

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHON JDIJAH HINTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48643

FILED

JUL 24 2008

TRACIE W. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of first-degree kidnapping, robbery with the use of a deadly weapon, and burglary while in possession of a deadly weapon, and two counts of sexual assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant Jonathon Hinton challenges three aspects of his trial. First, Hinton argues that the State violated the Equal Protection Clause by using a peremptory challenge to exclude a minority juror in violation of Batson v. Kentucky.¹ Second, Hinton argues that the State committed prejudicial misconduct by making several inappropriate comments during its closing argument. Third, Hinton asserts that the district court failed to provide proper jury instructions by (1) refusing to give an instruction regarding the jury's "duty to acquit" and (2) instructing the jury that a "knife" is a "deadly weapon."²

¹476 U.S. 79 (1986).

²Hinton also contends that the in-court identification testimony of the victim in this case, Judith Warren, was unreliable and unconstitutional. Hinton contends that the district court committed
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For the reasons set forth below, we conclude that all of Hinton's arguments fail except his final argument regarding the district court's deadly weapon instruction. Because the district court improperly instructed the jury that a "knife" is a "deadly weapon" as a matter of law, we reverse the district court's judgment of conviction and remand this case for a new trial on the deadly weapon issue alone. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Batson challenge

Hinton contends that the district court failed to properly apply Batson v. Kentucky's three-step analysis in denying his request for a new trial following the State's use of a peremptory challenge to remove a minority juror from the jury panel.

When a defendant in a criminal trial raises a Batson objection, the district court must undertake a three-step analysis. First, the defendant must demonstrate a prima facie case of discrimination. Second, once the defendant has demonstrated a prima facie case, the State must assert a neutral explanation for the challenge. Third, if the State tenders a neutral explanation, the district court must weigh the circumstances and decide whether the defendant has established purposeful

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reversible error by allowing Warren's in-court identification of Hinton as her assailant. This argument fails because Hinton stipulated to his presence in Warren's car—with Warren—on the morning of the attack. Thus, Warren's identification testimony was duplicative and inconsequential.

discrimination.³ This court affords “great deference” to the district court’s determination on the ultimate question of discriminatory intent.⁴

On appeal, Hinton argues that the district court misapplied step two of Batson by providing race-neutral justifications for the State’s peremptory challenge before requiring the State to advance such justifications itself.⁵ As this court has recognized, under step two of Batson, although “[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination,” the ultimate question (posed by step three of Batson) remains “whether the opponent of the peremptory challenge has met the burden of proving purposeful discrimination.”⁶

In this case, the district court should have required the State to provide the race-neutral justifications without judicial assistance. Nonetheless, Hinton has failed to demonstrate purposeful discrimination under Batson’s third and final step. According to the United States Supreme Court, the defendant carries the “burden of persuasion” to

³Ford v. State, 122 Nev. 398, 403-04, 132 P.3d 574, 577 (2006).

⁴Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997). (quoting Hernandez v. New York, 500 U.S. 352, 364 (1990)).

⁵Additionally, Hinton notes that the district court previously refused to dismiss the juror in question based on the juror’s apparent financial hardship and that another non-minority juror remained on the jury despite the fact that he was from Chicago, which was one of the bases given by the State in favor of the peremptory challenge.

⁶Ford, 122 Nev. at 404, 132 P.3d at 578.

“prove the existence of purposeful discrimination.”⁷ Indeed, this burden of persuasion “rests with, and never shifts from, the opponent of the strike.”⁸

Here, the State challenged one African American prospective juror. Although the juror in question was the only African American on the actual jury panel, another African American was seated as an alternate juror in the case. As a result, we conclude that the State’s decision to strike the prospective juror in question did not, in and of itself, demonstrate purposeful discrimination. For this reason, we conclude that the district court did not abuse its discretion in refusing to grant a new trial under Batson.

Alleged prosecutorial misconduct

Hinton argues that a new trial is warranted because of three allegedly improper statements made by the prosecutor during closing arguments: (1) a reference to Warren as a “God-fearing-church-going woman”; (2) a declaration that Warren did not have a taser gun with her at the time of the attack (though the gun was pictured in photos of her car and there was no testimony on the issue); and (3) a rhetorical question asking whether the jury believed that Warren enjoyed testifying and reliving her attack. Hinton objected to the first two allegedly improper statements and the district court sustained the objections, instructing the jury to disregard the statements. Hinton failed to object to the State’s rhetorical question, however, and no limiting instruction was given to the

⁷Batson, 476 U.S. at 93 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

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

jury. Later, the district court denied Hinton's request for a mistrial based on the State's first two statements.

This court will only reverse the denial of a motion for mistrial where there is a clear showing of an abuse of discretion.⁹ Having reviewed the record in this case, we conclude that no abuse of discretion occurred and that reversal is unnecessary based on any of the three challenged statements. Although the prosecutor's remark about Warren's religion was improper,¹⁰ the district court sustained Hinton's objection to the remark and instructed the jury to disregard it; thus, the district court eliminated any prejudice.¹¹ Similarly, the district court cured any prejudicial effect caused by the State's "taser" comment by sustaining Hinton's objection to the statement and instructing the jury to disregard it.¹² Finally, to the extent that the State's unchallenged rhetorical question may have crossed the line of permissible argument, we conclude that the question did not amount to prejudicial plain error.¹³

⁹Rose v. State, 123 Nev. ___, ___, 163 P.3d 408, 417 (2007).

¹⁰See NRS 50.105 ("Evidence of the beliefs or opinions of a witness on matters of religion is inadmissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.").

¹¹See Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (noting that a criminal conviction "is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial").

¹²Rose, 123 Nev. at ___, 163 P.3d at 418.

¹³See id. at ___, 163 P.3d at 418-19.

Jury Instructions

Hinton raises two challenges to the jury instructions at trial. First, Hinton contends that the district court abused its discretion by failing to instruct on the jury's "duty to acquit" with respect to each crime. Second, Hinton argues that the district court improperly instructed the jury that a "knife" is a deadly weapon as a matter of law.

The district court has broad discretion to settle jury instructions, and this court reviews those instructions for an abuse of discretion or judicial error when a party objects to the instructions at trial.¹⁴ The failure to object to a jury instruction at trial, however, generally precludes appellate review.¹⁵ Nevertheless, this court may address an erroneous instruction if the error was plain and affected the defendant's substantial rights.¹⁶ An error is plain if it "is so unmistakable that it reveals itself by casual inspection of the record."¹⁷ At a minimum, the error must be "clear under current law,"¹⁸ and "[n]ormally a defendant must show that an error was prejudicial in order to establish that it affected his substantial rights."¹⁹

¹⁴Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

¹⁵Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

¹⁶Id.

¹⁷Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks and citations omitted).

¹⁸Gaxiola, 121 Nev. at 648, 119 P.3d at 1232 (quoting U.S. v. Weinstraub, 273 F.3d 139, 152 (2d Cir. 2001)).

¹⁹Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001).

Duty to acquit instruction

Hinton argues that the district court abused its discretion by refusing to give a “duty to acquit” instruction for each of Hinton’s crimes. The district court refused to give the instructions because it found that they were unnecessary and duplicative in light of the court’s reasonable doubt instruction, which provided in part that “[i]f you have a reasonable doubt as to the guilt of the Defendant on any or all offenses, he is entitled to a verdict of not guilty.” In light of this reasonable doubt instruction, which properly instructed the jury of its “duty to acquit,” we conclude that the district court did not abuse its discretion by refusing to re-instruct the jury with respect to this duty for each of Hinton’s crimes.²⁰

Deadly weapon instruction

Hinton also contends that the district court usurped the jury’s role by instructing the jury that a “knife” is a deadly weapon as a matter of law. Because Hinton failed to object to the court’s deadly weapon instruction at trial, we review the instruction for plain error.

At trial, the district court instructed the jury that a “knife” is a “deadly weapon.” Specifically, the court’s “deadly weapon” instruction read as follows:

“Deadly weapon” means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; any weapon, device, instrument, material or substance which, under the circumstances in which it is used,

²⁰See Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995) (noting that the district court may refuse to give an instruction that is substantially covered by other instructions).

attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or a dangerous or deadly weapon specifically described as a dirk, dagger, switchblade knife, or knife.

(Emphasis added.) This instruction is based on the definitions provided in NRS 193.165, Nevada's deadly weapon enhancement statute. The first two clauses of the instruction mirror subparagraphs (6)(a) and (b) of the statute and therefore are not at issue here.²¹ However, the third clause, in addition to listing bladed weapons that the legislature has determined to be dangerous or deadly, wrongly lists a "knife" as a dangerous or deadly weapon.²² Accordingly, the instruction erroneously informs the jury that a knife is a deadly weapon as a matter of law and thereby relieves the jury of its fact-finding function, diminishes the State's burden of proof, and violates Hinton's right to due process.²³

²¹See State of Nevada v. Kelly, 1 Nev. 188, 190 (1865) (providing that an instruction in the words of a statute and pertinent to the facts of the case correctly places the law of the case before the jury).

²²NRS 193.165(6)(c) defines a deadly weapon as "[a] dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320, or 202.350." (Emphasis added.) The statutes enumerated in NRS 193.165(6)(c) specifically describe dirks, daggers, machetes, switchblade knives, and knives that are an integral part of a belt buckle as dangerous or deadly weapons, but they do not describe knives in general as dangerous or deadly weapons.

²³See Lord v. State, 107 Nev. 28, 39, 806 P.2d 548, 555 (1991) ("[i]n state criminal trials, the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"(quoting Cage v. Louisiana, 498 U.S. 39, 39 (1990))).

In Apprendi v. New Jersey, the Supreme Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.²⁴ We have since recognized that Apprendi applies to statutory enhancements such as the “deadly weapon” enhancement at issue here.²⁵

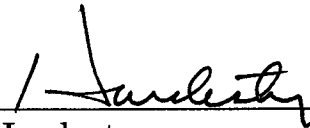
We conclude that the district court’s deadly weapon instruction erroneously removed from the jury’s consideration the factual issue of whether the knife constituted a deadly weapon, a necessary element of the burglary offense and a required factual finding for the deadly weapon enhancements to the robbery and sexual assault charges. We further conclude that this error was plain and that it affected Hinton’s substantial rights. Accordingly, the burglary conviction and deadly weapon enhancements must be reversed.


Having considered Hinton’s contentions and for the reasons discussed above, we

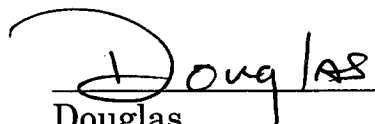
²⁴ 530 U.S. 466, 490 (2000).

²⁵Abrego v. State, 118 Nev. 54, 60, 38 P.3d 868, 871 (2002).

ORDER the judgment of conviction AFFIRMED IN PART
AND REVERSED IN PART AND REMAND this matter to the district
court for proceedings consistent with this order.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jennifer Togliatti, 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