

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY JAY DELGADO,

No. 34689

Appellant,

vs.

FILED

THE STATE OF NEVADA,

NOV 14 2000

Respondent.

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of aggravated stalking, burglary, first degree kidnaping with the use of a deadly weapon,¹ misdemeanor battery, first degree kidnaping of a minor and battery with the use of a deadly weapon.

Appellant Delgado argues that his convictions should be reversed on four grounds: (1) the trial court abused its discretion by admitting evidence that Delgado intimidated witnesses; (2) the prosecutor engaged in misconduct by intimidating witnesses; (3) there is insufficient evidence to support the conviction of first degree kidnaping of a minor; and (4) there is insufficient evidence of intent to kill and/or inflict substantial bodily harm to support the conviction of first degree kidnaping with the use of a deadly weapon. We conclude that all of these claims lack merit.

¹ NRS 200.310(1) states, in pertinent part,:

A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, . . . for the purpose of killing the person or inflicting substantial bodily harm upon him, . . . is guilty of kidnaping in the first degree which is a category A felony.

First, Delgado argues that the district court abused its discretion by allowing into evidence the prosecutor's suggestions that Delgado intimidated witnesses. Delgado failed to object to this line of questioning at both the preliminary hearing and the trial or request a curative instruction. We conclude this issue is not preserved for appeal and we will not address it absent plain error. See Steese v. State, 114 Nev. 479, 496, 960 P.2d 321, 332 (1998). Because the questioning was permissible for purposes of impeachment, we conclude that there is no plain error. See Lay v. State, 110 Nev. 1189, 1193, 886 P.2d 448, 450-51 (1994).

Second, Delgado argues that the prosecutor engaged in misconduct by intimidating witnesses, and by allegedly forcing the witnesses to testify. Witness intimidation by a prosecutor warrants a new trial if it results in the denial of the accused's right to a fair trial. See Rippo v. State, 113 Nev. 1239, 1251, 946 P.2d 1017, 1025 (1997). Again, Delgado failed to object, move for a mistrial or request curative instructions, and we will not, therefore, address his claim on appeal. See Riker v. State, 111 Nev. 1316, 1328, 405 P.2d 706, 713 (1995). We will review his claim only if it is "patently prejudicial" or raises issues of constitutional dimension. See id.; see also Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). Based on our review of the record, we conclude Delgado fails to show that he was prejudiced and we decline to address his claim.

Third, Delgado argues that there is insufficient evidence to support his conviction for first degree kidnaping of a minor. He argues that the State failed to adduce sufficient evidence of his specific intent to remove the minor from lawful custody. We review a claim for sufficiency of

evidence by "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). It is the jury's function to weigh the evidence and pass on the credibility of witnesses and their testimony. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). We conclude that the evidence reasonably supports the jury's finding that Delgado had the requisite specific intent to kidnap the minor. The jury heard testimony from Vasquez at trial about her testimony at the preliminary hearing and the statements she made to the police about Delgado's actions towards her and the minor. The jury could have reasonably believed her testimony at the preliminary hearing that Delgado refused to let the minor out of the car, which indicated his intent to kidnap the minor along with Vasquez. We conclude that this is sufficient to show specific intent and provides sufficient evidence to support the conviction of first degree kidnaping of a minor.

Finally, Delgado argues that there is insufficient evidence of intent to kill and/or inflict substantial bodily harm to support his conviction. He contends that because the jury acquitted him of the attempted murder charge, there is per se insufficient evidence to support the kidnaping charge. We disagree.

A defendant's intent to kill need not be carried out to uphold a conviction of first degree kidnaping. See Evans v. State, 113 Nev. 885, 897, 944 P.2d 253, 261 (1997). Intent and attempt are not synonymous, because one can have the intent to commit a crime without making a substantial enough step to render it an attempt. Testimony that Delgado stated to Vasquez that he would kill her constitutes sufficient

evidence of an intent to kill to support the conviction of first degree kidnaping, and the acquittal of the attempted murder charge has no relevance to the jury's finding. It is the jury's function to weigh the credibility of this testimony and accept or reject it, and we will not disturb that function as long as there are reasonable grounds to support the decision. See McNair, 108 Nev. at 56, 825 P.2d at 573.

Moreover, the jury could have rationally found that Delgado committed first degree kidnaping with the intent to inflict serious bodily harm. The jury reasonably could have found that either the ice pick stab on the leg or the choke marks on the neck constituted substantial bodily harm, or that they at least indicated Delgado's intent to inflict substantial bodily harm. We conclude that sufficient evidence of intent to kill and/or inflict substantial bodily harm existed to support Delgado's conviction of first degree kidnaping.

Having considered Delgado's arguments and concluded they lack merit, we affirm the judgment of conviction.


It is so ORDERED.



Shearing J.



Agosti J.



Leavitt J.

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County Public Defender
Clark County District Attorney
Clark County Clerk