

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

STEPHEN MANUEL,

Appellant,

v.

CASE NO. 1D03-2587

STATE OF FLORIDA,

Appellee.

Opinion filed January 5, 2005.

An appeal from the Circuit Court for Leon County.
Kathleen F. Dekker, Judge.

Nancy A. Daniels, Public Defender; and Jeffrey N. Golant, Certified Legal Intern,
Tallahassee, for Appellant.

Charlie Crist, Attorney General; and Shasta W. Kruse, Assistant Attorney
General, Tallahassee, for Appellee.

BROWNING, J.

Appellant seeks review of his conviction and sentence for aggravated battery.

He raises three issues on appeal; only one has merit. Because the trial court erred by admitting hearsay testimony, we reverse and remand for a new trial.

First, Appellant alleges the trial court erred in permitting the State to amend the information against him on the day of jury selection. Appellant is not entitled to relief on this issue because he failed to move for a continuance. See Yelvington v. State, 664 So. 2d 262 (Fla. 1st DCA 1995).

Second, Appellant raises several challenges to the trial court's denial of his motion for judgment of acquittal. There is no merit to Appellant's argument that he should have been acquitted because a witness's written statement and the victim's statement to the officer should not have been admitted. This is so because even evidence later found to have been erroneously admitted can support the denial of a motion for judgment of acquittal. See, e.g., State v. Brockman, 827 So. 2d 299, 302-03 (Fla. 1st DCA 2002). There is no merit to Appellant's argument that the State did not rebut his reasonable hypothesis of innocence, because the State need rebut such a hypothesis only where all evidence is circumstantial. See Melton v. State, 824 So. 2d 948 (Fla. 1st DCA 2002); State v. Law, 559 So. 2d 187 (Fla. 1989). Here, the evidence includes the victim's eyewitness statement, which is direct evidence. See Thorp v. State, 777 So. 2d 385, 389 (Fla. 2000). There is no merit to Appellant's argument that the State did not adequately prove intent because, taking the evidence

in a light most favorable to the State, intent can be inferred from the circumstances of the incident. Because direct evidence of intent is rare, and intent is usually proven through inference, “a trial court should rarely, if ever, grant a motion for judgment of acquittal on the issue of intent.” Washington v. State, 737 So. 2d 1208, 1215 (Fla. 1st DCA 1999). By failing to raise such argument in his initial brief, Appellant has waived any argument that the State did not prove other elements of the crime. See Marshall v. State, 854 So. 2d 1235 (Fla. 2003). To the extent Appellant argues the trial court erred by denying his judgment of acquittal because the State failed to rebut his evidence of self-defense, he is not entitled to relief because the argument was not adequately preserved below.

Third, Appellant alleges the trial court erred in admitting the victim’s statement to a police officer as to how the victim was injured. The statement should not have been admitted, despite its nature as an excited utterance, because it does not meet the requirements necessary to protect Appellant’s right to confront witnesses against him. The victim’s statement was testimonial in nature because it was made in response to the officer’s direct questioning; the State has not demonstrated that the victim was unavailable to testify; and there was no prior cross-examination of the victim. Accordingly, this testimony is inadmissible under Crawford v. Washington, 124 S. Ct. 1354 (2004). See Lopez v. State, 29 Fla. L. Weekly D2580 (Fla. 1st DCA Nov.

17, 2004).¹ The error is not harmless, for it is the only direct eyewitness testimony that the victim was injured by the hatchet swung by Appellant.

REVERSE and REMAND for a new trial.

LEWIS and POLSTON, JJ., CONCUR.

¹These cases had not been decided when the trial court made her ruling, which, when made, was correct under existing precedent.