

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANE M. JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50268

FILED

OCT 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 one count each of conspiracy to commit battery; battery with the use of a deadly weapon resulting in substantial bodily harm with the intent to promote, further, or assist a criminal gang; conspiracy to commit robbery with the intent to promote, further, or assist a criminal gang; and robbery with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant Shane Jones to a jail term of 12 months for the conspiracy to commit battery charge and concurrent prison terms of 36 to 96 months for the battery with a deadly weapon charge, plus an equal and consecutive term for the gang enhancement; 12 to 36 months for the conspiracy to commit robbery charge; and 24 to 96 months for the robbery with an equal and consecutive term for the deadly weapon enhancement.

First, Jones contends that the district court erred in issuing a flight instruction because there was insufficient evidence presented to demonstrate that Jones had fled with consciousness of guilt.

Initially, we note that Jones did not object to the flight instruction in the proceedings below. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.¹ Generally, an appellant must show that he was prejudiced by a particular error in order to prove that it affected his substantial rights.²

Our review of the record on appeal reveals that the evidence presented regarding Jones' departure was sufficient to infer that Jones fled with consciousness of guilt and for the purpose of avoiding arrest. Testimony was presented by defense witnesses that Jones left the scene after the battery. In addition, Jones testified that he left right after the incident occurred and that he was aware that police officers were going to arrive. Because evidence was presented that Jones fled, the district court did not err in instructing the jury on flight.³

Second, in a related argument, Jones contends that the flight instruction offered was improperly modified from the accepted flight instruction. Specifically, citing to Tavares v. State,⁴ Jones contends that the flight instruction did not include any language referring to immediacy of the flight.

¹See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

²Id.

³Potter v. State, 96 Nev. 875, 619 P.2d 1222 (1980).

⁴117 Nev. 725, 30 P.3d 1128 (2001).

The district court instructed the jury that:

[t]he flight of a person after the commission of a crime is not sufficient in itself to establish guilt, however if flight is proved, it is circumstantial evidence in determining guilt or innocence.

The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstance is entitled is a matter for the jury to determine.

Although the instruction in Tavares included language referring to immediacy of flight, the court in Tavares discussed the issue of whether a plan to flee was sufficient to justify a flight instruction, and not whether immediacy of flight was required language in a flight instruction. This court held in Walker v. State⁵ that the same instruction that was offered in this case was proper. Thus, Jones fails to demonstrate that the flight instruction as given was prejudicial such that it affected his substantial rights.

Third, Jones contends that there was insufficient evidence presented for a finding of the gang enhancement. Specifically, Jones contends that (1) the State's witnesses failed to enunciate specific information regarding each of the required elements for a gang enhancement, (2) the State's gang expert relied on reports without identifying who wrote the reports, when they were written, and what was

⁵113 Nev. 853, 870-71, 944 P.2d 762, 773 (1997).

specifically contained in the reports, and (3) the State only identified general crimes committed in the park over a four-year period.

We conclude that the State presented sufficient evidence to justify a gang enhancement in this case. In particular, pursuant to NRS 193.168(7), a criminal gang is any

combination of persons, organized formally or informally, so constructed that the organization will continue its operation even if individual members enter or leave the organization, which:

- (a) Has a common name or identifying symbol;
- (b) Has particular conduct, status and customs indicative of it; and
- (c) Has as one of its common activities engaging in criminal activity punishable as a felony, other than the conduct which constitutes the primary offense.

In contradiction to Jones' and defense witness's testimony that they were not members of a gang, Officer Wade Barnhart testified that he routinely patrolled the Desert Breeze Park, that the gang that was active in the area was known as DBK (Desert Breeze Krew), and that they marked their "turf" with graffiti. Barnhart testified that he had arrested several members of DBK for sale of narcotics and assault. Barnhart identified Jones as often being in the company of DBK members. Detective Dan Newman testified that there were 50 to 130 members in the DBK gang, with 30 reported incidents at the park, including drugs, robberies, batteries with a deadly weapon, drinking, violent crimes, intimidations, swarming attacks and thefts. The victim in this case testified that as Jones was beating him with a pipe, he stated that "[t]his is for DBK. You beat up my homey." The jury could reasonably infer from the evidence presented that Jones committed the battery "with the specific intent to

promote, further or assist the activities of the criminal gang.”⁶ It is for the jury to determine the weight and credibility to give to conflicting testimony, and the jury’s verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.⁷

Fourth, Jones contends that the State committed prosecutorial misconduct during closing argument by making an incorrect statement of fact. Specifically, Jones argues that the prosecutor stated that she had never heard of Andy Brock, who defense counsel contended was the actual perpetrator, until trial. Jones contends that this was incorrect because Brock had been listed on the defense’s witness list, and that it unfairly prejudiced his case. The district court found, over defense counsel’s objection, that the prosecutor’s statement was not prejudicial.

“[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.”⁸ Remarks by a prosecutor must be read in context⁹ and, if improper, will constitute harmless error when there is overwhelming evidence of guilt. Prejudice follows from a prosecutor’s remarks when they have “so infected the

⁶NRS 193.168(1).

⁷Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁸Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

⁹Butler v. State, 120 Nev. 879, 896, 102 P.3d 71, 83 (2004).

proceedings with unfairness as to make the results a denial of due process.”¹⁰

Considered in context, we conclude that the comment was not improper. The prosecutor was commenting on the fact that the State’s investigation had not uncovered any evidence that Brock had committed the offense rather than Jones. Specifically, although defense witnesses testified at trial that Brock had committed the offense, these same witnesses failed to mention Brock in prior interviews.

Fifth, Jones contends that his right to confrontation was violated when medical records were admitted and a juror reviewed and interpreted the records for other jury members. Specifically, Jones contends that the medical records stated that the victim was “mentally slow” and that the juror opined that “mentally slow people could not make a story up,” and thus, the victim could not be lying.

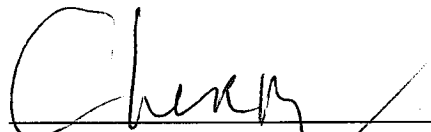
Initially, we note that defense counsel did not object to the admission of the medical records below. The State mentioned during closing argument that the victim had learning disabilities, so even if this information was listed in the medical records, this information was previously available to the jury. Further, according to the State, this information was available upon observation during the victim’s testimony. Thus, Jones has failed to demonstrate that the admission of the medical records which allegedly noted the victim’s learning disability, or the jury’s

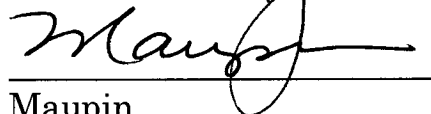
¹⁰Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)).


discussion of those records, prejudiced him such that it affected his substantial rights.

Having considered Jones' contentions and determined that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Maupin


_____, J.
Saitta

cc: Hon. Donald M. Mosley, District Judge
Patricia Erickson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk