

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

JOAN KATHRYN WENGER,  
Appellant,  
vs.

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Elizabeth A. Brown  
Clerk of Supreme Court  
Supreme Court Case No. 84003

THE STATE OF NEVADA,  
Respondent.

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**RESPONDENT'S ANSWERING BRIEF**

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**On Appeal from the Ninth Judicial District Court  
County of Douglas, State of Nevada  
Case No. 2021-CR-00114**

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## **Jurisdictional Statement**

The defendant was convicted pursuant to a guilty plea of vehicular homicide, a category A felony in violation of NRS 484C.130(1) and NRS 484C.440(1). The judgment of conviction was filed on November 29, 2021, and a timely Notice of Appeal was filed on December 20, 2021. This Court has jurisdiction pursuant to NRS 177.015(3).

## **Statement of Facts**

The defendant set forth a statement of facts relevant to the issue on appeal that the State does not dispute. However, the State offers the following additional relevant facts.

In argument on behalf of the defendant, defense counsel argued:

We are asking the Court to sentence her to ten to 25 years. She is 66 years old, Your Honor. Actually - - excuse me - - she's 67 now, I believe. If the Court sentenced her to ten to 25, she won't be able to parole until at the earliest she's 76 years of age and can be held until she's 91 years of age. If the Court sentences her to 25 to life, she won't be eligible for parole until she's 91 years old. It's essentially a life without parole sentence given her health and her circumstance, Your Honor.

Ten to 25, ten to 25 sentence, we submit to the Court, is sufficient under the circumstance to afford appropriate punishment and community protection.

Appellant's Appendix (AA) at 17-18. The Court and defense counsel then clarified that no matter which sentence was imposed, the defendant would be eligible for parole in 10 years. AA 19.

In argument to the Court, the State argued that the defendant was in the situation of being sentenced for this crime because she had repeatedly made the bad decision to drink and drive. AA at 27. The State further summarized the facts detailing the defendant's reckless driving prior to the collision in this case. AA 29.

The defense raised no objections during the sentencing hearing.

### **Standard of Review**

“Due process [ ] requires that the [plea] bargain be kept when the plea of guilty is entered. In determining whether the state has fulfilled its part of a plea bargain, the state is held to the most meticulous standards of both promise and performance.” *Van Buskirk v. State*, 102 Nev. 241, 243 (1986) (*internal quotations and citations omitted*). When, as here, there is a failure to object, claims of prosecutorial misconduct are reviewed for plain error. *Valdez v. State*, 124 Nev. 1172, 1190 (2008). Thus, Defendant has the burden of demonstrating that error affected her substantial rights, by causing actual prejudice or a miscarriage of justice. *Id.*

### **Summary of Argument**

1. The State did not violate the guilty plea agreement. The State's arguments fell within the terms of the agreement and the State's recommendations for sentencing were made pursuant to the agreement.
2. Even if the prosecutor breached the plea agreement, there was no plain error

and reversal is not warranted. None of the defendant's substantial rights were affected and there was no prejudice to the defendant or miscarriage of justice.

### **Argument**

#### **1. The State did not violate the guilty plea agreement.**

First, context reveals that the prosecutor's statement, "[t]his wasn't an accident. This was a reckless and intentional act by Ms. Wenger," was not a comment on the elements of the offense. The court reviewed the elements of the offense with the defendant at the arraignment and all parties understood there was no element of recklessness or specific intent, rather the State need only prove the defendant's actions were done willfully and unlawfully. RA 12-13. Rather, the statement that was a reckless and intentional act by Ms. Wenger was a continued statement of the State's recitation of the facts and circumstances of the crime; the defendant had been driving in a reckless manner just prior to the collision and had done so after repeatedly making decisions to drink and drive. The State never suggested that specific intent was an element of this crime.

In addition, the State not only made the recommendation for a 10 to 25 year sentence, as required by the guilty plea agreement, the State went beyond its obligation and affirmatively argued and recommended that sentence. As the defense did, the State argued that for this defendant, a sentence of 10 to 25 years

would likely be the same as a life sentence and therefore the 10 to 25 year sentence was appropriate in this case.

Second, the defendant alleges error by the prosecutor for reading a letter written by one of the defendant's victims. The defendant does not allege that there was anything improper in the contents of the letter, only that it was read by the prosecutor. The defendant has not cited any authority to support that such a procedure would constitute misconduct or a breach of the guilty plea agreement.

NRS 176.015(3) states:

3. After hearing any statements presented pursuant to subsection 2 and before imposing sentence, the court shall afford the victim an opportunity to:

(a) Appear personally, by counsel or by personal representative; and

(b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.

As seen, nothing in NRS 176.015(3) prevents a prosecutor from reading a victim statement. The letter was an emotional one written by Mr. Staugaard to his mother after losing her when the two of them were involved in this collision. It is not unreasonable or a violation of any law or the guilty plea agreement for a prosecutor to read such a letter when it may be too difficult for a victim to do so.

As shown, the State did not violate the guilty plea agreement. As a result, the defendant's judgment in this matter should be affirmed.

**2. Even if error is found, reversal is not warranted. There was no plain error and the defendant suffered no prejudice.**

“Due process [ ] requires that the [plea] bargain be kept when the plea of guilty is entered. In determining whether the state has fulfilled its part of a plea bargain, the state is held to the most meticulous standards of both promise and performance.” *Van Buskirk v. State*, 102 Nev. 241, 243 (1986) (*internal quotations and citations omitted*). When, as here, there is a failure to object, claims of prosecutorial misconduct are reviewed for plain error. *Valdez v. State*, 124 Nev. 1172, 1190 (2008). Thus, the defendant has the burden of demonstrating that error affected her substantial rights, by causing actual prejudice or a miscarriage of justice. *Id.*

As this Court described plain error review:

Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct. For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error. Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct “ ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ”

Harmless-error review applies, however, only if the defendant preserved the error for appellate review. Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this “allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.” When an error has not been preserved, this court employs plain-error review. Under that standard, an error that is plain from a review of the



record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing “actual prejudice or a miscarriage of justice.”

*Valdez v. State*, 124 Nev. 1172, 1189–90, (2008) (*footnotes omitted*).

The defendant has failed to identify any substantial right that was affected by the alleged errors. She merely alleges the alleged errors and asks for relief. Further, while arguing there was error, the defendant fails to make any argument that the alleged errors prejudiced her. In fact, the record belies any such claim.

First, as argued above, the arraignment transcript makes clear that all parties and the court knew this was not a crime involving specific intent. During sentencing, nothing in the transcript remotely suggests that the court based its sentence on a belief that this was a specific intent crime.

Second, the defendant does not identify, and nothing in the transcript suggests, how the prosecutor reading the victim’s letter could prejudice the defendant. In fact, it is quite reasonable to believe that the victim trying to read an emotional letter at sentencing, possibly through tears and pauses of becoming choked up with emotion would have been more detrimental to the defendant than the prosecutor reading the letter would.

Finally, neither of the violations alleged by the defendant were highlighted or even mentioned by the court in pronouncing judgment. Rather, the sentencing court did highlight some of the facts over which there is no dispute:

Ms. Wenger, the Court finds that based upon your history and the facts and circumstance of this case that the maximum penalty that the law allows is appropriate in this case.

...

You've heard some of the facts and circumstances here, but I highlight your prior convictions for driving under the influence and your blood alcohol level in this case, which is a .308.

AA 51-52.

Because the defendant failed to identify any substantial right affected by the alleged errors, and because she has failed to show any actual prejudice or miscarriage of justice, the defendant's conviction should be affirmed.

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## Conclusion

The State did not violate the terms of the guilty plea agreement filed in this case. Even if this Court finds that the prosecutor acted improperly, the defendant has failed to make any showing of the elements of plain error.

For the above reasons, defendant's conviction and judgment should be affirmed.

DATED this 29<sup>th</sup> day of June, 2022.

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## **CERTIFICATE OF COMPLIANCE**

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 proportionately spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is either:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains \_\_\_\_\_ words; or

☒ Does not exceed 30 pages.

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 of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

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

DATED this 29<sup>th</sup> day of June, 2022.

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## ADDENDUM

### Relevant Parts of Statutes Relied Upon

#### Nevada Revised Statutes

**NRS 176.015 Prompt hearing; court may commit defendant or continue or alter bail before hearing; statement by defendant; presentation of mitigating evidence; rights of victim; notice of hearing.**

1. Sentence must be imposed without unreasonable delay. Pending sentence, the court may commit the defendant or continue or alter the bail.
  2. Before imposing sentence, the court shall:
    - (a) Afford counsel an opportunity to speak on behalf of the defendant; and
    - (b) Address the defendant personally and ask the defendant if:
      - (1) The defendant wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment; and
      - (2) The defendant is a veteran or a member of the military. If the defendant meets the qualifications of subsection 1 of [NRS 176A.280](#), the court may, if appropriate, assign the defendant to:
        - (I) A program of treatment established pursuant to [NRS 176A.280](#); or
        - (II) If a program of treatment established pursuant to [NRS 176A.280](#) is not available for the defendant, a program of treatment established pursuant to [NRS 176A.230](#) or [176A.250](#).
  3. After hearing any statements presented pursuant to subsection 2 and before imposing sentence, the court shall afford the victim an opportunity to:
    - (a) Appear personally, by counsel or by personal representative; and
    - (b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.
  4. The prosecutor shall give reasonable notice of the hearing to impose sentence to:
    - (a) The person against whom the crime was committed;
    - (b) A person who was injured as a direct result of the commission of the crime;
    - (c) The surviving spouse, parents or children of a person who was killed as a direct result of the commission of the crime; and
    - (d) Any other relative or victim who requests in writing to be notified of the hearing.
- ↪ Any defect in notice or failure of such persons to appear are not grounds for an appeal or the granting of a writ of habeas corpus. All personal information, including, but not limited to, a current or former address, which pertains to a victim or relative and which is received by the prosecutor pursuant to this subsection is confidential.
5. For the purposes of this section:
    - (a) “Member of the military” has the meaning ascribed to it in [NRS 176A.043](#).
    - (b) “Relative” of a person includes:
      - (1) A spouse, parent, grandparent or stepparent;
      - (2) A natural born child, stepchild or adopted child;
      - (3) A grandchild, brother, sister, half brother or half sister; or
      - (4) A parent of a spouse.
    - (c) “Veteran” has the meaning ascribed to it in [NRS 176A.090](#).
    - (d) “Victim” includes:

(1) A person, including a governmental entity, against whom a crime has been committed;

(2) A person who has been injured or killed as a direct result of the commission of a crime; and

(3) A relative of a person described in subparagraph (1) or (2).

6. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

(Added to NRS by [1967, 1432](#); A [1989, 1425](#); [1991, 90](#); [1995, 371](#); [1997, 3236](#); [2001, 889](#); [2009, 100](#); [2017, 3018](#); [2019, 4380](#))



## **CERTIFICATE OF SERVICE**

I hereby certify that this document, **RESPONDENT’S ANSWERING BRIEF**, was filed electronically with the Nevada Supreme Court on the 29<sup>th</sup> day of June, 2022. Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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