IN THE SUPREME COURT OF THE STATE OF NEVADA

BRADLEY G. DRUMMOND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51203

FILED

AUG 24 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder and sexual assault. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The district court sentenced appellant Bradley Drummond to serve a term of life in prison without the possibility of parole for murder and a consecutive term of 10 to 25 years for sexual assault.

The primary issue raised on appeal is whether the district court erred in overruling Drummond's objections, pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), to the prosecution's use of its peremptory challenges to excuse three African-American prospective jurors.

This court has previously adopted the three-step analysis set forth by the United States Supreme Court in Purkett v. Elem, 514 U.S. 765, 767 (1995), for consideration of a Batson claim. Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004). First, "the opponent of the peremptory challenge must make out a prima facie case of discrimination." Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). Next, "the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge." Id. Finally, "the trial court must

then decide whether the opponent of the challenge has proved purposeful discrimination." Id. "[A] court must look at the totality of the jury-selection process to determine whether the prosecutor's stated reasons for a particular peremptory challenge are pretext for discrimination." Id. at 401, 132 P.3d at 576 (citing Miller-El v. Dretke, 545 U.S. 231, 239-40 (2005)). "[A] trial court's factual decision as to whether the state's reasons [are] racially neutral is a discretionary one to be given great deference." Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

Here, the prosecution used three of its peremptory challenges to excuse prospective juror nos. 0336, 0354, and 0439, all of whom were African American. Drummond objected to the peremptory challenges and moved for a mistrial. The prosecution offered the race-neutral explanation that it had exercised its peremptory challenges to dismiss those individuals who had close relatives presently incarcerated or had negative experiences with law enforcement.[1] After hearing argument, the district court concluded that the prosecution had a valid race-neutral explanation for the challenges, overruled Drummond's objections, and denied his motion for mistrial. We conclude that the district court did not err in doing so.

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[1]Drummond asserts for the first time in his reply brief that the reason proffered by the prosecution was not race neutral but rather amounted to de facto discrimination because a greater percentage of African Americans are incarcerated or have negative experiences with law enforcement. Because this issue was first raised in Drummond's reply brief, we decline to consider it here. See Diomampo v. State, 124 Nev. ___, ___ n.25, 185 P.3d 1031, 1039 n.25 (2008).

The State's reason for the challenges is supported by the record. Prospective juror no. 0336 described two prior bad experiences with law enforcement. On one occasion, he had called the police because he thought someone had fired a gun at his house and the responding officer had been dismissive and treated him rudely. On another occasion, he was mistaken for a robbery suspect. Prospective juror no. 0354 described an experience where he was stopped by multiple police cars, made to exit his vehicle, and searched before being released. In addition, he had a friend whom he felt had been unnecessarily shot in the back and killed by the police. He also had two cousins in prison for drug offenses. Finally, prospective juror no. 0439 had a cousin in prison for drug trafficking.

Our review of the jury selection process does not reveal evidence of purposeful discrimination. In addition to the three prospective jurors discussed above, there were two other prospective jurors with family members in prison dismissed by the prosecution, neither of whom were African American. In contrast, the prosecution elected not to excuse two African American prospective jurors who did not relate negative experiences with law enforcement or have relatives in prison. One of these individuals served on the jury that convicted Drummond.

For the reasons stated above, we conclude that the district court did not err in overruling Drummond's Batson objections and denying his motion for mistrial.[2]

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[2]Drummond's sole remaining claim is that the jury instructions on malice included archaic language that was unconstitutionally vague. Specifically, Drummond challenges the phrases "abandoned and

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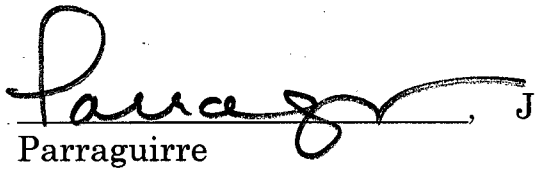
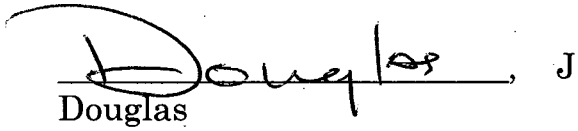
Having considered Drummond's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Parraguirre



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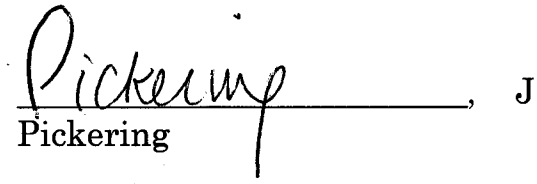
Douglas



_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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malignant heart" and "heart fatally bent on mischief." We have repeatedly rejected such challenges and upheld this language. See Thomas v. State, 120 Nev. 37, 50, 83 P.3d 818, 827 (2004); Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001); Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998); Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 482-83 (2000); Guy v. State, 108 Nev. 770, 776-77, 839 P.2d 578, 582-83 (1992). We decline to revisit our prior decisions in this regard.