IN THE SUPREME COURT OF THE STATE OF NEVADA

YVES HARRISON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44473

FILED

AUG 1 8 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with the use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. The district court sentenced appellant Yves Harrison to serve a prison term of 35 to 156 months.

First, Harrison contends that the district court erred in admitting the victim's mother's and stepfather's hearsay testimony that the victim said Harrison accidentally shot her. More specifically, Harrison contends that the victim's statement was not admissible as a prior inconsistent statement under NRS 51.035(2)(a) because, at trial, the victim did not deny telling her family that Harrison accidentally shot her. We conclude that Harrison's contention lacks merit.

"Pursuant to NRS 51.035(2)(a), an out-of-court statement is not inadmissible as hearsay if the following two conditions are met: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement; and (2) the out-of-court statement is

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inconsistent with the declarant's testimony."[1] In this case, we conclude that the district court did not err in ruling that the victim's mother and stepfather's testimony was admissible as a prior inconsistent statement pursuant to NRS 51.035(2)(a). The declarant, the victim, had previously testified at trial and was subject to cross-examination concerning the statement. Moreover, the declarant's statement that Harrison accidentally shot her was inconsistent with her trial testimony that "Harrison did not shoot [her] because he did not have a gun." Accordingly, the testimony was admissible under NRS 51.035(2)(a).

Second, Harrison contends that there was insufficient evidence to support his conviction for battery with use of a deadly weapon causing substantial bodily harm because there was no evidence that the shooting was willful. In particular, Harrison alleges that the State did not present any evidence to contradict the victim's hearsay statements that the shooting was accidental. We conclude that Harrison's contention lacks merit.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[2] In particular, the victim testified that, just prior to the shooting, she was arguing with Harrison. Additionally, the victim's mother testified that the victim told her that right before she was shot Harrison "pulled out a gun" and said "you think I won't shoot you; don't you?" Finally, according to the testimony of an eyewitness, when the

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[1]Cheatham v. State, 104 Nev. 500, 503, 761 P.2d 419, 421 (1988).

[2]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

victim was shot, she was standing directly facing Harrison, she did not see anyone else in the area that could have shot the victim and, after the victim was shot, Harrison did not go to the hospital with her. Although the victim described the shooting as accidental, the jury could reasonably infer from the evidence presented that Harrison used willful and unlawful force upon the victim with a deadly weapon resulting in substantial bodily harm.[3] 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.[4]

Third, Harrison contends that the district court erred by overruling his objection to the prosecutor's use of a peremptory challenge to strike a Hispanic venire person in violation of Batson v. Kentucky.[5] More specifically, Harrison argues that his constitutional rights to a fair trial and equal protection were violated when the State exercised a peremptory challenge based on race. We disagree.

Pursuant to Batson and its progeny, there is a three step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) upon a prima facie showing, the proponent of the peremptory challenge has the burden of providing a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the

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[3]See NRS 200.481; NRS 193.165.

[4]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[5]476 U.S. 79 (1986).

trial court must decide whether the proffered explanation is merely a pretext for purposeful racial discrimination.[6] The ultimate burden of proof regarding racial motivation rests with the opponent of the strike.[7] The trial court's decision on the question of discriminatory intent is a finding of fact to be accorded great deference on appeal.[8]

Our review of the record on appeal reveals that the district court did not abuse its discretion in overruling Harrison's objection to the peremptory challenge of the Hispanic venire person. The prosecutor offered a race-neutral explanation providing:

> [The venire person] is the mother of a Federal Public Defender and also said that she runs a sole proprietorship business and she would be distracted by the fact that she was losing money as she is her own sole support.

The district court overruled the objection, noting that the prosecutor did not appear to be challenging venire persons based on race because there was an African-American juror on the panel, as well as a Hispanic alternate. Additionally, the district court commented:

> I have not ever really had somebody whose business was closed due to the fact they were sitting on the jury. I almost let her go originally

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[6]See id. at 96-98; see also Purkett v. Elem, 514 U.S. 765, 767 (1995); Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

[7]See Purkett, 514 U.S. at 768.

[8]See Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (plurality opinion); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

> without having to sit in the box but I like the people with the financial problems to at least come forward and let you guys talk to them before I dismiss them. . . . But I think that her answer that she should would be distracted and if my business closed I'd be distracted too. So I think it was a -- it certainly was a race neutral challenge by the prosecutor in this case.

Although Harrison notes that the venire person also maintained that, despite being distracted, she could be fair and impartial to both sides, we conclude that the district court acted within its discretion in finding that the prosecutor's explanation for the peremptory challenge was race-neutral, instead of pretextual.

Finally, Harrison contends that the district court erred in allowing State's witness Henry Harvey, the victim's stepdad, to testify because the State provided insufficient notice of the witness in violation of NRS 174.234. The prosecutor sought to endorse Harvey on the second day of trial, explaining that Harvey had contacted him the night before and informed him that Adams, one of the eyewitnesses in the case who denied seeing the shooting, told him that Harrison had shot the victim. Harrison contends that he was prejudiced by the State's untimely disclosure because "[d]efense counsel was placed in the awkward position of interviewing Mr. Harvey after he testified on direct examination by the District Attorney's office." We conclude that Harrison's contention lacks merit.

In this case, the parties do not dispute that the State did not comply with the discovery deadlines set forth in NRS 174.234. NRS 174.295(2) sets forth the remedy for discovery violations pursuant to NRS 174.234. Specifically, where there has been a discovery violation, the

district court "may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."[9] "However, where the State's non-compliance with a discovery order is inadvertent and the court takes appropriate action to protect the defendant against prejudice, there is no error justifying dismissal of the case."[10]

Here, after considering the issue outside the presence of the jury, the district court allowed Harvey to testify, explaining that it would continue the trial so that defense counsel could do any investigation that was appropriate. We conclude that the district court did not err in allowing Harvey to testify. Harrison does not allege that the State's failure to notice Harvey was intentional. Additionally, the district court took appropriate action to protect Harrison from prejudice by allowing a brief continuance of the trial so that he could interview Harvey. Moreover, outside the presence of the jury, the district court asked Harvey if he had a criminal record in order to expedite the defense's investigation. Finally, after the defense interview with Harvey, Harrison did not object to the length of the continuance or request additional time to obtain his own rebuttal witnesses. Because the record indicates that Harrison was not

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[9]NRS 174.295(2).

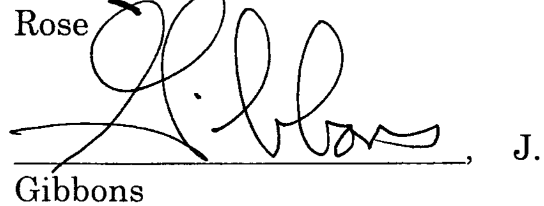
[10]State v. Tapia, 108 Nev. 494, 497, 835 P.2d 22, 24 (1992) (construing NRS 174.295).

prejudiced by the untimely disclosure, the district court did not err in allowing the testimony.

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

ORDER the judgment of conviction AFFIRMED.

_______________, J.
Rose



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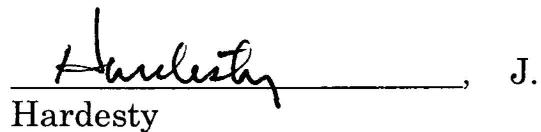
Gibbons



_______________, J.
Hardesty

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk