

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BRUCE TRACY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45124

FILED

MAR 27 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of assault with a deadly weapon and one count of failure to stop on the signal of a police officer. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant Robert Bruce Tracy to serve two consecutive prison terms of 12 to 30 months. The district court further ordered the sentences suspended and placed Tracy on probation for an indeterminate period not to exceed four years. Tracy presents five issues for our review.

First, Tracy contends that the district court erred when it forced him to choose between going to trial or going to jail. He specifically asserts that the district court's threat to return him to jail without a legitimate basis violated his right to due process of law, and that its refusal to consider the merits of a trial continuance violated his rights to due process and fair trial. We disagree.

The district court granted Tracy's third motion for own recognizance release based on his representations that he had no prior criminal record, he had a lengthy employment history, he could get a job, and he had a place to stay. The district court released Tracy pending trial

on intensive supervision and ordered him not to drive. And the district court specifically limited the window of time during which Tracy might pose a threat to the health, safety, and welfare of the community by advancing the trial date.

During calendar call, the following colloquy occurred:

MS. BAYUDAN: Mr. Tracy would like to address the Court, your Honor. I was in trial last week and week before that and that's the reason I have not been able to meet with Mr. Tracy.

...

THE DEFENDANT: I'd like to make my feelings be known that due to the inability to getting to meet with my attorney because of her workload. I don't feel like I have been properly represented.

THE COURT: You have a right to hire any attorney in the State of Nevada. If you can't afford to hire your own attorney, you get an attorney appointed assigned to you from the Public Defender. She's been in a lot of trials. If you don't want to go to trial next week I will put you back in jail.

We conclude that Tracy's release was conditioned on an early trial and therefore the district court did not err in warning him that his release would be revoked if his trial was continued.¹ To the extent that Tracy requested a continuance, we conclude that the district court did not abuse its discretion by denying the request.²

¹See generally NRS 178.4851; NRS 178.4853.

²See McCabe v. State, 98 Nev. 604, 607, 655 P.2d 536, 537 (1982) (the decision to grant or deny a request for a continuance is within the sound discretion of the district court).

Second, referring again to the above colloquy, Tracy contends that the district court violated his right to counsel by preventing him from retaining new counsel and failing to determine whether he had a conflict with court-appointed counsel. However, Tracy did not request new counsel nor did he identify an actual conflict of interest. He merely stated that he did not feel that he had been properly represented. Accordingly, we conclude that Tracy has failed to demonstrate that the district court abused its discretion.³

Third, Tracy contends that he was denied his due process right to a fair trial as the result of prosecutorial misconduct. Tracy claims that during closing argument the prosecutor impermissibly vouched for witnesses and maligned the defense case. However, Tracy failed to object to these alleged instances of prosecutorial misconduct. As a general rule, the failure to object to prosecutorial misconduct precludes appellate review absent plain error.⁴ Having considered the comments in context, we conclude that they do "not rise to the level of improper argument that would justify overturning [Tracy's] conviction."⁵

Fourth, Tracy contends that the district court failed to properly instruct the jury on the specific intent required to find that an

³See generally Thomas v. State, 94 Nev. 605, 584 P.2d 674 (1978).

⁴Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

⁵See Greene v. State, 113 Nev. 157, 169-70, 931 P.2d 54, 62 (1997), ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); see generally Rowland v. State, 118 Nev. 31, 38-40, 39 P.3d 114, 118-19 (2002).

automobile was used as deadly weapon. Tracy did not object to the instructions. Failure to object to instructions at trial precludes appellate review absent plain error.⁶ Having considered the instructions as a whole, we conclude that they sufficiently directed the jury to consider whether Tracy intentionally placed "another person in reasonable apprehension of immediate bodily harm" with the use of a deadly weapon.⁷

⁶See Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000).

⁷See NRS 200.471(1). The jury instructions presented regarding intent were

Instruction No. 4.

An Assault With a Deadly Weapon is an intentional placing of another person in reasonable apprehension of immediate bodily harm, by or through the use of a deadly weapon.

To constitute an assault, it is not necessary that any actual injury be inflicted.

Instruction No. 13.

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

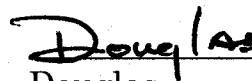
Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.


Fifth, Tracy contends that insufficient evidence was adduced at trial to support his conviction of assault with a deadly weapon. He specifically asserts that the evidence presented at trial demonstrated that he lacked the requisite intent to commit the assault and that he did not operate his vehicle as a deadly weapon. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.⁸

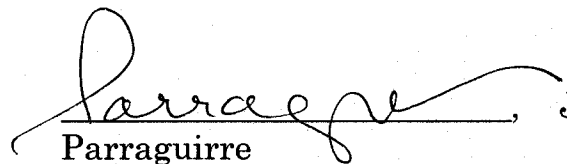
In particular, we note that the State presented evidence that Tracy made eye contact with the victim, revved his car engine, and drove straight at the victim. We conclude that the jury could reasonably infer from the evidence presented that Tracy had the requisite intent to commit assault, using his car as a deadly weapon.

Having considered Tracy's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

⁸McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk