

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MIKELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37059

FILED

OCT 01 2002

ORDER OF AFFIRMANCE

JANET L. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of kidnapping with the use of a deadly weapon (count I) and robbery with the use of a deadly weapon (count II). The district court sentenced appellant James Mikell to serve two consecutive life prison terms with parole eligibility in 5 years for count I and two consecutive prison terms of 26 to 120 months for count II, to run consecutively to count I.

Mikell first contends that reversal of his conviction is warranted because the district court erred in failing to provide a cautionary instruction to the jury regarding the sudden absence of Mikell's two codefendants, who each entered a nolo contendere plea near the end of the trial. We conclude that Mikell's contention lacks merit.

It is well settled that the failure to object to a jury instruction generally precludes appellate review except in cases of plain or fundamental error.¹ "Failure to instruct the jury regarding a co-defendant's midtrial absence because of a guilty plea, however, has rarely

¹Bonacci v. State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980).

been found to be plain error.”² Here, trial counsel failed to preserve this error for this court’s review by requesting a cautionary instruction or lodging an objection. Nonetheless, even assuming defense counsel preserved this error for our review, we note that the lack of a cautionary instruction rarely warrants reversal of a conviction.³ In fact, the lack of a cautionary instruction will result in reversal only in “rare situations in which other ‘aggravating circumstances’ have exacerbated the prejudice.”⁴ Here, Mikell failed to show that he was prejudiced by the lack of a cautionary instruction.

Mikell next contends that his conviction should be reversed because the district court failed to conduct a sufficient canvass to determine whether he knowingly and intelligently waived his right to testify. We disagree. While "it is good practice" for a trial court to advise a defendant of his right to testify, we have previously held that such an advisement is not mandatory for purposes of a valid conviction.⁵

In the instant case, the record reveals that Mikell was informed about his right to testify. The district court thoroughly advised Mikell of his right to testify and the implications of doing so, and Mikell acknowledged that he understood. Although Mikell notes that the district

²United State v. Barrientos, 758 F.2d 1152, 1157 (7th Cir. 1985) (citing United States v. Anderson, 642 F.2d 281 (9th Cir. 1981), United States v. King, 505 F.2d 602 (5th Cir. 1974), and United States v. Jones, 425 F.2d 1048 (9th Cir. 1970)).

³United States v. DeLucca, 630 F.2d 294, 299 (5th Cir. 1980).

⁴Id. at 299 (citing United States v. Harrell, 436 F.2d 606, 617 (5th Cir. 1970)).

⁵Phillips v. State, 105 Nev. 631, 633, 782 P.2d 381, 382 (1989).

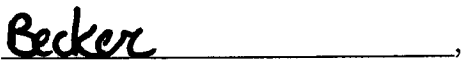
court advised him of the right to testify after the defense had rested its case, there is no indication that the district court would not have allowed Mikell to reopen his case and testify if he expressed a desire to do so. In fact, the district court stated: "I believe you've indicated to your attorney that you will not testify. If you wish to discuss it further, you may do so." Finally, there is no evidence in the record that Mikell was coerced or misled into not testifying. Rather, the record indicates that Mikell had two prior felony convictions, which suggests that Mikell may have decided not to take the stand to avoid being impeached with his prior convictions.⁶ Accordingly, we conclude that Mikell was sufficiently advised of his right to testify.

Having considered Mikell's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

⁶See id.

cc: Hon. Kathy A. Hardcastle, District Judge
Myers & Spretnak
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk