

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTELL COTHRAN A/K/A DONELL
COTHRAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44283

FILED

FEB 02 2006

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; Stewart L. Bell, Judge.

On December 17, 2004, the district court convicted appellant Dontell Cothran, pursuant to a jury verdict, of sexual assault and battery with substantial bodily harm. The district court sentenced Cothran to 24 to 60 months in prison for sexual assault and a consecutive term of life with the possibility of parole after 10 years for battery with substantial bodily harm.

Cothran raises three issues on appeal. First, he complains that he was denied a fair trial because the victim Cheryl Brown improperly referred to a prior violent encounter with him. Specifically, he contends that Brown's comment, "[Cothran] locked the door so I couldn't get out, as he had done in the past," improperly referred to Cothran's alleged prior kidnapping of Brown and prejudiced him.

Prior to Brown's testimony, counsel, the State, and the district court discussed the permissible scope of Brown's testimony respecting her relationship with Cothran. The State agreed that it would not elicit any prior bad act evidence from Brown, and the district court admonished the

State to "stay away" from the tumultuous nature of Cothran and Brown's relationship.

Cothran's defense was that all of Brown's actions on the evening in question, including the sexual intercourse, were voluntary. During cross-examination, counsel took Brown step by step through her encounter with Cothran on March 18, 2004. The exchange between counsel and Brown was very contentious, and Brown frequently attempted to explain that Cothran was "commanding and demanding" and "abusive sometimes." The evidence of which Cothran now complains was elicited during cross-examination after defense counsel challenged Brown that all her actions respecting her encounter were voluntary. Brown disputed counsel's characterization. Based on the record, we conclude that there is no error here.

However, even assuming error, we conclude that no relief is warranted. "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith" on a particular occasion.¹ This court reviews the improper admission of prior bad act evidence under a harmless error analysis.² Cothran fails to demonstrate prejudice. First, counsel declined a curative instruction, albeit for a strategic reason, *i.e.*, counsel did not wish to further draw attention to Brown's testimony. Second and most important, the testimony about which Cothran complains concerned Brown's allegations of Cothran's prior kidnappings of her. However, the jury found Cothran not guilty of five out of the seven counts alleged,

¹NRS 48.045(2).

²See Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998).

including kidnapping. Therefore, the challenged testimony had little, if any, impact on the jury's decision.

Second, Cothran complains that the district court denied him a fair trial by improperly rushing the jury selection process. He argues that several comments by the district court during jury selection made his trial unfair. However, Cothran failed to object to any of these comments; therefore, any impropriety in this regard is reviewed for plain error.³ "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights."⁴ "[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice."⁵

Having considered the district court's comments in context, we conclude that they were not improper, but rather were an effort to keep jurors focused and the jury selection process moving at a reasonable pace. The district court in no way limited counsel's voir dire. And there is no evidence indicating that the challenged comments created "a hurried atmosphere" or otherwise impacted the jury selection process. Therefore, we conclude that no error occurred and this claim is without merit.

Finally, Cothran argues that the district court erroneously denied his Batson⁶ challenge after the State exercised a peremptory challenge against a potential juror who was African American. Under

³See Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998).

⁴Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

⁵Id.

⁶See Batson v. Kentucky, 476 U.S. 79 (1986).

Batson, a peremptory challenge may not be used to exclude a potential juror based on race.⁷ Recently, in Foster v. State, this court reiterated the three-step analysis used in resolving a Batson challenge:

In determining whether peremptory challenges have been used in a discriminatory manner, the complaining party must [first] make a prima facie showing of intentional discrimination. Next, the party accused of discriminatory challenges must offer a gender or race-neutral explanation for striking the jurors. The trial court must then decide whether the complaining party has carried his burden of proving purposeful discrimination.⁸

Here, the defense approached the bench and properly preserved its right to object to the State's peremptory challenge. The district court noted that it allowed the peremptory challenge and another potential juror that was African American was seated on the panel. The district court further commented that a third potential juror was also African American and that the State did not exercise a peremptory challenge against either of these potential jurors.

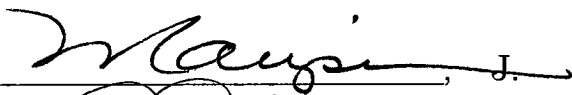
The State argued that there was no pattern of discrimination; it was concerned about the potential juror's response to its question whether she believed that "a woman [was] likely to falsely accuse somebody of sexual assault." She responded that it was possible; it would "[d]epend on the situation, depend on the person. Could be vindictiveness." The State also expressed concern about the potential juror's eye contact.

⁷Id. at 89.

⁸121 Nev. ___, ___, 111 P.3d 1083, 1088 (2005) (internal citations and quotations omitted); see Purkett v. Elem, 514 U.S. 765, 767-68 (1995).

The district court concluded that there was no pattern of discrimination and that the State offered a race neutral explanation for its peremptory challenge. This court reviews a district court's denial of a Batson challenge for abuse of discretion.⁹ Based on the record before us, we conclude that the district court did not abuse its discretion in denying Cothran's Batson challenge. Accordingly, we

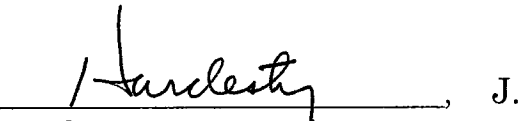
ORDER the judgment of the district court AFFIRMED.


_____, J.

Maupin


_____, J.

Gibbons


_____, J.

Hardesty

cc: Hon. Stewart L. Bell, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁹See Doyle v. State, 112 Nev. 879, 890, 921 P.2d 901, 908 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).