

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACY LOUIS BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37195

FILED

JUN 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Schork*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a deadly weapon, and robbery with the use of a deadly weapon. The district court sentenced appellant to a prison term of 24 to 100 months for robbery with an equal and consecutive term for the use of a deadly weapon, and a concurrent prison term of 30 to 180 months for burglary.

First, appellant contends the district court erred by allowing the State to use a peremptory challenge to remove an African-American venireperson. Specifically, appellant asserts that the removal of the venireperson was racially motivated.

Pursuant to Batson v. Kentucky,¹ there is a three-step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) upon a prima facie showing, the proponent of the peremptory challenge has the burden of providing a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the trial court must decide whether the proffered explanation is merely a pretext for purposeful

¹476 U.S. 79, 96-98 (1986).

racial discrimination.² The trial court's decision on the question of discriminatory intent is a finding of fact to be accorded great deference on appeal.³

In the instant case the State cited the venireperson's responses that she thought appellant looked familiar, that she would have difficulty judging appellant because he was so young, and that she might have to leave early because of her job. All of these are race-neutral reasons. The State also noted that the venireperson nodded when another venireperson stated that appellant would not be able to get a "fair shake" because of his race. This does not reflect a racial motivation for excluding a juror, but rather reflects the State's concern that the excused venireperson might have had a racial bias that would affect her ability to judge impartially. We therefore conclude that the State proffered race-neutral reasons for exercising its peremptory challenge and that the district court did not err.

Appellant next contends that the State improperly commented on appellant's post-arrest silence. Specifically, appellant points to the testimony of one of the police officers who arrested appellant. The officer testified that when he told appellant that he was under arrest, appellant "wouldn't cooperate or give me his name or date of birth, address, any information like that and just asked where his attorney was." At that point, the defense moved for a mistrial, and the district court denied the motion.

²See also Purkett v. Elem, 514 U.S. 765, 767 (1995); Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996).

³See Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (plurality opinion); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

In Nevada, the prosecution is forbidden at trial to comment upon the accused's election to remain silent following an arrest, regardless of whether the silence is preceded by Miranda warnings.⁴ However, reversal is not required where the error is harmless beyond a reasonable doubt.⁵

In the instant case, there was only one reference to appellant's silence. Additionally, the State presented overwhelming evidence of guilt. Accordingly, we conclude that any error was harmless beyond a reasonable doubt.

Finally, appellant contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.⁶ In particular, we note that four witnesses identified appellant as the robber, that appellant's clothing matched the description of the robber's clothing, and that when appellant saw the police he appeared very nervous and jittery and then fled. Additionally one of the witnesses testified that the robber smelled strongly of alcohol, and appellant smelled strongly of alcohol when he was arrested shortly after the robbery.

The jury could reasonably infer from the evidence presented that appellant was the robber. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on

⁴See Morris v. State, 112 Nev. 260, 263-64, 913 P.2d 1264, 1267 (1996); Coleman v. State, 111 Nev. 657, 895 P.2d 653 (1995).

⁵See Morris, 112 Nev. at 264, 913 P.2d at 1267.

⁶See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

appeal where, as here, substantial evidence supports the verdict.⁷

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

⁷See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).