

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERMAINE JONES A/K/A JERMAINE
JOHNSON A/K/A JERMAINE
MONTANA JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47467

FILED

FEB 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary, one count of first degree kidnapping, and one count of robbery. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

In this appeal, Jones argues that: (1) he was denied the right to a fair and impartial jury, (2) his right to due process was violated when the State questioned him on cross-examination as to the veracity of another witness, (3) evidence of a prior bad act was improperly admitted, (4) his right to confrontation was violated, (5) the instructions provided to the jury were a violation of his right to due process, and (6) the district court's instruction to continue deliberations following the announcement that they were hopelessly deadlocked amounted to reversible error.

First, Jones contends that his right to a fair and impartial jury was violated because the venire was comprised of too few African-Americans. We have consistently recognized that defendants are "entitled to a venire selected from a fair cross-section of the community under the

Sixth and Fourteenth Amendments of the United States Constitution.”¹ In order to succeed in a challenge to the fair cross-section requirement, the defendant must show that, among other things, the representation of the group allegedly excluded from the venire was not fair and reasonable in relation to the community at large.² We conclude that an 8 percent representation of African-Americans in the venire amidst a 9.1 percent representation in the community at large was both fair and reasonable.³ Accordingly, in light of the holding in both Williams v. State⁴ and Evans v. State,⁵ we conclude that Jones was not deprived of the right to a fair and impartial jury.

Jones also asserts a Batson⁶ challenge and contends that the State improperly struck potential jurors on the basis of their race and gender. Indeed, the United States Supreme Court has recognized that the elimination of potential jurors solely on the basis of their race or gender is a violation of the Equal Protection Clause.⁷ However, when the

¹Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005) (citing Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996)).

²Evans, 112 Nev. at 1186, 926 P.2d at 275 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

³Id.; U.S. Census Bureau, Profile of General Demographic Characteristics (2000), available at <http://censtats.census.gov/data/NV/05032003.pdf>.

⁴Williams, 121 Nev. at 939, 125 P.3d at 631.

⁵Evans, 112 Nev. at 1186, 926 P.2d at 275.

⁶Batson v. Kentucky, 476 U.S. 79, 95 (1986).

⁷Id. at 89; J.E.B. v. Alabama, 511 U.S. 127 (1994).

discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral.⁸

Here, the State proffered that it struck single males without children from the jury pool because the victim in this case was female and they wanted to ensure that the jurors could relate in some way to the victim. As such, we conclude that discriminatory intent is not inherent in the State's proffered reasoning.⁹ Accordingly, we conclude that Jones' contention is without merit.

Second, Jones contends that his right to due process was violated when the State questioned him on cross-examination as to the veracity of another witness. Generally, it is the responsibility of the jury, and not the prosecutor, to question the veracity of a witness, unless "the defendant during direct examination has directly challenged the truthfulness of those witnesses."¹⁰ In the instant case, Jones took the stand and directly challenged the veracity of the State's witness by testifying that he was in California on the day of the attack. Because Jones directly challenged the truthfulness of the witness during direct examination, we conclude that Jones' right to due process was not violated when the State questioned him on cross-examination as to the veracity of another witness.¹¹

⁸Purkett v. Elem, 514 U.S. 765, 768 (1995).

⁹Id.

¹⁰Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988); Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003).

¹¹See Daniel, 119 Nev. at 519, 78 P.3d at 904.

Third, Jones argues that the district court committed reversible error when it improperly referenced a fingerprint identification card from his prior conviction. The test for determining whether a reference to a prior bad act has occurred “is whether ‘a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.’”¹² The error is harmless, however, when “the result would have been the same if the trial court had not admitted the evidence.”¹³ Based upon our review of the record, we conclude that even without the fingerprint card, the jury would have convicted Jones. Accordingly, we conclude that any error as to the fingerprint identification card was harmless because there is abundant evidence in the record establishing Jones’ guilt beyond a reasonable doubt.

Fourth, Jones argues that the district court erred in admitting certain pawn shop documents into evidence because they were testimonial in nature, and therefore, in violation of his Sixth Amendment right to confrontation. Generally, statements that are testimonial in nature are prohibited from being admitted into evidence, unless the witness is unable to testify, and the accused was provided an opportunity for cross-examination.¹⁴ This court has recognized that testimonial statements include those that are “taken by police officers in the course of

¹²Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (quoting Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972)).

¹³Byford v. State, 116 Nev. 215, 227, 994 P.2d 700, 709 (2000) (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

¹⁴Crawford v. Washington, 541 U.S. 36, 53-54 (2004).

interrogations”¹⁵ and those documents created in anticipation of litigation.¹⁶ Nontestimonial statements, on the other hand, include business records, which are admissible despite the Confrontation Clause.¹⁷

In Harkins v. State, this court presented a nonexhaustive set of factors to consider when determining whether a statement is testimonial.¹⁸ One such factor focuses on whether “the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial.”¹⁹ In the instant case, the contested pawn shop documents were created during the normal course of business, not for the purpose of gathering evidence to be used during a later trial. Accordingly, we conclude that Jones’ argument as to the Confrontation Clause is without merit.

Fifth, Jones argues that the instructions that were provided to the jury were in violation of his right to due process of law because they failed to include an instruction on the dangers associated with cross-racial identification. We disagree. Courts will rarely reverse a criminal conviction for an improper instruction when no objection has been made

¹⁵Harkins v. State, 122 Nev. ___, ___, 143 P.3d 706, 711 (2006) (quoting Crawford, 541 U.S. at 52).

¹⁶Ramirez v. State, 114 Nev. 550, 558-59, 958 P.2d 724, 729 (1998); see also Flores v. State, 121 Nev. 706, 718-19, 120 P.3d 1170, 1178-79 (2005).

¹⁷Crawford, 541 U.S. at 56.

¹⁸Harkins, 122 Nev. at ___, 143 P.3d at 714.

¹⁹Id.

during trial.²⁰ Accordingly, Jones' failure to object to the lack of an instruction on cross-racial identification requires him to show that the "ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."²¹ We conclude that Jones has not met this heavy burden because two witnesses have provided an accurate identification of Jones as the individual at the scene of the crime.

Finally, Jones contends that the district court erred when it instructed the jury to continue deliberations after learning that they were hopelessly deadlocked. We conclude this argument to be without merit. Any disagreement among the jury regarding the testimony or any point of law shall be brought to the attention of the court, "in the presence of, or after notice to, the district attorney and the defendant or his counsel."²² However, "[a] simple request, . . . that the jury continue its deliberations is not inappropriate or coercive."²³

Here, because the district court simply instructed the jury to continue deliberations, there was no error. As such, we conclude that: (1) Jones was not denied the right to a fair and impartial jury, (2) his right to due process was not violated when the State questioned him on cross-examination as to the veracity of another witness, (3) evidence of a prior bad act was properly admitted, (4) his right to confrontation was not

²⁰Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

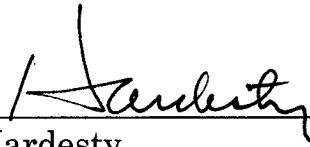
²¹Id. (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

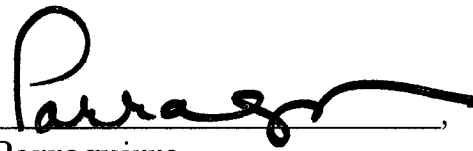
²²NRS 175.451; see Farmer v. State, 95 Nev. 849, 854, 603 P.2d 700, 703 (1979).

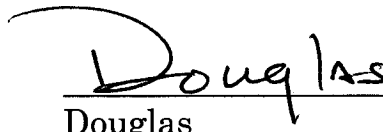
²³Farmer, 95 Nev. at 853, 603 P.2d at 703.

violated, (5) the jury instructions did not violate his right to due process, and (6) the district court's instruction to continue deliberations following the announcement that they were hopelessly deadlocked did not amount to reversible error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Kenneth C. Cory, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk