IN THE SUPREME COURT OF THE STATE OF NEVADA

ARCHIE MAURICE ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63424

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

First, appellant Archie Maurice Allen contends that the district court erred by overruling his objection to the State's use of a peremptory challenge to remove the only African American in the venire. *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 State argued that the veniremember in question demonstrated, both non-verbally and verbally, a strong, negative opinion of the police and "[s]omeone who isn't comfortable with law enforcement isn't someone [the prosecutors] and the State in this circumstance want on our jury." Referring to *Miller-El v. Dretke*, 545 U.S. 231 (2005), the State also noted that it struck several "similarly situated" non-minority jurors from the panel "who did not trust the police." The district court determined that the State provided "a race-

neutral reason, which I could not find was . . . pretextual." *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))). The district court agreed that "body language is every bit as expressive as verbal. I don't think that lawyers in exercising a *Batson* challenge are – are limited to what's in a cold record, necessarily. . . . [I]t seems to me that there were enough things said and done by that juror." *See generally Thomas v. State*, 114 Nev. 1127, 1136, 967 P.2d 1111, 1117-18 (1998) (overruling *Batson* objection and permitting peremptory strike based on non-verbal cues). We conclude that Allen fails to demonstrate that the State's race-neutral explanation was a pretext for racial discrimination or that the district court erred by rejecting his *Batson* challenge.

Second, Allen contends that the district court violated his right to due process by denying his motion to suppress the victim's identification of him as the perpetrator because the circumstances surrounding the show-up were unduly suggestive and the identification was not reliable.[1] The district court denied Allen's motion after finding that "there's nothing in the record that I see that . . . was overly suggestive to make the identification in question here." *See generally Bolin v. State*, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998) (the standard is whether, upon review "of the totality of the circumstances, the identification was so unnecessarily suggestive and conducive to irreparable mistaken

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[1]The Honorable Michael Villani, District Judge, presided over the hearing on Allen's motion to suppress.

identification that the defendant was denied due process of law" (citing *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967)), *overruled on other grounds by Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002). We conclude that even if the show-up was suggestive, the victim's identification was sufficiently reliable and Allen's due process rights were not violated. *See Bias v. State*, 105 Nev. 869, 871-72, 784 P.2d 963, 964-65 (1989); *Canada v. State*, 104 Nev. 288, 294, 756 P.2d 552, 555 (1988). Therefore, the district court did not err by denying Allen's motion to suppress. *See Lamb v. State*, 127 Nev. ___, ___, 251 P.3d 700, 703 (2011) ("[W]e review the district court's legal conclusions de novo and its factual findings for clear error."). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Kenneth C. Cory, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk