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VI. CONCLUSION

We conclude that the Act covers illegal aliens under a contract of hire with a covered employer in Nebraska. We also conclude that the Act does not preclude an award of PTD benefits for illegal aliens. Finally, we conclude that the trial judge was not clearly wrong in finding that Moyera's injury to his foot had resulted in pain to his back that interfered with his ability to perform the work he had previously performed. Thus, the trial judge's finding of permanent total disability was not clearly wrong.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM B. PEREIRA, APPELLANT.

824 N.W.2d 706

Filed January 4, 2013. No. S-12-438.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Sentences: Words and Phrases.** Allocution is an unsworn statement from a convicted defendant to the sentencing judge in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.
3. **Verdicts: Sentences.** Before a sentence is pronounced, the defendant must be informed by the court of the verdict and asked whether he or she has anything to say why judgment should not be passed against him or her.
4. **Constitutional Law: Evidence: Sentences.** A defendant must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information on which the judge may rely in determining the sentence to be imposed.
5. **Sentences.** Allocution is an opportunity to address the court, not to speak to spectators in attendance.
6. ____. The time of imposition of sentence is not a public forum to be used by either a defendant or his or her attorney for that purpose.
7. **Sentences: Waiver: Appeal and Error.** Generally, where no objection is made at a sentencing hearing when a defendant is provided an opportunity to do so, any claimed error is waived and is not preserved for appellate review.

8. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
9. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
11. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.
12. ____. An argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, George R. Love, and Dain J. Johnson, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

The district court convicted William B. Pereira of second degree murder, pursuant to his plea of no contest, and imposed a sentence of 50 years' to life imprisonment. Because, viewed in context, the district court merely required Pereira's sentencing comments to be addressed to the bench rather than to spectators, we reject his contention that the court improperly limited or denied his right of allocution. He also argues that the court imposed an excessive sentence. Because we find no abuse of discretion, we affirm.

BACKGROUND

On December 4, 2010, at approximately 5 a.m., Lincoln police officers were sent to a disturbance call at an apartment. The officers heard rhythmic pounding coming from the apartment. They entered the apartment, headed to the bedroom from where the noise was coming, and observed Pereira kneeling next to Alissa Magoon and striking her head with an object. Magoon was deceased, and an autopsy determined that she died from blunt force trauma to the head.

In Pereira's statements to police, he said that he was angry with Magoon—an intimate partner—because he perceived that she was being unfaithful to him. He began choking Magoon and then hitting her with numerous objects found in the bedroom. When the officers arrived, Pereira was using part of a large picture frame to strike Magoon.

The State initially charged Pereira with first degree murder and use of a deadly weapon to commit a felony. Pursuant to a plea agreement, the State amended the information to charge only second degree murder and Pereira pled no contest. The district court subsequently sentenced Pereira to imprisonment for 50 years to life. Pereira timely appeals.

STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[1]

ASSIGNMENTS OF ERROR

Pereira assigns, reordered, that the district court (1) erred or abused its discretion by limiting or denying the right of allocution and (2) abused its discretion by imposing an excessive sentence. He also alleges a problem with the interpreter and the translation during sentencing.

ANALYSIS

Claimed Denial of Allocution.

[2,3] Pereira asserts that the district court erred or abused its discretion by limiting or denying his right to allocution.

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[1] *State v. Ramirez, ante* p. 697, 823 N.W.2d 193 (2012).

"Allocution" is "[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence."[2] In Nebraska, allocution is statutorily required by Neb. Rev. Stat. § 29-2201 (Reissue 2008), which provides: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict . . . and asked whether he [or she] has anything to say why judgment should not be passed against him [or her]."

[4] The most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence.[3] As this court stated in *State v. Barker*[4]:

> [A] defendant must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information on which the judge may rely in determining the sentence to be imposed.

Pereira asserts in his brief that he "was unfairly denied a fair opportunity to be heard and to express to the court comments which could have mitigated his sentence."[5] He argues that "[t]he relevant information which he was not permitted to share went directly to the acceptance of responsibility and the amenability to rehabilitation."[6] But Pereira does not tell us what he would have said or how that might have changed the sentence.

Before announcing the sentence, the district court asked Pereira if he had any comments to make with respect to sentencing. The following colloquy then occurred:

> [Pereira]: I want to make an apology to her family.

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[2] Black's Law Dictionary 88 (9th ed. 2009).

[3] *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992).

[4] *State v. Barker*, 231 Neb. 430, 436, 436 N.W.2d 520, 524 (1989).

[5] Brief for appellant at 24.

[6] *Id.*

THE COURT: Thank you, sir.

Are you ready for me to tell you what I am going to do?

[Pereira]: Can I make an apology to them?

THE COURT: I thought you just did, sir.

I think that what you've said was — I don't want you speaking to people in the pews, no, sir.

Do you have any other comments you want to make?

[Pereira]: No, Your Honor.

THE COURT: Are you ready for me to tell you what I'm going to do?

[Pereira]: Yes, Your Honor.

THE COURT: [Counsel for Pereira], are you aware of any legal reason why I should not proceed with sentencing?

[Counsel for Pereira]: No, Your Honor.

[5,6] The district court properly limited the right of allocution to Pereira's comments to the court. From the context of the discussion that ensued, it appears that Pereira wished to address an additional apology to Magoon's family, which the court declined to allow. We find no error in that regard.[7] Allocution is an opportunity to address the court, not to speak to spectators in attendance. "The time of imposition of sentence is not a public forum to be used by either a defendant or his [or her] attorney for that purpose."[8] The court properly limited Pereira's allocution to comments directed to the court.

Pereira cites *State v. Dunn*[9] in support of his argument that he was denied allocution. In that case, the Nebraska Court of Appeals determined that although the trial court literally complied with the requirement of § 29-2201 by asking the defendant if he had anything to say why judgment should not be passed against him, the defendant was effectively denied his right of allocution. In *Dunn*, the sentencing court first ignored

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[7] See *State v. Brockman*, 184 Neb. 435, 168 N.W.2d 367 (1969) (failure to strictly comply with § 29-2201 was harmless error).

[8] *United States v. Mitchell*, 392 F.2d 214, 216 (2d Cir. 1968).

[9] *State v. Dunn*, 14 Neb. App. 144, 705 N.W.2d 246 (2005).

defense counsel's request for a presentence investigation, then described its understanding of the facts of the case and cut off defendant's counsel on three occasions as counsel tried to challenge the court's recitation or to otherwise present further information. The court finally imposed a jail sentence without allowing the defendant or his counsel any opportunity to contest the court's summary.

The situation in the instant case is far different from that in *Dunn*.[10] Pereira's counsel submitted what he described as a "rather lengthy" letter on the matter of sentencing and, at the sentencing hearing, made supplemental comments consuming nearly five pages in the bill of exceptions. Moreover, the district court provided Pereira with an opportunity to speak prior to being sentenced. A fair reading of the colloquy is that the court felt that Pereira's statement, "I want to make an apology to her family," was the extent of Pereira's expression of regret. That statement alone sufficiently apprised the court of Pereira's remorse. After the court declined to allow Pereira to directly address members of Magoon's family, the court asked him if he had any other comments to make. He did not. The court again verified that Pereira was finished by asking if he was ready to be informed of the court's sentence. Pereira said that he was. We find no error in the court's handling of Pereira's allocution.

[7] Moreover, neither Pereira nor his counsel alerted the district court to any concern about the extent of allocution permitted to him. After responding to Pereira's question about making a statement to members of Magoon's family, the court gave Pereira two additional opportunities to speak. He declined both of them. The court then asked Pereira's counsel if there was any legal reason why the court should not proceed with sentencing, and Pereira's counsel answered that there was not. If Pereira or his counsel felt that Pereira was indeed being denied allocution, a timely objection would have alerted the court to that fact. Instead, the court was left with the impression that there was nothing more to be said. Generally, where no objection is made at a sentencing hearing when a defendant

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[10] *Id.*

is provided an opportunity to do so, any claimed error is waived and is not preserved for appellate review.[11] Because the general rule has not been applied previously in the context of allocution at sentencing, we have addressed the allocution issue on its merits. In the future, however, we will apply the waiver rule where a defendant fails to make an objection after having the opportunity to do so.

Excessive Sentence.

Pereira argues that his sentence—particularly the life imprisonment portion—is excessive. He contends that the sentence was not tailored to fit him, that it placed undue reliance on involuntary statements, and that it did not account for the plea agreement reached by the parties.

[8] The district court convicted Pereira of a Class IB felony, which carries a sentence of 20 years' to life imprisonment.[12] The court sentenced Pereira to 50 years' to life imprisonment. Pereira's sentence is within the statutory range. Accordingly, we review the sentence for an abuse of discretion.[13] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[14]

[9,10] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[15] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude

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[11] *State v. Svoboda*, 13 Neb. App. 266, 690 N.W.2d 821 (2005).

[12] See Neb. Rev. Stat. § 28-105(1) (Reissue 2008).

[13] See *State v. Ramirez, supra* note 1.

[14] *Id.*

[15] *Id.*

and all the facts and circumstances surrounding the defendant's life.[16]

The district court's statements before announcing the sentence demonstrate that it considered the pertinent factors. The court noted that Pereira was 26 years old, that he was born in El Salvador, and that he moved to New York City when he was 16 years old to be reunited with his mother, who had moved to the United States when Pereira was 8. Pereira's neighborhood in New York was full of gangs, and killings were not uncommon. Pereira subsequently moved to Lincoln, enrolled in Lincoln East High School, and began working part-time jobs. He suffered a head injury in a car accident in approximately 2004. He graduated from high school in 2005. Although the court found Pereira to be competent to stand trial, the court recognized that medical reports established that Pereira had suffered and continues to suffer from a number of mental health issues. Pereira's involvements with law enforcement between 2005 and 2009 were primarily traffic related, with the exception of a procuring alcohol charge. In January 2010, he was cited after getting in a fight and breaking out several windows in a home. In August, he was charged with third degree domestic assault and third degree assault. The victim of the domestic assault was Magoon. Then, in December, Pereira killed Magoon. In the hours prior to the murder, Pereira and Magoon had smoked synthetic marijuana. The court stated: "As a result of [Pereira's] jealousness, and that's what I believe this is about, he savagely and repeatedly beat . . . Magoon about the head with a piece of wood." The court noted that Magoon's brain was exposed as a result of the beating and stated that "[t]he terror the 19-year-old . . . Magoon had to have experienced as a result of this punishment being meted out on her by . . . Pereira is almost unimaginable to me."

Further, the presentence investigation report contained several elevated evaluation scores. Pereira scored in the "high risk" range for categories measuring "Leisure/Recreation," "Alcohol/

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[16] *Id.*

Drug Problem," and "Procriminal Attitude/Orientation." He scored in the "medium risk" range for categories measuring "Criminal History," "Family/Marital," "Companions," and "Antisocial Pattern."

The district court imposed a sentence within the statutory range, and Pereira has failed to show that the court abused its discretion in sentencing him.

Remaining Assignment of Error.

Pereira's final assigned error is as follows: "Issues involving the use of interpreters at the sentencing proceeding below have been identified but will require a further evidentiary hearing. [Pereira] maintains that because of the manner in which translation was conducted of the sentencing proceedings from English to Spanish, he was unable to comprehend the proceedings."

[11] This allegation is purely conclusory. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.[17] Regardless of the state of the record, Pereira's assignment fails to identify the alleged defect. This conclusory assignment fails to preserve any issue for appellate review.

[12] Pereira's argument does not save the assignment. His argument on the issue does not elaborate on the assignment or otherwise support it with any facts. An argument that does little more than to restate an assignment of error does not support the assignment, and this court will not address it.[18]

Further, Pereira concedes that the existing record is insufficient to address his claim. We agree that the record does not address any matters regarding interpretation of a non-English language. The insufficient record provides an additional reason not to consider this assignment of error.

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[17] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

[18] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

CONCLUSION

We find no error by the district court with respect to allocution or abuse of discretion with respect to sentencing. Accordingly, we affirm the district court's judgment.

AFFIRMED.