IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA LAMAR GIPSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 90163

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, two counts of discharging a firearm at or into an occupied vehicle, and ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Appellant Joshua Lamar Gipson was convicted by a jury of attempted murder, among other charges, after he fired two shots through the driver's side window of a vehicle, striking the victim. At trial, two law enforcement officers testified to bullet holes they observed at the scene and inferences they made based on those observations. Gipson argues that law enforcement's testimony was erroneous, caused him prejudice, and warrants vacating his attempted murder charge. We disagree and affirm the amended judgment of conviction.

The district court did not abuse its discretion in the admission of officer testimony

At the heart of this appeal is Gipson's contention that Officers Stafford Edwards and Juan Diaz provided opinion testimony that improperly commented on Gipson's intent to kill the victim. Gipson argues the testimony was tantamount to opining on the intent to kill, that the

district court abused its discretion in treating identical testimony differently, and that the testimony prejudiced him. Generally, the admissibility of evidence is reviewed for an abuse of discretion. *Collins v. State*, 133 Nev. 717, 724, 405 P.3d 657, 664 (2017).

Under NRS 50.265, a non-expert witness may testify in the form of opinion or inference, as long as the testimony is "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." But it is impermissible for a witness to opine on the *direct* issue of guilt or innocence. *Cordova v. State*, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000). Rather, opinion testimony is proper where "a witness . . . give[s] testimony from which an inference of guilt—even, an inference that the witness is of the opinion the defendant is guilty—may be drawn." *Collins*, 133 Nev. at 725, 405 P.3d at 664-65. We address each officer's testimony in turn.

Officer Edwards did not opine on Gipson's intent to kill

Gipson specifically takes issue with the following testimony elicited from the State:

> Q All right. Now when you got there, what did you see on Duke Ave.?
>
> A When I arrived on scene, I observed two things. I observed the victim's name was . . . . He's a big, tall guy, about 6'6, 300 pounds. I noticed that he had two bullet holes -- gunshot wounds on his person, one of which was on the -- I believe it was the left bicep area, and the other one was like -- I believe was around the right forearm, if I'm not mistaken.
>
> I also noticed that -- he directed me to his -- it was a black Chevy Tahoe and on the Tahoe, there was *two bullet holes, pretty high up on the driver's side window and they were grouped closely together*. So looking at that and seeing how tall [the victim]

> was in comparison to -- *my judgment call based on what I believe was* that the shooter was either a hell of a shot, with the grouping being so close together, shooting at the driver side window or he -- it was like shooting like point blank at the driver side door *right where [the victim]'s head would possibly be.*
>
> *That's why I went with the -- when I spoke with detectives and I asked after everything was said and done, would the charge of attempt murder be appropriate and they agreed. So that's why I went with that charge. So based on what I saw -- visually, what I saw, the grouping of the bullet holes on the driver's side window and where [the victim]'s head would have possibly been, I went with –*
>
> MR. BOLEY: Judge, move to strike the discussion about attempt murder.
>
> THE COURT: All right. I'll sustain that and order the jury to disregard that statement.
>
> Counsel, why don't you control the examination a little bit more?

(Emphases added.)

Gipson argues Officer Edwards explicitly opined on Gipson's intent to kill when Officer Edwards testified that Gipson aimed at where the victim's head would ordinarily be located. Officer Edwards pointed to the location and grouping of bullet holes in the driver's window to make a "judgment call" that Gipson was shooting where the driver's head was positioned inside the vehicle. Gipson argues Officer Edwards' testimony does not qualify as course-of-investigation testimony; therefore, it was improper.

We agree that Officer Edwards' testimony was not course-of-investigation testimony. When law enforcement personnel testify before a jury, there is "the possibility that jurors may be improperly swayed by the opinion of a witness who is presented as an experienced criminal

investigator." *Cordova*, 116 Nev. at 669, 6 P.3d at 485 (citation modified). Thus, we are cautious in the admission of course-of-investigation testimony to ensure it is relevant and does not introduce unconfronted hearsay or evidence concerning matters irrelevant to the issue of guilt. *Collins*, 133 Nev. at 726, 405 P.3d at 666. In this case, the testimony in question was not provided in direct rebuttal to the questioning of the investigation or its effectiveness. *See id.* (recognizing that course-of-investigation testimony is relevant *after* its effectiveness is called into question). Therefore, the subject testimony by Officer Edwards was not ordinary course-of-investigation testimony. The district court's decision to strike any testimony related to the attempted murder charge was proper, but that does not mean that all of Officer Edwards' testimony was improper.

Officer Edwards' testimony relating to Gipson aiming where the victim's head would be is proper opinion testimony. Law enforcement is permitted to provide opinion testimony based on rational observations they personally make. NRS 50.265(1). Here, Officer Edwards testified to the groupings he observed in the upper half of the driver side window. His testimony that the shooting was likely where the victim's head would possibly be located, while certainly speculative, was not a direct reference to his opinion on guilt. Rather, it is an inference he made based on evidence he observed. Therefore, we disagree with Gipson's claim that the testimony was tantamount to opining on the direct issue of guilt.

Officer Diaz directly opined on Gipson's intent to kill

Turning to Officer Diaz's testimony, the challenged testimony is as follows:

> Q Okay. And can you just describe one more time the location of the shots fired into the window?

A So the shots were fired in the driver door window. So they were fired closer, center portion of the window from the top to the bottom, but closer to the B-pillar. So each vehicle has an A-pillar, B-pillar, C-pillar and SUVs have D-pillars. And the one --

Q Okay. Sorry, one second. Can you explain what a B-Pillar is?

A So they're portions of the vehicle where the door kind of like hinges at. So the A-pillar is where the front of the door hinges at, the B-pillar is where it secures at, where the door latch is typically closed. *So the shots were placed right in the middle of the window from the top to bottom, but closer to the back of the window towards the B-Pillar, which to me is very specific because where they're placed, an average male or anybody -- an average person sitting inside the driver's seat, it'd be placed towards like the top of your body towards your face and head or your -- the shots are specifically placed because you're trying to injure this person seriously or kill them because they're shooting at their face or head.*

MR. BOLEY: Judge, sidebar.

THE COURT: All right.

[Sidebar Begins]

. . . .

[Sidebar Concludes]

THE COURT: All right. Ladies and Gentlemen, you may consider the testimony of the witness as to the shooters -- where he was shooting into the window, but you are not to consider, and I order you to disregard any testimony concerning the intent of the shooter either to kill or to do anything. So any testimony related to the intent of the shooter, you are instructed to disregard.

(Emphasis added.)

Gipson argues Officer Diaz's testimony about the "very specific" location of the bullet holes and an intent to injure or kill was direct testimony on the issue of guilt. Gipson argues the district court provided an impossible limiting instruction that did not diminish any prejudice because it is impossible to consider the shooter aiming at the victim's head while simultaneously *not* considering that the shooter intended to kill the victim. Ultimately, Gipson argues that Officer Diaz's testimony usurped the jury's role because it deprived the jury of the opportunity to make its own inferences based on the evidence.

The State relies on *Collins* to argue that Officer Diaz opined on the relationship between the evidence he observed and an inference he made based on such evidence—that the bullet location indicated the shooter was likely aiming at the driver's head. The State maintains that Officer Diaz's testimony was not a direct statement on Gipson's guilt or innocence, but even if it was, any prejudice was diminished by the district court's instruction to disregard such testimony.

In *Collins*, the police officer testified "that he arrested Collins based on the facts he learned as the lead investigator into [the victim's] death [and] stopped [the testimony] there." 133 Nev. at 726, 405 P.3d at 665. We recognized the testimony was proper because it was relevant—it came in *rebuttal* to an argument that the investigation was inadequate. *Id.* at 726, 405 P.3d at 666. Additionally, the testimony did not introduce unconfronted hearsay or evidence irrelevant to guilt or innocence, therefore, the testimony was proper. *Id.* In this case, there are no arguments suggesting Officer Diaz's testimony came in rebuttal to an argument that the investigation was inadequate. But even if there were, Officer Diaz's testimony was about the location of the bullets and the impression it left on

him—that it was aimed at the victim's head. He then erroneously opined that the bullets were specifically placed there because "[they're] trying to injure this person seriously or kill them." Therefore, we conclude that the district court was correct in striking the testimony that directly opined on the intent to kill, while allowing the testimony related to the officer's observations and inferences to remain.

Gipson's argument that the curative instruction was impossible to follow is unpersuasive. Gipson argues the instruction was impossible to follow because it asks the jury to consider the shooter aiming at the victim's head while simultaneously *not* considering that the shooter intended to kill the victim. While the latter half of Officer Diaz's testimony was improper, the location of the bullets and the shooter's intent are distinct concepts. We believe the district court's curative instruction aided the jury in keeping such concepts separate.

Contrary to Gipson's argument, Officer Edwards' testimony about aiming at the victim's head *is not* the same testimony Officer Diaz provided about Gipson's intent to kill. Officer Edwards testified about the bullet placement being near the location of the victim's head. Officer Diaz also testified about bullet placement being near the victim's head. In both instances, the district court properly allowed the testimony to remain. Subsequently, Officer Edwards' testimony was struck when he commented on an attempted murder charge. Officer Diaz's testimony was also struck when he commented that the shooter was trying to substantially injure or kill the victim. While it is correct that the testimony was nearly identical in substance, it is incorrect that the district court treated the testimony differently. Therefore, we conclude that the district court did not abuse its discretion in its treatment of the officers' testimony—both were allowed to

comment on evidence they observed and inferences they made based on those observations. But where the officers opined on an attempted murder charge and Gipson's intent to kill, the district court properly struck the testimony.

Neither testimony caused undue prejudice

Because Officer Diaz improperly opined on Gipson's intent to kill, we address whether such testimony caused undue prejudice. In *Collins*, we recognized that improper opinion testimony violates a defendant's constitutional right to a jury trial. *See* 133 Nev. at 725, 405 P.3d at 665. When a constitutional right is at stake, we evaluate the error by determining "whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Tavares v. State*, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001) (citation modified), *holding modified by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008).

Gipson argues the improper opinion testimony unduly prejudiced him in two ways. First, the opinion testimony was belied by physical evidence presented at trial. Second, the opinion testimony provided the State its primary piece of evidence during closing argument—especially where the State lacked evidence on the issue. Gipson argues the prejudice was compounded because the same testimony was repeated to the jury.

First, Gipson's argument relies on the assumption that he *knew* the victim's seated position *at the time of the shooting* and purposefully did not aim at the victim's head. The record does not indicate Gipson's knowledge at the time of the shooting. Even reviewing the relevant video surveillance footage of the shooting, it is not readily apparent that Gipson witnessed or was aware of the victim's position in his vehicle. And to the

extent physical evidence conflicts with opinion testimony, such a conflict is for the jury to resolve. Therefore, Gipson's first argument is unavailing.

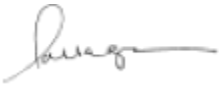
Second, an overwhelming amount of evidence suggests that any potential error here did not unduly prejudice Gipson. Based on our review of the record, it is not clear that the State explicitly pointed to the officers' testimony to prove intent, as Gipson argues. Therefore, Gipson's argument that the testimony improperly bolstered the State's closing argument is unpersuasive. But even if the State did use the testimony to prove intent, it also pointed to video surveillance footage that clearly shows Gipson running up to the vehicle and firing two shots into the driver-side window. The jury was instructed to infer intent from "the facts and circumstances surrounding the case," and any rational jury could have inferred an intent to kill from the surveillance video alone. Therefore, we conclude that the State did not unduly prejudice Gipson by eliciting improper opinion testimony. An overwhelming amount of evidence existed for a rational jury to conclude beyond a reasonable doubt that Gipson shot through the victim's driver-side window in an attempt to kill the victim. *See Tavares*, 117 Nev. at 732 n.14, 30 P.3d at 1132 n.14.

Finally, Gipson argues he suffered double prejudice since identical testimony was provided twice. But as previously mentioned, the district court properly identified and struck the improper testimony, diminishing any prejudicial effect. This, together with the overwhelming evidence of guilt, eliminated any potential prejudice Gipson may have faced. Thus, overwhelming evidence of guilt existed for a rational jury to conclude

Gipson was clearly guilty beyond a reasonable doubt. *See id.* Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.



Parraguirre, J.

Bell, J.

cc: Hon. Eric Johnson, District Judge
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