

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH AVERY PENNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55349

FILED

NOV 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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 with a deadly weapon and a guilty plea of one count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

First, appellant Kenneth Penner contends that there was insufficient evidence to support his conviction for assault with a deadly weapon. We review the evidence in the light most favorable to the prosecution and determine whether 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). Here, the jury heard testimony that Penner pointed a revolver directly at the victim and stated "we could end this all right here;" the victim testified that he was terrified and thought he was going to die; and another witness testified that he had some knowledge of guns, the revolver was a real gun, and it looked like a .357 six-shooter. We conclude that a rational juror could infer from this testimony that Penner intentionally placed the victim in reasonable apprehension of immediate bodily harm by pointing a firearm at him and uttering a threat. See NRS 200.471(1)(a)(2), (2)(b); Harrison v. State, 96

Nev. 347, 351, 608 P.2d 1107, 1109-10 (1980) (the State need not produce the firearm used to commit a crime if there is sufficient evidence to establish the existence of the firearm). 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, sufficient evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Second, Penner contends that the district court erred by denying his motion for separate juries to hear the bifurcated charges. A jury found Penner guilty of assault with a deadly weapon and Penner pleaded guilty to possession of a firearm by an ex-felon. We conclude that Penner waived his right to appeal from the district court's pretrial order when he entered his guilty plea without reserving the right to challenge the denial of his motion. See NRS 174.035(3); Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (defendant may not challenge events preceding entry of a guilty plea).

Third, Penner contends that the district court erred by allowing the State to admit prior bad acts evidence without satisfying the requirements of Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), and Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001). Penner did not preserve this issue for appeal. We have reviewed the record and we conclude that Penner has not demonstrated that the alleged errors were plain and affected his substantial rights. See NRS 178.602; Diomampo v. State, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008).

Fourth, Penner contends that the district court erred by admitting testimony of his invocation of his right to be silent. The record reveals that Officer Robert Kingsley made an unsolicited comment on

Penner's post-arrest silence, the district court sustained Penner's objection, and the district court instructed the jury to disregard the comment. We conclude that the officer's comment was merely a passing reference to Penner's post-arrest silence and was harmless beyond a reasonable doubt. See Diomampo, 124 Nev. at 427-28, 185 P.3d at 1039-40.

Fifth, Penner contends that he was deprived of a fair trial as the result of multiple acts of prosecutorial misconduct. Penner objected to the prosecutor's comment regarding his mother's refusal to consent to a search of her home and claims that it impermissibly shifted the burden of proof. Penner did not object to the prosecutor's comments regarding a recording of the victim's wife's 911 call, which he claims constitute impermissible witness vouching. We have reviewed the comments in context and conclude that they do not constitute prosecutorial misconduct because they are fair comments on the evidence. See Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996); see generally Valdez v. State, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008).

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

ORDER the judgment of conviction AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk