IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD DEAN HODSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50759

FILED

JAN 0 8 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of making a bomb threat. Eighth Judicial District Court, Clark County; David B. Barker, Judge. The district court sentenced appellant Richard Dean Hodson to a prison term of 12 to 48 months, ordered the sentence suspended, and placed Hodson on probation for a period not to exceed 36 months.

First, Hodson contends that his statements were protected speech under the First Amendment because he "did not intend his joke to cause an immediate breach of the peace or mass pandemonium."[1] Hodson did not raise this claim in the court below. "Failure to raise a claim below generally bars its consideration on appeal, but this rule is relaxed in cases involving plain error or constitutional issues." Miller v. State, 113 Nev. 722, 724, 941 P.2d 456, 457 (1997).

[1]Hodson does not challenge the constitutionality of NRS 202.840, Nevada's bomb threat statute.

"It is well-established that the First Amendment protects speech that others might find offensive or even frightening." Fogel v. Collins, 531 F.3d 824, 829 (9th Cir. 2008). "'The protections afforded by the First Amendment, however, are not absolute.'" Id. at 830 (quoting Virginia v. Black, 538 U.S. 343, 358 (2003)). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). One of these classes of speech is the true threat. See Watts v. United States, 394 U.S. 705, 708 (1969). "A true threat is 'an expression of an intention to inflict evil, injury, or damage on another.'" Fogel, 531 F.3d at 830 (quoting Planned Parenthood v. Amer. Coalition of Life, 290 F.3d 1058, 1075 (9th Cir. 2002)). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." Black, 538 U.S. at 359-60 (internal quotation marks omitted) (alteration in original).

Here, the jury found that the statement "I'm going to blow up your car" constituted a true threat under the circumstances that it was made and, because true threats fall outside of the First Amendment's protective umbrella, we conclude that Hodson's constitutional "right to express himself" was not violated.

Second, Hodson contends "that the jury instructions given to the jurors were deficient, misleading, and improper resulting in a conviction that is not supported by the evidence presented therein." Hodson specifically claims that he was entitled to an instruction on his

theory of defense and that either Instruction No. 4 was "wrong or the prosecutor mislead [sic] the jury into thinking that there was no need for intent regarding this crime."

The district court is ultimately responsible for ensuring that the jury is fully and correctly instructed. Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005). As a general rule, "'[a] defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it.'" Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (quoting Roberts v. State, 102 Nev. 170, 172-73, 717 P.2d 1115, 1116 (1986) (alteration in original)). Failure to object to a jury instruction or prosecutorial misconduct generally precludes appellate review. Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482 (2000); Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987). However, we have discretion to consider an error if it was "plain" and affected the appellant's "substantial rights." NRS 178.602. "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks and citations omitted). At a minimum, the error must be "clear under current law." Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (internal quotation marks and citations omitted).

Here, Hodson did not request an instruction on his theory of the case, he did not object to the jury instructions, and he did not object to the comments the prosecutor made during closing argument. We have reviewed the instructions that Hodson provided in his appendix, the instruction that the State provided in its appendix, and the transcript of

the prosecutor's closing argument and we conclude Hodson has not demonstrated plain error.

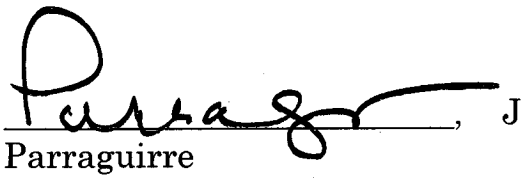
Further, to the extent that Hodson claims that insufficient evidence was adduced at trial to support his conviction for making a bomb threat, our review of the trial transcript reveals sufficient evidence to establish his guilt beyond a reasonable doubt as determined by a rational trier of fact. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

The jury heard testimony that Hodson told the victim that he was going to blow up her car, there was no laughter in his face, he was very serious, and he delivered the statement in a matter of fact voice. The victim, a credit union loan officer, left her desk to talk to the underwriters on a separate phone and she informed them that Hodson had just threatened to blow up her car because she was requiring him to show proof of income. When she returned to her desk, Hodson said, "[t]he comment that I made earlier about blowing up your car was a little over the hill, but you never know nowadays, you have to watch your back." Again, there was no laughter, the comment was delivered in a matter of fact voice, and there was no indication that he did not mean what he said. The following morning, the victim reported the incident to the police.

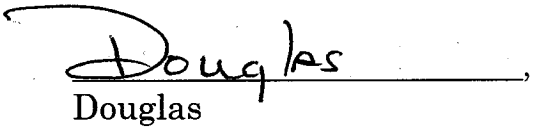
We conclude that a rational juror could reasonably infer from this testimony that Hodson made a bomb threat. See NRS 202.840. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Having considered Hodson's contentions and concluded that he is not entitled to relief, we

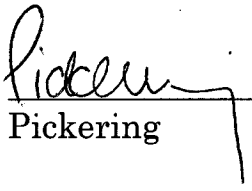
ORDER the judgment of conviction AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. David B. Barker, District Judge
Law Offices of Martin Hart, LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk