

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS JOSEPH SILVA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 86383-COA  
**FILED**

JAN 19 2024

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

*ORDER OF AFFIRMANCE*

Nicholas Joseph Silva appeals from a judgment of conviction, entered pursuant to a jury verdict, of one count of second-degree murder with use of a deadly weapon and one count of robbery with use of a deadly weapon. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

In early 2021, Silva lived in a Reno townhouse with his mother and her boyfriend (the victim Charles Hooper), Silva's brother, and Silva's brother's girlfriend.<sup>1</sup> There was some tension in the house, and Silva, and Silva's brother and his girlfriend planned to move out in April.

One night Silva's mother and Hooper were in their bedroom playing music "as loud as it [could] go[.]" This upset Silva, who could not sleep and had to work in the morning. He complained about the music to his brother, who told Silva that he was "not in [the] right mind" and "need[ed] to calm down." Silva then drank alcohol and smoked marijuana before continuing to complain to his brother. The brother asked his mom and Hooper to turn down the music and then returned to his room.

Hooper, telling the mother that he would "take care of" the situation, put on a pair of shorts, went into the hallway, and began poking

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

Silva in the ribs and “squared up” with him. Hooper saw Silva concealing a gun and told Silva “[y]ou are going to pull a gun on me in my house, you better just shoot me now.” Hooper then told Silva “[t]his is over with. This is done with. It’s over with tomorrow.” Silva then shot Hooper between the eyes, killing him. Silva fled the scene and drove to a convenience store, where he robbed the store clerk at gun point. Silva fled with the cash and led law enforcement on a high-speed chase through Humboldt County. Law enforcement ultimately arrested Silva in the driveway of his grandmother’s house.

During a police interview, Silva explained the argument he had with Hooper, that things got out of hand, and that Silva had pulled a gun from his sweatshirt pocket and shot Hooper in the face. Silva stated that “it all happened very, very quickly,” and that he “didn’t want to do that to that man.” Silva told detectives he did not believe the shooting was justified, instead stating that “[i]t was an idiotic move.” He further told the detectives about the convenience store robbery.

The State filed a criminal information charging Silva with one count of open murder with use of a deadly weapon and one count of robbery with use of a deadly weapon. At trial, Silva did not dispute intentionally killing Hooper or robbing the clerk in the convenience store at gunpoint, but instead solely argued that he was guilty of voluntary manslaughter rather than murder because Hooper’s actions constituted adequate provocation under NRS 200.050(1).<sup>2</sup> Silva’s mother, brother, and brother’s girlfriend all

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<sup>2</sup>NRS 200.050(1) provides that if the jury finds there was a “serious and highly provoking injury inflicted upon the [defendant], sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the [defendant],” then

testified at trial, along with police detectives and the store clerk Silva robbed. The State also introduced recordings of Silva's confession to the detectives.

The jury found Silva guilty of second-degree murder with use of a deadly weapon and robbery with use of a deadly weapon. The district court sentenced Silva to life with the possibility of parole after ten years for second-degree murder and imposed a deadly weapon enhancement of eight to twenty years. For the robbery, the district court sentenced Silva to six to fifteen years and imposed a deadly weapon enhancement of six to fifteen years. All counts and enhancements were run consecutively, for an aggregate sentence of thirty years to life with the possibility of parole after thirty years. At the sentencing hearing, the district court explained its sentencing decision including its determination of the lengths of each of Silva's deadly weapon enhancements. First, as to the sentence enhancement related to the murder charge, the court explained that Silva committed a heinous crime and "[w]hatever caused [Silva] to lose [his] temper that night was inexcusable." The court also noted that Silva had no criminal history, but explained that gave it cause for concern because, with his first crime being a murder, Silva "started right out at the top." Additionally, the court explained that Silva's and Hooper's families were both "gravely impacted by" the murder. Finally, the court explained that it did not "find any mitigating circumstances in that [it couldn't] find any excuse for [Silva's] behavior."

As for the deadly weapon enhancement to Silva's robbery charge, the district court likewise explained that drawing a loaded gun with

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the defendant may be punished for voluntary manslaughter instead of murder.

a chambered bullet and robbing the store clerk by holding the gun to his face “inexcusable,” and that the circumstances of the crime gave it “grave concern for the entire community.” The court also noted the significant impact of the crime on the store clerk, who was so fearful he left his job after the incident and went into depression, was physically ill and “scarred for life.” Finally, the court again found no mitigating circumstances, given the serious nature of Silva’s actions. This appeal followed, with Silva raising two issues that we address in turn.

Silva first argues that insufficient evidence supports his second-degree murder conviction because Hooper’s actions constituted adequate provocation under NRS 200.050(1) and, therefore, he was only guilty of voluntary manslaughter.<sup>3</sup> The State responds that the record contains sufficient evidence showing that Silva killed Hooper with malice aforethought and that Hooper’s minimal provocation did not compel a reduction from murder to voluntary manslaughter.

We agree with the State that sufficient evidence in the record supports Silva’s second-degree murder conviction. When a defendant challenges the sufficiency of the evidence to support a conviction, this court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We “will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.” *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

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<sup>3</sup>Silva does not challenge the sufficiency of the evidence for his conviction for robbery with a deadly weapon.

To support a murder conviction, the State must prove beyond a reasonable doubt that the defendant unlawfully killed a human being “with malice aforethought, either express or implied.” NRS 200.010(1). “Express malice is that deliberate intention unlawfully to take away the life of a fellow creature,” NRS 200.020(1), and malice may be implied when a defendant “commit[s] an[ ] affirmative act that harm[s] [the victim],” *Desai v. State*, 133 Nev. 339, 347, 398 P.3d 889, 895 (2017) (alterations in original) (internal quotation marks omitted).

However, if the jury finds that there was a “serious and highly provoking injury inflicted upon the [defendant], sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the [defendant],” then it may reduce the defendant’s conviction from murder to voluntary manslaughter. NRS 200.050(1). While the provoking injury “need not be a direct physical assault on the accused, neither ‘slight provocation nor an assault of a trivial nature will reduce a homicide from murder to manslaughter.’” *Collins v. State*, 133 Nev. 717, 728, 405 P.3d 657, 667 (2017) (internal citation omitted) (quoting *State v. Fisko*, 58 Nev. 65, 75, 70 P.2d 1113, 1116 (1937), *overruled on other grounds by Fox v. State*, 73 Nev. 241, 247, 316 P.2d 924, 927 (1957)). For example, in *Fisko*, the Nevada Supreme Court affirmed a jury’s finding that a victim’s grabbing the defendant by the neck for a few seconds—which amounted to little more than a slight battery—did not provide provocation adequate to reduce the defendant’s conviction of murder to voluntary manslaughter. 58 Nev. at 75, 70 P.2d at 1116.

In this case, we conclude that sufficient evidence supports Silva’s conviction of second-degree murder. The State proved Silva killed Hooper with malice aforethought beyond a reasonable doubt by offering

testimony and statements from several witnesses—including Silva’s own confession—showing that Silva intentionally shot Hooper in the head. See NRS 200.020(1). Further, viewing the evidence in the light most favorable to the prosecution, a reasonable juror could have concluded that Hooper’s provocation was trivial, and thus did not warrant reducing the conviction for murder to voluntary manslaughter. See *Collins*, 133 Nev. at 728, 405 P.3d at 667. While Cooper’s physical poking and “squaring up” with Silva possibly *could* have supported a finding of adequate provocation to support a reduction to voluntary manslaughter, it did not constitute adequate provocation *requiring* the jury to reduce Silva’s conviction from murder to voluntary manslaughter. See *Fisko*, 58 Nev. at 75, 70 P.2d at 1116.

Silva next argues that the district court abused its discretion in determining the length of his deadly weapon enhancements because it found there were no mitigating circumstances despite his lack of criminal history and his submission of letters of support. The State responds that the district court did consider Silva’s lack of criminal history, and that Silva fails to show how the district court’s failure to make findings as to Silva’s letters of support affected his sentence and constituted plain error.

We again agree with the State and conclude that Silva has failed to demonstrate plain error at his sentencing phase. See *Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009) (providing that plain error review applies when a criminal defendant fails to object to a district court’s findings during their sentencing hearing). “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.* (quoting *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008)).


If a jury finds that a defendant committed a crime with the use of a deadly weapon, then the district court must, "in addition to the term of imprisonment prescribed by statute for the crime," impose "a minimum term of not less than 1 year and a maximum term of not more than 20 years." NRS 193.165(1). In determining the length of a deadly weapon enhancement, the district court shall 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." *Id.* The district court must "articulate factual findings, on the record, regarding each of the factors enumerated" in NRS 193.165(1), and "make separate findings for each deadly weapon enhancement." *Mendoza-Lobos*, 125 Nev. at 643, 218 P.3d at 507.


In this case, at Silva's sentencing hearing, he did not object to the district court's alleged inadequate findings. The record shows the court made findings when determining the length of his deadly weapon enhancements. The findings encompassed the circumstances of Silva's crimes; his lack of criminal history; the extreme impact of his crimes on the victims and their families; the lack of mitigating circumstances compared to the crimes; and other relevant information including that Silva led law enforcement on a high-speed chase after the robbery that exceeded 100 miles per hour thereby endangering officers and the public.


Additionally, while the district court did not make specific findings as to Silva's letters of support as mitigating factors, the record shows that the district court was provided with and considered Silva's

letters of support.<sup>4</sup> See *Martin v. State*, No. 80077, 2021 WL 5629843, at \*8 (Nev. Nov. 30, 2021) (Order of Affirmance) (affirming a defendant's sentence where the district court failed to make findings under the NRS 193.165(1) factors because the record showed that the "district court was provided [and properly considered] information concerning all of the factors enumerated in NRS 193.165(1)"). Silva does not otherwise explain how the district court's failure to make specific findings of the letters as mitigating factors "had any bearing on the district court's sentencing decision," especially considering that the record shows the court received and considered the letters. See *Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 508. As such, Silva fails to demonstrate plain error at sentencing. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge  
Washoe County Public Defender  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>4</sup>During sentencing, counsel for defense asked "[t]here were three letters that were written in mitigation. Did the court receive those?" To which the court replied, "[y]es. Thank you very much."