IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD WAYNE OSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61032

FILED

NOV 14 2013

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Appellant Gerald Wayne Osby contends that the district court erred by rejecting his *Baston* challenge. *See Batson v. Kentucky*, 476 U.S. 79 (1986). He claims that the district court committed structural error by excusing prospective juror 118 from the venire before conducting a *Batson* hearing on his challenge and that the State's race-neutral explanation for removing this prospective juror was pretext for intentional discrimination as evidenced by the State's failure to challenge a nonminority prospective juror who exhibited the same conduct.

A trial court commits structural error if it discharges a prospective juror who is the subject of a timely *Batson* challenge before conducting a hearing on that challenge. *Brass v. State*, 128 Nev. ___, ___,

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291 P.3d 145, 149 (2012). A *Batson* challenge requires the trial court to employ a three-step analysis:

> (1) the defendant must make a prima facie showing that discrimination based on race has occurred based upon the totality of the circumstances, (2) the prosecution then must provide a race-neutral explanation for its peremptory challenge or challenges, and (3) the district court must determine whether the defendant in fact demonstrated purposeful discrimination.

Diomampo v. State, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008). "The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Id.* at 422-23, 185 P.3d at 1036-37 (internal alteration and quotation marks omitted).

After the State used its second peremptory challenge to remove prospective juror 118 and the district court had excused the prospective juror and asked the clerk to call an additional name to fill the vacated seat, Osby approached the bench and made his *Batson* challenge. The district court conducted the *Batson* hearing outside the presence of the venire. Osby claimed that the State's decision to preempt prospective juror 118 was motivated by her race, argued that his original trial ended in deadlock and the lone holdout was an African-American juror, and asserted that the Clark County District Attorney's Office engages in a pattern of preempting minorities and young people. The State, in turn, explained that it used a peremptory challenge on prospective juror 118 because she appeared very disengaged, her body language was closed, her

arms were crossed and folded, she did not look at the court or the attorneys, and she seemed bored and to not to want to be there. Osby responded that inattentiveness in and of itself was not a sufficient race-neutral reason to overcome a *Batson* challenge and noted that the State did not challenge prospective juror 84 who also had her arms folded and indicated that she did not want to be there. The district court observed that Osby had removed prospective juror 84 with his first peremptory challenge, agreed with the State's assessment that prospective juror 118 was disengaged and obviously uninterested, and ruled that the State's reason for removing prospective juror 118 was race-neutral.

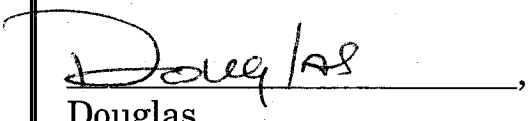
We conclude that the district court did not err in rejecting Osby's *Batson* challenge. The district court dismissed the prospective juror *before* Osby made his *Batson* challenge, therefore, the rule in *Brass* does not apply. *See Brass*, 128 Nev. at ___, 291 P.3d at 149. And the district court's determination that the State had advanced a race-neutral explanation for its peremptory challenge is not clearly wrong. *See People v. Artis*, 694 N.Y.S.2d 5, 6 (App. Div. 1999) (State's explanation that prospective juror seemed bored and disinterested in the proceedings was race-neutral and non-pretextual); *People v. Martinez*, 696 N.E.2d 771, 778 (Ill. App. Ct. 1998) ("[T]he demeanor of a prospective juror has traditionally been an important factor in jury selection, and thus constitutes a legitimate, racially-neutral reason for exercising a peremptory challenge.").

Osby also contends that the district court erred by allowing the State's firearm expert to testify that the bullet fragment recovered from the victim's body and a bullet fragment recovered from the crime

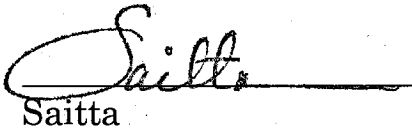
scene were fired from the same gun and were nominally .38 caliber because his testimony was not the product of a reliable methodology. However, Osby did not object to the admission of this testimony, and we conclude he has not demonstrated plain error. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (discussing plain-error review).

Having concluded that Osby is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Saitta

cc: Chief Judge, Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk