IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY EDWARD WHITNEY A/K/A GARY E. WHITNEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48822

FILED

OCT 0 3 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, six counts of robbery with the use of a deadly weapon, one count of attempted robbery with the use of a deadly weapon, and one count of possession of a short-barreled shotgun. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge. The district court sentenced appellant Gary Edward Whitney to serve consecutive and concurrent prison terms totaling 102 to 456 months.

Whitney first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt for conspiracy to commit robbery. Specifically, Whitney contends that there was no evidence presented that proved that Whitney conspired to commit the robbery because his alleged co-conspirator, Verna Magmus, did not testify at trial.

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.[1] In particular, we note that testimony during the trial demonstrated that Magmus drove Whitney to a nail salon, and left the vehicle idling behind the salon until Whitney exited through the backdoor. Several eyewitnesses testified that Whitney entered the salon with a short-barreled shotgun, then demanded and took personal property. At trial, the defense stipulated to Whitney's identification as the robber. Following the robbery, Whitney exited the business with the weapon, and Magmus drove Whitney from the scene and attempted to evade police officers.

The jury could reasonably infer from the evidence presented that Whitney had conspired with Magmus to commit the robbery. 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.[2]

Next, Whitney contends that instances of prosecutorial misconduct denied him a fair trial. First, Whitney contends that the prosecutor committed misconduct in his opening argument by appealing to the sympathy of the jurors. Specifically, Whitney contends that the prosecutor's remark that Whitney's actions "forever changed the lives of

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[1]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).

[2]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).

[the victims]" clearly was intended to "garner sympathy for the alleged victims." Second, Whitney contends that the prosecutor committed misconduct in rebuttal closing argument by expressing a personal opinion about the case. The prosecutor stated during rebuttal closing argument:

> We have to go to the next counts, because here's where we're told that we're piling on. That's what has been said. Overcharging and piling on. . . . [L]adies and gentlemen, let's think about it here for a second. If I'm piling on, don't you think I'd parade Christine VanRoy's 12-year old daughter in here –

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."[3] "If the issue of guilt or innocence is close, if the State's case is not strong, prosecutor misconduct will probably be considered prejudicial."[4] However, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may be harmless error.[5]

We conclude that the prosecutor's conduct did not rise to the level of affecting the fairness of the trial. Defense counsel objected to each instance of alleged misconduct and the district court admonished the jurors to disregard the comments. Further, even assuming the

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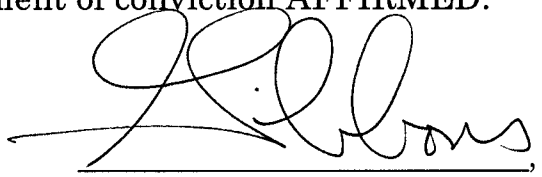
[3]United States v. Young, 470 U.S. 1, 11 (1985).

[4]Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

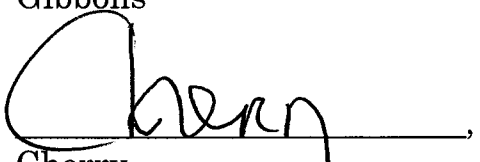
[5]Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997).

prosecutor's comments were improper, given the overwhelming amount of evidence of guilt, the comments cannot be considered prejudicial.

Having concluded that Whitney's contentions lack merit, we ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Jennifer Togliatti, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk