

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANGELO MARINO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 65824

**FILED**

MAY 07 2015

*ORDER OF AFFIRMANCE*

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of assault with a deadly weapon and robbery with a deadly weapon. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Angelo Marino asserts three issues on appeal. First, Marino argues the district court erred in overruling his *Batson* objection to the State's use of peremptory challenges to remove three non-white prospective jurors from the jury. Second, Marino asserts the district court erred in admitting prior bad act evidence without the proper notice or a *Petrocelli* hearing and without giving a limiting instruction to the jury. Third, Marino contends the cumulative effect of these errors denied him a fair trial and therefore requires reversal of his conviction.

*FACTS*

In July of 2012, Gabriel Figueroa and Jose Figueroa, two cousins, visited Las Vegas from Arizona for Gabriel's birthday. On the evening of July 17, Gabriel and Jose left Treasure Island and walked north on Las Vegas Boulevard toward the Stratosphere. As they neared the Stratosphere at approximately 2:00 a.m. on July 18, Marino approached the cousins, identified himself as "Derrick," and offered to help them refill their Fat Tuesday souvenir drink inside the Stratosphere.

Although suspicious of Marino, the cousins agreed. Once inside, the three men discovered Fat Tuesday's had closed, but Marino continued to lead the cousins around the hotel. Gabriel became very uncomfortable and ran out of the Stratosphere. Jose ran after him and the two cousins headed south on Las Vegas Boulevard. At a stoplight, Gabriel ran ahead. Marino ran after the cousins and caught up with Jose at the stoplight. When Marino pulled out his pocket knife, Jose ran away from him and caught up with Gabriel in front of a CVS. Marino acquired a pink bicycle and peddled after them. As Marino neared the cousins, Jose ran across the street, leaving Gabriel alone. Marino reached Gabriel in front of the CVS and, while threatening to kill him with his pocket knife, demanded Gabriel give him his money. Gabriel pulled sixty dollars from his pocket and threw it on the ground. As Marino picked up the money, Gabriel ran south down Las Vegas Boulevard.

Shortly thereafter, Las Vegas Metropolitan Police Officer Medeles saw Marino riding a pink bicycle north on Las Vegas Boulevard and decided to conduct a traffic stop because Marino was riding the bicycle on the sidewalk. At approximately 2:07 a.m., seven minutes after the robbery, Officer Medeles approached Marino, who told Officer Medeles his name was "Derrick." Officer Medeles soon learned the man's real name was Angelo Marino. Officer Medeles also discovered that Marino had a pocket knife and a wadded ball of money in his pocket, which he estimated was sixty dollars. During the stop, Marino told Officer Medeles he was going to the Stratosphere.

After Gabriel reunited with Jose, the two cousins ran into the Encore hotel and called the police. Their call took place at 2:12 a.m., twelve minutes after the robbery and while Officer Medeles was

conducting the traffic stop of Marino. When Officer Medeles received the alert from dispatch about a robbery that had just occurred, he let Marino go and drove to the Encore hotel to follow up on the call. When the two cousins described Marino to Officer Medeles, Officer Medeles realized it was the man he just let go. Officer Medeles then relayed a description of Marino over dispatch and informed his fellow officers to search the area near the Stratosphere.

At 3:14 a.m., fellow police officers apprehended Marino near the Stratosphere. At that time, Marino had twenty-seven dollars in his pocket and his pocket knife, but no pink bicycle. Gabriel and Jose independently identified Marino as the man who robbed Gabriel. Police took Marino into custody and charged him with assault with a deadly weapon, robbery with use of a deadly weapon, and carrying a concealed firearm or other deadly weapon. The State dropped the third charge. The jury entered a guilty verdict as to the assault and robbery charges. This appeal followed.

## *DISCUSSION*

### *A. The Batson Challenge*

On appeal, Marino first contends that the district court erred in denying his *Batson* objection to the State's use of peremptory challenges because the State did not provide legitimate reasons for removing two African-Americans and one Asian from the jury.<sup>1</sup> *See Batson v. Kentucky*,

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<sup>1</sup>Marino also argues that the district court committed structural error in overruling Marino's *Batson* objection. This argument is misplaced. "[A] district court commits a structural error if it dismisses the challenged prospective juror prior to conducting a *Batson* hearing." *Brass v. State*, 128 Nev. \_\_\_, \_\_\_, 291 P.3d 145, 149 (2012). Since the district  
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476 U.S. 79, 97 (1986). We agree with the district court and conclude that the State's reasons were race neutral and sufficient to withstand a *Batson* challenge.

Under *Batson*, it is unconstitutional to use peremptory challenges to remove potential jurors on the basis of race. *Ford v. State*, 122 Nev. 398, 403-04, 132 P.3d 574, 577 (2006). When ruling on a *Batson* objection, the trial court engages in a "three-step analysis: (1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination." *Ford*, 122 Nev. at 403. 132 P.3d at 577. Under the second-step, a race-neutral explanation need not be persuasive, plausible, or even make sense. *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (citing *Purkett v. Elem*, 514 U.S. 765, 767-78 (1995)). Rather, a reason is neutral so long as "discriminatory intent is not inherent in the State's explanation." *Ford*, 122 Nev. at 403, 132 P.3d at 578.

"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

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court held a hearing outside the presence of the jury when defense counsel made its *Batson* challenge, the court did not commit structural error.

P.3d 157, 165 (2014) (internal citations and quotation marks omitted). We now address each reason advanced by the State.

With respect to Juror #201, the State explained that the juror and his wife were expecting a baby. The record supports this explanation. Juror #201 stated during voir dire that he and his wife expected to have their first child within the next three weeks, but possibly within the next few days. The State also explained that this juror did not volunteer much information when it questioned him about his smoke shop business and suggested other prospective jurors might pay better attention to the facts. The record also supports this reason. During the State's questioning, Juror #201 gave short responses and the State had to ask him to repeat his answers on two occasions. See *Diomampo*, 124 Nev. at 427, 185 P.3d at 1039 (2008) (finding that a potential juror's statement that she had to care for her parents justified the State's peremptory challenge because the State could have suspected the juror was "preoccupied and unfocused"). To the extent the State could have suspected the juror might be preoccupied and unfocused due to the upcoming birth of his first child, it presented a permissive, nondiscriminatory reason to justify its peremptory challenge.

With respect to Juror #288, the State exercised its peremptory challenge based on the juror's statements that police frequently harass her and her family, particularly her son. The basic purpose of a peremptory challenge is "to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias." *Diomampo*, 124 Nev. at 426, 185 P.3d at 1039 (quoting *Ford*, 122 Nev. at 409, 132 P.3d at 581). Even though the juror stated she could be impartial in listening to officers' testimony, the State explained it was concerned because the

juror's son is a frequent subject of police harassment. This explanation is at least plausible, if not persuasive. See *Artiga-Morales v. State*, 130 Nev. \_\_\_, \_\_\_, 335 P.3d 179, 181 (2014) (finding that a juror whose son is detained on gang-related charges establishes a race-neutral nonpretextual reason for the prosecution's peremptory challenge of her).

With respect to Juror #231, the State expressed concern because the juror did not respond to questions posed to the group by the parties and appeared to be distracted and inattentive. Although the degree of attentiveness cannot be determined from the record, the record reflects the juror did not respond to any questions posed to the group by either party. Additionally, before the district court questioned the juror, it asked the juror if he was "pondering [his] responses to these questions." As mentioned above, suspicion that a juror is "preoccupied and unfocused" is sufficient to justify a peremptory challenge. See *Diomampo*, 124 Nev. at 427, 185 P.3d at 1039.

We conclude the reasons given by the State were nondiscriminatory and supported by the record. Therefore, the district court's decision to overrule Marino's *Batson* challenge was not clearly erroneous.

#### B. Admission of Evidence

Marino next argues that the district court erred in allowing the State to submit evidence of Marino's encounter with Officer Medeles without the proper notice or a *Petrocelli* hearing and without giving a limiting instruction to the jury. *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-508 (1985); see NRS 48.045(2). Alternatively, Marino argues the court erred in admitting the evidence under the doctrine of *res gestae*

because the State could have told the story without bringing in the evidence. See NRS 48.035(3).

Marino's first argument regarding a *Petrocelli* hearing and limiting jury instruction is without merit.<sup>2</sup> The State argued and the court admitted the evidence pursuant to NRS 48.035(3) (the res gestae statute).<sup>3</sup> Therefore, the court was not required to hold a *Petrocelli* hearing or give a limiting instruction on the use of the evidence to the jury. See *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 180 (2005); NRS 48.035(3).

Next, Marino argues the court erred in admitting evidence of Marino's encounter with Officer Medeles under the doctrine of res gestae because it is not part of the complete story of the crime. "The decision to admit evidence is within the sound discretion of the district court and will not be disturbed unless it is manifestly wrong." *Wesley v. State*, 112 Nev. 503, 510, 916 P.2d 793, 798 (1996) (citing *Petrocelli*, 101 Nev. at 52, 692 P.2d at 508). Accordingly, this court will not reverse a district court's decision to admit res gestae evidence absent manifest error. See *State v. Shade*, 111 Nev. 886, 892, 900 P.2d 327, 330 (1995).

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<sup>2</sup>Marino's claim that the court admitted the evidence "without a hearing of any kind," is belied by the record which shows the court did in fact hold a hearing to consider the State's motion in limine for a pretrial evidentiary ruling. Moreover, pursuant to NRS 48.035(3), Marino bore the burden of seeking a cautionary instruction. Since he did not, the court did not error in failing to give a limiting instruction.

<sup>3</sup>Evidence of uncharged bad acts may be admitted under *either* NRS 48.045(2) (evidence of other crimes, wrongs, or acts may be admitted for limited purpose) or NRS 48.035(3) (the res gestae statute).

Pursuant to NRS 48.035(3), "a witness may . . . testify to another uncharged act . . . if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act." *Bellon*, 121 Nev. at 444, 117 P.3d at 181. The State argued that Officer Medeles' testimony that Marino possessed a pink bicycle and sixty dollars when he encountered Marino was necessary to tell the "complete story of the crime." Specifically, the State argued at the pre-trial hearing that Officer Medeles' testimony provided the only direct evidence that Marino was in possession of sixty dollars and a pink bicycle shortly after the robbery. The district court admitted the evidence, finding that Officer Medeles' testimony gives the complete story to the jury because the Officer "has direct evidence which goes to the timing of everything that occurred, the description of [Marino], the location as well as other identifying characteristics." Nevertheless, the district court did not admit Officer Medeles' testimony that he stopped Marino because he was riding a bicycle on the sidewalk because it found the reason for the stop was not necessary to telling the entire story.

We agree with the district court and conclude that without Officer Medeles' testimony about his encounter with Marino, the State could not have told the complete story of the crime. Specifically, the State could not adequately inform the jury how Officer Medeles was able to instruct fellow officers to search the area near the Stratosphere, how Officer Medeles knew the apprehended suspect was Marino, or how Officer Medeles was able to identify the knife. Additionally, the State would not be able to explain why police did not conduct a more thorough investigation, including why police did not Mirandize and interrogate Marino, why the police did not fingerprint or take DNA analysis on the



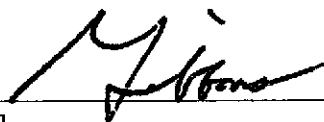
knife, and why the police did not collect video surveillance from the Stratosphere. *See Shade*, 111 Nev. at 894-895, 900 P.2d at 331.

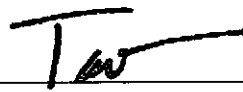
Accordingly, we conclude the district court's decision to admit the evidence as *res gestae* evidence did not constitute manifest error.

C. Cumulative Effect of Errors

Finally, Marino alleges that the cumulative effect of the previously discussed alleged errors denied him a fair trial and therefore require reversal of his conviction. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Because there are no errors to cumulate, we conclude that this claim of cumulative error has no merit.

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Stefany Miley, District Judge  
Law Office of Betsy Allen  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk