

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCUS CAMPBELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51021

FILED

JAN 08 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, pursuant to a jury verdict, of one count each of murder with the use of a deadly weapon and with the intent to promote, further, or assist a criminal gang, attempted murder with the use of a deadly weapon and with the intent to promote, further, or assist a criminal gang, and discharging a firearm at or into a vehicle with the intent to promote, further, or assist a criminal gang. Eighth Judicial District Court, Clark County; Valerie Adair, Judge. The district court sentenced appellant Marcus Campbell to prison terms of life with the possibility of parole after 20 years for murder, plus an equal and consecutive term for the deadly weapon enhancement; 72 to 240 months for attempted murder, plus an equal and consecutive term for the criminal gang enhancement, to run concurrently with the murder conviction; and 12 to 60 months for discharging a firearm, plus an equal and consecutive term for the criminal gang enhancement, to run consecutive to the murder and attempted murder convictions.

Campbell raises two issues on appeal. First, Campbell contends that prosecutorial misconduct resulted in a violation of his right to confrontation. Specifically, Campbell contends that during opening

statement, the prosecutor stated that the victim's mother would testify that the victim's family sent him to Arizona because he was receiving threatening phone calls from Campbell. Campbell argues that the district court later precluded the witness from testifying that the victim was being threatened, and this prevented Campbell from confronting the witness about sending the victim to Arizona. Campbell did not object to these statements. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting a defendant's substantial rights. See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). Generally, an appellant must show that he was prejudiced by a particular error in order to prove that it affected his substantial rights. Id. A prosecutor "has a duty to refrain from making statements in opening argument that cannot be proved at trial." Rice v. State, 113 Nev. 1300, 1312, 989 P.2d 262, 270 (1997), (citing Riley v. State, 107 Nev. 205, 212, 808 P.2d 551, 555 (1991)). "Even if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith." Id. (citing Garner v. State, 78 Nev. 366, 374 P.2d 525, 528 (1962)).


We conclude that the prosecutor's statement during opening argument was not made in bad faith and therefore, was not prosecutorial misconduct. Even assuming that the comment was made in error, Campbell did not demonstrate that it was prejudicial. In particular, we note that overwhelming evidence of guilt was presented. The driver of the target vehicle was familiar with Campbell and identified him as the shooter. Campbell twice admitted to another witness to being the triggerman. Campbell made a video that was shown on the Internet in

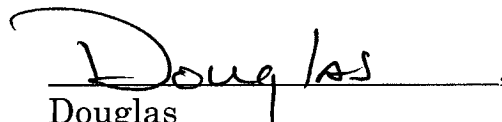
which he threatened the victim. Further, evidence was admitted that the victim was in Arizona. Because Campbell cannot demonstrate prejudice, we conclude that his claim of prosecutorial misconduct lacks merit.

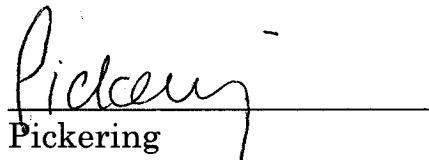
Second, Campbell claims that the district court abused its discretion in allowing the prosecutor to provide transcripts of a MySpace video to be given to the jury without a limiting instruction. However, the record is unclear as to whether the transcripts were ever distributed to the jury. The State represents that nothing in the record suggests that copies of the transcripts were ever provided to the jury. However, even if the district court erred in this regard, Campbell failed to adequately demonstrate prejudice. Campbell does not contend that the transcript was misleading or inaccurate, and the videotape upon which the transcripts were based was shown to the jury.

Having considered Campbell's contentions and determined that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Hon. Valerie Adair, District Judge
Kocka & Bolton
Longabaugh Law Offices
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk