

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY TRABERT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49820

**FILED**

APR 30 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant Tony Trabert raises two issues on appeal. Trabert contends that he is entitled to a new trial because (1) the district court erred when it excluded prospective jurors who had family members with mental illness, and (2) the district court erred when it refused to give the jury a manslaughter instruction. The parties are familiar with the facts and we do not recount them except as necessary to our disposition. For the following reasons, we affirm.

DISCUSSION

Batson Challenge

Trabert argues that his rights under Sixth and Fourteenth Amendments of the United States Constitution were violated when, despite his objection, the district court permitted three jurors to be excused who had mentally ill family members. We conclude that Trabert's argument is without merit.

A district court's ruling on whether peremptory challenges were exercised in an impermissible discriminatory fashion is reviewed for

an abuse of discretion. Foster v. State, 121 Nev. 165, 172, 111 P.3d 1083, 1088 (2005).

Pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, a criminal defendant has the right to a fair and impartial jury chosen from a cross-section of the community. U.S. Const. amends. VI, XIV; Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). “It is impermissible to use a peremptory challenge to exclude a potential juror based on race or gender.” Foster, 121 Nev. at 171, 111 P.3d at 1088.

In evaluating whether the State exercised its peremptory challenges in a discriminatory fashion, the district court must employ a three-step evaluation:

[T]he complaining party “must [first] make a prima facie showing of intentional discrimination.” Next, the party accused of discriminatory challenges must offer a gender or race-neutral explanation for striking the jurors. The trial court must then decide whether the complaining party has carried his burden of proving purposeful discrimination.

Id. at 172, 111 P.3d at 1088 (quoting Walker v. State, 113 Nev. 853, 867, 944 P.2d 762, 771 (1997)); see Batson v. Kentucky, 476 U.S. 79, 89 (1986).

Our review of the record reveals that Trabert’s claim under Batson is wholly without merit because there is no evidence that the three jurors in question were excused due to intentional racial or gender discrimination. Rather, the evidence demonstrates that the three jurors were excused because all of them had relatives with mental illness. One juror stated that her son was a paranoid schizophrenic and she believed the government and social services had failed him dramatically. The district court granted the State’s peremptory challenge. The second juror

explained that he had a brother who was mentally ill and stated 11 times that he was biased in Trabert's favor. The State challenged this juror, and the district court granted the State's for-cause challenge. The third juror said that her mother was mentally ill and it would affect her ability to be fair; the district court excused the juror sua sponte. There is no evidence of juror dismissal based on race, gender, or any other impermissible basis, and therefore Trabert failed to satisfy the threshold requirement of Batson. Because the dismissed jurors all had admitted biases and were dismissed for nondiscriminatory reasons, we conclude that the district court did not abuse its discretion in dismissing the three jurors.

### Jury Instructions

Trabert argues that the district court erred when it refused to give a manslaughter instruction to the jury. We disagree.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. (quoting Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

Nevada's voluntary manslaughter statute, NRS 200.050, states that "[i]n cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." In contrast, the statute governing when a killing should be punished as murder, NRS 200.060, states the following:

The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

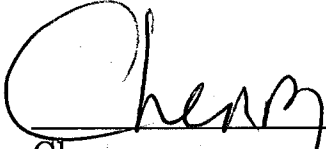
The district court did not abuse its discretion when it denied Trabert's request for a manslaughter instruction because the record indicates that there was no evidence adduced at trial of a "serious and highly provoking injury," as set forth in NRS 200.050, or of a "sudden, violent impulse of passion . . . [without] an interval between the assault and the provocation," as set forth in NRS 200.060. Rather, the record indicates that the killing occurred without a serious and highly provoking injury because Trabert stabbed the victim, Steve Gentis, while Gentis was sleeping and they did not speak or argue prior to the attack. While Trabert contended at trial that he stabbed Gentis for stealing some money, the record indicates that there was at least a two-day interval between the alleged theft and the assault. Accordingly, we conclude that the district court did not abuse its discretion when it determined that a manslaughter instruction was not justified in this case.

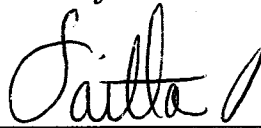
#### CONCLUSION


For the reasons stated herein, we conclude that the district court did not abuse its discretion when it dismissed three potential jurors,

nor when it refused to give a manslaughter instruction to the jury.  
Therefore, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge  
Christopher R. Oram  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk