IN THE SUPREME COURT OF THE STATE OF NEVADA

LEO HUNTER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58717

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Sufficiency of the evidence

Appellant Leo Hunter, Jr., contends that insufficient evidence was adduced to support the jury's verdict. We disagree and conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Hunter and the victim, his daughter Lenora, argued often and especially about the amount of time she spent caring for her young children. Hunter, his wife Stella (Lenora's mother), and Lenora and her two daughters, lived together in Hunter's home. On the night of the incident, after another argument, Lenora informed Stella that she was moving out and taking the children with her. Stella informed Hunter, who then retrieved a .44 Magnum handgun from the closet, intending, he claimed, to scare her. Hunter also told detectives the next day, however,

that he "wasn't thinking" at the time, he "was just angry," and "[t]hat was the last straw for me because every time she takes her children out of the house, they come back in worse state than they were before." Stella tried to stop Hunter, but he pushed her aside and knocked her to the ground in order to confront Lenora. Stella told detectives that she heard him say, "I'm willing to do the time." Stella testified that she did not believe the gun was loaded, but Hunter told detectives that the .44 Magnum was the only one of his many weapons that he kept loaded, due to problems with coyotes. Hunter did not recall pulling the trigger, only that "[w]e pushed each other and the gun went off."

Circumstantial evidence alone may sustain a conviction. See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003); Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (explaining that malice may be implied from "'the intentional use of a deadly weapon in a deadly and dangerous manner'" (quoting Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975))). It is for the jury to determine the weight and credibility to give conflicting testimony, McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also NRS 200.010(1); NRS 200.020(2); NRS 200.030(2). Therefore, we conclude that Hunter's contention is without merit.

Batson challenge

Hunter contends that the district court erred by denying his objection to the State's use of a peremptory challenge to remove an alleged minority juror. See U.S. Const. amends. VI, XIV, § 1; Nev. Const. art. 1, §§ 3, 8; Batson v. Kentucky, 476 U.S. 79 (1986). We disagree.

"Appellate review of a Batson challenge gives deference to [t]he trial court's decision on the ultimate question of discriminatory intent." Hawkins v. State, 127 Nev. ___, ___, 256 P.3d 965, 966 (2011) (quotation omitted); see also Felkner v. Jackson, 562 U.S. ___, ___, 131 S. Ct. 1305, 1307 (2011). The district court found that the prosecutor provided a "nonrace-based reason" for seeking to remove the juror in question. See Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) ("'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991))). Moreover, Hunter failed to provide us with the transcript of the juror's voir dire. See Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))). Therefore, we conclude that Hunter failed to establish that the district court erred by rejecting his Batson challenge.

Prosecutorial misconduct

Hunter contends that the prosecutor committed misconduct during closing arguments by shifting the burden of proof and commenting about his failure to produce evidence. Hunter did not object to the alleged prosecutorial misconduct and we conclude that he failed to demonstrate reversible plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (challenges to unobjected-to prosecutorial misconduct are reviewed for plain error); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (when reviewing for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice"); see also NRS 178.602.

Jury instructions

Hunter contends that the district court erred by refusing to provide the jury with his proposed instruction on accident or misfortune. See NRS 194.010(6). In Ricci v. State, 91 Nev. 373, 384, 536 P.2d 79, 85 (1975), however, this court stated that an accident or misfortune "instruction is improper, where the offense charged is a homicide." See NRS 200.180(1) (source for "excusable homicide" instruction). The district court brought Ricci to the parties' attention and subsequently rejected Hunter's proposed instruction. We conclude that the district court did not abuse its discretion. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error.").

Hunter contends that the district court erred by refusing to provide the jury with his proposed instruction on unlawful acts. The district court found that Hunter's proposed instruction was covered by other jury instructions. We conclude that Hunter fails to demonstrate that the district court abused its discretion, see Crawford, 121 Nev. at 748, 121 P.3d at 585.

Abuse of discretion at sentencing

Hunter contends that the district court abused its discretion at sentencing by failing to make express findings on the record, pursuant to NRS 193.165(1)(a)-(e), prior to imposing the deadly weapon enhancement. After the sentencing hearing concluded, the district court went back on the record and, in the presence of the parties, stated only that it considered the statutory factors prior to making its sentencing determination.

We agree that the district court erred by failing to make factual findings on the record prior to the imposition of the deadly weapon enhancement, thus violating the mandate of Mendoza-Lobos v. State, 125 Nev. 634, 643-44, 218 P.3d 501, 507 (2009). Hunter, however, did not object to the sufficiency of the district court's findings with regard to the deadly weapon enhancement and we conclude that he fails to demonstrate plain error affecting his substantial rights. See NRS 178.602; Mendoza-Lobos, 125 Nev. at 644, 218 P.3d at 507-08; see also Puckett v. United States, 556 U.S. 129, 135 (2009). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Michael Montero, District Judge
Humboldt County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk