IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY QUINCY WHITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60296

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to violate the Uniform Controlled Substances Act and sale of a controlled substance. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

First, appellant Roy Quincy White contends that there was insufficient evidence to support his convictions and that the district court erred by denying his motion for a directed verdict. Nevada law does not provide for a directed verdict. Instead, White "should have moved for an advisory instruction to acquit pursuant to NRS 175.381(1)," or moved for a judgment of acquittal after the verdict. *See State v. Combs*, 116 Nev. 1178, 1180, 14 P.3d 520, 521 (2000). As to White's sufficiency claim, we review the evidence in the light most favorable to the prosecution to determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Here, evidence was presented that an undercover officer approached White and asked if he had marijuana. White asked the officer

how much he needed and then walked to a nearby park where he approached the codefendant. White returned to the officer and said that his "boy" was getting the drugs. White walked back to the park, where he and the codefendant exchanged a handshake. When White returned to the officer, he provided him with two plastic baggies containing marijuana in exchange for $20. The officer asked White for his contact information in order to conduct later transactions, and White provided his moniker and a phone number. When the officer gave the signal, police apprehended White and the codefendant. The prerecorded buy money was discovered on White, while a sandwich baggie containing four individually packaged baggies of marijuana, wadded U.S. currency, and five individually packaged baggies containing cocaine were found on the codefendant. We conclude that a rational juror could infer from these circumstances that White conspired with the codefendant to violate the Uniform Controlled Substances Act and that White sold a controlled substance. *See* NRS 453.321(1)(a); NRS 453.401(1); *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (holding that "a conspiracy conviction may be supported by a coordinated series of acts," in furtherance of the criminal purpose, "sufficient to infer the existence of an agreement") (internal quotation marks omitted), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004).

White further claims that he could not be convicted because the procuring-agent defense negates the element of sale. He contends that he acted exclusively as an agent of the officer as evidenced by the fact that he did not have drugs on his person to sell and he did not take the officer's money before obtaining drugs from another. Additionally, he argues that there is no evidence he purchased drugs from the codefendant and then

sold them to the officer or that he received any benefit. We have held that "[t]he procuring agent defense can be maintained only if the defendant [was] merely a conduit for the purchaser and in no way benefitted from the transaction," *Dixon v. State*, 94 Nev. 662, 664, 584 P.2d 693, 694 (1978), and we have "held that the burden is on the State to establish that the defendant had a profit motive or other direct interest when [he] obtained drugs for the recipient," *Dent v. State*, 112 Nev. 1365, 1368, 929 P.2d 891, 892 (1996).

Here, the State presented evidence that White was found with the prerecorded buy money on his person after the transaction and that he provided the officer with his moniker and a phone number in order to conduct future transactions. The jury was instructed on the procuring-agent defense, and it was the jury's function to weigh the evidence, determine the credibility of the witnesses, and decide whether the State demonstrated that White received a benefit. *See McNair*, 108 Nev. at 56, 825 P.2d at 573. Based on the evidence in the record, and viewing that evidence in the light most favorable to the prosecution, we conclude that there is sufficient evidence from which a rational juror could find that White received a benefit, and thus reject his theory of the procuring-agent defense, and find him guilty beyond a reasonable doubt.[1]

Second, White contends that the district court erred by denying his objection to a peremptory challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). When a defendant raises a *Batson*

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[1]We note that the State did not object below to the use of the procuring-agent defense, and we decline the State's invitation to modify our decision in *Adam v. State*, 127 Nev. ___, 261 P.3d 1063 (2011).

challenge, he must first make out a prima facie case of discrimination. *See Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). "[T]he production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge." *Id.* "[T]he trial court must then decide whether the opponent of the challenge has proved purposeful discrimination." *Id.* "This court affords great deference to the district court's factual findings regarding whether the proponent of a strike has acted with discriminatory intent, . . . and we will not reverse the district court's decision unless clearly erroneous." *Watson v. State*, 130 Nev. ___, ___, 335 P.3d 157, 165 (2014) (internal citations and quotation marks omitted).

At trial, the State claimed that it challenged prospective juror 135, an African American, because he did not answer truthfully during voir dire. Specifically, prospective juror 135 was asked if he had ever been accused of or arrested for a crime, regardless of whether there was a conviction, and he twice replied in the negative. After the State indicated its belief that prospective juror 135 was not answering honestly, the district court questioned the prospective juror outside the presence of other prospective jurors, and the prospective juror admitted that he had been arrested. The district court concluded that the State provided a race-neutral reason for the challenge and that the reason was not pretextual as the prospective juror's answers had not been completely accurate.[2] The

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[2]We disagree with White's assertion that the district court's reason for denying his *Batson* challenge was based on the prospective juror's criminal history as obtained by the State. When confronted with a possible inconsistency, prospective juror 135 admitted to a prior arrest, thereby making his previous answers "not necessarily completely

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district court further concluded that, because prospective juror 135 was the only juror who had to be called back in for clarifying, follow-up questions, a comparative juror analysis was unavailable.[3] We conclude that the district court did not abuse its discretion in denying White's *Batson* challenge. *See Nunnery v. State*, 127 Nev. ___, ___, 263 P.3d 235, 258 (2011).

Third, White claims that the State held an unfair advantage during jury selection and during his *Batson* challenge because it obtained criminal histories on the potential jurors that were not disclosed to him. He contends that fundamental fairness demands that the State disclose all criminal history information it uses for jury selection. This contention was not raised below; therefore, we review for plain error or constitutional issues. *See Miller v. State*, 113 Nev. 722, 724, 941 P.2d 456, 457 (1997). We recently addressed this issue in *Artiga-Morales v. State*, 130 Nev. ___, ___, 335 P.3d 179, 181 (2014), *petition for cert. filed* (U.S. Jan. 14, 2015) (No. 14-8063), and concluded that "Nevada's disclosure statute, NRS 174.235, does not mandate disclosure of prosecution-developed juror background information." Similar to Artiga-Morales, White does not claim

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accurate." It appears that his inaccuracy, not his criminal history, was the basis for the district court's decision.

[3]We note that the State exercised a peremptory challenge on prospective juror 190, who voluntarily brought it to the district court's and parties' attention that she had not answered truthfully when she denied that anyone close to her had been accused of a crime because she omitted the fact that her stepdaughter had been arrested.

that any of the empaneled jurors were not fair and impartial; therefore, he does not demonstrate that he was denied his constitutional right to a fair and impartial jury. *See id.* White has demonstrated neither a statutory nor constitutional basis for reversal based on the non-disclosure of the potential jurors' criminal histories.

To the extent that White claims the prosecutor lacked authority to obtain criminal and background information for the purpose of investigating potential jurors, he failed to raise this argument below and fails to demonstrate plain error. *See Miller*, 113 Nev. at 724, 941 P.2d at 457; *see also Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) ("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." (internal quotation marks omitted)).

Fourth, White contends that the district court erred by failing to give his jury instruction on possession of a controlled substance, which he argued was a lesser-included offense of sale of a controlled substance and was his theory of the case. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). While a defendant is entitled to a jury instruction on his theory of the case if some evidence supports it, *Harris v. State*, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990), we have held that a defendant is not entitled to instructions that are "misleading, inaccurate or duplicitous," *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). "A lesser offense is included in a greater offense when all of the elements of the lesser offense are included in the elements of the greater offense." *Rosas v. State*, 122 Nev. 1258, 1263, 147 P.3d 1101, 1105

(2006) (internal quotation marks omitted); *see also Jackson v. State*, 128 Nev. ___, ___, 291 P.3d 1274, 1280 (2012) (affirming the use of the "same elements" test outlined in *Blockburger v. United States*, 284 U.S. 299 (1932), and accepted in *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas*).

Nevada's sale-of-a-controlled-substance statute, NRS 453.321(1), states that "it is unlawful for a person to: (a) Import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance; (b) Manufacture or compound a counterfeit substance; or (c) Offer or attempt to do any act set forth in paragraph (a) or (b)." The possession statute, NRS 453.336(1), prohibits a person from "knowingly or intentionally possess[ing] a controlled substance." NRS 453.321 does not contain an element of possession, so possession of a controlled substance is not a lesser-included offense of sale of a controlled substance. Additionally, White was not charged with possession, and the instruction would incorrectly suggest that the jury could find him guilty of a crime that was neither charged nor tried by the State. Accordingly, we conclude that the district court did not err by refusing to give the proffered instruction.

Fifth, White claims that the district court erred by giving jury instruction number 7, because it was confusing and lowered the State's burden of proof when compared to his procuring-agent defense; jury instruction number 10, because it allowed the jury to consider the testimony of the detectives as expert evidence without advising the jury that it was free to accept or reject expert opinions; and jury instruction number 22, because it misstated the State's burden of proof. We review for an abuse of discretion or judicial error. *Crawford*, 121 Nev. at 748, 121

P.3d at 585. We conclude that none of the above instructions were clearly erroneous and that, when read together, the jury instructions clearly and correctly informed the jury regarding the challenged topics. *See Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997) ("[J]ury instructions taken as a whole may be sufficient to cure an ambiguity in a challenged instruction.").

Sixth, White contends that the State committed prosecutorial misconduct during its closing argument by improperly disparaging White and his counsel when it referred to codefendant's counsel by name and as "a very, very good criminal defense attorney," but called White's attorney a public defender or "the criminal defense attorney sitting at the end of the table." After White immediately made an objection to the State's mention of a public defender, the district court conducted a bench conference, sustained the objection, and, pursuant to White's wishes, did not issue an admonishment. When reviewing allegations of prosecutorial misconduct, we consider whether the prosecutor's conduct was improper and whether any improper conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Even assuming that the prosecutor's comments were improper, we conclude that they were harmless and no relief is warranted on this basis alone. *See Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) ("[P]rejudice from prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process." (alteration omitted) (internal quotation marks omitted)); *Knight v. State*, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) ("'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's

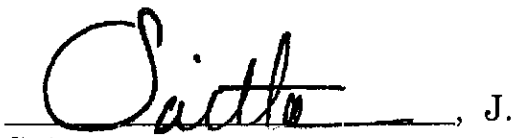
comments standing alone.'" (quoting *United States v. Young*, 470 U.S. 1, 11 (1985))).

Seventh, White claims that the State committed prosecutorial misconduct during its rebuttal argument by misstating the law. The State argued that "[a]nother thing to negate the procuring [agent] defense . . . is if [the State] show[s] that the drug dealer was someone that [White] was not associated with." White objected, the district court directed the jury to compare what was said to the jury instructions, and the State went on to argue that clearly the codefendant and White were associated in selling controlled substances. It appears the prosecutor misspoke, as his supporting argument was to the contrary of the challenged statement. Even so, the jury instructions correctly informed the jury regarding the procuring-agent defense, including the inference that, if a defendant is acting solely on behalf of a purchaser and undertook to act on behalf of the purchaser, the defendant will not be associated in selling controlled substances with the seller. We conclude that any misstatement by the prosecutor does not warrant reversal. *Cf. Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001) (stating that the prosecutor's misstatement of the reasonable doubt standard was an improper remark but did not warrant reversal because a proper jury instruction cured any prejudice).

Eighth, White contends that cumulative error entitles him to relief. Having considered the appropriate factors, *see Valdez*, 124 Nev. at

1195, 196 P.3d at 481, we conclude that no relief is warranted. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



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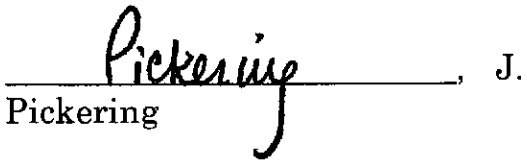

_____, J.
Pickering

cc: Eighth Judicial District Court, Dept. 20
Clark County Public Defender
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Eighth District Court Clerk