IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE VALENTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62820

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of battery constituting domestic violence-strangulation, second-degree kidnapping, and coercion. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.[1]

First, appellant Antoine Valentin contends that the district court erred by overruling his objection to the State's use of peremptory challenges to remove two minority jurors. *See Batson v. Kentucky*, 476 U.S. 79 (1986). We disagree. "Appellate review of a *Batson* challenge gives deference to [t]he trial court's decision on the ultimate question of discriminatory intent." *Hawkins v. State*, 127 Nev. ___, ___, 256 P.3d 965, 966 (2011) (quotation marks omitted) (alteration in original); *see also Felkner v. Jackson*, 562 U.S. ___, ___, 131 S. Ct. 1305, 1307 (2011). The district court determined that the prosecutor provided "legitimate reasons, race neutral," for removing juror 5, and our review of the record reveals

[1]The jury found appellant not guilty on two counts of battery constituting domestic violence-strangulation and one count of attempted murder.

that the prosecutor also offered race-neutral reasons for striking juror 7. *See Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) ("'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991))). Valentin fails to offer any cogent argument in support of his claim that the State's race-neutral explanations were a pretext for racial discrimination, and we conclude that he fails to demonstrate that the district court erred by rejecting his *Batson* challenges.

Second, Valentin contends that the district court erred by denying his motion to dismiss based on evidence admitted at the preliminary hearing. The victim was not present at the preliminary hearing; the justice court admitted her incriminating statements as excited utterances through the investigating officer's testimony pursuant to NRS 51.095. Valentin claims that the officer's testimony amounted to impermissible hearsay and violated his right to confrontation.[2] We disagree.

A lower court's determination regarding whether a statement falls within a hearsay exception is reviewed for an abuse of discretion. *Rodriguez v. State*, 128 Nev. ___, ___, 273 P.3d 845, 848 (2012). For a statement to be admissible as an excited utterance, it must have been

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[2]Valentin did not object below to the officer's testimony on Confrontation Clause grounds pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), and he "cannot change [his] theory underlying an assignment of error on appeal." *Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Moreover, a defendant has no constitutional right to confrontation at preliminary hearings. *See Sheriff v. Witzenburg*, 122 Nev. 1056, 1062, 145 P.3d 1002, 1006 (2006).

made while the declarant was still "under the stress of the startling event." *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006); *see* NRS 51.035; NRS 51.095. During the preliminary hearing, the justice court overruled Valentin's objection and allowed the officer's testimony after hearing that the challenged statements were made while the victim "was crying, very upset, shaken up, shivering, [and] very nervous," soon after escaping from the apartment where she was held captive for approximately 20 hours. The district court agreed with the State that Valentin's motion to dismiss was "more akin" to an untimely habeas petition challenging the justice court's probable cause determination, but nevertheless decided to rule on the merits of the motion. In denying Valentin's motion, the district court agreed that the victim's statements were admissible at the preliminary hearing as excited utterances. We conclude that the district court did not abuse its discretion by denying Valentin's motion to dismiss. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (we review a district court's denial of a motion to dismiss for an abuse of discretion).[3]

Third, Valentin contends that the district court erred by granting the State's motion in limine and allowing evidence of a prior bad act at trial, specifically, a domestic violence incident involving the same victim more than 16 months before the instant offense. We disagree. The district court conducted a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), heard testimony from the victim and Valentin, and determined that the prior incident was "clearly probative on many

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[3]We also note that the victim testified at trial and was subject to Valentin's cross-examination.

levels" and admissible pursuant to NRS 48.045(2) and NRS 48.061(1). *See Newman v. State*, 129 Nev. ___, ___ n.2, 298 P.3d 1171, 1179 n.2 (2013) (noting the expanded use of bad-act-evidence in domestic violence cases after the 2001 amendments to NRS 48.061). The district court instructed the jury immediately prior to the victim's testimony about the incident that "[s]uch evidence is received to, and may be considered only by you, for the purpose of revealing an intent, motive, lack of accident, knowledge, or the purpose for providing context for the relationship between the parties, the Defendant and [the victim's] conduct." The district court also provided the jury with a limiting instruction prior to deliberations. We conclude that the factors for admissibility were met, *see Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *clarified by Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1249-50 (2012); *see also Tavares v. State*, 117 Nev. 725, 733, 30 P.3d. 1128, 1133 (2001), *modified by Mclellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008), and the district court did not abuse its discretion by admitting the prior-bad-act evidence, *see Newman*, 129 Nev. at ___, 298 P.3d at 1178.

Fourth, Valentin contends that the district court erred by allowing the State to present the testimony of an expert on domestic violence in violation of NRS 48.061(2), which states that "[e]xpert testimony concerning the effect of domestic violence may not be offered against a defendant . . . *to prove the occurrence of an act which forms the basis of a criminal charge against the defendant.*" (Emphasis added.) Valentin claims that the State "wish[ed] to introduce inflammatory testimony of the [prior domestic violence] incident to make the defendant appear monstrous." We disagree. The witness did not testify to matters precluded by NRS 48.061(2) or pertaining to the prior bad act. The

witness testified consistently with the State's pretrial notice "as an expert in battered women's syndrome, power and control dynamics, and generally the cycle of abuse." The witness also testified that she was not familiar with the facts and circumstances of the instant case, had not reviewed any reports pertaining to the case, and had never met Valentin or the victim. The witness was not asked and did not offer an opinion about the victim's credibility or Valentin's guilt. We conclude that the district court did not abuse its discretion by allowing the testimony of the State's expert witness on domestic violence. *See Perez v. State*, 129 Nev. ___, ___, 313 P.3d 862, 866 (2013).

Finally, after the jury reached its verdict, and with the assistance of newly retained counsel, Valentin filed a "Brief in Support of Defendant's Motion for New Trial Pursuant to NRS 176.515 and Defendant's Motion for Judgment of Acquittal Pursuant to NRS 175.381," wherein he alleged that trial counsel were ineffective. Valentin now claims that the district court erred by not finding that counsel were ineffective for (1) failing to file a pretrial habeas petition, (2) failing to consult with and present a domestic violence expert, and (3) informing the jury during opening statements that he would testify on his own behalf when, in fact, he did not. We disagree with Valentin's contentions.

When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Here, the district court conducted an evidentiary hearing and heard testimony from Valentin and his two trial counsel. The district court determined

that trial counsel were not deficient and that Valentin failed to demonstrate prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); *see also Cullen v. Pinholster*, 563 U.S. ___, ___, 131 S. Ct. 1388, 1408 (2011) ("We have recently reiterated that [s]urmounting *Strickland*'s high bar is never an easy task." (quotation marks omitted) (alteration in original)). We conclude that the district court did not err by rejecting Valentin's ineffective-assistance claims or abuse its discretion by denying his motions. *See Servin v. State*, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001); *Milton v. State*, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[4]

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

[4]The fast track statement does not comply with NRAP 3C(h)(1) and NRAP 32(a)(4) because the text in the body of the briefs is not double-spaced and the brief does not contain 1-inch margins on all four sides. The "Verification" in the fast track response does not comply with NRAP 3C(h)(2)-(3), NRAP 32(a)(8)(B), and NRAP Form 7 because the brief exceeds 10 pages and does not specify the exact number of words contained therein. Counsel for the parties are cautioned that the failure to comply with the briefing requirements in the future may result in the imposition of sanctions. *See* NRAP 3C(n).

cc: Hon. James M. Bixler, District Judge
Carmine J. Colucci & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk