

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY PETTY A/K/A TIMOTHY
PENNELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37405

FILED

JUN 05 2002

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant Anthony Petty to serve two consecutive life prison terms with parole eligibility after 20 years.¹

Petty contends that reversal of his conviction is warranted because the prosecutor committed misconduct. In particular, Petty contends that the prosecutor improperly commented on his Fifth Amendment right not to testify by calling him the “fourth witness” and by stating in closing that the testimony against him was “uncontroverted.” We conclude that reversal of Petty’s conviction is not warranted.

¹Petty’s first conviction for first-degree murder with the use of a deadly weapon was reversed by this court, and his case was remanded for a new trial. See Petty v. State, 116 Nev. 321, 997 P.2d 800 (2000). After a second jury trial, Petty was again convicted of first-degree murder with the use of a deadly weapon. The instant appeal followed.

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."² A prosecutor's "[c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence, or (2) there is overwhelming evidence of guilt."³

In the instant case, we conclude that even assuming the prosecutor committed misconduct, it was harmless in light of the overwhelming evidence of Petty's guilt. In particular, several eyewitnesses testified that they observed Petty shoot the victim five times, and that the victim did nothing to provoke the shooting. Additionally, Petty fled the scene of the shooting, and was apprehended by a Texas State Trooper, approximately one month later, hiding in the backseat of a vehicle. Although Petty presented opinion evidence that the victim had a propensity for violence, the eyewitnesses who testified stated that the victim did not act violently towards Petty prior to the shooting. Accordingly, because the evidence against Petty was overwhelming, we conclude that the two isolated instances of misconduct alleged did not


²United States v. Young, 470 U.S. 1, 11 (1985).

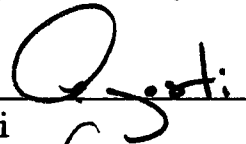
³Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996) (citations omitted).


affect the fairness of the proceeding, and reversal of Petty's conviction is not warranted.

Having considered Petty's contention and concluded that it lacks merit, we

ORDER the judgment of conviction affirmed.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Mark W. Gibbons, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk