

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDY LEE GAMWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52510

FILED

MAY 26 2010

FRANK K. ANDEMAN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of burglary and first-degree kidnapping. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. Appellant Randy Lee Gamwell raises four claims.

First, Gamwell contends that insufficient evidence supports the conviction for kidnapping because the kidnapping was incidental to the associated offenses. This claim lacks merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish Gamwell's guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). The victim testified that Gamwell put something over her head; dragged her from the kitchen to the bedroom; tied her hands behind her back; placed duct tape over her mouth; and told her that he needed her gun, he was going to put her in the trunk of her car, and he was going to take her into the mountains to murder her and commit suicide. We conclude that a rational juror could reasonably infer from this testimony that Gamwell

seized the victim for the purpose of killing her. See NRS 200.310(1). 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).

Second, Gamwell contends that the district court erred by denying his post-trial motion for a judgment of acquittal on the first-degree kidnapping count. Gamwell argues that because the jury did not convict him of attempted murder it must have based its first-degree kidnapping verdict on the "inflicting substantial bodily harm" language in the charging document and because the jury was not instructed on the definition of substantial bodily harm it cannot be said that the jury unanimously rested its decision on that basis. We disagree. The jury was instructed that a person who kidnaps a victim for the purpose of killing her or inflicting substantial bodily harm upon her is guilty of first-degree kidnapping. The elements for the crimes of attempted murder and first-degree kidnapping are different. To prove attempted murder, the State had to show that Gamwell tried but failed to kill the victim. See NRS 193.330(1); NRS 200.010. Whereas, to prove first-degree kidnapping, the State had to show that Gamwell seized the victim for the purpose of killing her or inflicting substantial bodily harm. See NRS 200.310(1). Here, sufficient evidence was presented at trial to support a finding that Gamwell seized the victim for the purpose of killing her. Accordingly, we conclude that Gamwell's contention is without merit. See NRS 175.381(2); Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (the district court may set aside a jury verdict of guilty and enter a judgment of acquittal only when there is insufficient evidence to support a conviction).

Third, Gamwell contends that the district court should have granted his motion to dismiss the charges because the prosecutor interfered with the defense team's attempt to contact the victim. See Davis v. State, 110 Nev. 1107, 1120, 881 P.2d 657, 665 (1994) (prosecutors are not allowed to discourage victims from cooperating with defense counsel and defense investigators absent special circumstances). We review a district court's decision to deny a motion to dismiss charges for an abuse of discretion. See Hill v. State, 124 Nev. ___, ___, 188 P.3d 51, 54 (2008). There was no abuse of discretion because the record on appeal supports the district court's finding that the prosecutor did not intentionally "hinder the defense and their efforts."

Fourth, Gamwell contends that he was deprived of a fair trial due to prosecutorial misconduct. We analyze claims of prosecutorial misconduct in two steps: first, we determine whether the prosecutor's conduct was improper, and second, if the conduct was improper, we determine whether it warrants reversal. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008). When the misconduct has been preserved for appeal, we use a harmless-error standard to determine whether it warrants reversal. Id. When the misconduct has not been preserved for appeal, we review it only for plain error. Id. at ___, 196 P.3d at 477. Under the plain-error standard, "an error that is plain from review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

During closing argument, the prosecutor told the jury that the presumption of innocence no longer applied. This was error. "A prosecutor may suggest that the presumption of innocence has been

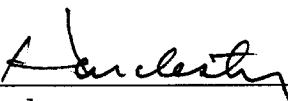
overcome; however, a prosecutor may never properly suggest that the presumption no longer applies to the defendant.” Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006). Gamwell did not preserve this error for review and he has not demonstrated or even alleged that the prosecutor’s improper comment resulted in actual prejudice or a miscarriage of justice. Accordingly, we conclude that this error does not warrant reversal.


The prosecutor also committed misconduct during rebuttal argument when she discussed Gamwell’s decision not to testify. Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (“A direct reference to a defendant’s decision not to testify is always a violation of the fifth amendment.”). Gamwell preserved this constitutional error for review, however, we conclude from our review of the trial record that it does not warrant reversal. The evidence presented at trial overwhelmingly established that Gamwell entered the victim’s house; dragged her to the bedroom; tied her hands behind her back; placed duct tape over her mouth; and told her that he needed her gun, he was going to put her in the trunk of her car, and he was going to take her into the mountains to murder her. It is clear from this evidence that Gamwell entered the victim’s house with the intent to kidnap and kill her. See Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (“intent can rarely be proven by direct evidence of a defendant’s state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime, which are capable of proof at trial”); Lisle v. State, 113 Nev. 679, 691-92, 941 P.2d 459, 467 (1997) (circumstantial evidence is enough to support a conviction); see also NRS 193.200. And based on this evidence, we are convinced beyond a reasonable doubt that this error did not contribute to the verdict and is therefore harmless. See Valdez, 124 Nev.

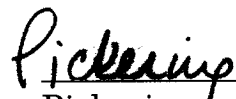
at ___, 196 P.3d at 476 (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

Having considered Gamwell's contentions, we conclude that he is not entitled to relief. However, our review of the record reveals two clerical errors in the judgment of conviction: (1) it states that Gamwell was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict; and (2) it incorrectly cites to NRS 193.165. Accordingly, we

ORDER the judgment of conviction AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk