IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILBURT HICKMAN, JR. A/K/A WILLIAM HICKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64776

FILED

SEP 16 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of battery with the use of a deadly weapon, one count of battery with the use of a deadly weapon causing substantial bodily harm, five counts of assault with the use of a deadly weapon, and one count of burglary. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

First, appellant Wilburt Hickman claims a witness provided improper lay testimony when that witness testified regarding whether alcohol was involved in the crash. Hickman failed to object to this testimony at trial.

We review a district court's decision to admit or exclude evidence for an abuse of discretion. *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). Because Hickman did not object, we review for plain error. *Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). Under the plain error standard, we determine "whether there was an

error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (internal quotation marks and citation omitted).

The witness at trial was asked, "So based on your observations from beginning to end, could you tell that alcohol was involved." The witness answered, "Other than odor, no." The witness was then asked about the behavior of Hickman before and after the crash. The witness was not asked to offer a final opinion as to whether Hickman intended to commit the crimes. Instead, he was asked about his observations of Hickman as they related to whether Hickman appeared intoxicated. This was proper under NRS 50.265 because a lay witness may testify in the form of opinions or inferences as long as that testimony is "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or determination of a fact in issue." Therefore, there was no error, plain or otherwise, in allowing this testimony.

Second, Hickman claims the district court violated his due process rights by refusing to give two instructions regarding intoxication affecting the intent to kill. It may have been error for the district court to refuse to give these instructions, *see Guitron v. State*, 131 Nev. ___, ___, 350 P.3d 93, 102 (2015), however, even assuming it was error, we conclude the error was harmless. Hickman was not convicted of attempted murder. Further, an instruction was given to the jury regarding intoxication and its effect on intent. Therefore, we conclude Hickman is not entitled to relief on this claim.

Third, Hickman claims the State committed prosecutorial misconduct during closing argument by stating "a car is something that kills people every day sadly, in accidents or hits pedestrians." Hickman claims this was error because the State was able to improperly argue that a car is a "per se" deadly weapon.

We analyze claims of prosecutorial misconduct in two steps: first, we determine whether the prosecutor's conduct was improper, and second, if the conduct was improper, we determine whether it warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

We conclude this claim lacks merit. In the context of the State's closing argument, this statement was not an argument that a car is a per se deadly weapon. Instead, the State properly argued that a car can be a deadly weapon. *See* NRS 193.165(6)(b) ("Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death"). Therefore, we conclude there was no misconduct by the prosecutor.

Fourth, Hickman argues there was insufficient evidence presented to convict him of battery with the use of a deadly weapon resulting in substantial bodily harm. Specifically, he argues the State failed to prove the element of substantial bodily harm because the pain complained of by the victim was not within the meaning of NRS 0.060.

Under a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the prosecution and determines whether "any rational trier of fact could have found the

essential elements of the crimes beyond a reasonable doubt." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (emphasis and internal quotation marks omitted). NRS 0.060 defines substantial bodily harm as, "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function any bodily member or organ; or . . . [p]rolonged physical pain."

The record demonstrates the child victim suffered a broken pinky toe. She was medicated for the pain, the pain persisted for at least a week after the medication ran out, and her foot felt broken. Further, after being on crutches for a week, she then had to be in a walking boot. We conclude, based on these facts, there was sufficient evidence that the victim suffered prolonged physical pain and Hickman committed battery with the use of a deadly weapon causing substantial bodily harm.

Fifth, Hickman claims there was insufficient evidence to convict him of assault with the use of a deadly weapon as to all of the victims. Specifically, he claims, under *Powell v. State*, 113 Nev. 258, 934 P.2d 224 (1997) a defendant may not be convicted of multiple counts of assault with the use of a deadly weapon in which the circumstances are one action against a group or more than one person.

We conclude *Powell* is factually different than the instant case. To prove intent for assault with the use of a deadly weapon, the State must demonstrate the defendant had the specific intent to commit a violent injury on each of the victims. *Id.* at 263, 934 P.2d at 228; *see also* NRS 200.417; NRS 193.330. In *Powell*, the Nevada Supreme Court noted "Powell only shot the rifle once, at a group of people, and not at any one

specific person, let alone three specific people." *Powell*, at 263, 934 P.2d at 227. In the instant case, Hickman drove a car toward a group of people. Unlike a bullet, a car possesses the ability to harm multiple people, and therefore, Hickman could intend to commit a violent injury on each of his victims. In this case, Hickman knew there was a group of people outside the church and there were people inside the church because he had just been escorted out. Hickman intentionally turned his steering wheel towards one parishioner, then towards the group outside and directly inside the church. Therefore, there was sufficient evidence to demonstrate Hickman's intent to commit assault with the use of a deadly weapon on all of the victims.

Sixth, Hickman claimed there was insufficient evidence to convict him of assault with the use of a deadly weapon with respect to one victim who was inside the church. Specifically, Hickman claimed she was not aware of the car approaching, and therefore, could not have been placed in reasonable apprehension of harm. *See* NRS 200.471(a)(2). This claim lacks merit, because as stated above, there was sufficient evidence to convict Hickman on this count based on an "attempted battery" theory of assault. *See* NRS 200.471(a)(1).

Seventh, Hickman claims the district court abused its discretion at sentencing because it relied on impalpable or highly suspect evidence. Specifically, he claims the district court relied on argument from the State that Hickman had the intent to kill, despite the fact that the jury hung on the attempted murder counts, and relied on the State's argument regarding uncharged conduct relating to Hickman's daughter.

Hickman failed to demonstrate the district court relied on impalpable or highly suspect evidence when sentencing Hickman. *See Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (We will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."). Hickman's conduct in this case was egregious and the sentence imposed in this case is within the parameters provided by the relevant statutes, *see* NRS 207.010(1)(a); NRS 200.471(2)(b); NRS 205.060(2). Therefore, Hickman is not entitled to relief on this claim.

Seventh, Hickman claims the district court abused its discretion at sentencing by sentencing him as a habitual criminal.[1] Specifically, Hickman claims his convictions were old and stale and the district court failed to consider the fact that Hickman was an alcoholic. The record reveals the district court considered the parties' arguments, the nature of the crime, the staleness of Hickman's prior convictions, and the district court declined to dismiss the habitual criminal count. *See* NRS 207.016(5); *O'Neill v. State*, 123 Nev. 9, 15, 153 P.3d 38, 42 (2007); *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) ("NRS 207.010 makes no special allowance for non-violent crimes or for the

[1]To the extent Hickman argues he received ineffective assistance of counsel in regard to his habitual criminal adjudication, this claim is not properly raised in a direct appeal from a judgment of conviction. *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

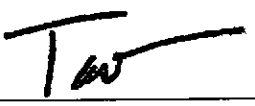
remoteness of convictions; instead, these are considerations within the discretion of the district court."). We conclude that the district court did not abuse its discretion in this regard.

Finally, Hickman claims the cumulative errors at trial warrant reversal of his convictions. We conclude Hickman is not entitled to relief on this claim. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error.").

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

ORDER the judgment of the conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Carolyn Ellsworth, District Judge
Law Office of Kristina Wildeveld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk