

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCUS WASHINGTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 61139

**FILED**

**FEB 26 2015**

*ORDER OF AFFIRMANCE*

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

The parties are familiar with the facts, which will only be recounted as necessary for this decision. Robert Hicks was fatally shot in the gated courtyard of a Las Vegas apartment complex. On the scene, police found Donald Williams, who told them that the shooter was his nephew, appellant Marcus Washington.

During the police investigation, Devin Belanger contacted Detective Barry Jensen and told him that she had information about the shooting. Belanger then contacted Detective Joseph Zepeda and informed him that she could purchase the gun used in the shooting and that she knew where the gun was located.

At trial, Washington called Belanger to testify. Belanger testified that she was a confidential informant for police. The district court prohibited Belanger from testifying that she overheard Jason Owens, a drug dealer, admit that he shot Hicks because the court found this testimony to be untrustworthy.

The State called Detective Jensen, who testified that he interviewed Owens and did not believe him to be a suspect. Detective Jensen testified that Owens denied responsibility for the murder.

In rebuttal to Belanger's testimony, the State called Detective Zepeda. Detective Zepeda said that Belanger told him that Washington was the shooter. Detective Zepeda said that he did not use Belanger as a confidential informant to purchase the murder weapon because she indicated that Washington was upset with her and Washington might have been at the purchase location.

The jury returned a verdict of guilty. Washington was sentenced to life in prison without parole and consecutive term of 96 to 240 months for the use of a deadly weapon. This appeal follows.

*Exclusion of Belanger's hearsay testimony that Owens confessed to the murder*

Washington argues that he was deprived of his right to present a defense when the district court excluded Belanger's hearsay testimony that Owens confessed to the murder. This court "generally review[s] a district court's evidentiary rulings for an abuse of discretion." *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). We conclude that the district court did not abuse its discretion.

NRS 51.345(1) provides that "a [hearsay] statement tending to expose the declarant to criminal liability and offered to exculpate the accused in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."<sup>1</sup>

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<sup>1</sup>Washington appears to argue that the constitutionality of NRS 51.345(1) is questionable. On the contrary, we have recently decided that  
*continued on next page . . .*

Washington argues that Belanger's proposed testimony meets the requirements of NRS 51.345(1). Because neither side questions that the hearsay statement would incriminate Owens, the issue is whether the statement is sufficiently trustworthy. In *Coleman*, this court analyzed the same legal issue by considering the following factors used by the Fourth Circuit Court of Appeals:

- (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement,
- (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie,
- (3) whether the declarant repeated the statement and did so consistently,
- (4) the party or parties to whom the statement was made,
- (5) the relationship of the declarant with the accused, and
- (6) the nature and strength of independent evidence relevant to the conduct in question.

*Coleman*, 130 Nev. at \_\_\_, 321 P.3d at 909 (quoting *United States v. Kivanc*, 714 F.3d 782, 792 (4th Cir. 2013)).

Applied to this case, the first factor weighs in favor of trustworthiness because Owens was still exposed to potential prosecution for the murder. The third factor weighs against trustworthiness because there is no evidence that the statement, though possibly repeated to Belanger twice (it is unclear from her testimony), was made to anyone else on a second occasion. The fourth factor weighs against trustworthiness because the district court found that Belanger, the person who overheard

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NRS 51.345(1) is indeed constitutional. See *Coleman v. State*, 130 Nev. \_\_\_, \_\_\_, 321 P.3d 901, 907 (2014).

the statement, was using heroin at the time the statement was allegedly made. The sixth factor weighs against trustworthiness: There is no independent evidence supporting the statement and the statement contradicts eyewitness testimony that Owens was not at the scene. The other factors cannot be assessed under the facts of this case.

In sum, three of the six factors weigh against the statement's trustworthiness. We cannot therefore say that the district court abused its discretion by excluding the statement under NRS 51.345(1). *See, e.g., Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) ("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.").

Washington argues in the alternative that Belanger's testimony should have been admitted under NRS 51.069(1). NRS 51.069(1) provides that "[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked or supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness." The district court permitted Detective Jensen to testify that his conversation with Owens convinced him that Owens was not involved in the case. Washington argues that Belanger's testimony was admissible in order to rebut the hearsay testimony of Detective Jensen.

Washington's argument is not persuasive. Owens' statement to Detective Jensen was not hearsay because it was not offered to prove the truth of the matter asserted. *See* NRS 51.035. The defense's questioning brought into question the adequacy of Detective Jensen's investigatory techniques: "Q: You had access to [Owens] didn't you? . . . It's not hard to pick up the phone and ask him, right?" The State's direct

examination attempted to justify Detective Jensen's investigatory techniques: "Q: Talking to Mr. Owens . . . did you have any indication whatsoever in your discussions with him that at least superficially he was involved in this? A: No, not at all." Only when Washington objected to this question as vague did the State ask, "Did he deny that he had . . . done this shooting?" The detective replied, "Yes, he did."

As this line of questioning shows, the State was interested in whether Detective Jensen had reason to consider Owens as a suspect or as possessing any relevant information. The issue was the adequacy of Detective Jensen's investigation. Owens' out-of-court denial was not hearsay because it was not offered to prove the truth of Owens' statement.<sup>2</sup> Accordingly, Washington was not permitted to introduce Belanger's hearsay testimony to rebut hearsay under NRS 51.069(1).

*Belanger's out-of-court statement that Washington committed the murder*

Washington argues that his rights under the Equal Protection and Confrontation Clauses of the United States Constitution were violated when the State elicited testimony from Detective Zepeda that Belanger told him that she saw Washington shoot the victim. He argues that it was unfair for the court to allow Detective Zepeda's hearsay testimony but prohibit Belanger's hearsay testimony regarding Owens' confession.

We fail to see how it violates equal protection for the court to rule differently on the different out-of-court statements. The district court

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<sup>2</sup>Because Owens' denial was not hearsay, Washington's Confrontation Clause argument lacks merit. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

could consistently find Detective Zepeda's testimony about what Belanger said to him to be reliable while at the same time finding that Belanger's testimony about what Owens said to her to be unreliable. The circumstances surrounding the two statements are completely different. Moreover, because Belanger was available to testify as to whether she said that statement to Detective Zepeda, there is no Confrontation Clause violation. *See Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (“[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.”). Therefore, Washington’s argument lacks merit.

*Washington’s other arguments*

We reject Washington’s remaining arguments. Washington’s argument that the State unlawfully concealed evidence fails because Washington was able to cross-examine Detective Jensen after he became aware of evidence contradicting the detective’s testimony. *See Madsen v. Dormire*, 137 F.3d 602, 605 (8th Cir. 1998).

Washington’s argument that the State knowingly used false testimony lacks merit because there is nothing in the record indicating that the prosecution knowingly misrepresented Belanger’s status as a confidential informant.

Washington fails to demonstrate that the State improperly vouched for its witnesses because he does not indicate how the prosecution placed the prestige of government behind its witnesses. *See Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004).

Washington's argument that the State failed to provide him with notice of certain witnesses fails because the witnesses were rebuttal witnesses. *See Grey v. State*, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008) ("NRS 174.234 does not encompass rebuttal evidence.").

Washington argues that the district court erred by admitting evidence of an unrelated drug raid that led to Washington's arrest. We reject his argument because the record shows he stipulated to its admission in an effort to exclude other unwelcome testimony. *See Rhyne v. State*, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002).

We also conclude that sufficient evidence supports the jury's verdict. Based on a witness's physical description of the shooter and Williams' statement to police that Washington was the shooter, a rational trier of fact could have found Washington guilty beyond a reasonable doubt. *See Brass v. State*, 128 Nev. \_\_\_, \_\_\_, 291 P.3d 145, 149-50 (2012).

We also conclude that Washington was not denied his statutory right to a speedy trial. Washington waived his statutory right to proceed to trial within 60 days when he filed his pretrial petition for a writ of habeas corpus. *See NRS 34.700(1)(b)(1)*.

And, finally, because Washington fails to demonstrate any errors by the district court, his cumulative error claim lacks merit. Accordingly we,

ORDER the judgment of conviction AFFIRMED.

Hardesty, C. J.  
Hardesty

Douglas, J.  
Douglas

Cherry, J.  
Cherry

cc: Hon. Douglas Smith, District Judge  
Christopher R. Oram  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk