IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY JAMES TURNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59723

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder and battery causing substantial bodily harm. Second Judicial District Court, Washoe County; David A. Hardy, Judge. Appellant Jeremy Turner raises multiple arguments on appeal.

First, Turner argues that the evidence presented at trial was insufficient to support his conviction for second-degree murder because his one punch to the victim was insufficient to demonstrate malice. We disagree. The evidence presented at trial indicated that Turner and his codefendant attacked the victim's son. When the victim attempted to intervene, Turner instructed his sister to "take care" of her. After Turner's sister attacked the victim, Turner pulled the victim's head back by her hair and punched her once in the face, knocking her unconscious with a blow described by the medical examiner as "very forceful." Turner's codefendant kicked the victim once in the face, leaving a footprint. The jury also heard of the size and age differences between Turner and his codefendant and the victim, who was 57 and in relatively poor health at the time. Turner then fled the scene. Malice may be implied from an assault and battery with the hands or fists alone if evidence showing the

character of the assault and the circumstances under which it was made "'signifies general malignant recklessness of others' lives and safety or disregard of social duty.'" Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (quoting Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970)); see also People v. Jones, 186 N.E.2d 246, 249 (Ill. 1962) (citation omitted); People v. Munn, 3 P. 650, 652 (Cal. 1884). "[I]t is the function of the jury, not the appellate court, to weigh the evidence." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Accordingly, we conclude that "'after viewing the evidence in the light most favorable to the prosecution,'" a rational juror could have found the essential elements of the crime beyond a reasonable doubt under the alternative theories offered by the prosecution. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); NRS 200.010; NRS 200.030(2).

Second, Turner argues that the district court erred by requiring him to share his preemptory challenges with his codefendant. Turner is mistaken. "Our legislature has seen fit to treat several defendants, for this purpose, as one party." Anderson v. State, 81 Nev. 477, 480, 406 P.2d 532, 533 (1965). Therefore, codefendants share their preemptory challenges. NRS 175.041; Young v. State, 103 Nev. 233, 235, 737 P.2d 512, 514 (1987). Accordingly, we conclude that Turner is not entitled to relief on this claim.

Third, Turner argues that the district court erred by permitting the prosecution to use a touch-screen during witness testimony. Turner argues that the technology, which allows a witness to press a touch-screen and leave a digital mark on an exhibit, is different from mere pointing because the mark remains throughout the witness'

direct testimony and is thereby "memorialized" in the jury's mind, yet can be erased immediately thereafter, depriving this court of a record and inhibiting cross-examination. Because Turner points to no instance in which this court is unable to review his claim due to the semi-permanency of the marks, we conclude that he is not entitled to relief. Daniel v. State, 119 Nev. 498, 508, 510, 78 P.3d 890, 897, 898 (2003) (providing that appellant must establish (1) a missing portion of the record and (2) that the subject matter missing from the record is so significant that the appellate court cannot meaningfully review appellant's contention of error and the prejudicial effect of any error). In addition, we disagree that the semi-permanency of the marks in any way inhibits a defendant from cross-examining a witness and conclude that use of such technology is soundly within the district court's discretion. Isbell v. State, 97 Nev. 222, 227, 626 P.2d 1274, 1277-78 (1981).

Fourth, Turner argues that the district court abused its discretion by admitting his racial comments because they were substantially more prejudicial than probative. Because Turner did not object on these grounds below, we review them for plain error affecting his substantial rights. Dieudonne v. State, 127 Nev. ___, ___, 245 P.3d 1202, 1204-05 (2011). During and after the incident, Turner used racial epithets to describe the victim and to explain why he attacked her son. As Turner was charged with open murder, whether he had the requisite malice was a pivotal issue. Because these racial statements were relevant to motive and evidence of malice they were more probative than prejudicial and we cannot say that the district court plainly erred in admitting them. See NRS 48.035(1); Quillen v. State, 112 Nev. 1369, 1377, 929 P.2d 893, 898 (1996); see generally Wilkins v. State, 96 Nev. 367, 374-75, 609 P.2d 309,

313-14 (1980) (considering appellant's dislike of the victim as evidence of malice).

Fifth, Turner argues that the prosecutor committed misconduct during voir dire when he stated that he represented the people of Nevada. Turner claims that this is improper because NRS 169.055 states that "[a] criminal action is prosecuted in the name of the State of Nevada," not in the name of the people of the State of Nevada. We disagree. A prosecutor representing the incorporeal State of Nevada necessarily represents the people who make up the State. Such comments are not inappropriate so long as a prosecutor does not personally align himself with the members of the jury. Lisle v. State, 113 Nev. 540, 554, 937 P.2d 473, 481-82 (1997), decision clarified on denial of reh'g, 114 Nev. 221, 954 P.2d 744 (1998). Accordingly, we conclude that the prosecutor did not commit misconduct.

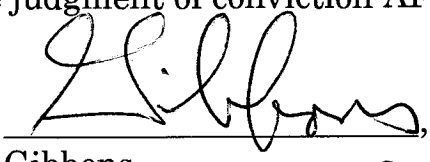
Sixth, Turner argues that the prosecutor committed misconduct by repeatedly emphasizing the racial elements of the case in an attempt to inflame the jury. Because Turner did not object to the prosecutor's comments and they are not constitutional in nature we review them for plain error affecting his substantial rights. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) ("Under that standard, an error that is plain from a 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." (internal quotation marks omitted)). Having considered the prosecutor's comments in light of the context of the case, we conclude that they do not merit relief under a plain error analysis.

Seventh, Turner argues that the prosecutor committed misconduct during closing argument when he stated that the defense as well as the State had the power to call a witness that the defense noted had not testified. It is outside the boundaries of proper argument to comment on a defendant's failure to call a witness, and such a comment warrants reversal unless "'without reservation . . . the verdict would have been the same in the absence of error.'" Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (omission in original) (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)). Having considered the statement in light of the evidence presented at trial, we conclude that, while improper, the verdict would have been the same in the absence of the error. Id. Accordingly, Turner is not entitled to relief on this claim.

Eighth, Turner argues that cumulative error warrants reversal. "The relevant factors to consider when deciding whether cumulative error requires reversal are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007) (internal quotations omitted). Although the crimes charged are serious, and the issue of guilt related to Turner's second-degree-murder conviction is close, the only arguable error that we have discussed was harmless; "one error is not cumulative error." U.S. v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000).

Having considered Turner's contentions, and concluded that none warrant relief, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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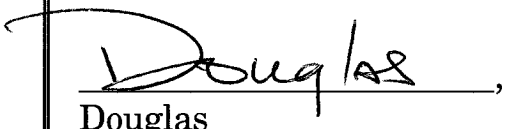

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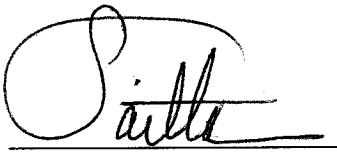

_____, J.
Saitta

cc: Hon. David A. Hardy, District Judge
Janet S. Bessemer
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk