

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO MERINO OJEDA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 77917

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RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. **ROUTING STATEMENT**

This case is an appeal from a judgment of conviction based on a guilty plea. Therefore, it is presumptively assigned to the Court of Appeals.

NRAP 17(b)(1).

II. **STATEMENT OF THE ISSUES**

Did the sentencing court abuse its discretion when it sentenced Appellant Francisco Merino Ojeda (hereinafter "Ojeda") within statutory parameters?

III. **STATEMENT OF THE FACTS**

This case resulted in a guilty plea, and as a result the facts available in the record are not fully developed. The following facts are taken from the

Presentence Investigation Report (“PSI”)¹, the sentencing transcript, and the State’s Sentencing Memorandum and attached exhibits that were filed with the district court.²

In September of 2004, Kyla Annan (“Kyla”) was 28 years old, living at 624 Quincy Street in Reno, Nevada, and working at Golden Goose Preschool. Respondent’s Appendix (“RA”) Volume I, p. 26. Kyla had been dating Travis Miller for approximately two months. 1RA 33-34. Around the same time, Ojeda was working as a landscaper, drinking and using drugs, and regularly visiting a drug house across the street from Kyla’s residence. PSI p. 6, 1RA 73-74, 84-85, 125, 137. During his visits to the drug house, Ojeda saw Kyla working in her garden approximately ten or twelve times. PSI p. 6, 1RA 139.

Ojeda twice entered Kyla’s home that September. The first time, on September 13, 2007, Ojeda entered the house through the back door with the idea that Kyla might be “willing to do things with me” or that “by maybe

¹ The State has filed a contemporaneous Motion to Transmit the Presentence Investigation Report. As the PSI is not included in the Respondent’s Appendix, PSI page number references pertain to the PSI’s own pagination.

² The Joint Appendix did not include the exhibits to the State’s Sentencing Memorandum. As they were available to the sentencing court and are referenced in this brief, they are included in the Respondent’s Appendices.

showing her drugs would make her be with me” despite the fact that he had never talked to her, he did not speak English, and he had entered her house uninvited in the middle of the night. 1RA 79, 82, 139, 195. Upon entering Kyla’s house, Ojeda took off his two shirts and made his way to the bedroom where he placed his hand over the mouth of a person sleeping in Kyla’s bed. PSI p. 5, 1RA 26-27, 79-80, 193. Unbeknownst to Ojeda, he placed his hand over Mr. Miller’s mouth and then fled when he moved. 1RA 48, 201-202. Kyla and Mr. Miller discovered Ojeda’s shirts left behind and turned them over to the police who collected them. PSI p. 5, 1RA 27, 49-50.

The second time that Ojeda entered Kyla’s home, over the weekend of September 17-19, he raped and killed her. 1RA 37, 184-185. Around 2:00 in the morning, Ojeda jumped over a fence into the backyard of Kyla’s home and walked around the outside a couple of times to check to see if anyone else was inside with her. 1RA 160, 163-165. After verifying that nothing was going on inside the house, Ojeda removed a screen to gain access through a window. 1RA 165-166. Ojeda believes that Kyla heard him getting into her house because she met him in a hallway and swung at him with a small bat. PSI p. 6, 1RA 166. Kyla missed and Ojeda grabbed her

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and threw her onto her bed. PSI p. 6, 1RA 82-83, 168. Ojeda got on top of Kyla and told her to calm down in Spanish. 1RA 83.

Kyla was able to bite Ojeda's fingers at which point Ojeda "lost [his] mind" and "[t]he anger came out" of him. 1RA 84. The autopsy report confirms this. As a result of Ojeda's attack, Kyla suffered significant and varied injuries, including: a fractured hyoid bone in her throat; hemorrhages in the strap muscles of her neck; multiple abrasions and contusions on and about her head, including her eyes, lips, cheeks, chin, and ears; multiple abrasions and contusions on her torso, including her shoulders, chest, back, and right hip; a partial bite mark on her right breast; and multiple abrasions and contusions on her legs. 1AA 5. In other words, as the prosecutor pointed out at sentencing, "[h]e beat her into submission." Joint Appendix ("JA"), p. 96.

While on top of Kyla, Ojeda strangled her with the bat across her throat. PSI p. 6, 1RA 84, 170. Ojeda put all of his weight on the bat while it was across Kyla's neck and kept it there until she stopped moving and breathing. 1RA 170-171. After Kyla stopped breathing, Ojeda removed her underwear and raped her vaginally and anally. 1RA 173-174. After Ojeda ejaculated, he left Kyla's house and went home briefly before going to work for the day. PSI p. 6, 1RA 178, 183-184. A week or two later, Ojeda left

Reno for Santa Ana, California, where he met his wife, told her about the murder, and fathered four children. PSI p. 2, 1AA 84, 86, 185-188, 2RA 277-280.

While Ojeda was busy meeting his wife and starting a family, the investigation into Kyla's death went cold. Detectives obtained and analyzed DNA samples from numerous individuals with ties to Kyla and her neighborhood. PSI p. 5, 2RA 317-364. None of them matched the suspect's DNA and the case was eventually suspended. PSI p.5. The case was re-examined in 2014 but no new leads were generated and the case again was put on hold. *Id.* Finally, in January 2015, the case was broken open when an anonymous source contacted the Reno Police Department and identified Ojeda as the suspect. *Id.* Detectives worked with the FBI to obtain a sample of Ojeda's DNA, which confirmed that he was the suspect. *Id.*

Detectives obtained a warrant for Ojeda's arrest and approached him in Santa Ana in March 2015. PSI pp. 5-6. Upon being contacted by police, Ojeda lied to detectives and told them that he had only been in Reno for approximately eight months as a student. 2RA 251. He lied about being separated from his wife. 1RA 210, 2RA 281-282. He lied about not recognizing the victim. 2RA 294-295. Ojeda finally started telling the truth and admitted that he killed Kyla after detectives told him that they had a

warrant for his arrest as they placed him in handcuffs. 2RA 308-309.

During a subsequent interview in Orange County and during his extradition back to Reno, Ojeda provided details about the murder and surrounding events.

IV. ARGUMENT

Standard of Review

“A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court’s determination will not be disturbed on appeal.” Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993)(citation omitted). “So 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, this court will refrain from interfering with the sentence imposed.” Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Discussion

Ojeda does not argue that he was sentenced beyond the parameters available for first degree murder and therefore cannot argue that the district court’s decision represented a manifest abuse of discretion. State v. Dist. Ct. (Armstrong), 127 Nev. 927, 932, 237 P.3d 777, 780 (2011)(“A manifest abuse of discretion is a clearly erroneous interpretation of the law

or a clearly erroneous application of a law or rule.”)(internal quotation and citation omitted). Instead, Ojeda suggests that the district court’s decision was an arbitrary or capricious abuse of discretion. Opening Brief, pp.12, 15. “An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason... or contrary to the evidence or established rules of law.” Armstrong, 127 Nev. at 931-932, 237 P.3d at 777 (internal quotations and citations omitted).

Ojeda argues that the sentencing court should have sentenced him to a term of life imprisonment with the possibility of parole after 20 years. Opening Brief, p. 16. Ojeda reaches this conclusion via the process of elimination. Ojeda suggests that the district court could have properly rejected his request for a term of 20 to 50 years imprisonment as not representing a sufficient sentence, but argues that the court should also have rejected the State’s request for life imprisonment without the opportunity of parole because “he is not without redemptive qualities.” Opening Brief, pp. 15-16. By knocking out the minimum and maximum options, represented by the requests of the parties, Ojeda concludes that the district court was left with only one reasonable option: life imprisonment with the possibility of parole.

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Ojeda relies on Naovarath v. State, 105 Nev. 525, 779 P.2d 944 (1989) for the premise that life sentences without the possibility of parole should be reserved for the “deadliest and most unsalvageable of human beings.” Opening Brief, p. 13. This argument has been made before in Nevada. In Harte v. State, the appellant relied on Naovarath for the same premise. 132 Nev. Adv. Op. 40, 373 P.3d 98, 102 (2016). The Nevada Supreme Court noted that Harte was effectively making a cruel and unusual punishment argument and analyzed it as such. *Id.* The Harte court highlighted the distinguishing characteristics between Harte’s crime and Naovarath’s. *Id.* In Harte, the appellant was an adult who “killed a complete stranger without provocation” while in Naovarath, the appellant was a “mentally and emotionally disordered thirteen-year-old child” who killed a man who had sexually abused him. *Id. citing Naovarath*, 105 Nev. at 526, 779 P.2d at 945.

To the extent that this case is similar to either the facts of Harte or Naovarath, it is more akin to Harte. Ojeda twice entered the home of a complete stranger while under the influence of drugs and alcohol. After being scared off by an unexpected person in Kyla’s bed the first time, he worked up his courage to invade Kyla’s home again a week later. After staking out the premises and ensuring that everything was quiet inside, he

surreptitiously removed a screen to gain entry. Upon encountering Kyla defending herself in her own home, Ojeda “lost his mind” and brutally beat Kyla before strangling her to death and sexually violating her in her own bed.

As to Ojeda’s claimed redemptive qualities, his argument that he “did immediately admit to the crime when he was contacted by police” is demonstrably untrue. Opening Brief, p. 14. When Ojeda was contacted by Reno Police Department detectives ten years after his crime, he lied about how long he had lived in Reno, he lied about recognizing Kyla, and he lied about having had any contact with Kyla. 2RA 251, 294-295. Only after the detectives told Ojeda that they had a warrant for his arrest and were taking him into custody did he admit to his crime. 2RA 308-309. Ojeda did not turn himself in to law enforcement. Ojeda did not step forward to take responsibility. Law enforcement was fortunate to receive an anonymous tip that pointed them to Ojeda. They were then able to continue their exhaustive investigative efforts to confirm that Ojeda was their suspect. They travelled hundreds of miles to confront Ojeda only to have him meet their questions with lies and denials. As pointed out by the prosecutor and the district court at sentencing, Ojeda’s remorse after the handcuffs were already on was easy. Coming forward and taking responsibility for his

monstrous acts before he was caught would have demonstrated actual remorse.

That Ojeda enjoyed the next decade of his life by marrying and fathering four children does not mean that he is entitled to a chance at parole. His heinous and reprehensible acts in taking the life of a total stranger, brutalizing her during her last moments, choking her to death while they were face-to-face, and then continuing to violate her until his sexual desire was satisfied are all factors that the court weighed in deciding that life without parole is an appropriate sentence. The prosecutor pointed out, and it bears repeating here, that “what he got is priceless. He stole it, and he got ten years, over ten years of freedom that he shouldn’t have had. He got his parole in the prime of his life. He killed Kyla in the prime of hers and he enjoyed a decade in the prime of his.” JA 105. By avoiding justice for ten years, Ojeda was able to create a life for himself and set himself up to present as a family man. Fleeing and avoiding responsibility for his crimes is not a mitigating factor, it is aggravating in the extreme.

The district court highlighted several reasons for its sentence. It noted that Ojeda’s crime was heinous and that he terrorized Kyla in her last moments. JA 112. It recognized that Ojeda ran and avoided responsibility for his crime. JA 112. It observed that Ojeda was calculated in how he

carried out his crime. JA 112. It reminded Ojeda that he took a week between his first aborted foray into her home before going back the second time. JA 112. Finally, the court pointed out the irrevocable nature of Ojeda's act by concluding that Kyla's family "can't see their daughter ever" and sentenced Ojeda to life without parole. JA 113.

"This Court does not sit as a re-sentencing body, but it can vacate the existing sentence and remand for a new sentencing hearing." Opening Brief, p. 16. Ojeda is not explicitly asking this Court to sit as a re-sentencing body, but he is implicitly asking this Court to substitute its judgment for that of the district court. Ojeda has no complaint with the conduct of the sentencing hearing. Rather, he is dissatisfied with his sentence and wants this Court to agree with him and force the district court to resentence him accordingly. Dissatisfaction does not amount to an abuse of discretion as Ojeda cannot point to any error in the conduct of the sentencing hearing or the rationale of the sentencing court, this Court should not vacate his sentence.

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V. CONCLUSION

The State respectfully requests that the Court affirm the sentence imposed and deny Ojeda's appeal.

DATED: June 14, 2019.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Kevin Naughton
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 14, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 14, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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/s/ Margaret Ford
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