

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR GOMEZ, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 76487-COA

FILED

MAY 15 2019

ELIZABETH A. BROWN  
CLERK OF THE COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Oscar Gomez, Jr., appeals from a judgment of conviction entered pursuant to a guilty plea of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

First, Gomez argues the district court erred by failing to state on the record that it had considered the factors required by NRS 193.165(1) before imposing the sentence for the deadly weapon enhancement. Because Gomez did not preserve this claim of error for appellate review, he would not be entitled to relief absent demonstration of plain error. *See Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009) (applying plain-error review to alleged sentencing errors). “An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights.” *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks, brackets, and citation omitted).

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Here, the record reveals the district court failed to state on the record that it considered the information described in NRS 193.165(1) paragraphs (a) to (e) in deciding the appropriate penalty for Gomez' use of a deadly weapon. However, the record also reveals the district court was aware of the facts and circumstances of Gomez' crime, his criminal history, his mitigation evidence, and the victim-impact evidence. See NRS 193.165(1). Therefore, Gomez has not shown the error was prejudicial, see *Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 508; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (“[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.”), and we conclude he is not entitled to relief.

Second, Gomez argues his sentence is cruel and unusual because it is unnecessarily long and removed the meaningful possibility of rehabilitation. Gomez also asserts the district court did not consider his background and the facts of the case when imposing sentence. 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).

Gomez' sentence of life with the possibility of parole in 10 years for the primary offense plus a consecutive term of 96 to 240 months for the deadly weapon enhancement is within the parameters provided by the

relevant statutes, *see* NRS 193.165(1); NRS 200.030(5)(a), and Gomez does not allege that those statutes are unconstitutional. We conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment.

Third, Gomez argues it was improper for the written plea agreement to contain a waiver of his appellate rights and that such a waiver goes against public policy. Gomez' claim lacks merit because the Nevada Supreme Court has stated that "[a] knowing and voluntary waiver of the right to appeal made pursuant to a plea bargain is valid and enforceable." *See Cruzado v. State*, 110 Nev. 745, 747, 879 P.2d 1195, 1195 (1994), *overruled on other grounds by Lee v. State*, 115 Nev. 207, 210, 985 P.2d 164, 166 (1999). Therefore, Gomez is not entitled to relief.


Fourth, Gomez argues his trial-level counsel was ineffective for failing to properly explain the consequences he faced by entering a guilty plea and for failing to ensure he understood the waiver of his rights. Claims of ineffective assistance of counsel "may not be raised on direct appeal, unless there has already been an evidentiary hearing." *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Because there has not been an evidentiary hearing concerning Gomez' ineffective-assistance-of-counsel claims, they are not appropriately raised on direct appeal and we decline to consider them.


Fifth, Gomez argues his guilty plea is invalid because he did not fully understand the consequences of his plea or the rights he waived when entering his plea. A criminal defendant may not challenge the validity of a guilty plea on direct appeal, unless the error clearly appears from the record or rests purely on legal grounds. *See O'Guinn v. State*, 118 Nev. 849, 851, 59 P.3d 488, 489 (2002). The issues involved with Gomez' challenges to the


validity of his plea do not clearly appear from the record and do not rest on purely legal grounds. We therefore decline to address Gomez' claims in the first instance on direct appeal. *See id.* at 851-52, 59 P.3d at 489-90.

Sixth, Gomez argues he is entitled to relief due to cumulative error. Gomez failed to demonstrate there were multiple errors which could have been cumulated, *see United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."). Therefore, Gomez is not entitled to relief. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. Valerie Adair, District Judge  
Terrence M. Jackson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk