



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROIDAN DURRUTHY MENDOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 91630-COA

*ORDER AFFIRMING IN PART, VACATING IN PART, AND
REMANDING*

Roidan Durruthy Mendoza appeals from a judgment of conviction, entered pursuant to a guilty plea, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

First, Mendoza claims the district court failed to articulate specific findings in support of the deadly weapon enhancement as required by NRS 193.165(1) and *Mendoza-Lobos v. State*, 125 Nev. 634, 218 P.3d 501 (2009). Mendoza asserts he was prejudiced by the district court's failure to make specific findings because the lack of findings resulted in a mechanical application of the sentencing enhancement without proper consideration of factors that could have rendered a different result. Neither Mendoza nor the State objected to the sufficiency of the district court's findings during sentencing. We therefore review this claim for plain error. *See Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 507. "Under plain-error analysis, an error that is plain from the record requires reversal if a defendant demonstrates that the error affected his or her substantial rights, by causing actual

prejudice or a miscarriage of justice.” *Id.* (internal quotation marks omitted).

NRS 193.165(1) provides that a person using a deadly weapon in the commission of a crime shall, in addition to the punishment for that crime, be sentenced to a term in prison between 1 and 20 years. In determining the length of the deadly weapon enhancement, a district court must consider: “(a) [t]he facts and circumstances of the crime; (b) [t]he criminal history of the person; (c) [t]he impact of the crime on any victim; (d) [a]ny mitigating factors presented by the person; and (e) [a]ny other relevant information.” NRS 193.165(1). The district court must also state on the record that it has considered these factors in making its determination. *Id.*; *see also Mendoza-Lobos*, 125 Nev. at 643, 218 P.3d at 507 (concluding the language and legislative history of NRS 193.165(1) require district courts to “articulate factual findings, on the record, regarding each of the factors enumerated therein”).

Although the record shows the district court heard arguments and evidence relevant to the factors set forth in NRS 193.165(1)(a)-(e), the district court did not make any findings on the enumerated factors, nor did it provide any indication that it had considered the factors. The district court instead imposed a deadly weapon sentencing enhancement of 8 to 20 years’ imprisonment. On this record, we conclude the district court’s failure to make the NRS 193.165(1) findings necessary to support imposing the deadly weapon enhancement constitutes plain error. In addition to violating the supreme court’s mandate that district courts must “articulate findings on the record, for each enumerated factor” of NRS 193.165(1), *Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 508, the district court’s failure to

articulate findings regarding the sentencing factors affected Mendoza's substantial rights because the district court imposed the maximum sentence for the deadly weapon enhancement without showing it considered the factors. We therefore vacate the deadly weapon enhancement and remand for findings with respect to the enhancement, and for resentencing in accordance with those findings.

Second, Mendoza claims the State committed prosecutorial misconduct by making inflammatory and factually unsupported arguments at sentencing. Specifically, Mendoza asserts the State improperly argued that: (1) the crime was an "execution" and Mendoza had "executed" the victim; (2) the victim obtained a temporary protection order against Mendoza prior to being shot and killed by Mendoza; (3) Mendoza had cut the gas line to the kitchen stove in the home he shared with the victim with the intent to cause an explosion; and (4) the victim would never be able "to stand by the wedding aisle and see her daughter get married." Mendoza further alleges the State committed prosecutorial misconduct by allowing the victim's daughter M.M. to testify during her victim impact statement that Mendoza was a "monster" who had sexually assaulted the victim and threatened to kill the victim and her family.

This court reviews prosecutorial misconduct claims by engaging in a "two-step analysis." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we "determine whether the prosecutor's conduct was improper." *Id.* Second, we "determine whether the improper conduct warrants reversal." *Id.* Here, the district court overruled Mendoza's objections to the State's use of the terms, "execution" and "executed." Although Mendoza preserved these claims

of prosecutorial misconduct, *see id.*, the record reflects that Mendoza shot the victim in the forehead at close range. Given this, we conclude the State's use of the terminology was a reasonable interpretation of the facts of the incident such that the prosecutor's statements were not improper and no relief is warranted.

Mendoza did not object to the remaining instances of alleged prosecutorial misconduct, and we therefore review those claims for plain error. *Id.* at 1190, 196 P.3d at 477. With respect to the temporary protection order, Mendoza asserts the State's comment that the victim had obtained a temporary protection order against him was improper because the victim sought dissolution of the order prior to her death. The thrust of Mendoza's argument is that the State indicated the temporary protection order was still in effect at the time Mendoza shot the victim. The transcript of the sentencing hearing, however, reflects the State referenced the fact that the victim had obtained a temporary protection order to support its general argument that Mendoza had engaged in a pattern of "abuse, coercion, and violence" prior to the shooting. We therefore conclude Mendoza fails to demonstrate this facet of the State's arguments at the sentencing hearing amounted to error plain from the record affecting his substantial rights.

As to the State's arguments regarding the cut gas line at the family residence, Mendoza acknowledged that he cut the gas line on the day of the incident but asserted he did so while repairing faulty burners on the kitchen stove. Although the record on appeal does not resolve the parties' dispute regarding Mendoza's reason for cutting the gas line, the State was free to comment on the evidence regarding Mendoza's act of cutting the gas line and invite the district court to draw reasonable

inferences from the evidence. *Cf. State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) (“The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.”). We therefore conclude Mendoza fails to demonstrate the State’s characterization of Mendoza’s alleged motive for cutting the gas line at his home amounted to error plain from the record affecting his substantial rights.

Turning next to the State’s argument that the victim would never see her daughter get married, the supreme court has “repeatedly held that so-called ‘holiday’ arguments are inappropriate” but “rarely warrant reversal by themselves.” *Quillen v. State*, 112 Nev. 1369, 1382, 929 P.2d 893, 901 (1996) (explaining that “holiday” arguments “are generally made to arouse jurors’ passions by referring to the victim and a holiday—such as the victim will never celebrate Christmas again with his children”); *see also id.* at 1382 n.10, 929 P.2d at 901 n.10 (compiling cases where “holiday” arguments were held not to be prejudicial). While improper, the State’s “wedding aisle” statement was isolated.¹ Moreover, the record does not indicate the district court’s sentencing decision was affected by this facet of the State’s argument, and we “expect[] judges . . . to disregard improper, inadmissible, or impalpable evidence and base their findings and decisions on only admissible evidence.” *Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 109, 506 P.3d 334, 339 (2022); *see also Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278,

¹*See, e.g., Quillen*, 112 Nev. at 1381, 929 P.2d at 901 (noting that the State referred to Thanksgiving “no fewer than eight times” during closing arguments).

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 determining an appropriate sentence.” (quotation marks omitted)). We therefore conclude Mendoza fails to demonstrate the State’s “wedding aisle” argument amounted to error plain from the record affecting his substantial rights.

Turning finally to Mendoza’s claim that the State committed prosecutorial misconduct with respect to M.M.’s impact statement, Mendoza does not cite any authority standing for the proposition that a victim’s statements at sentencing can be attributed to the State for the purposes of establishing misconduct. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”). Further, nothing in the record indicates the State elicited the statements made by M.M. We therefore conclude Mendoza fails to demonstrate an error plain from the record affecting his substantial rights.²

²Mendoza also argues the district court “did not allow the defense counsel to cross-examine the witness after her false, prejudicial[,] and unsupported bad act allegations.” 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.” If an impact statement refers 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.” *Cassinelli v. State*, 131 Nev. 606, 620, 357 P.3d 349, 359 (Ct. App. 2015) (quoting *Buschauer v. State*, 106 Nev. 890, 894, 804 P.2d

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Third, Mendoza claims the district court abused its discretion by considering accusations founded on facts only supported by impalpable or highly suspect evidence. Specifically, Mendoza contends the district court considered M.M.'s description of him as a "monster" and the unsupported accusations included in her impact statement in sentencing him. 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). The record does not reflect that M.M.'s statement affected the district court's sentencing decision, and "[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*, 109 Nev. at 8, 846 P.2d at 280. We therefore conclude that Mendoza fails to

1046, 1048 (1990)). The case summary appended to Mendoza's notice of appeal indicates the State filed a notice of oral statements in advance of the sentencing hearing, but Mendoza did not include a copy of that notice in the record. Thus, to the extent Mendoza claims that M.M.'s impact statement exceeded the scope of NRS 176.015(3) or the State's notice, we are unable to assess such a claim. *See* NRAP 30(b)(3) (providing that an appellant's appendix must include "portions of the record necessary to determination of issues raised" on appeal). We further note that Mendoza did not seek leave to cross-examine M.M. during the sentencing hearing. Accordingly, we conclude no relief is warranted for this argument.

demonstrate prejudice resulting from the district court's reliance on impalpable or highly suspect evidence in sentencing him.

Fourth, Mendoza argues the sentence imposed by the district court constitutes cruel and unusual punishment. Because we are vacating the deadly weapon sentencing enhancement for the reasons discussed above, we review this claim only with respect to the sentence imposed for Mendoza's murder conviction. 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 sentence imposed of life imprisonment without the possibility of parole is within the parameters provided by the relevant statutes, see NRS 200.010; NRS 200.030(4)(b)(1), and Mendoza does not allege that those statutes are unconstitutional. We conclude the sentence imposed for Mendoza's murder conviction is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment.

Finally, Mendoza argues that the cumulative effect of the errors set forth above warrants relief. To the extent a claim regarding cumulative error at a sentencing hearing before a judge is viable, see *Barr v. State*, No 78295, 2020 WL 5634157, at *4 (Sept. 18, 2020) (Order

of Affirmance) (concluding errors occurring at sentencing could not have impacted the jury's verdict and citing law regarding the assessment of a cumulative error claim), Mendoza has not demonstrated relief is warranted based on the factors for a cumulative error claim, *see Valdez*, 124 Nev. at 1195, 196 P.3d at 481. Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for resentencing proceedings consistent with this order.



Bulla, C.J.



Gibbons, J.



Westbrook, J.

cc: Michelle Leavitt, District Judge
Clark County District Attorney
Special Public Defender
Attorney General/Carson City
Eighth District Court Clerk