

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE KELLY ARMSTEAD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45255

FILED

JAN 25 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Joe Kelly Armstead to serve two consecutive prison terms of 120 to 300 months. Armstead presents four issues for our review.

First, Armstead contends that he was denied his due process right to a fair trial as the result of prosecutorial misconduct. He claims that during direct examination of a witness the prosecutor improperly elicited testimony that drug dealers were on the corner in the trailer park, and on re-direct examination the prosecutor elicited testimony that Armstead was one of the individuals on the corner. Armstead argues that this testimony was highly prejudicial because it portrayed him as a drug dealer and provided the State with a motive for the crime.

Armstead directs us to the following exchange, which occurred during the prosecutor's direct examination of Daniel Poole:

Q What happens when you come back?

A Well, I pulled up to the trailer park, and I
– I – well, Harry had said, there's – there's dealers

over there at the corner of the trailer park where the bend was. And –

Q There's what? I'm sorry?

A Dealers like drug dealers.

Q Okay.

Later, on re-direct examination, this exchange transpired:

Q (By Mr. Miller) You had also indicated that you saw four other individuals standing on the corner prior to that; is that right?

A Correct.

Q Did you subsequently see any of those individuals again?

A Yes. I had seen the Defendant when he came into the trailer.

Q So the Defendant was one of those four individuals that was sitting on the –

A Correct.

Q – corner; is that right?

A Correct.

Armstead did not object to the prosecutor's questions. The failure to object to prosecutorial misconduct below precludes appellate review unless the alleged misconduct constitutes plain error and affected the defendant's substantial rights.¹ "Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights."²

¹Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (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.").

²Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001); see also Manning v. Warden, 99 Nev. 82, 87, 659 P.2d 847, 850 (1983) (noting *continued on next page . . .*)

Given the overwhelming evidence of his guilt, we conclude that Armstead failed to demonstrate that these exchanges were prejudicial beyond a reasonable doubt.

Second, Armstead contends that the district court erred by denying his motion for a mistrial. Armstead claims that the testimony regarding drug dealers prevented the jury from reaching an impartial verdict. The decision whether to grant or deny a motion for a mistrial is well within the district court's sound discretion and will not be disturbed absent a clear showing of an abuse of that discretion.³ "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached."⁴ Here, the district court denied the motion for a mistrial after finding that the evidence did not show "that the corner where the bend was, which was where the drug dealers were, was one in the same as the corner where the defendant was." As this finding is supported by substantial evidence and is not clearly wrong, we conclude that Armstead has failed to demonstrate that the district court abused its discretion.

... continued

"that in a majority of jurisdictions improper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court therefore must determine whether the error was harmless beyond a reasonable doubt").

³Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

⁴Beck v. District Court, 113 Nev. 624, 627, 939 P.2d 1059, 1061 (1997) (quoting Illinois v. Somerville, 410 U.S. 458, 464 (1973)).

Third, Armstead contends that the district court erred by denying his motion for a new trial. He asserts that the district court "found that the misconduct complained of did occur and that it was prejudicial, but denied the motion because Armstead was not 'unfairly prejudiced' by the testimony." At the conclusion of a hearing on Armstead's motion, the district court stated, "I don't see that the analysis has changed since the Court ruled on the motion for mistrial. I don't believe that the defendant was unfairly prejudiced by the testimony at issue, and, I therefore, find that the motion is not warranted and deny it pursuant to NRS 176.515." "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse."⁵ We conclude Armstead has not demonstrated that the district court clearly abused its discretion.

Fourth, Armstead contends that the district court abused its discretion by giving an instruction that defined express and implied malice in archaic terms. He claims that instruction no. 14 was unconstitutionally vague and prejudicial because the language "abandoned and malignant heart" is "obscure, fosters unguided speculation, and creates confusion."⁶ We have previously considered this argument and concluded that the


⁵Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

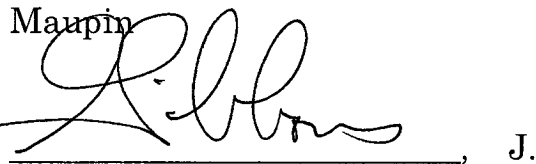
⁶Instruction no. 14 was nearly identical to NRS 200.020 and differed only in that it used the term "human being" instead of "fellow creature" and the term "may" instead of "shall."

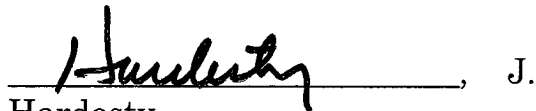
statutory language defining malice is appropriate for use in a jury instruction.⁷

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

ORDER the judgment of conviction AFFIRMED.

 J.

Maupin
 J.
Gibbons

 J.
Hardesty

cc: Hon. Valorie Vega, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001).