IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIN CORNELL YOUNG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45155

FILED

MAR 16 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. Appellant Erin Young was sentenced to a prison term of 66-180 months, plus an equal and consecutive term for the use of a deadly weapon.

Young raises six issues on appeal. First, he asserts the district court improperly examined a witness, thereby showing bias to the jury. Young failed to object at trial. "Judicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court. However, this court has reviewed judicial misconduct, absent the appellant's failure to preserve adequately the issue for appeal, under the plain error doctrine."[1] The district court's

[1]Oade v. State, 114 Nev. 619, 621-622, 960 P.2d 336, 338 (citing Parodi v. Washoe Medical Ctr., 111 Nev. 365, 369-370, 892 P.2d 588, 591 (1995); see NRS 178.602 ("plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.")

line of questioning did not amount to plain constitutional error. "A trial judge has the right to examine witnesses for the purpose of establishing the truth or clarifying testimony, but in doing so he must not become an advocate for either party, nor conduct himself in such a manner as to give the jury an impression of his feelings."[2] The district court, noticed the witness demonstrated the strike with his right hand, yet testified that Young hit the victim with his left hand. The judge intervened with a question to clarify the obscurity in his testimony. This does not rise to the level of plain error.

Further, Young claims the court erred in asking the witness about the victim and Young's clothing. Again, Young failed to object, and the questioning of a factual matter does not rise to the level of plain error.

Second, Young asserts prosecutorial misconduct occurred in closing when the State said "don't be fooled by [witness], don't be fooled by this defendant." Again, Young failed to object at trial. Even assuming that the comment was improper, "[a] prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[3] Here, when looking at the context of the whole trial, the one sentence from the prosecution advising the jury to not be fooled does not rise to the level of plain error.

---

[2]Azbill v. State, 88 Nev. 240, 249, 495 P.2d 1064, 1070 (1972).

[3]Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

Third, Young contends the evidence failed to prove beyond a reasonable doubt that Young committed the crime of attempted murder with use of 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.[4]

In particular, we note Young stipulated to the injuries constituting substantial bodily harm. Further, both the victim and a witness testified that Young, a 6'4" male, struck the victim, a 5'3" female in the face with a metal pipe. The jury also heard numerous witnesses testify that Young had threatened to kill the victim numerous times just days before the attack. The jury could reasonably infer from the evidence presented that Young was guilty of attempted murder with use of a deadly weapon. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[5]

Fourth, Young contends the jury was not specifically instructed on alternative charging. Young failed to object or request an instruction regarding the alternative charge, which generally precludes appellate review except for errors that are patently prejudicial.[6] Young was convicted of both attempted murder with use of a deadly weapon and

---

[4]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

[5]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[6]McKenna v. State, 114 Nev. 1044, 1052, 968 P.3d 739, 745 (1998).

battery with use of a deadly weapon resulting in bodily harm. The district court remedied the situation by dismissing the conviction for the lesser included offense. Because the court only convicted Young of the greater of the two charges, Young has not shown the lack of an instruction on the alternative charging was patently prejudicial.

Fifth, Young contends the district court violated Batson[7] by permitting the State to exclude the only African-American venire panel member on discriminatory grounds. To establish a prima facie case that peremptory challenges were used in a racially discriminatory manner, appellant must show that the prosecutor exercised his peremptory challenges to remove potential jurors from the venire because of their race.[8] However, the State provided a long list of permissible, race neutral reasons for dismissal of the juror, and as a result, Young has failed to demonstrate a prima facie case of racial discrimination.[9]

Sixth and finally, Young asserts the district court erred in admitting cumulative evidence in rebuttal testimony. Again, Young failed to object at trial. The district court is not required to exclude cumulative evidence. NRS 48.035(2), provides that "relevant [ ] evidence may be excluded if its probative value is substantially outweighed by . . . [the] needless presentation of cumulative evidence." We conclude that even assuming the district court abused its discretion in permitting cumulative

---

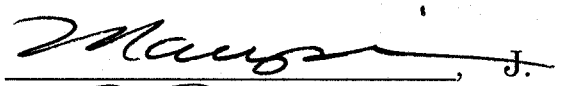
[7]Batson v. Kentucky, 476 U.S. 79 (1986).

[8]See Kaczmarek v. State, 120 Nev. 314, 332-33, 91 P.3d 16, 29 (2004).

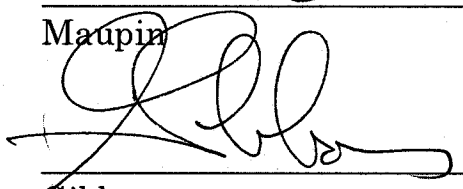
[9]See id.

testimony, such error was harmless and reversal is not warranted.[10] Therefore, we

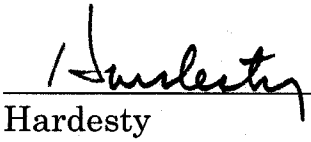
ORDER the judgment of conviction AFFIRMED.



_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

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

---

[10]See Batson v. State, 113 Nev. 669, 677-78, 941 P.2d 478, 484 (1997).