

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON TABILE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49585

**FILED**

DEC 03 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, and two counts of possession of stolen property. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. The district court sentenced appellant Brandon Tabile to serve two consecutive terms of life in prison with the possibility of parole after 20 years for the first-degree murder with the use of a deadly weapon, two consecutive terms of 2 to 5 years in prison for the attempted robbery with the use of a deadly weapon, two terms of 10 to 40 years in prison for the first-degree kidnapping with the use of a deadly weapon, and terms of 12 to 30 months for each possession of stolen property. The court imposed the sentences for all counts concurrently and gave Tabile credit for 1,074 days of presentence confinement.

The underlying offenses arose from an incident in which 17-year-old Tabile attempted to rob James Greene while armed with a handgun and a revolver. After Greene indicated that he had some money in his nearby apartment, Tabile walked with Greene to the apartment. When Greene managed to enter the apartment and shut the door without giving Tabile the money that he had demanded, Tabile fired three shots through the door. One bullet struck Greene in the chest and killed him; another went through a wall and penetrated a couch in a neighboring apartment. A neighbor discovered Greene's body a few days later, and an anonymous tip led police to Tabile. Two guns found in Tabile's possession had been reported stolen.

On appeal from the judgment of conviction, Tabile raises two issues. First, he argues that disruptive emotional displays by spectators during his trial deprived him of his right to a fair trial. Second, he argues that this court should remand for a new sentencing hearing so that he may receive the benefit of recent ameliorative amendments to the deadly weapon enhancement statute. For the reasons discussed below, we conclude that both claims lack merit and therefore affirm the judgment of conviction.

Tabile first complains that while Greene's family members were in the courtroom, they were crying and that this emotional display influenced the jury and violated his right to a fair trial. In support of this argument, Tabile cites authority for the general proposition that a

defendant is entitled to a determination of guilt or innocence based on the evidence rather than outside factors.<sup>1</sup>

As a general rule, a defendant must object to an error or misconduct below and give the district court an opportunity to correct the error or admonish the jury in order to preserve an issue for appellate review.<sup>2</sup> However, NRS 178.602 provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Therefore, for this court to grant relief based on this unpreserved claim, Tabile must demonstrate that (1) there was an error, (2) that the error is “plain,” and (3) that the error “affect[ed] [his] substantial rights.”<sup>3</sup> To show that an error affected his substantial rights, Tabile must demonstrate “actual prejudice or a miscarriage of justice.”<sup>4</sup> Tabile argues, however, that in extreme circumstances, prejudice may be presumed when a trial “lacked the solemnity and sobriety appropriate to a judicial proceeding.”<sup>5</sup>

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<sup>1</sup>See Irvin v. Dowd, 366 U.S. 717, 722 (1961).

<sup>2</sup>Pascua v. State, 122 Nev. 1001, 1007, 145 P.3d 1031, 1034 (2006); Garner v. State, 78 Nev. 366, 372-73, 374 P.2d 525, 529 (1962).

<sup>3</sup>NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

<sup>4</sup>Green, 119 Nev. at 545, 80 P.3d at 95.

<sup>5</sup>State v. Bible, 858 P.2d 1152, 1170 (Ariz. 1993) (quoting State v. Greenawalt, 624 P.2d 828, 842 (Ariz. 1981)); see also Garner, 78 Nev. at 373, 374 P.2d at 529.

The trial record reveals two incidents that form the basis for Tabile's argument. First, the record indicates that Greene's daughter cried in front of the potential jurors after being scolded by a bailiff when she approached the bailiff to ask a question. When the trial judge learned of the incident, he explained to the woman, who was still crying, that she could attend the proceedings but had to keep her emotions in control and not "put on any kind of demonstration in the courtroom in front of the jurors." The court also determined that none of the jurors knew the woman's relationship to Greene. In the second instance, the judge interrupted a witness's testimony to inquire who was making a "noise" in the courtroom. The record, however, does not clearly indicate any response or that, as Tabile represents, spectators in the courtroom were crying. Although Tabile relies on a newspaper article suggesting that the judge's question came as Greene's relatives were choking back tears, that article is not a part of the record that can be considered by this court.<sup>6</sup> Moreover, at no point did Tabile object, ask the trial court to admonish the spectators or give the jury a limiting instruction, or seek a mistrial. Under the circumstances, the record does not shed any light on the events that actually took place and we therefore are in no position to determine

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<sup>6</sup>See Tabish v. State, 119 Nev. 293, 312 n.53, 72 P.3d 584, 596 n.53 (2003) (denying motion to consider new information, including affidavits and photographs, because record on appeal is limited to record made and considered in district court and appellate court "cannot consider matters not properly appearing in the record on appeal").

that Tabile was prejudiced or that the trial was so lacking in the appropriate judicial decorum as to warrant a presumption of prejudice.<sup>7</sup> Accordingly, based on the record currently before this court, Tabile has not demonstrated plain error on the face of the record,<sup>8</sup> and this claim therefore lacks merit.<sup>9</sup>

Tabile next argues that this court should remand this case for a new sentencing hearing so that he can get the benefit of ameliorative amendments to the deadly weapon enhancement statute that allow for a sentence of 1 to 20 years for the use of a deadly weapon rather than a sentence that is equal to that for the primary offense.<sup>10</sup> We recently held in State v. District Court (Pullin) that the 2007 amendments to NRS 193.165 do not apply to offenses committed before the effective date of the amendments.<sup>11</sup> Tabile committed the charged offenses before the effective

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<sup>7</sup>See Bible, 858 P.2d at 1171-72.

<sup>8</sup>See Nelson v. State, 123 Nev. \_\_\_, \_\_\_, 170 P.3d 517, 524 (2007) (“To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record.” (quoting Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002))).

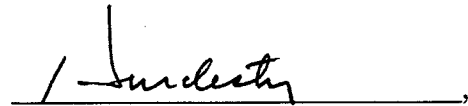
<sup>9</sup>Cf. Johnson v. State, 122 Nev. 1344, 1358-59, 148 P.3d 767, 777 (2006) (concluding that any prejudice from incident in which victim’s brother groaned and passed out in the courtroom was minimal), cert. denied, 128 S. Ct. 1061 (2008).

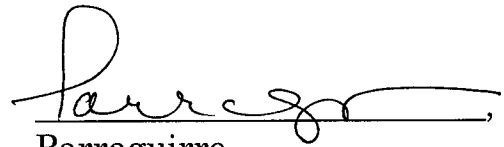
<sup>10</sup>2007 Nev. Stat., ch. 525, § 13, at 3188.

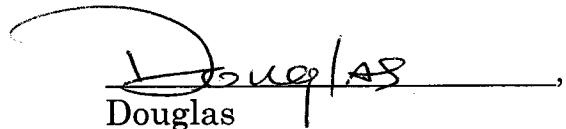
<sup>11</sup>124 Nev. \_\_\_, 188 P.3d 1079 (2008).

date of the amendments to NRS 193.165. Accordingly, consistent with our decision in Pullin, we conclude that Tabile's argument lacks merit. Having considered Tabile's arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Lee A. Gates, District Judge  
Joel M. Mann, Chtd.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk