

IN THE SUPREME COURT OF THE STATE OF NEVADA

CONRADO BAYLON FIEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43709

FILED

NOV 17 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Edwards*
CHIEF DEPUTY CLERK

This is a direct appeal from a judgment of conviction. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On August 24, 2004, the district court convicted appellant Conrado Baylon Fiel, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Fiel was sentenced to a life term in prison with the possibility of parole after 10 years, plus an equal and consecutive term for the deadly weapon enhancement.¹

Fiel's sole issue on appeal is that the district court erred in giving the following instruction to the jury:

On arriving at a verdict in this case, you shall not discuss or consider the subject of penalty or punishment as that is a matter which will be decided later, and must not in any way affect your

¹Fiel committed the murder in 1989, before the Legislature increased the possible penalties for first-degree murder. See 1995 Nev. Stat., ch. 443, § 44, at 1181-82.

decision as to the innocence or guilt of the defendant.

He argues that this instruction confused the jury, implying that he was guilty of first-degree murder and signaling to the jury that a penalty hearing would follow.

Counsel did not object to the instruction. Generally, the failure to object to a jury instruction precludes appellate review.² Nonetheless, this court may review issues not preserved for appeal if there is plain error affecting a defendant's substantial rights.³ Fiel bears the burden of showing actual prejudice or a miscarriage of justice.⁴

We conclude that the instruction here implied an inappropriate assumption by stating that punishment would be decided later. But even assuming this was plain error, Fiel does not show actual prejudice. Generally, an erroneous instruction does not affect substantial rights where there is overwhelming evidence of guilt.⁵

We conclude that overwhelming evidence supports Fiel's conviction for first-degree murder. The evidence shows that Fiel disliked the victim Jesse Lake, and on July 11, 1989, he confronted Lake, accusing

²See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

³Id.; NRS 178.602.

⁴See Green, 119 Nev. at 545, 80 P.3d at 95.

⁵Id. at 548, 80 P.3d at 97.

him of shooting at Fiel's wife's car several days earlier. Fiel was extremely angry, and after arguing with Lake for several minutes, Fiel walked to his apartment nearby. Minutes later, Fiel, armed with a handgun, returned and engaged Lake in yet another argument. Fiel then shot an unarmed Lake four times and fled Reno. Fiel was ultimately located in the Philippines in 2000 and extradited back to the United States for trial. Fiel conceded that he shot Lake, but argued that Lake was a gun-toting drug dealer. Fiel argued that he feared for his family's safety because Lake had fired several shots at his wife's car. Fiel asserted that he was not guilty because the State had failed to prove that the killing was unlawful.

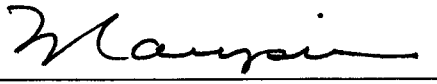
Moreover, as a whole, the challenged instruction advised the jury that punishment was a matter that must not influence its decision respecting Fiel's innocence or guilt. Additionally, the district court properly instructed the jury respecting the presumption of innocence and that the State bore the burden of establishing each element of the offense beyond a reasonable doubt.

Based on the foregoing, we conclude that any error in the challenged instruction did not affect Fiel's substantial rights in light of the overwhelming evidence of his guilt and the other proper instructions given.⁶

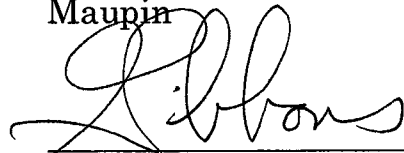
⁶Williams v. State, 103 Nev. 106, 112, 734 P.2d 700, 704 (1987).

Having considered Fiel's claim and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.

Maupin

 _____, J.

Gibbons

 _____, J.
Hardesty

cc: Hon. Janet J. Berry, District Judge
Scott W. Edwards
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk