IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN PEREZ EBANREB FERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62601

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of eight counts of sexual assault of a minor under fourteen years of age and eleven counts of lewdness with a minor under fourteen years of age.[1] Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge. Appellant raises three issues on appeal.

First, appellant argues that the district court abused its discretion by denying his motion to suppress his statement to the police because he did not waive his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and his statement was involuntary.

As to appellant's *Miranda* claim, he contends that his statement was involuntary because the police detective did not inquire whether he understood what it meant to waive his rights, never provided any detail about what his rights meant, and never asked him if he waived his rights. A valid waiver of rights must be voluntary, knowing and

[1]After the jury returned the verdict, the district court dismissed eight lewdness counts because they were charged alternatively to the sexual assault counts.

intelligent. *Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006). "The inquiry as to whether a waiver is knowing and intelligent is a question of fact, which is reviewed for clear error," but "the question of whether a waiver is voluntary is a mixed question of fact and law" that is reviewed de novo. *Id.* "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998). A waiver of the right to remain silent need not be made orally or in writing; "[r]ather, a waiver may be inferred from the actions and words of the person interrogated." *Mendoza*, 122 Nev. at 276, 130 P.3d at 182. After conducting an evidentiary hearing, the district court found that the transcripts of the police interview revealed that appellant was advised of his *Miranda* rights at the beginning of the interview, understood those rights, and expressly agreed to talk to police detectives. Under these facts, we conclude that the district court did not err by denying appellant's motion to suppress on this ground.

Appellant also argues that his statement to the police was the product of police coercion and therefore involuntary. A confession is admissible if it is made freely and voluntarily without coercion. *Passama v. State*, 103 Nev. 212, 213-14, 735 P.2d 321, 322-23 (1987). Determining voluntariness requires that we look at the totality of the circumstances. *Id.* at 214, 735 P.2d at 323. Considering the evidence developed at the hearing, the district court determined that appellant engaged in a lengthy narrative with police detectives and provided considerable detail about the allegations. He denied certain assertions made by police detectives while admitting others, which, the district court concluded, suggested a lack of

coercion. The district court further noted that appellant acknowledged that the consequences of his actions could include prison or community service, suggesting that appellant had some knowledge of the criminal justice system. Based on those facts, the district court concluded that under the totality of the circumstances, appellant's statements were voluntary and not coerced. Although appellant suggests that police detectives promised him leniency and immunity and used psychological coercion and implied threats that caused him to make incriminating statements, the record does not bear that out. Accordingly, we conclude that the district court did not err by denying appellant's motion to suppress on this basis.

Second, appellant contends that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by using peremptory challenges to strike four minority jurors from the panel. The district court must use a three-step analysis to assess a *Batson* challenge: (1) the opponent of the peremptory challenge must articulate a prima facie case of discrimination, (2) the proponent of the challenge must then assert a neutral explanation for the challenge, and (3) the trial court must determine whether the opponent of the challenge has proved purposeful discrimination. *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006); *see Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004). "'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.'" *Walker v. State*, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (quoting *Hernandez v. New York*, 500 U.S. 352, 364 (1991)). Here, the district court determined that there appeared to be a prima facie case of a pattern of racial discrimination in the prosecutor's

exercise of peremptory challenges against two Asian males (jurors 5 and 12), a Hispanic male (juror 25), and a Latino female (juror 31). The prosecutor explained its exercise of peremptory strikes on the challenged jurors as follows: (1) juror 5 was a third-year medical student who had received some training in the area of sexual abuse and sexual abuse examinations, which might lead jurors to defer to him as a de facto expert; (2) juror 12 expressed a belief that police officers frequently lied and commented that the police were unhelpful when his friend was killed 20 years ago; (3) juror 25 was unresponsive to questions, inattentive, appeared to not want to participate in the proceedings, and did not bring necessary medication with him; and (4) juror 31 made several comments about "chakras, Eastern medicine, Eastern modalities" that would make her uncomfortable judging another person and she was equivocal about her level of discomfort. The district court concluded that the peremptory challenges were not race-based or pretextual. Based on the record before us and giving deference to the district court's findings on discriminatory intent, we conclude that the district court did not err by denying appellant's *Batson* challenge.

Third, appellant argues that the prosecutor committed misconduct during rebuttal argument by making disparaging remarks regarding counsel's efforts to defend appellant. In particular, he challenges the prosecutor's comments about "what the Defense wants [the jurors] to believe" and his characterization of the defense's interpretation of appellant's police statement as "absurd." A prosecutor may not disparage legitimate defense tactics. *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004); *see Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). Considering the challenged comments in context, *see*

Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002), we conclude that the prosecutor was attempting to convey to the jury that appellant's contention that he admitted to sexual contact with the victim in an attempt to keep the victim out of trouble was incongruous with the evidence. To the extent that the prosecutor's statements may be deemed improper, no prejudice resulted considering the overwhelming evidence of appellant's guilt. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (providing that prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt); *see also United States v. Young*, 470 U.S. 1, 11 (1985) (observing that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone").

Having considered appellant's arguments and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Jerome T. Tao, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk