

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMAR RICE A/K/A JAMAR LAMONT
RICE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49308

FILED

OCT 18 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
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 three counts of coercion with force or threat of force, two counts of conspiracy to commit battery, battery with substantial bodily harm, conspiracy to commit robbery, two counts of robbery, conspiracy to commit burglary, and burglary. Eighth Judicial District Court, Clark County; James M. Bixler, Judge. The district court sentenced appellant Jamar Rice to serve multiple concurrent terms in prison, the lengthiest being 60 to 180 months for each of the robbery convictions.

Rice argues that the district court erred in overruling his objection to the State's peremptory challenge of a juror in violation of Batson v. Kentucky.¹ The district court reviews a Batson challenge using the following three-step analysis: "(1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then

¹476 U.S. 79 (1986).

decide whether the opponent of the challenge has proved purposeful discrimination."² "Under the first step, the trial court should consider the totality of the circumstances in determining whether the opponent of the peremptory challenge has made a prima facie showing of discrimination."³ The district court need not consider this step where, as here, the State gave its reasons for its peremptory challenge before the district court determined whether Rice made a prima facie showing of discrimination.⁴

Under step two, the State's neutral rationale for its peremptory challenge need not be persuasive or even plausible, and the reason offered should be deemed neutral if discriminatory intent is not inherent in the State's explanation.⁵ Here, the State explained that the challenged juror's demeanor showed that she was "completely disinterested" in the proceedings. The State further explained that the juror indicated that her godson had been wrongly accused of marijuana possession.

In the final step, the district court considers the persuasiveness of the State's explanation and determines whether the opponent of the peremptory challenge has proved purposeful discrimination.⁶ "Because the trial court's findings on the issue of

²Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006); see Purkett v. Elem, 514 U.S. 765, 767 (1995).

³Ford, 122 Nev. at 403, 132 P.3d at 577.

⁴Id.

⁵Id. at 403, 132 P.3d at 577-78.

⁶Id. at 403, 132 P.3d at 578.

discriminatory intent largely turn on evaluations of credibility, they are entitled to great deference and will not be overturned unless clearly erroneous."⁷ In denying Rice's Batson challenge, the district court concluded that the State proffered sufficiently race-neutral grounds for the peremptory challenge based on the juror's responses during voir dire. Specifically, the district court noted that it appeared that the juror would have difficulty fulfilling her duties without bias due to the incident with her godson. We conclude that the district court's ruling was not clearly erroneous, and we deny relief on this claim.

Rice next argues that the evidence is insufficient to support his convictions for two counts of coercion with force or threat of force and one count of conspiracy to commit battery. Rice's convictions stem from a series of events that occurred on April 15 and 16, 2006. However, the crimes at issue in this claim involve an event at a Wal-Mart store in North Las Vegas. That evening, a group of 15 to 25 teenagers, mostly males, converged in the Wal-Mart parking lot. Wal-Mart assistant manager Josue Medrano responded to a store-wide call to all assistant managers to report to the parking lot due to a disturbance. Upon arriving at the parking lot, two men approached Medrano and asked him if he had called the police, to which Medrano responded that he had. One of the men punched Medrano in the face, pushed him to the ground, and waved other members of the group over. Several individuals surrounded Medrano, kicking and punching him until another assistant manager, Raudel Torres, intervened. Medrano was unable to identify any of his attackers.

⁷Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004) (footnote omitted).

While assisting Medrano, Torres heard a woman screaming that her daughter, Kim Hall, had been hit and her purse stolen. Hall was attacked while attempting to call the police, having observed Medrano's beating. Torres testified that he observed two men, who "came from the group that was beating [Medrano]," walking away from Hall's location. However, on cross-examination, Torres acknowledged more specifically that he was unable to identify anyone, including Rice, as having been involved in Medrano's beating. Torres further testified that he did not witness Hall's attack.

Hall testified that one teenage male approached her and absconded with her purse and water bottle. As Hall dialed 911 on her mother's cell phone, two other teenage males ran toward her. The first male punched the cell phone out of her hand and then punched Hall again, breaking her eyeglasses. The second male slammed her to the ground while the first male hit her. Hall testified that she selected Rice's picture from a photographic lineup because the thickness of his eyebrows "looked familiar." During the lineup, Hall indicated that she was 50 percent sure that Rice was one of the males who hit her. At trial, Hall described her certainty that Rice had assaulted her as "almost pretty sure," and "still 50 percent." More specifically, on cross-examination, Hall acknowledged that she had no specific recollection of Rice hitting her because "there were two of them, and moving fast, that's why I wrote 50 percent, because I didn't want to. . . say the wrong guy." She further acknowledged that she "still cannot testify that Jamar Rice [was] one of the two people that hit her," and that "it was a 50/50 shot that Rice was one of the persons who attacked her." Rice testified that he was present at Wal-Mart because

"two girls were supposed to fight," but he denied any participation in the attacks on Medrano or Hall.

We conclude that the evidence at trial, even when viewed in the light most favorable to the prosecution, does not provide a rational factfinder with sufficient evidence to find Rice guilty of the convictions stemming from the Wal-Mart incident.⁸ Rice's testimony that he was in the Wal-Mart parking lot at the time Medrano and Hall were attacked establishes Rice's presence at the crime scene at the relevant time. However, the trial record is devoid of evidence showing that Rice participated in any capacity in Medrano's beating. And Hall's tentative identification of Rice as one of her assailants under the circumstances of this case is insufficient to support a finding beyond a reasonable doubt that he participated in her attack. Therefore, we reverse Rice's convictions for two counts of coercion with force or threat of force (counts 1 and 3) and one count of conspiracy to commit battery (count 2).

Rice next contends that his trial was unfair due to numerous instances of prosecutorial misconduct committed during the State's closing argument. However, he failed to object to any of the comments of which he now complains. Consequently, we review Rice's claim for plain error.⁹

Rice first argues that the prosecutor misstated the law regarding vicarious co-conspirator and aiding and abetting liability. Specifically, he asserts that the prosecutor improperly stated that Rice's

⁸See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

⁹See Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

mere presence was sufficient to hold him liable under these theories and that the State was not obligated to prove the intent required to hold him liable as an aider and abettor or a co-conspirator. Rice further complains that the prosecutor improperly argued that Rice was either "guilty of acting alone or he was a member of the conspiracy." To the extent that the State misstated the law, we conclude that Rice cannot demonstrate prejudice. First, in light of our order reversing counts 1, 2, and 3, any impact the State's arguments may have had on these counts is immaterial.

Respecting the remaining counts, the evidence establishing Rice's guilt is overwhelming, including surveillance videotapes showing Rice's attack on MGM Casino employee Richard Markwell, Jr. (counts 4 through 8) and his participation in the robbery at the Green Valley Grocery Store (counts 9 through 11). Moreover, the district court properly instructed the jury on the law of conspiracy and vicarious co-conspirator and aiding and abetting liability. The jury was further advised to follow the law set forth in the instructions irrespective of counsels' arguments. Nothing in the record suggests that any error in this regard affected Rice's substantial rights. Accordingly, we conclude that Rice has not demonstrated plain error.

Rice further claims that the State improperly changed its theory of the case respecting the allegation of battery resulting in substantial bodily injury to Markwell. Specifically, Rice contends that in the charging documents, the State alleged that the substantial bodily injury was an injury to Markwell's shoulder, but that at trial, the State argued that a blow to Markwell's jaw, inflicted by Rice, satisfied the substantial bodily harm element of the offense. The indictment, however, alleges that Rice, along with other named co-defendants, committed the

offense by "punching and/or hitting and/or stomping the body of Richard Markwell. . . .Said actions collectively resulting in substantial bodily harm." The indictment does not restrict the allegation of substantial bodily harm solely to a shoulder injury. Although the prosecutor focused primarily on Markwell's shoulder injury during closing argument, she also commented that Markwell continued to suffer jaw pain. A video surveillance tape shows Rice punching Markwell in the face repeatedly, and Rice admitted at trial that he hit Markwell in the face. Markwell testified that he still suffers pain in his jaw as a result of the attack. Rice has not alleged that Markwell's jaw injury did not constitute substantial bodily harm or that he was unfairly surprised by the prosecutor's focus on the shoulder injury. Accordingly, we conclude that Rice fails to show plain error in this regard.

Rice also contends that the prosecutor improperly interjected her personal opinion by arguing that Rice was the instigator of the attack on Markwell. Rice does not point to any particular statement by the prosecutor. However, during closing argument, the prosecutor commented that Rice threw the first punch, "caus[ing] a chain reaction" that led to substantial bodily injury to Markwell. We discern no interjection of personal opinion in the prosecutor's statement, but rather a legitimate comment on the evidence presented. The surveillance videotape of Markwell's beating shows that Rice was the first person to hit Markwell. Additionally, one of Rice's cohorts in the crime testified that Rice hit Markwell first, "trigger[ing] the whole thing." We conclude that Rice fails to demonstrate plain error in this regard.

Rice next complains that the "State mixed apples and oranges by applying law to factually dissimilar situations from that of [Rice]."

However, Rice neglects to identify what comments he now asserts were improper. We therefore conclude that Rice fails to demonstrate plain error in this regard.

Finally, Rice argues that the prosecutor improperly questioned him on cross-examination about a prior bad act, namely his excusal from school for threatening a teacher. However, Rice did not object to the prosecutor's query, and he fails to explain how the admission of this testimony constituted plain error. Consequently, we reject this claim.

Having considered Rice's claims, we reverse his conviction for two counts of coercion with force or threat of force (counts 1 and 3) and one count of conspiracy to commit battery (count 2) and remand this matter to the district court for re-sentencing. We affirm the remaining convictions. Accordingly, we

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.

Gibbons

 J.

Cherry

 J.

Saitta

cc: Hon. James M. Bixler, District Judge
Michael H. Schwarz
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk