

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIBERTO LEON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43156

FILED

APR 21 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On March 31, 2004, appellant Eriberto Leon was convicted, pursuant to a jury verdict, of conspiracy to commit burglary, burglary while in the possession of a firearm, conspiracy to commit kidnapping, first-degree kidnapping with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon resulting in substantial bodily harm, conspiracy to commit murder, attempted murder with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, robbery with the use of a deadly weapon, and grand larceny. Leon was sentenced to two concurrent life terms in the Nevada State Prison with the possibility of parole, plus equal and consecutive terms for the deadly weapon enhancement, for the two first-degree kidnapping offenses. The district court also sentenced Leon to 60 to 180 months for the attempted murder, plus an equal and consecutive sentence for the deadly weapon enhancement. He was also sentenced to 48 to 120 months for the robbery, plus an equal and consecutive term for the deadly weapon enhancement. Leon also received a sentence of 24 to 60 months for the conspiracy to commit robbery, plus an equal and consecutive term for the

deadly weapon enhancement. Finally, Leon was sentenced to concurrent fixed terms for the remaining offenses.

On appeal, Leon claims that he was denied a fair trial because he and his codefendant, Pablo Guerrero, were tried together. Leon did not move for severance of his trial, so he must establish that plain error occurred.¹ We conclude that no error occurred.

Joinder of defendants rests within the trial court's discretion, and a defendant carries a heavy burden of showing that the district court abused its discretion.² "[A] defendant is entitled to a separate trial if he presents a sufficient showing of facts demonstrating that substantial prejudice would result in a joint trial."³ Proof of substantial prejudice to the defendant requires more than a greater likelihood of acquittal if he were tried alone.⁴ The fact that codefendants raise antagonistic defenses is insufficient to justify severance unless "a joint trial would . . . prevent the jury from making a reliable judgment about guilt or innocence."⁵

Leon advances a vague claim that he should have been tried separately from Guerrero due to their antagonistic defenses. He references a myriad of one-sentence excerpts from his counsel's cross-examination of Guerrero as illustrative of Guerrero's attempt to minimize

¹See NRS 178.602.

²Lisle v. State, 113 Nev. 679, 688, 941 P.2d 459, 466 (1997); Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990).

³Lisle, 113 Nev. at 689, 941 P.2d at 466; see NRS 174.165.

⁴See id. at 689-90, 941 P.2d at 466.

⁵Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

his culpability in the crimes. However, Leon offers no further explanation or support as to how Guerrero's defense theory conflicted with his or prejudiced him.

Even assuming Leon and Guerrero's defenses were antagonistic, such a contention is inadequate in itself to require severance.⁶ Leon "must show that the joint trial compromised a specific trial right or prevented the jury from making a reliable judgment regarding guilt or innocence."⁷ Having carefully considered the record on appeal, we conclude that Leon fails to demonstrate that a joint trial undermined the jury's ability to render a reliable judgment as to his guilt. Accordingly, we conclude that the district court did not err in trying Leon and Guerrero together.

Leon also contends that his trial was unfair because the State exercised peremptory challenges against two minority jurors. Under Batson v. Kentucky⁸ and its progeny, determining whether the State's peremptory challenge was discriminatory involves a three-step inquiry.⁹ First, the defendant must make a prima facie showing of racial discrimination. Here, Leon argues that the State's excusal of Juror No. 43, an African-American, was racially motivated because she was too intelligent and too educated. Next, he contends that the State's peremptory challenge of Juror No. 134, a Hispanic, was racially motivated

⁶Id. at 648, 56 P.3d at 379-80.

⁷Id. at 648, 56 P.3d at 380.

⁸476 U.S. 79 (1986).

⁹See Purkett v. Elem, 514 U.S. 765, 767 (1995); King v. State, 116 Nev. 349, 353, 998 P.2d 1172, 1175 (2000).

because despite her family's criminal history, she stated that she could be fair and impartial.

Second, if a prima facie showing is made, the State must offer a race-neutral explanation, which need not be persuasive or even plausible.¹⁰ "A legitimate reason for excluding a juror 'is not a reason that makes sense, but a reason that does not deny equal protection.'"¹¹ Therefore, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."¹²

Here, the State explained that Juror No. 43's occupation as a feng shui interior decorator was of concern because it was "a very new age, very kind of out there profession." Additionally, the State noted that Juror No. 43 unsuccessfully attempted to forge a business relationship with the District Attorney's Office.

Respecting Juror No. 134, the State expressed concern over her family's extensive criminal history. During voir dire, Juror No. 134 stated that "quite a few" of her relatives had been charged with crimes. Specifically, she and her mother had been charged with driving under the influence, her uncle was serving a life sentence for murder and kidnapping, and another uncle was serving a life sentence for burglary

¹⁰See Purkett, 514 U.S. at 767-68; King, 116 at 353, 998 P.2d at 1175.

¹¹Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998) (quoting Purkett, 514 U.S. at 769).

¹²Purkett, 514 U.S. at 768 (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991)).

pursuant to California's three strikes law. Juror No. 134 also advised the court that her brother-in-law and cousins had been charged with unspecified crimes.

Turning to step three of the Batson analysis, the district court must determine whether the State's explanation is merely pretextual and whether the defendant proved racial discrimination.¹³ "Because the trial court's findings on the issue of discriminatory intent largely turn on evaluations of credibility, they are entitled to great deference and will not be overturned unless clearly erroneous."¹⁴

Here, the district court concluded that the State had race-neutral reasons to peremptorily challenge Juror No. 43, noting her failed attempt to establish a business relationship with the District Attorney's Office and her current occupation. Further, the district court concluded that Juror No. 134's criminal history and that of several members of her family constituted a race-neutral reason to excuse her. Moreover, the record does not reveal the racial makeup of the jury. However, the district court stated that the jury was one of the most diverse it had seated and that almost half of the jury was "made up of different minority members." The district court therefore determined that the State had not engaged in a pattern of discrimination and concluded that Leon's Batson challenges lacked merit.

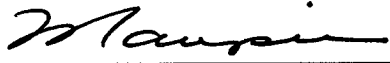
We conclude that the district court's findings were not clearly erroneous, and thus it did not abuse its discretion in permitting the peremptory challenges of the two jurors.

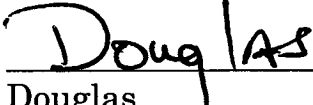
¹³See Thomas, 114 Nev. at 1137, 967 P.2d at 1118.

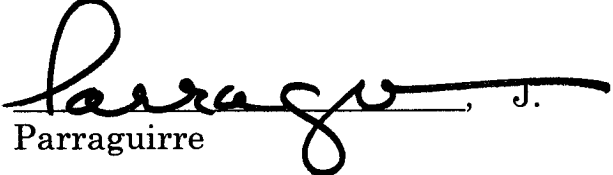
¹⁴Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

Having considered Leon's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk