IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY DEWAYNE DIXON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53700

FILED

MAR 17 2011

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 resisting a public officer, battery with the use of a deadly weapon, four counts of attempted murder with the use of a deadly weapon, discharging a firearm at or into a structure, and five counts of discharging a firearm within or from a structure. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. Appellant Terry DeWayne Dixon's convictions stem from an incident that began as an argument between him and his mother, who ultimately called the police. A standoff between the police and Dixon ensued, during which Dixon fired multiple shots at police officers. Three police officers were struck by bullets.

Dixon argues that the State engaged in prosecutorial misconduct through improper arguments and withholding evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

As to the alleged improper arguments, Dixon identifies three instances, two of which he failed to preserve for review. Therefore we review those claims for plain error affecting his substantial rights. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). First, Dixon claims that the prosecutor's use of a picture and accompanying argument

suggesting that he had an unobstructed view of the officers was unsupported by the evidence and convinced the jury that he intended to kill police officers whom he could not see. Considering the physical evidence presented and testimony that Dixon shot at or immediately near the victims, we discern no plain error. Second, Dixon's claim that the prosecutor disparaged counsel by calling her arguments ridiculous and accusing her of "advocating lawless, drug-fueled anarchy" illustrates no plain error, as the comments responded to Dixon's suggestion that his drug-induced state obviated any intent to kill. See Greene v. State, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). Third, Dixon contends that the prosecutor improperly shifted the burden of proof by suggesting in closing argument that Dixon could have produced a photograph showing his vantage point relative to the police officers' locations. The district court sustained Dixon's objection but denied his motion for mistrial. Considering the brevity of the comment and relevant instructions given, we conclude that the district court did not err by denying his motion for mistrial. See Rudin v. State, 120 Nev. 121, 142, 86 P.2d 572, 586 (2004).

Regarding Dixon's Brady claim, we conclude that no relief is warranted as he conceded at trial that the information contained in the withheld document was included in other documents and therefore it was a "no harm, no foul situation." Thus, Dixon failed to show to prejudice. See Browning v. State, 120 Nev. 347, 369, 91 P.3d 39, 54 (2004) (observing that showing of prejudice required for successful Brady claim).

Dixon next contends that he was entitled to eight peremptory challenges because the sentence range in this case included a term of life

in prison under the habitual felon statute. See NRS 175.051(1). We have held that habitual criminal adjudication does not dictate the number of peremptory challenges allowed under NRS 175.051 because that adjudication is a status determination, not a separate offense; rather, the sentence for the primary offense controls.[1] Nelson v. State, 123 Nev. 534, 547, 170 P.3d 517, 525-26 (2007); see Schneider v. State, 97 Nev. 573, 574-75, 635 P.2d 304, 304-05 (1981). Dixon's claim lacks merit as none of the primary offenses carries a life term in prison.

Third, Dixon asserts that the district court erred by denying his fair-cross-section challenge to the jury pool without conducting an evidentiary hearing. At trial, Dixon argued that the jury pool reflected an underrepresentation of African Americans and that the Public Defender's office is attempting to keep statistics regarding the racial makeup of jury pools to support a contention that minorities are systematically excluded from jury pools in Clark County.[2] Even assuming that Dixon showed that African Americans are a distinctive group in the community—to which

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[1]Dixon argues that his adjudication under NRS 207.012 (the habitual felon statute) distinguishes his case from our opinions on this issue as those cases involved NRS 207.010 (the habitual criminal statute). However, the charging document indicates that the State sought habitual adjudication under NRS 207.010 and the judgment of conviction references the "Large Habitual Criminal Statute." Moreover, we conclude that Dixon's claim fails under either statute.

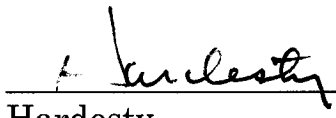
[2]Dixon also argues that Hispanics were underrepresented in the jury pool. Although he noted below that only one Hispanic was included in the jury pool, his argument focused on the African-American representation. Even assuming that this argument was preserved for appeal, it fails because Dixon made no showing of systematic exclusion.

there is no dispute—and that African Americans were unfairly and unreasonably underrepresented, Dixon's arguments at trial indicate that he could not show a systematic exclusion of that group. See Williams v. State, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005). Accordingly, we conclude that the district court did not err in this regard.

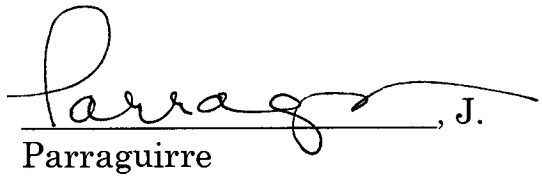
Having considered Dixon's arguments and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk