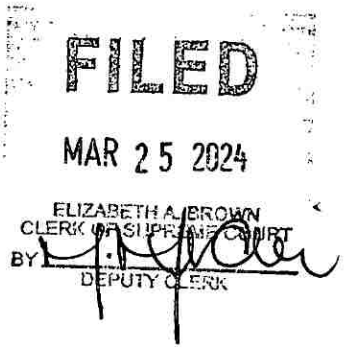
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARLOS PEREZ GUTIERREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86566-COA



ORDER OF AFFIRMANCE

Carlos Perez Gutierrez appeals from a judgment of conviction, entered pursuant to an *Alford*[1] plea, of first-degree murder. Second Judicial District Court, Washoe County; Tammy Riggs, Judge.

First, Gutierrez argues NRS 200.030(4) is unconstitutional. Gutierrez did not object to NRS 200.030(4)'s constitutionality below; therefore, we review this claim for plain error. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (stating "all unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension"). 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).

It is the final sentence of NRS 200.030(4)(b) with which Gutierrez takes issue. While NRS 200.030(4)(a) requires the finding and weighing of aggravating and mitigating circumstances before a sentencer

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

may impose death, the close of NRS 200.030(4)(b) states that a person convicted of first-degree murder may be punished by life in prison with or without the possibility of parole and that a sentencer need not determine aggravating circumstances exist before imposing such a sentence. Gutierrez argues that a sentence of life in prison without the possibility of parole is analogous to a sentence of death and because the United States Supreme Court has held that a sentencer must find and weigh aggravating and mitigating circumstances before imposing a death sentence, this should also be required before a court imposes a sentence of life in prison without the possibility of parole.

Gutierrez does not cite any authority that holds a sentencer is constitutionally required to find and weigh aggravating and mitigating circumstances before imposing a sentence of life in prison without the possibility of parole. And the United States Supreme Court has indicated that a sentencer need not find aggravating circumstances exist before imposing such a sentence.[2] *See Jones v. Mississippi*, 593 U.S. 98, 106 (2021) (recognizing that a sentencer is only constitutionally required to "follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence" against a juvenile homicide offender and that precedent "did not impose a formal factfinding requirement" (internal quotation marks omitted)); *see also Harmelin v. Michigan*, 501 U.S. 957, 961, 994-96 (1991) (stating a sentence of life in prison without the possibility of parole cannot be compared to a

[2]To the extent Gutierrez relies on Justice Sotomayor's statement respecting the denial of certiorari in *Campbell v. Ohio*, 583 U.S. 1204 (2018), nothing in that opinion indicates a sentencer is constitutionally required to find aggravating circumstances exist before imposing a sentence of life in prison without the possibility of parole.

death sentence and holding a *mandatory* sentence of life-without-parole for possessing more than 650 grams of cocaine did not violate the Eighth Amendment). Therefore, NRS 200.030(4)(b)'s purported unconstitutionality is not clear under current law from a casual inspection of the record.

Moreover, Gutierrez's policy arguments that a sentence of life in prison without the possibility of parole should be treated as analogous to a death sentence, and thus subject to the same sentencing jurisprudence, implicitly acknowledge that the statute's purported unconstitutionality is not clear under current law from a casual inspection of the record. Therefore, Guiterrez fails to demonstrate that NRS 200.030(4)(b) is plainly unconstitutional, and we conclude Guiterrez is not entitled to relief on this claim.

Second, Gutierrez identifies several instances that he claims demonstrate that the district court relied on impalpable or highly suspect evidence in determining his sentence. 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).

Gutierrez contends that the following statements by the district court constitute or were based upon impalpable or highly suspect evidence: (1) Gutierrez entered an *Alford* plea to first-degree murder under a theory

of premeditation and deliberation; (2) two witnesses told Gutierrez to take the victim to the hospital; (3) the victim's injuries were comparable to those suffered by prisoners of war; and (4) Gutierrez's lack of prior criminal history did not benefit him. Gutierrez did not object to these statements at the sentencing hearing below, and he does not argue on appeal that they constitute plain error. We thus conclude he has forfeited these claims, and we decline to review them on appeal. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48; *see also Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (stating it is the appellant's burden to demonstrate plain error).

Gutierrez also contends that the district court relied upon or found compelling certain other impalpable or highly suspect evidence that he challenged below. Specifically, Gutierrez contends that (1) the district court found prior testimony from a forensic pathologist (Dr. R. O'Halloran) compelling and this was erroneous because the evidence does not indicate that Gutierrez delivered "the fatal blow"; (2) the district court relied upon his codefendant's prior testimony that Gutierrez abused and killed the victim and this was erroneous because his codefendant was untruthful and unreliable; and (3) the district court found the victim's statement that "Daddy did it" compelling and this was erroneous because the victim was inconsistent, the victim was only two years old, and the evidence indicated the victim sustained injuries from falling from a jungle gym.

At the plea hearing, the State outlined the factual basis for Gutierrez's plea. In particular, the State informed the court that it would have called Dr. O'Halloran, Gutierrez's codefendant and wife Tara G., and Reno Police Department employee R. Clark. The State informed the court that (1) Dr. O'Halloran's testimony would have described the results of a

forensic pathological examination that detailed the victim's injuries;[3] (2) Tara's testimony would have detailed how Gutierrez abused the victim from May 1993 until June 15, 1994, when the victim died; and (3) Ms. Clark would have testified that when she responded to an incident in August 1993, she observed bruising on the victim and when she asked the victim how she got her injuries, the victim replied, "It hurt; Daddy did it." In entering his plea, Gutierrez agreed that the State possessed this evidence and that the State had sufficient evidence to convict him of first-degree murder. Gutierrez cannot demonstrate that the facts that formed the basis of his plea are impalpable or highly suspect such that the district court was barred from considering them at sentencing. Therefore, we conclude Guiterrez is not entitled to relief on these claims.[4]

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[3]To the extent Gutierrez contends the district court erred by relying on autopsy photographs taken by Dr. O'Halloran because the photographs were more prejudicial than probative and "[did] not bear on the critical sentencing issue of who committed the fatal blow," we note that autopsy photographs are generally admissible at trial, *see Archanian v. State*, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006), and that a district court may consider evidence at sentencing that would not be admissible at trial, *see Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 945 (1995). Gutierrez also fails to demonstrate that the autopsy photographs constitute impalpable or highly suspect evidence. Therefore, we conclude Gutierrez is not entitled to relief on this claim.

[4]To the extent Gutierrez implicitly challenges the factual basis or validity of his plea, we note that the Nevada Supreme Court has previously held that Gutierrez entered his plea knowingly and voluntarily and that the State presented a strong factual basis to support Gutierrez's plea, *see Gutierrez v. State*, Docket No. 33643 (Order Dismissing Appeal, June 9, 2000), and these holdings are the law of the case, *see Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

Gutierrez also contends the district court did not give enough weight to the evidence indicating he was not a violent person outside the confines of his family and that he had no reports of violence in prison. As previously stated, this court "afford[s] the district court wide discretion in its sentencing decision," *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009), and Gutierrez fails to identify any impalpable or highly suspect evidence upon which the district court relied. Therefore, we conclude that Gutierrez is not entitled to relief on this claim. And for the foregoing reasons, we cannot conclude that the district court relied on impalpable or highly suspect evidence in sentencing Gutierrez.

Third, Gutierrez argues his sentence is excessive when compared against his codefendant's sentence. This court does not review nondeath sentences for excessiveness, and Gutierrez does not contend that his sentence constitutes cruel and unusual punishment. *See Harte v. State*, 132 Nev. 410, 414-15, 373 P.3d 98, 101-02 (2016). Moreover, "sentencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms." *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). Although the record indicates that Gutierrez received a different sentence than Tara, Tara was not convicted of first-degree murder, and the district court properly considered Gutierrez's individual circumstances in determining his sentence. Therefore, we conclude Gutierrez is not entitled to relief on this claim.

Finally, Gutierrez argues the district court violated his constitutional rights by failing to consider the immigration consequences of his conviction as a mitigating factor when determining his sentence. Gutierrez contends that, had he received a sentence of life in prison with the possibility of parole, he would have been paroled and removed to an area

of Mexico that is "awful." Gutierrez did not raise this issue at the sentencing hearing below; therefore, we review this claim for plain error. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Gutierrez concedes that trial-level counsel did not contend at the sentencing hearing that the immigration consequences of his conviction constituted a mitigating factor that warranted a lesser sentence, and he does not cite any authority that the court must consider this factor sua sponte. Therefore, Gutierrez fails to demonstrate that the district court's failure to consider the immigration consequences of his conviction was error that is clear under current law from a casual inspection of the record. Accordingly, we conclude Gutierrez is not entitled to relief on this claim.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Tammy Riggs, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk