

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY LEE HARRIS A/K/A TERRY  
HARRIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45199

**FILED**

MAR 24 2006

JANET W. BLOOM  
CLERK OF THE COURT  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted murder. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Terry Lee Harris to serve two consecutive prison terms of 43 to 192 months.

Harris contends that the district court erred by admitting hearsay statements, through the testimony of several police officers, implicating him as a suspect in the shooting. At trial, over the objection of defense counsel, one police officer testified that several different residents of the apartment complex near where the shooting took place told him that the shooter was a person named "mouse" and described him as having a tattoo on his neck that said "bitch killer."<sup>1</sup> The police officer further explained that he asked several residents "to write a statement or do a taped statement, and they said no, they were in fear for their life if they did." Likewise, another police officer testified that a domestic violence victim had "related" to him that the shooter "was a gentleman who had a

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<sup>1</sup>Evidence was admitted at trial that Harris had the moniker "mouse" and the words "bitch killer" tattooed on his neck.

tattoo on his neck that possibly said, bitchkiller, and that his nickname was Mouse or Mousy." The district court admitted the police officer testimony, concluding that it was not hearsay because the State was not offering it for the truth of the matter, but merely to show what the officers did in the course of their investigation.

We conclude the district court abused its discretion by admitting the testimony because it was hearsay.<sup>2</sup> Although the State offered the evidence to show its effect on the listener, the district court erred in admitting the evidence for that purpose because the probative value under the facts of this case was negligible and substantially outweighed by the danger of unfair prejudice.<sup>3</sup>

We cannot say that the erroneous admission of hearsay evidence in this case was harmless beyond a reasonable doubt.<sup>4</sup> The prejudicial nature of the hearsay evidence was significant given that it directly implicated Harris in the charged offense without affording him

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<sup>2</sup>See NRS 51.035 (hearsay is a "statement offered in evidence to prove the truth of the matter asserted"); cf. Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) (concluding that statement made to police officer to show how listener was affected is admissible non-hearsay because it was relevant to explain officer's conduct).

<sup>3</sup>Rowland v. State, 118 Nev. 31, 43, 39 P.3d 114, 121-22 (2002); see also NRS 48.035(1). Although not briefed by the parties, we note that the admission of the testimony may have also violated Harris's constitutional right to confront and cross-examine the witnesses implicating him in the shooting. See Crawford v. Washington, 541 U.S. 36 (2004); Flores v. State, 121 Nev. \_\_\_, 120 P.3d 1170 (2005).

<sup>4</sup>See Bellon v. State, 121 Nev. \_\_\_, \_\_\_, 117 P.3d 176, 181 (2005) (setting forth factors to determine whether the erroneous admission of evidence constitutes harmless error).

the right to confront his declarant-accusers.<sup>5</sup> Moreover, the prejudicial nature of the evidence was compounded by police officer testimony that the declarants refused to provide written or taped statements because they were afraid Harris would kill them.

While we agree with the State that there was sufficient evidence to sustain the conviction, the evidence presented at trial was far from overwhelming. There was no physical evidence, such as ballistics, DNA, or fingerprints directly or indirectly linking Harris to the shooting. The only eyewitness who positively identified Harris as the shooter was the victim, but his testimony was not free from doubt given the evidence that he had poor eyesight, was under the influence of crack cocaine on the day of the shooting, and was comatose for a month after the shooting. Also, the victim testified that Harris had no motive to shoot him and had, in fact, rendered assistance when the victim was attacked by another drug dealer just prior to the shooting. Although a neighbor testified that Harris seemed angry before the shooting and told him he was going to get a gun, the neighbor did not see Harris shoot the victim, and the neighbor's testimony is equally consistent with Harris's innocence, *i.e.*, that Harris was angry at the other drug dealer and sought a gun in defense of the victim.<sup>6</sup>

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<sup>5</sup>Although not briefed by the parties, we note that the admission of the testimony may have also violated Harris's constitutional right to confront and cross-examine witnesses implicating him in the shooting. See Crawford v. Washington, 541 U.S. 36 (2004); Flores v. State, 121 Nev. \_\_\_, 120 P.3d 1170 (2005).

<sup>6</sup>At trial, the neighbor also testified that he last saw Harris in October 2004. Harris attempted to impeach the neighbor by requesting that the district court take judicial notice of the fact that Harris was

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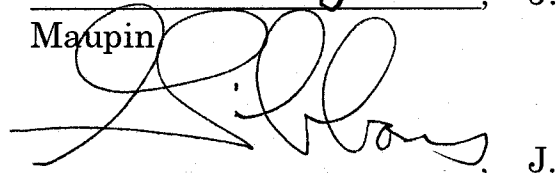
In this case, Harris was charged with attempting to commit the most serious of offenses, murder with the use of a deadly weapon and, like every criminal defendant, had a constitutional right to a fair trial. Because the issue of innocence or guilt is close and the gravity of the error is significant, we conclude that the erroneous admission of hearsay evidence deprived Harris of his constitutional right to a fair trial.

Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for a new trial.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

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incarcerated during October 2004, as well as allow him to present unnoticed testimony to prove he was in custody during that time. We conclude that the district court did not abuse its discretion by refusing to admit evidence, or take judicial notice of the fact, that Harris was in custody because Harris's whereabouts on October 2004 was relatively inconsequential to the issue of whether he shot the victim on August 4, 2005. See NRS 47.150; NRS 47.130; NRS 48.015.

cc: Honorable Jackie Glass, District Judge  
Jonathan E. MacArthur  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk