IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO ALFONSO ESTRADA, II,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38322

FILED

DEC 04 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of armed robbery, and one count of willfully endangering a child as the result of abuse. The district court sentenced appellant: for armed robbery, to a prison term of 30 to 90 months, with an equal and consecutive term for the use of a firearm; and for endangering a child, to a concurrent jail term of 12 months.

Appellant contends that the district court erred by admitting hearsay statements of the victim. Specifically, appellant argues that the statements should not have been admitted under the excited utterance exception[1] because the victim was merely "shaken" or "upset."

We will not disturb the district court's decision to admit or exclude evidence unless that decision was the result of manifest error.[2] For a statement to be admissible as an excited utterance, it must have been made at a time when the declarant was still under the influence of the startling event and had not had sufficient time to fabricate.[3] In this case, the statements in question were made approximately one hour after the robbery, and the record demonstrates that the victim was "really scared," "very upset," "shaking," and "nervous." We conclude that, under

[1]NRS 51.095.

[2]See Kazalyn v. State, 108 Nev. 67, 71-72, 825 P. 2d 578, 581 (1992).

[3]State v. Whitney, 768 P.2d 638, 644 (Ariz. 1989).

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the facts of this case, the district court did not err in concluding that the excited utterance exception applied.[4]

Appellant also contends that the district court erred by excluding other hearsay statements of the victim. Specifically, appellant argues that the district court should have admitted statements that the victim recognized the voice of appellant's girlfriend during the robbery. Appellant was offering the testimony as evidence that appellant was not present when the robbery occurred. The testimony, however, if it had been admitted would not necessarily have exculpated appellant. The mere fact that another person may have been present for the robbery does not change the victim's statement that there was a Hispanic male present at the robbery. Moreover, evidence was presented that the victim told a police officer that she heard the voice of a female accomplice during the robbery. We therefore conclude that any error in failing to admit the hearsay statement was harmless.[5]

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender
Washoe County Clerk

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[4]See Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987).

[5]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.")