

IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK M. JOHNS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42424

FILED

MAY 10 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with substantial bodily harm. The district court sentenced appellant to a prison term of 20 to 60 months, and ordered appellant to pay restitution in the amount of \$28,000.00.

Appellant first contends that the district court erred by allowing victim impact testimony during the guilt phase of the trial. Specifically, appellant argues that the victim should not have been allowed to testify regarding the head injuries suffered as a result of the battery.

As an initial matter, we note that appellant failed to object to the testimony at trial. He therefore failed to preserve this issue for appellate review.¹ Moreover, the testimony was properly allowed as evidence of the element of substantial bodily harm. The probative value of the testimony was not substantially outweighed by unfair prejudice, and it

¹See Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991) (as a general rule, the failure to object below bars appellate review, except in cases of plain error or errors of constitutional dimension), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

was therefore not inadmissible pursuant to NRS 48.035.² Accordingly, we conclude that this issue is without merit.

Appellant next contends that the testimony of one of the witnesses was improper and prejudicial. Specifically, the witness testified that appellant repeatedly kicked the victim in the head, and went on to say, "I couldn't believe he was doing this. He wasn't even human. This was disgusting."

As with the previous issue, appellant failed to object, but appellant argues that the district court should have intervened sua sponte and cautioned the jury to disregard the witness' comment. The cases cited by appellant in support of his argument both deal with comments by a prosecutor which disparage a defendant or compare a defendant to an animal. Appellant cites no authority for the proposition that a witness' description of the manner in which the crime was committed requires sua sponte intervention by the trial court. The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.³ Appellant has failed to demonstrate that the district court erred, and this issue is therefore without merit.

Finally, appellant contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Specifically, appellant points to testimony by one eyewitness that the victim was

²NRS 48.035(1) provides: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

³See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

actually battered by an individual other than appellant. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.⁴


In particular, we note that two eyewitnesses testified that appellant repeatedly kicked the victim in the head while the victim lay unconscious on the ground. There was also testimony that the victim suffered serious injuries to his head and brain as a result of the battery.

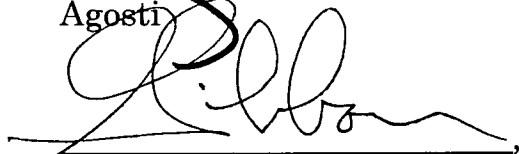
The jury could reasonably infer from the evidence presented that appellant battered the victim, causing substantial bodily harm. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.⁵

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

⁴See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

⁵See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

cc: Hon. Sally L. Loehrer, District Judge
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