IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES CHAPPELL, Appellant, v. THE STATE OF NEVADA, Respondent.	)	Case No. 61967

RESPONDENT'S APPENDIX

CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar #004349
520 South Fourth Street, 2nd Fl.
Las Vegas, Nevada 89101
(702) 384-5563

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar #003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 8, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

CHRISTOPHER R. ORAM, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

BY */s/ E. Davis*
Employee, District Attorney's Office

SSO/Alyssa Staudinger/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49478

FILED

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BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, sentencing appellant James Montell Chappell to death for first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On December 31, 1996, Chappell was convicted, pursuant to a jury verdict, of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. The district court sentenced Chappell to serve a term of 4 to 10 years in prison for burglary and two consecutive terms of 6 to 15 years for robbery with the use of a deadly weapon. A jury sentenced him to death for first-degree murder with the use of a deadly weapon. On appeal, this court affirmed Chappell's convictions and sentence of death. Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998).

On October 19, 1999, Chappell filed a post-conviction petition for a writ of habeas corpus in the district court. The district court granted Chappell's petition in part, vacated his sentence of death, and ordered a

new penalty hearing. This court affirmed. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

On May 10, 2007, following Chappell's second penalty hearing, a jury again sentenced him to death. This appeal followed.

Chappell raises thirteen claims of error arising from his second penalty hearing. Specifically, Chappell claims that his death sentence should be vacated because: (1) the sexual assault aggravator is invalid and unsupported by the evidence; (2) NRS 177.055(3), which governs this court's review of a death sentence, is unconstitutional; (3) his constitutional rights were violated when the district court declined to order the District Attorney's Office to conduct a second review of his case; (4) the district court erred in failing to dismiss three potential jurors for cause; (5) the district court erred in admitting unreliable hearsay evidence; (6) the district court erred in admitting two presentence investigation reports; (7) the district court erred in admitting improper victim impact testimony; (8) the district court erred in admitting Chappell's previous guilt-phase testimony; (9) the prosecution committed five instances of misconduct; (10) the district court erred in failing to instruct the jury that it had to find that the mitigators did not outweigh the aggravators beyond a reasonable doubt; (11) the jury erred in failing to find certain mitigating circumstances; (12) instructional error occurred during the guilt phase of his trial; and (13) he was prejudiced by cumulative error.

We conclude that each of these claims lacks merit. We further conclude that, pursuant to the mandatory review of NRS 177.055, there is

no indication that Chappell's death sentence was improperly imposed. Therefore, we affirm the judgment of conviction.

Sexual assault aggravator

The sole aggravator found by the jury was that the murder was committed while Chappell was engaged in the commission of a sexual assault. Chappell claims that the sexual assault aggravator should be stricken because (1) insufficient evidence supported it and (2) the aggravator is invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

Sufficiency of the evidence

Our review of the record reveals sufficient evidence to establish the sexual assault aggravator beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

In particular, we note evidence presented at the penalty hearing showing that: (1) the victim, Deborah Panos, was curled up in the fetal position, fearful, and crying when she found out that Chappell was at large; (2) Panos had told Chappell that their relationship was over; (3) Panos was in the process of moving where Chappell could not find her; (4) Panos was beaten approximately 15 to 30 minutes prior to being stabbed to death; and (5) despite Chappell's assertions that he did not ejaculate into Panos during their sexual encounter, semen matching his DNA was recovered from her vagina.

Although Chappell claims that the sexual encounter was consensual, we conclude that the jury could reasonably infer from the evidence presented "that either Panos would not have consented to sexual intercourse under these circumstances or was mentally or emotionally incapable of resisting Chappell's advances, and that Chappell therefore committed sexual assault." Chappell v. State, 114 Nev. 1403, 1409, 972 P.2d 838, 842 (1998).

Application of McConnell

Chappell contends that the sexual assault aggravator is invalid pursuant to this court's decision in McConnell because the State divided the felonies charged and used two (burglary and robbery) to prove felony murder and the remaining crime (sexual assault) as an aggravating circumstance. Chappell's claim is without merit.

In McConnell, this court deemed "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." Id. at 1069, 102 P.3d at 624. We also proscribed the practice of "selecting among multiple felonies that occur during 'an indivisible course of conduct having one principal criminal purpose' and using one to establish felony murder and another to support an aggravating circumstance." Id. at 1069-70, 102 P.3d at 624-25 (quoting People v. Harris, 679 P.2d 433, 449 (Cal. 1984), rejected by People v. Proctor, 842 P.2d 1100, 1129-30 (Cal. 1992)) (internal footnote omitted).

During the course of Chappell's direct appeal and post-conviction proceedings, three aggravators were stricken—a torture

aggravator and the aggravators for robbery and burglary[1]—leaving the sexual assault aggravator as the only aggravator alleged at Chappell's second penalty hearing. Chappell now claims that the State's decision to "split" the robbery, burglary, and sexual assault felonies and use the sexual assault only as an aggravator violated McConnell. Based on the evidence, however, we conclude that Chappell committed the sexual assault with a criminal purpose distinct from the burglary and robbery. See McConnell, 120 Nev. at 1069-70, 102 P.3d at 624-25. Therefore, Chappell's claim is without merit.

NRS 177.055(3)

Chappell argues that NRS 177.055(3) is unconstitutional because it grants this court "unfettered discretion" to impose a sentence of less than death upon the finding of a constitutional violation. Chappell further argues that allowing this court to impose a sentence of less than death on direct appeal, but not in post-conviction proceedings, violates his constitutional right to equal protection. Chappell's claims are without merit.

NRS 177.055(3) was not the basis for Chappell's second penalty hearing. That hearing was the result of the district court's finding that Chappell's penalty phase counsel was ineffective rather than from this court's independent review of his death sentence. Because this court

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[1]The robbery and burglary aggravators were stricken pursuant to McConnell. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006), at 10-14.

did not conduct a mandatory review of Chappell's death sentence during his post-conviction appeal—that had already been done on direct appeal—Chappell's second penalty hearing did not result from the application of NRS 177.055.

Likewise, Chappell's equal protection argument lacks merit. The legal standards applicable to a habeas proceeding are different from those applicable on direct appeal. A prisoner's equal protection rights are not violated when different statutes are applied in these two distinct proceedings. Because a defendant on direct appeal is not similarly situated to a defendant in post-conviction proceedings, there is no constitutional violation merely because the legal standards and statutory schemes are different during different stages of the legal process.

Review by the District Attorney's Death Review Committee

Chappell argues that his constitutional rights were violated when the State refused to resubmit his case to the District Attorney's Death Review Committee after remand for a new penalty hearing to reconsider its decision to seek the death penalty. Specifically, Chappell argues that by failing to review his case a second time and by relying on a 12-year-old decision to seek the death penalty, the State failed to consider contemporary standards of decency, thereby violating his due process rights and his right to be free from cruel and unusual punishment. See Roper v. Simmons, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting). Furthermore, Chappell argues that his equal protection rights were violated because the State failed to treat him in the same manner as other

defendants who faced capital proceedings at the same time. Chappell's claims are without merit.

As to Chappell's due process claim, he fails to demonstrate that his due process rights were violated. The Due Process Clause prohibits a prosecutorial decision that is "based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). "[T]he decision to seek the death penalty is a matter of prosecutorial discretion, to be exercised within the statutory limits set out in NRS 200.030 and NRS 200.033." Thomas v. State, 122 Nev. 1361, 1374, 148 P.3d 727, 736 (2006). Matters of prosecutorial discretion are "'within the entire control of the district attorney,' absent any unconstitutional discrimination." Id. at 1373, 148 P.3d at 736 (quoting Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973)). Because the decision to seek the death penalty is entirely within the discretion of the district attorney and Chappell fails to demonstrate that the prosecution engaged in unconstitutional discrimination or based its decision on any "unjustifiable standard," the district court's decision to deny Chappell's motion to compel the State to reconsider seeking the death penalty did not violate due process.

As to Chappell's Eighth Amendment claim, he fails to show that his sentence constituted cruel and unusual punishment. Chappell has not explained how contemporary standards of decency have changed such that the death penalty is no longer acceptable under the circumstances of his case. See Atkins v. Virginia, 536 U.S. 304, 213 (2002). Accordingly, even if the State had submitted the case for re-evaluation, contemporary

standards of decency would not have mandated against a decision to seek the death penalty.

Respecting his equal protection claim, Chappell fails to demonstrate any constitutional violation. As explained above, Chappell's second penalty hearing took place in 2007, about 12 years after the District Attorney's Office decided to seek the death penalty. Chappell argues that because the decision to seek the death penalty in other cases that proceeded to sentencing in 2007 were made more recently, he was not treated in the same manner as the defendants in those cases. Chappell offers no explanation of this claim, and he does not cite any authority in support of it. Moreover, Chappell is not "similarly situated" with defendants being tried for the first time. Chappell provides no evidence that he was treated differently than any other defendant who had previously been convicted and was granted a second penalty hearing.

Because the Death Review Committee is a creation of the Clark County District Attorney's Office and review by that committee is not mandated by any law, a defendant has no right to force the Clark County District Attorney to send a particular case to that committee for review. Accordingly, the district court did not err in denying Chappell's motion.

Failure to dismiss jurors for cause

Chappell argues that the district court erred in denying challenges for cause of three potential jurors he claims indicated their firm intent to impose a sentence of death. We conclude that Chappell's contentions lack merit.

A trial judge "has broad discretion in ruling on challenges for cause since these rulings involve factual determinations." Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001). In a capital case, the trial court properly excludes a juror for cause when that juror's views on capital punishment "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Walker v. State, 113 Nev. 853, 866, 944 P.2d 762, 770 (1997) (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)) (internal quotation marks omitted). When a "'prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.'" Walker, 113 Nev. at 865, 944 P.2d at 770 (quoting People v. Livaditis, 831 P.2d 297, 303 (Cal. 1992)). Further, when a juror expresses a preconceived notion regarding the outcome of the case, the juror is not disqualified "'if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)). Finally, even if a district court errs in refusing to dismiss a juror for cause, a defendant is not prejudiced unless the seated jury includes a juror who is not fair and impartial. Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005).

Prospective juror D

Chappell argues that the district court should have excused prospective juror D. During voir dire, this juror expressed some predisposition to impose a sentence of death. Chappell challenged her for

cause, and the district court conducted its own examination, observing that the juror had mentioned that her predisposition was based on information in the juror questionnaire. After explaining to the juror that any sentencing decision would have to be based on the evidence presented, the district court asked juror D if, after hearing all of the evidence, she would be able to consider all forms of punishment, to which she responded affirmatively. Neither party questioned the juror further. Because the juror agreed to consider all of the evidence and the available sentencing options, see Blake, 121 Nev. at 795, 121 P.3d at 577, the district court did not err by denying Chappell's challenge for cause.[2]

Prospective juror H

Chappell argues that the district court erred in denying his challenge for cause of prospective juror H. During voir dire, juror H expressed his reluctance to consider mitigating circumstances. Specifically, he stated that "it would be difficult" to find any mitigating circumstances other than insanity because he did not think there was any way to justify a murder. After questioning juror H, the district court denied Chappell's challenge for cause, finding that the juror had stated that he could (1) "consider all four forms of punishment," (2) "follow the instructions of the court," and (3) "consider all the evidence." We conclude

[2]There is some dispute as to whether this potential juror served on the jury that sentenced Chappell to death. Our review of the record demonstrates that she did not. Thus, even if the district court erred in denying Chappell's challenge for cause, he fails to show prejudice. See Weber, 121 Nev. at 581, 119 P.3d at 125.

that the district court properly rehabilitated the juror, and therefore did not err in denying Chappell's challenge for cause. Moreover, Chappell cannot demonstrate prejudice because prospective juror H did not serve on the jury and he has not demonstrated that any member of the seated jury panel was not fair and impartial. See Weber, 121 Nev. at 581, 119 P.3d at 125.

Prospective juror R

Chappell argues that the district court erred in refusing to dismiss prospective juror R for cause. Juror R expressed his opinion that the death penalty was not used enough, explaining that he came from Texas and did not think that aggravating circumstances should be necessary to sentence someone convicted of murder to death. However, he also stated that he would (1) try to listen to all the information presented, (2) use that information to make what he believed to be a fair decision, and (3) apply the law that the judge gave him. Accordingly, because sufficient testimony was adduced for the district court to conclude that juror R could fulfill his "'duties as a juror in accordance with his instructions and his oath,'" Walker, 113 Nev. at 866, 944 P.2d at 770 (quoting Wainwright, 469 U.S. at 424), the district court did not err in denying this challenge for cause. Moreover, juror R did not serve on the jury and thus Chappell fails to demonstrate prejudice. See Weber, 121 Nev. at 581, 119 P.3d at 125.

Admission of hearsay evidence

Chappell asserts that the district court erred by admitting four instances of testimonial hearsay and several non-testimonial hearsay

statements.[3] He asserts that these admissions violated the Confrontation Clause of the Sixth Amendment and that this evidence was inadmissible and highly inflammatory.

This court has held that the Confrontation Clause of the Sixth Amendment does not apply in a capital sentencing hearing. Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006); Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006); Thomas v. State, 122 Nev. 1361, 1367, 1370, 148 P.3d 727, 732, 734 (2006). Chappell acknowledges Summers, but urges the court to overrule it. However, Chappell cites no authority that this court failed to consider when it first decided this issue three years ago. We recently declined to revisit Summers in Browning v. State, 124 Nev. ___, 188 P.3d 60 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009), and we decline to do so here.

Presentence investigation reports

Chappell claims that the district court erred in admitting two presentence investigation reports (PSIs): a 1995 report related to a gross misdemeanor charge and a 1996 report prepared for Chappell's first trial

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[3]Specifically, Chappell argues that he was prejudiced by the admission of: (1) testimony of a Department of Parole and Probation officer about statements the victim made before her death, (2) a detective's testimony about the results of a DNA test, (3) a police officer's testimony about statements that the victim made about Chappell's physical abuse, and (4) a detective's testimony about statements made by a man who was assaulted by Chappell. Chappell also argues that he was prejudiced by the admission of testimony from various people about their conversations with the victim.

on the instant charges. Chappell claims that not only were the reports confidential pursuant to NRS 176.156, but they included prejudicial evidence about prior arrests for which he was not convicted. He also complains that the PSIs included incorrect statements of fact and a prejudicial statement by Panos' mother. Finally, he claims that a written statement included in one PSI was obtained in violation of his Miranda rights, and was thus inadmissible. Chappell fails to demonstrate that he is entitled to relief on any of these claims.

At the penalty hearing, defense counsel stated that there was no objection to admission of the PSIs, with the exception of Chappell's handwritten statement that was included in one report. Thus, in all other respects, Chappell failed to preserve this matter for appeal and must demonstrate plain error. See, e.g., Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). Because Chappell objected only to the admission of his written statement, the disclosure of the remaining contents of the PSIs is only grounds for a new penalty hearing if he can "demonstrate[ ] that the error affected his . . . substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Confidentiality of PSI reports

Chappell claims that the PSIs admitted during his penalty hearing are statutorily confidential and are thus inadmissible. NRS 176.156(5) states that except where otherwise permitted by the statute, "a report of a presentence investigation or general investigation and the

sources of information for such a report are confidential and must not be made a part of any public record." However, the statute also provides that the contents of a report must be disclosed "to a law enforcement agency of this State or a political subdivision thereof . . . for the limited purpose of performing their duties, including, without limitation, conducting hearings that are public in nature." NRS 176.156(2) (emphasis added). Thus, we conclude that the legislature contemplated circumstances in which these reports could be used in public hearings for law enforcement purposes.

Moreover, this court has held that other sections of chapter 176 do not apply in first-degree murder cases, and recognized that "NRS 175.552[4] governs the admissibility of evidence during the penalty hearing of a first degree murder case." Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994). Thus, while this court has recognized NRS 176.156 in capital cases where the contents of a PSI have been disclosed to a jury, the violation of that statute has not been the basis for our decisions, which instead have focused on whether the evidence was relevant and not unfairly prejudicial. See Herman v. State, 122 Nev. 199, 208-09, 128 P.3d 469, 474-75 (2006); Guy v. State, 108 Nev. 770, 781-82, 839 P.2d 578, 585-86 (1992). Specifically, in Guy we concluded that the confidential nature

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[4]NRS 175.552(3) provides that during a penalty hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible."

of a PSI does not render it inadmissible under NRS 175.552(3). Guy, 108 Nev. at 781-82, 839 P.2d at 585-86. We reaffirm that while PSIs are to be kept confidential and not made part of the public record, their confidential nature does not in and of itself preclude their admission at capital sentencing hearings.

Evidence of prior arrests

Chappell claims that the PSIs should not have been admitted because they included prejudicial information about prior arrests that did not result in convictions. This court has held that evidence of police investigations and uncharged crimes is admissible at a capital penalty hearing only if the evidence is not "impalpable or highly suspect." Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001); see also Leonard v. State, 114 Nev. 1196, 1214, 969 P.2d 288, 299 (1998); Homick v. State, 108 Nev. 127, 138, 825 P.2d 600, 607 (1992). We conclude that no error occurred here for three reasons.

First, while the admitted PSIs did include information about prior arrests, this information was minimized rather than emphasized by the prosecution.

Second, the evidence presented in the PSIs about Chappell's criminal history was presented through other means. At the time the district court admitted the redacted PSIs, the jury had already heard testimony about Chappell's numerous arrests in Michigan, Arizona, and Nevada, and his history of drug abuse, theft, and violence. Thus, even assuming error in their admission, the redacted PSIs listing Chappell's criminal history did not result in "actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Third, the redacted PSIs were not introduced during the State's case-in-chief but as rebuttal evidence after the defense presented its case in mitigation. The evidence in the PSIs rebutted Chappell's attempts to blame others for his actions and his requests for "another chance." The State never informed the jury of any of Chappell's prior unresolved offenses. Therefore, we conclude that Chappell fails to demonstrate plain error respecting the admission of the PSIs on this basis.

Other statements in the PSIs

Chappell claims that he was prejudiced because the PSIs incorrectly stated that Panos had a protective order in place at the time that she was murdered. Evidence adduced at trial indicated that the protective order had been vacated before Chappell killed Panos. Despite the apparent error, Chappell's substantive rights were not affected because the prosecution never commented on the error and compelling evidence showed the domestic violence Chappell inflicted on Panos before her death. Thus, he fails to demonstrate plain error.

In addition, Chappell claims that he was prejudiced by the admission of a statement of Panos' mother in the 1996 PSI that "[t]he SOB does not deserve to live." Chappell argues that the statement was inadmissible but does not explain how this statement affected his substantial rights. This statement was not brought to the jury's attention, and it is clear from the context that this statement was a mother's expression of grief and not the government's sentencing recommendation. We therefore conclude that admission of this statement was not plain error.

Chappell's written statement

Finally, Chappell argues that the district court erroneously admitted his written statement attached to one of the PSIs because it was obtained in violation of his constitutional rights. Unlike the previous claims, Chappell objected to the admission of the PSI on this ground. Therefore, the district court's decision to admit the statement is reviewed for an abuse of discretion. See Herman, 122 Nev. at 208, 128 P.3d at 474.

At a hearing on the matter, Chappell objected to the admission of his written statement because he did not receive Miranda warnings before giving it. The district court recounted the process by which PSI statements are obtained after conviction and found that the process for obtaining the statement was a voluntary one that did not give rise to a Miranda warning.

"Miranda affects the admissibility of statements made during 'in-custody interrogation.'" Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1242 (2008) (quoting Miranda v. Arizona, 384 U.S. 436, 445 (1966)). The United States Court of Appeals for the Ninth Circuit has held that even if a routine post-conviction, pre-sentence interview is technically an in-custody interrogation, it does not entail those pressures that "'the Miranda Court found so inherently coercive as to require its holding.'" Baumann v. United States, 692 F.2d 565, 577 (9th Cir. 1982) (quoting Beckwith v. United States, 425 U.S. 341, 347 (1976)), holding limited by U.S. v. Herrera-Figueroa, 918 F.2d 1430, 1433 (9th Cir. 1990) (requiring probation officers to permit defendants to have their attorneys present at presentence interviews). Thus, the Ninth Circuit has declined to require

Miranda warnings before routine presentence interviews with probation officers. Id. We conclude that this analysis logically extends to written statements submitted as part of the presentence interview process.

Moreover, NRS 175.552(3) states that a district court has discretion to admit any evidence "which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." Thus, even if Chappell's statement was normally inadmissible due to the failure to give Miranda warnings, it was relevant and admissible evidence at the penalty hearing. We therefore conclude that the district court did not abuse its discretion in admitting Chappell's statement.

Victim impact testimony

Chappell claims that the district court erred by permitting the prosecution to introduce "excessive victim impact testimony." Specifically, Chappell argues that the district court erred in admitting (1) victim impact testimony of people who were not family members of the victim and (2) victim impact testimony that was not included in the State's notice pursuant to SCR 250(4)(f). During the penalty hearing, the district court overruled Chappell's objection to any victim impact testimony by persons outside of Panos' family. A district court's "'decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion.'" Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 774 (2006) (quoting McConnell v. State, 120 Nev. 1043, 1057, 102 P.3d 606, 616 (2004)) (quotation marks omitted). However, Chappell did not object on the grounds of insufficient notice and thus his second claim is reviewed

for plain error affecting his substantial rights. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

The testimony of which Chappell complains relates to both claims. In particular, several of Panos' friends testified to abuse that Chappell inflicted upon Panos prior to her death and her fear of him. At the end of their testimony, these witnesses made brief statements about how Panos' death had affected them. Chappell claims that not only was their testimony improper because they were not family members of the victim, but that he did not receive adequate notice of their potential testimony.

With respect to Chappell's claim about the victim impact testimony of non-family members, "this court has held that individuals outside the victim's family can present victim impact evidence." Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996). Therefore, the district court did not abuse its discretion in permitting victim impact testimony by Panos' close friends.

With respect to the notice issue, SCR 250(4)(f) requires the State to file a notice of evidence in aggravation at least 15 days before trial. SCR 250(4)(f) applies not only to evidence in support of the enumerated aggravating circumstances but to "any evidence which the State intends to introduce." Mason v. State, 118 Nev. 554, 561, 51 P.3d 521, 525 (2002). Here, each of the five witnesses named by Chappell were listed in the State's Notice of Evidence. But because these witnesses were primarily used to establish the aggravating evidence, they were listed in the section entitled "Aggravating Circumstance," rather than in the section entitled "Other Evidence." Chappell essentially claims that

because these witnesses were not listed in both sections, he did not have adequate notice of their potential victim impact testimony.

We conclude that even if the State provided inadequate notice of the challenged witnesses respecting their victim impact testimony, Chappell fails to demonstrate that he was prejudiced. Defense counsel cross-examined each of the five witnesses and the record does not reveal that counsel was caught unaware by the testimony. Furthermore, the witnesses Chappell identifies testified mainly about their observations of Chappell and his relationship with Panos and merely concluded their testimony with a brief statement of the physical or emotional affect of Panos' death. Because only two family members testified as to victim impact at the hearing, the testimony of these five witnesses did not result in the presentation of excessive victim impact evidence. Accordingly, Chappell fails to demonstrate prejudice affecting his substantial rights.

Admission of Chappell's guilt-phase testimony

Chappell claims that the district court erred in permitting the State to introduce his testimony from his first trial. Chappell objected to the admission of his prior testimony on the ground that it was the result of ineffective assistance of counsel. Normally, "a defendant's testimony at a former trial is admissible in evidence against him in later proceedings." Harrison v. United States, 392 U.S. 219, 222 (1968); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000). However, prior testimony is not admissible if it implicates a constitutional violation during the trial in which it was obtained. Byford, 116 Nev. at 225, 994 P.2d at 707. Although a claim of ineffective assistance of counsel implicates the Sixth

Amendment, see Strickland v. Washington, 466 U.S. 668 (1984), Chappell offered no explanation of how his trial counsel's performance was deficient or how his trial testimony was the result of that deficiency. Therefore, we conclude that the district court did not err in admitting this evidence.

Prosecutorial misconduct

Chappell asserts that the prosecution committed several instances of misconduct warranting a new penalty hearing. Chappell only objected to one instance he identifies in this appeal: the prosecutor's comment on his right to remain silent. He failed to object to all others.

Comment on Chappell's right to remain silent

Chappell argues that the prosecutor committed misconduct by introducing his prior trial testimony because the transcript included an improper comment on Chappell's right to remain silent. In particular, Chappell contends that the State's suggestion that he had a "substantial period of time" to think about what he would tell the jury about the events constituted an improper comment on his right to remain silent. This court reviews allegations of improper argument to determine whether the "'prosecutor's statements so infect[ed] the proceedings with unfairness as to make the results a denial of due process.'" Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 72 (2008) (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009).

Even if the State's comments can be considered an "implied" comment on Chappell's right to remain silent, this court has previously held that any error was harmless beyond a reasonable doubt. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

Furthermore, in light of the evidence presented at Chappell's second penalty hearing, this questioning did not "so infect[ ] the proceedings with unfairness as to make the results a denial of due process." Thomas, 120 Nev. at 47, 83 P.3d at 825.

Comparative worth

Chappell claims that the prosecutor committed misconduct by comparing the worth of Panos and himself. Chappell failed to object to the challenged comment; therefore, his claim is reviewed for plain error affecting his substantial rights. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). We conclude that Chappell fails to demonstrate plain error.

Chappell relies on the United States Supreme Court's decision in Payne v. Tennessee, 501 U.S. 808 (1991). However, while Payne "'prohibits comparisons that suggest that there are worthy and unworthy victims'" it "'does not prohibit character comparisons between defendants and victims.'" Humphries v. Ozmint, 397 F.3d 206, 219 (4th Cir. 2005) (quoting Humphries v. State, 570 S.E.2d 160, 167-68 (S.C. 2002)). "'[C]learly established Supreme Court precedent does not prohibit victim-to-defendant comparisons; they are inevitable in any capital case in which the jury is asked to assess the persuasive force of the defendant's mitigating evidence and the victim-impact evidence.'" Hall v. Catoe, 601 S.E.2d 335, 340 n.4 (S.C. 2004) (quoting Humphries v. Ozmint, 366 F.3d 266, 288 (4th Cir. 2004) (Hamilton, J., dissenting), vacated en banc, 397 F.3d 206 (4th Cir. 2005)). Therefore, Chappell fails to demonstrate plain error.

The role of mitigating circumstances

Chappell argues that the prosecutor committed misconduct when he argued that the difficulties in Chappell's life did not justify his conduct. In particular, he argues that the prosecutor's commentary "foreclosed the jury's consideration of mitigating evidence" and thus violated his constitutional rights. Because Chappell failed to object to this argument, his claim is reviewed for plain error.

At the penalty hearing, Chappell presented mitigating evidence that (1) he suffered from substance abuse, (2) he had no father figure in his life, (3) his mother died when he was very young, (4) he was raised in an abusive household, (5) he was the victim of physical abuse as a child, (6) he was the victim of mental abuse as a child, (7) he was born to a drug and alcohol addicted mother, (8) he had a learning disability, (9) he was raised in a depressed housing area, and (10) he was involved in a racially tense relationship. Dr. Lewis Etcoff, a psychologist, testified that because of Chappell's upbringing, he had less free will than the average person.

The State is entitled to rebut evidence relating to a defendant's "character, childhood, mental impairments, etc." Thomas v. State, 122 Nev. 1361, 1368, 148 P.3d 727, 732 (2006). Therefore, the State properly argued that Chappell's personal history did not "take away his actions." Furthermore, the jury was properly instructed on the role of mitigating evidence and in fact found seven mitigating circumstances. This belies Chappell's claim that the prosecutor foreclosed the jury from considering the mitigating evidence. Accordingly, we conclude that Chappell fails to demonstrate plain error.

Argument that jury should not be "conned" by Chappell

Chappell contends that the prosecution committed misconduct when it told the jury not to be "conned" by Chappell. Because he failed to object to this comment, his claim is reviewed for plain error.

During closing argument, the prosecutor pointed out that Dr. Etcoff's testimony was based on Chappell's own statements and that Chappell had lied to Dr. Etcoff during their interview. The prosecutor also argued that Chappell was only able to kill Panos because he had "conned" the probation officer into believing that he was trying to change and could be trusted to check into a rehabilitation facility without an escort. The prosecutor told the jury not to be "conned" in the same way into believing that Chappell was going to change.

The State's argument was based on the evidence presented to the jury and was not inflammatory as Chappell suggests. Therefore, we conclude Chappell fails to demonstrate plain error.

"No mercy" argument

Chappell claims that the prosecutor committed misconduct by arguing to the jury that mercy was not an appropriate consideration. Because Chappell failed to object to the challenged comment, his claim is reviewed for plain error.

Chappell's claim is belied by the record. While the prosecutor naturally emphasized justice and punishment, he also stated, "Is there a place for mercy in murder cases? There is. There is. That's something that you need to consider." He also stated, "You don't just owe James Chappell the consideration of mercy, you owe the victims and the State of Nevada a just sentence as well." The prosecutor's argument did not direct

the jury to ignore mercy but to consider both justice and mercy, suggesting that considerations of mercy in this case did not outweigh the demands of justice. Because the prosecutor's argument was proper, Chappell fails to demonstrate plain error.

Jury instructions on weighing mitigators and aggravators

Chappell argues that the district court erred by failing to instruct the jury that the State had the burden to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. Because Chappell did not object to this instruction or proffer an alternative, his claim is reviewed for plain error.

Chappell bases his argument on United States Supreme Court jurisprudence requiring any fact that operates to increase a defendant's penalty to be proven beyond a reasonable doubt. See Blakely v. Washington, 542 U.S. 296, 301-02 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). However, while the aggravating factors must be found beyond a reasonable doubt, the weighing of the aggravating and mitigating factors is not a fact to be found by the jury, but rather a subjective process. Thus, the applicable statutes do not impose the "beyond a reasonable doubt" standard on the weighing process.[5] And this

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[5]NRS 200.030(4)(a), which outlines the range of punishment for a first-degree murder conviction, provides that death can be imposed "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances." NRS 175.554(3), which addresses jury instructions, determinations, findings and the verdict,

continued on next page . . .

court has repeatedly declined to impose such a requirement. See, e.g., DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 789-91, 711 P.2d 856, 862-63 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). Accordingly, we conclude that the instructions given accurately reflected Nevada law and that Chappell fails to demonstrate plain error.

Mitigating circumstances not found by the jury

Chappell asserts that the jury failed to find mitigating circumstances that were "clearly established and uncontested," requiring vacation of his sentence. Chappell fails to cite any relevant authority supporting his contention. This court has previously held that jurors are not required to find proffered mitigating circumstances simply because there is unrebutted evidence to support them. See Thomas, 122 Nev. at 1370, 148 P.3d at 733; Gallego v. State, 117 Nev. 348, 366-67, 23 P.3d 227, 240 (2001); Hollaway v. State, 116 Nev. 732, 744, 6 P.3d 987, 995-96 (2000); Thomas v. State, 114 Nev. 1127, 1149, 967 P.2d 1111, 1125 (1998). Nevada law permits the jury to decide, even if the evidence supports the factual basis for a mitigating circumstance, whether the proposed mitigator actually extenuates or reduces the defendant's moral culpability.

. . . *continued*

states that "[t]he jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

In this case, the jury found seven of the thirteen mitigating circumstances offered by the defense. We conclude that the failure of the jury to find all of the proffered mitigators did not deprive Chappell of his constitutional rights and that no relief is warranted on this claim.

Guilt phase jury instructions

Chappell raises two claims of error regarding jury instructions given at the guilt phase of his trial. First, Chappell argues that the premeditation instruction commonly known as the Kazalyn instruction, Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), was erroneous and prejudicial.[6] Second, he contends that the jury was not properly instructed on the elements of felony murder.

Chappell acknowledges that his present appeal is from a second penalty hearing, but he argues that he is entitled to raise claims from the guilt phase of his trial because his conviction is not yet final. See Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) ("A conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired."). Chappell's claim is meritless.

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[6]Chappell's challenge to the Kazalyn instruction was previously raised as a claim of ineffective assistance of trial counsel during post-conviction proceedings. This court affirmed the district court's denial of relief on that claim. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006).

This court previously affirmed Chappell's murder conviction, Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998), and the United States Supreme Court denied certiorari, 528 U.S. 853 (1999). The relief granted to Chappell during post-conviction proceedings was expressly limited to the penalty phase. Chappell v. State, Docket No. 43493 (Order of Affirmance, April 7, 2006). Thus, the jury's determination of Chappell's guilt was final when certiorari was denied by the United States Supreme Court on October 4, 1999. See, e.g., Phillips v. Vasquez, 56 F.3d 1030, 1033 (9th Cir. 1995) (holding that under California's bifurcated death penalty process, a conviction for murder is final even when the death sentence has been reversed and is not yet final); People v. Kemp, 517 P.2d 826, 828 (Cal. 1974) (concluding retrial of penalty issue does not change fact that defendant's judgment became final when United States Supreme Court denied defendant's petition for writ of certiorari); People v. Jackson, 429 P.2d 600, 602 (Cal. 1967) (stating that an "original judgment on the issue of guilt remains final during the retrial of the penalty issue and during all appellate proceedings reviewing the trial court's decision on that issue"). We therefore decline to address these claims on the merits.

Even if this court were to consider Chappell's claim regarding the Kazalyn instruction, this court recently concluded in Nika v. State, 124 Nev. ___, 198 P.3d 839 (2008), that Byford does not apply to cases that were final when it was decided. Id. at ___, 198 P.3d at 849-50. Byford was decided on February 28, 2000; Chappell's conviction was final on October 4, 1999. Accordingly, neither our decision in Byford nor the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provides Chappell with grounds for relief.

Cumulative error

Chappell claims that his death sentence should be reversed as the result of cumulative error. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). However, a defendant is not entitled to a perfect trial, merely a fair one. Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Based on the foregoing discussion of Chappell's claims, we conclude that any error in this case, when considered either individually or cumulatively, does not warrant relief.

Mandatory appellate review of the death sentence

NRS 177.055(2) requires that this court review every death sentence and consider:

> (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

With respect to the first question, we previously concluded that there was sufficient evidence to support the sexual assault aggravating circumstance.

With respect to the second question, although the evidence presented at Chappell's penalty hearing showed him to be a man who had physically abused his girlfriend and the mother of his children for a long period of time before he sexually assaulted and stabbed her thirteen times,

nothing in the record demonstrates that the jury's verdict was the result of passion, prejudice, or any other arbitrary factor. Despite Chappell's claims that he was subjected to an unfair penalty hearing on the grounds outlined above, any error committed did not unduly prejudice him or serve to inflame the jury.

Finally, we must consider whether the death sentence is excessive. The evidence shows that Chappell had beaten Panos and stolen from her and their children to support his drug habit for almost a decade before he was incarcerated. Immediately after being released from custody, he went to Panos' home, beat her, sexually assaulted her, and stabbed her thirteen times. Chappell's mitigating evidence highlighting his troubled upbringing and his drug addiction and expert testimony suggesting that he did not have the same level of "free will" as the average person was weakened by rebuttal evidence demonstrating that Chappell had a history of blaming others for his problems and his behavior. And in fact, while Chappell admitted to killing Panos, he continued to blame her, at least in part, for her murder at his hands. Chappell also had a lengthy criminal history that included repeated acts of domestic violence, and evidence adduced during the penalty hearing demonstrated that he had a general disregard for the well-being of others. Based on these considerations, we conclude that the jury's decision to impose the death penalty was not excessive.

Having considered Chappell's claims and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[7]

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Saitta

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[7]The Honorable Michael L. Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 49478

District Court Case No. C131341

FILED

JUN 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: June 8, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Douglas W. Herndon, District Judge
Attorney General/Carson City
Clark County District Attorney
Special Public Defender

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JUN 11 2010.

Heather Ungermann
Deputy District Court Clerk

RECEIVED
JUN 15 2010
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

RECEIVED
JUN 10 2010
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MONTELL CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 49478

District Court Case No. C131341

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 20th day of October, 2009.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "Rehearing denied."

Judgment, as quoted above, entered this 16th day of December, 2009.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 8th day of June, 2010.

Tracie Lindeman, Supreme Court Clerk

By: A. Ingersoll
Deputy Clerk