

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY ALAN BURTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52844

**FILED**

DEC 03 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 assault on a school employee. Seventh Judicial District Court, Lincoln County; Steve L. Dobrescu, Judge. The district court sentenced appellant Jeffrey Alan Burton to serve a jail term of four months, suspended execution of the sentence, and placed Burton on probation for a period not to exceed one year.

Insufficient Evidence

Burton contends that there was insufficient evidence adduced at trial to support his conviction for assault because he never threatened to “immediately batter” the school employee to effectively bring his actions within the purview of Nevada’s assault statute. See NRS 200.471. Instead, Burton argues, his threat against the school employee was merely “conditional,” applicable only if the school employee searched Burton’s daughter in the future.

“[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Accordingly, the standard of review for a challenge to the sufficiency of the evidence is

“whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.” McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Circumstantial evidence is enough to support a conviction. Lisle v. State, 113 Nev. 679, 691-92, 941 P.2d 459, 467-68 (1997), holding limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998).

Based on the testimony of the eye witnesses presented at trial, we conclude that a rational juror could reasonably infer that Burton’s behavior before the school employee placed that employee in reasonable fear of immediate bodily harm. See NRS 200.471 (defining “assault” to mean “intentionally placing another person in reasonable apprehension of immediate bodily harm”); McNair, 108 Nev. at 56, 825 P.2d 573. As we noted above, it is not our function to “pass on the credibility” of witnesses and their testimony. See Walker, 91 Nev. at 726, 542 P.2d at 439.

#### Prosecutorial Misconduct

Burton contends that the prosecutor committed misconduct during closing arguments. Burton challenges the following statement by the prosecutor:


Dr. Babcock stated there’s 187 students or approximately some number that he has to worry about every day. It’s his job to take care of these students. Society places a great import on the education of our students. School officials cannot be assaulted; that is a crime against the State of Nevada.

Burton argues that the prosecutor’s comments encouraged jurors to look beyond the law and facts in deciding the case before them. We disagree.

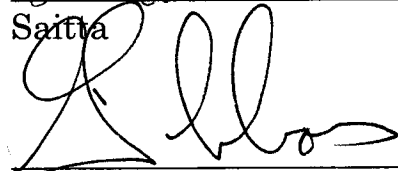
As an initial matter, we note that Burton did not object to the prosecutor's allegedly improper comments. Therefore, we will only review the argument for plain error. See NRS 178.602; Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993). That being said, we cannot conclude that the remarks above prejudiced Burton in any way amounting to reversible plain error. Even if the remarks were inappropriate, we conclude that the State presented overwhelming evidence of Burton's guilt, and "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error." King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

Having considered Burton's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Steve L. Dobrescu, District Judge  
State Public Defender/Carson City  
State Public Defender/Ely  
Attorney General Catherine Cortez Masto/Carson City  
Lincoln County District Attorney  
Lincoln County Clerk