,' a victim testifying as a witness must be sworn in, 'but . . . cross-examination and prior notice of the contents of the impact statement normally are not required.'" *Cassinelli v. State*, 131 Nev. 606, 620, 357 P.3d 349, 359 (Ct. App. 2015) (quoting *Buschauer*, 106 Nev. at 893-94, 804 P.2d at 1048). "However, when an impact statement includes references to specific prior acts of the defendant that fall outside the scope of NRS 176.015(3), 'due process requires that the accuser be under oath, [and have] an opportunity for cross-examination and . . . reasonable notice of the prior acts which the impact statement will contain' must be provided." *Id.* (quoting *Buschauer*, 106 Nev. at 894, 804 P.2d at 1048). "Generally, a defendant will already be aware of the information in the statement and will be able to rebut that information." *Id.*

With regard to notice and the content of the testimony, the victim's mother and brother appeared to simply read their previously submitted letters aloud in court. Thus, we conclude Mendoza had notice of the content of their testimony and, for the reasons discussed above, we decline to consider whether the testimony was improper.

Although the failure to swear in the victim's mother and brother prior to their victim impact testimony constitutes error, Mendoza

fails to demonstrate the error affected his substantial rights. There is no indication in the record that the district court's sentencing decision was meaningfully impacted by the unsworn victim impact statements. While the district court recognized the grief and loss suffered by the victim's family, in sentencing Mendoza, the district court explained that the facts of the offense, including Mendoza's "deliberate and voluntar[y]" decision to consume alcohol before driving a car "in a very reckless manner," was the primary reason for the sentencing decision. Moreover, "[t]he district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision." *Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) ("[J]udges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence." (quotation marks omitted)). For these reasons, we conclude Mendoza is not entitled to relief based on this claim.

Third, Mendoza argues the district court abused its discretion in imposing his sentence because it considered impalpable or highly suspect evidence in the form of the above-discussed letters and testimony and failed to take into consideration his mitigating evidence. Mendoza also argues his sentence constitutes cruel and unusual punishment. The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Generally, this court will not interfere with a sentence imposed by the district court that falls within the parameters of relevant sentencing statutes "[s]o long as the record does not

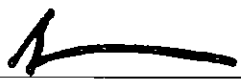
demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); *see Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). Regardless of its severity, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

The 8-to-20-year prison sentence imposed by the district court is within the parameters provided by the relevant statute, *see* NRS 484C.430(1), and Mendoza does not allege the statute is unconstitutional. Further, for the reasons discussed above, Mendoza fails to demonstrate the district court improperly considered the impact letters and testimony. We have considered the sentence and the crime, and we conclude the sentence imposed is not grossly disproportionate to the crime, it does not constitute cruel and unusual punishment, and the district court did not abuse its discretion when imposing sentence.

Finally, in his reply brief, Mendoza urges this court to overrule *State v. Second Jud. Dist. Ct. (Jackson)*, 121 Nev. 413, 414, 116 P.3d 834, 835 (2005), and hold that a defendant is entitled to credit for time served

for time spent on presentence house arrest subject to electronic monitoring. We decline to consider this issue because it was raised for the first time in a reply brief. *See LaChance*, 130 Nev. at 277 n.7, 321 P.3d at 929 n.7; *see also* NRAP 28(c) (stating a reply brief is "limited to answering any new matter set forth in the opposing brief"). Further, "this court cannot overrule Nevada Supreme Court precedent." *Eivazi v. Eivazi*, 139 Nev. 408, 418 n.7, 537 P.3d 476, 487 n.7 (Ct. App. 2023). Accordingly, we

ORDER the judgment of conviction AFFIRMED.



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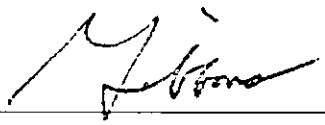

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk