IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN DENNIE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41404

FILED

APR 21 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered upon a jury verdict finding appellant Bryan Dennie guilty of one count each of invasion of a home while in possession of a firearm, robbery with the use of a deadly weapon, discharging a firearm at or into a structure, two counts of battery with the use of a deadly weapon and possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

The district court sentenced Dennie to various consecutive and concurrent prison sentences as follows: Invasion of the home while in possession of a firearm, 35 to 156 months; Robbery with use of a deadly weapon, consecutive terms of 35 to 156 months; Discharging a firearm at or into a structure, 13 to 60 months; Battery with use of a deadly weapon, 24 to 96 months; Battery with use of a deadly weapon, 24 to 96 months concurrent to the other Battery charge; and Possession of a firearm by an ex felon, 13 to 60 months. The district court also imposed a $25.00 administrative assessment, a $150.00 DNA analysis fee, and awarded Dennie 311 days credit for time served in local custody prior to sentencing.

Dennie raises five issues on appeal. First, that conflicting testimony by Michelle Dennie (Michelle) and the victim, Crystal Griffin, regarding the color of the get-away car warrants a new trial. Second, that

the State had a duty to procure Odis Bolden to testify on behalf of the defense. Third, that the trial court erred by not admitting a letter that contained a statement by Michelle that Dennie was innocent. Fourth, that the trial court abused its discretion by admission of alleged hearsay statements through a police investigator. Fifth, that the trial court abused its discretion in allowing the prosecutor to rely upon inadmissible hearsay testimony during closing argument.

DISCUSSION

Conflicting Testimony

During the trial, victim Griffin testified that Dennie and Michelle left her residence in a tan or gold colored automobile. At trial, Michelle testified that she and Dennie drove around in a maroon Cadillac.[1] Dennie argues the conflicting testimony of the color of the car warrants a new trial.

Pursuant to NRS 176.515[2] a new trial may be granted as a matter of law or on the grounds of newly discovered evidence. Additionally, the trial court has the power to evaluate conflicting evidence, and may grant a new trial if the evidence does not prove the defendant was guilty beyond a reasonable doubt.[3]

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[1]Michelle testified on behalf of the prosecution and against Dennie, in exchange for the State dismissing the charges against her.

[2]**NRS 176.515 New trial: Grounds; time for filing motion.**

1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

[3]State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994) (citing Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982)).

Review of the record supports Dennie's conviction as the perpetrator of the home invasion. Michelle identified Dennie as the person who drove her to Griffin's house. Victims Griffin and Bolden identified Dennie as their attacker. Both Michelle and Griffin testified to observing Dennie with a two-foot long shotgun in his possession during the home invasion. The crime scene investigation corroborated the eyewitness testimony of the door being kicked in and of shotgun blasts hitting the wall. Finally, Griffin and Bolden's injuries corroborated their testimony that Dennie pistol-whipped them.

The inconsistency in Griffin's testimony regarding the color of the get-away car could be explained by the early morning hour, by possible intoxication and by being suddenly awakened by a shotgun blast that caused her to sustain head injuries.

We conclude Dennie's argument as to the inconsistency of the color and make of the get-away car is without merit and therefore does not warrant a new trial.

State's Failure to Procure Odis Bolden

Dennie argues that the State violated his rights when it failed to procure victim Bolden to testify at the trial. Dennie argues he was unaware of the legal procedures in obtaining witnesses, thus the court should have acted on his behalf.

Pursuant to Vanisi v. State,[4] a defendant who exercises his Sixth Amendment right to self-representation must comply with the relevant rules of procedure and substantive law. During canvassing,

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[4]117 Nev. 330, 340, 22 P.3d 1164, 1171-72 (2001) (citing Faretta v. California, 422 U.S. 806, 835-36 (1975)).

Dennie was warned of the pitfalls of representing himself. The public defender explained to Dennie the hardships he would encounter in trial preparation. Additionally, Dennie could have queried stand-by counsel on the proper procedure to compel the appearance of Bolden.

The State attempted to secure Bolden, but was notified that Bolden was too ill to appear. When Dennie learned that Bolden was unable to testify he stated, "[O]kay. That's all right. No problem." Dennie did not object to Bolden's lack of appearance. Nor did he inform the court of the importance of Bolden's testimony to his defense strategy. Dennie did not request a continuance or proffer what Bolden would have testified to, and he did not request that the court issue a material witness warrant. Thus, Dennie cannot now complain that the prosecution had a duty to ensure that his witness would appear.

We conclude Dennie's argument that the State should have procured Bolden on Dennie's behalf is without merit.

Letter by Michelle

Dennie argues that a letter written to him by Michelle should have been admitted into evidence because, in the letter, Michelle claimed that Dennie was innocent.

Pursuant to NRS 51.035(2)(a),[5] prior inconsistent statements are admissible as non-hearsay.

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[5]**NRS 51.035 "Hearsay" defined.** "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:

1. The statement is one made by a witness while testifying at the trial or hearing;

2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(a) Inconsistent with his testimony;

During the trial, Michelle testified on behalf of the State. Dennie was allowed to question her about the contents of the letter, and about her claim that he was innocent of the crime. The court then asked Michelle if she was coerced into writing the letter to Dennie. She testified that she was afraid when she wrote the letter. When asked if Dennie was the person who took her to the house that night, Michelle confirmed that Dennie was the person who went with her to Griffin's home and shot at and pistol-whipped Griffin and Bolden. The district court found that admission of the letter was unnecessary as cumulative, because the relevant portions of the letter were admitted through Michelle's testimony. The various testimonial inconsistencies were explained and the alleged exculpating statements in the letter were nullified by Michelle's testimony that Dennie was with her on the night in question.

We conclude that the district court's decision to exclude the letter was not an abuse of discretion in light of Dennie's opportunity to examine Michelle as to her inconsistent statements.

Testimony of Officer Salyer

Dennie argues the court abused its discretion when it allowed Officer Randy Salyer to testify that Bolden told him that someone had entered the home, assaulted them and removed personal possessions. Dennie states that although he did not object or move the court to strike the non-responsive answer, the court should have sua sponte stricken the testimony and admonished the jury to disregard the answer.

The State argues that it did not offer Bolden's statements for the truth of the matter, but rather as a preliminary explanation of Officer Salyer's first contact with the victims at the scene. We conclude that the testimony of Officer Salyer was non-hearsay, as it was not offered for the

truth of the matter asserted, but rather to lay a foundation as to the sequence of events that took place during the home invasion. Also, Bolden's statements qualify as an excited utterance.

Closing Arguments

Dennie argues the trial court abused its discretion by failing to admonish the prosecutor for improper use of Bolden's statements to Officer Salyer during closing arguments.

The State argues that during closing argument, the prosecutor attempted to direct the jury to look at the crime through the eyes of the different witnesses. She methodically discussed the testimony of each witness and the similar facts that consistently supported the elements of the crimes that were charged. The prosecutor recounted what Bolden told Officer Salyer upon first arriving on the scene. The court allowed Officer Salyer's testimony into the record and Dennie failed to object.

In Coleman v. State,[6] this court held that, regardless of whether an appellant objected and preserved the record during trial, this court may review an issue of constitutional or plain error sua sponte. However, even in the absence of an objection, the error should be so obvious that failure to notice it would affect the fairness and integrity of the judicial proceedings.[7]

The district court properly allowed the prosecutor during closing argument to mention the statement made by Bolden to Officer Salyer. Bolden's statement was an excited utterance and reflected his perception that someone invaded the home, assaulted him and Griffin and

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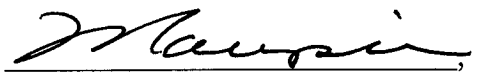
[6]111 Nev. 657, 662, 895 P.2d 653, 656 (1995).

[7]U.S. v. Chaney, 662 F.2d 1148, 1152 (5th Cir. 1981).

stole some personal items.[8] Thus, we conclude the statements by the prosecutor during closing argument did not constitute error.

Having considered the entirety of Dennie's arguments, we conclude they are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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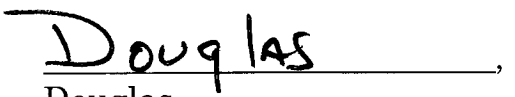

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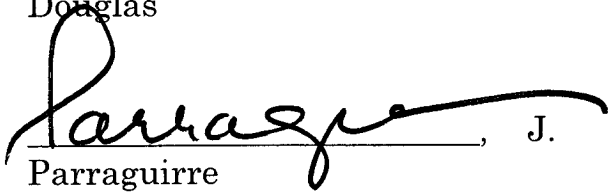

_____, J.
Parraguirre

cc: Hon. John S. McGroarty, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[8]**NRS 51.095 Excited utterances.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule.