IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN TYRONE RUFFIN A/K/A MICHAEL SIMMONS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36330

FILED

NOV 19 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary and larceny from the person. The district court adjudicated appellant as a habitual criminal and sentenced him to serve two consecutive terms of life in prison with the possibility of parole after ten years. Appellant was ordered to pay restitution in the amount of $260.00, and was given credit for 451 days time served.

First, appellant contends that the district court erred by rejecting his objection under Batson v. Kentucky[1] to the prosecutor's use of a peremptory challenge to strike the only African-American venireperson on the jury panel. Appellant argues that the State's explanation for the exercise of the peremptory strike was pretextual and proves purposeful discrimination. We conclude that the district court did not err and that appellant's contention is without merit.

Pursuant to Batson and its progeny, there is a three-step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) upon a prima facie showing, the proponent of the peremptory challenge has the burden of providing a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the trial court must decide whether the proffered explanation is merely a

[1]476 U.S. 79 (1986).

pretext for purposeful racial discrimination.[2] The ultimate burden of proof regarding racial motivation rests with the opponent of the strike.[3] The trial court's decision on the question of discriminatory intent is a finding of fact to be accorded great deference on appeal.[4]

We conclude that a review of the jury voir dire transcript reveals that the State adduced a sufficiently race-neutral explanation for striking the juror. The district court asked the State for an explanation for its strike, and the prosecutor responded:

> [The juror] stated, when she was talking with [defense counsel], that his face was very familiar, that I felt as though she laughed immaturely and inappropriately while he was talking with her, which indicated to me that she was trying to curry favor with him. And also she stated that she had a baby sitting problem immediately after 5 o'clock, and I felt as though that would interfere with her ability to deliberate if we adjourned and they start deliberating, which would maybe take them past 5 o'clock, she would just throw an answer rather than actually deliberate.

The district court subsequently ruled that the State's peremptory strike was proper. Appellant failed to prove that the explanation was a pretext for purposeful discrimination, and therefore, we conclude that the district court did not err in rejecting appellant's objection to the strike.

Second, appellant contends the district court erred by responding to a jury question during deliberations by ordering the readback of certain witnesses' testimony. Appellant argues that the readback was misleading and improperly influenced the jury's verdict. We disagree.

The third amended information indicated that the State was proceeding at trial against appellant for crimes committed at both the New York New York Hotel & Casino and the Bellagio Hotel & Casino. The State sought to introduce into evidence two videotapes of appellant committing the crimes at each location. After the jury heard witness

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[2]See Purkett v. Elem, 514 U.S. 765, 767 (1995); Batson, 476 U.S. at 96-98; see also Grant v. State, 117 Nev. ____, ___, 24 P.3d 761, 766 (2001).

[3]See Purkett, 514 U.S. at 768.

[4]See Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (plurality opinion); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

testimony about the crimes and the existence of the two videotapes, a Petrocelli[5] hearing was conducted outside the presence of the jury, and the district court was informed that the Bellagio victim, after viewing the videotape, indicated that she was not the victim on the tape. Further, the district court stated that appellant could not be identified in the Bellagio videotape and that its prejudicial value outweighed its probative value, and therefore ruled that it was not admissible.

During deliberations, the jury forwarded the following question to the district court:

> Did officers Jordan or Wolfe see the Bellagio video that [the Bellagio employee] submitted. Is that how they recognized the Defendant on 3/3/99 or was it from the New York New York tape only?

After discussing the request with appellant's counsel and the State, and over the objection of appellant's counsel, the district court decided to have the testimony of the two officers read back to the jury. When the district court informed the jury about the readback, one of the jurors stated, "we just want to know why we didn't get to see that tape," and the following exchange took place -

> THE COURT: I'll respond to your question. When I said we did something outside your presence, we had a hearing on whether [the Bellagio tape] was to be shown to you. For reasons I will not disclose, I ruled that it was not to be shown to you. So, does that answer this or do you still want to hear the testimony of the --
>
> UNIDENTIFIED JURORS: (Want to hear testimony played back)
>
> THE COURT: That will be fine.

The testimony of the two officers was subsequently read back to the jury, and the jury heard once again about the inadmissible Bellagio videotape and its alleged connection to appellant. Nevertheless, while the jury eventually returned a guilty verdict for the two counts relating to the New York New York crimes, the jury was unable to come to a decision on the alleged Bellagio crimes and the district court declared a mistrial as to

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[5]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996), modified on rehearing, 114 Nev. 321, 955 P.2d 673 (1998).

the remaining counts. The counts relating to the incident at the Bellagio were later dismissed.

A review of the trial transcript reveals that the district court did not abuse its discretion by ordering the readback of testimony.[6] Appellant fails to demonstrate how he was prejudiced by the readback of the testimony. Appellant argues that the jury's knowledge of a Bellagio videotape improperly influenced its decision to convict on the New York New York charges; however, the jury considered the charges separately as indicated by the fact that they did not convict on the Bellagio charges.[7] Therefore, we conclude that appellant's contention is without merit.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[8]

Shearing, J.

Rose, J.

Becker, J.

cc: Hon. Jack Lehman, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

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[6]See Miles v. State, 97 Nev. 82, 84, 624 P.2d 494, 495 (1981) (holding that the district court's response to a jury's request for reading back of testimony is reviewed for an abuse of discretion).

[7]See Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998) (holding that erroneous admission of other bad act evidence is subject to harmless error analysis).

[8]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.