IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON DANGELO PAYTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68750

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of home invasion, burglary, battery constituting domestic violence-strangulation, and battery constituting domestic violence. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Appellant Brandon Dangelo Payton asserts several points of error. Having considered the parties' arguments and reviewed the record on appeal, we conclude that Payton fails to establish grounds for reversal.[1]

First, we reject Payton's claim that the district court erred by denying his motion to strike the jury venire for an alleged violation of the fair cross-section guarantee, as Payton failed to make a prima facie showing that the underrepresentation of certain groups in the venire was due to systematic exclusion of the group in the jury-selection process. *See Buchanan v. State*, 130 Nev. ___, ___, 335 P.3d 207, 209 (2014). *See also Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005) ("[A]s long

[1]We do not recount the facts except as necessary to our disposition.

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as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible.").

We also conclude that the district court did not abuse its discretion by denying Payton's *Batson*[2] challenge concerning juror no. 37. In reviewing a *Batson* challenge, this court gives great deference to the trial court's decision on the ultimate question of discriminatory intent. *Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008). This court utilizes the three-prong test outlined in *Batson* to determine whether illegal discrimination has occurred: "(1) the defendant must make a prima facie showing that discrimination based on race has occurred based upon the totality of the circumstances, (2) the prosecution then must provide a race-neutral explanation for its peremptory challenge or challenges, and (3) the district court must determine whether the defendant in fact demonstrated purposeful discrimination." *Id.* at 422, 185 P.3d at 1036.

Here, Payton asserted his *Batson* challenge during an unrecorded bench conference. As recounted at the next break, the district court concluded that Payton did not establish a pattern of discriminatory conduct, and thus denied the challenge. Although the court did not ask the State to do so, the State offered its race-neutral reasons for striking

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[2]*Batson v. Kentucky*, 476 U.S. 79 (1986).

juror no. 37 – the juror's stated difficulty with the English language, and the State's impression that the juror was trying to "do whatever he could to get off jury service." The district court agreed with the State that the juror likely did not want to be there. Based on these facts, we cannot conclude the district court abused its discretion in determining Payton failed to make a prima facie showing of discrimination. Even if Payton met the first prong, the State offered a race-neutral reason for using its peremptory challenge on juror no. 37.

Payton also challenges the district court's denial of his for-cause challenges regarding juror nos. 18 and 19. The district court has broad discretion in ruling on challenges for cause, as these rulings involve factual determinations and the district court "is better able to view a prospective juror's demeanor than a subsequent reviewing court." *Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001). "The test for evaluating whether a juror should have been removed for cause is whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Weber v. State*, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (internal quotation marks and citation omitted).

As to juror no. 18, the record indicates juror no. 18 was struck and was not seated on the jury; therefore, the juror played no role in the verdict and no prejudice occurred even if juror no. 18 could be said to have been biased.

Regarding juror no. 19, the juror made some statements that, read broadly, could have been construed as reflecting bias, and Payton

challenged juror no. 19 for cause. However, we need not determine whether the district court should have granted Payton's for-cause challenge based upon those statements because of the absence of a proper record. The district court conducted much of the juror voir dire process, including almost all of the parties' exercise of peremptory challenges, during unrecorded off-the-record sidebar discussions which it never memorialized on the record. Moreover, when given the opportunity Payton's counsel did not either object to this procedure, request that the sidebar discussions be recorded or memorialized, or attempt to place his own verbal summary of those discussions on the record when the court came back in session. Indeed, it appears from the record that the exercise of peremptory challenges was conducted in part by having the parties write their challenges upon a piece of paper, but the paper was apparently never made a part of the trial record (or if it was, Payton has not included it as part of the record on appeal), such that we are unable to determine how many challenges each party exercised, and upon which potential jurors. The existing record reveals that the State exercised at least three peremptory challenges and Payton exercised at least one, but more than four jurors were excused in total and we are unable to ascertain how the other challenges were allocated between Payton and the State, how many challenges were used or unused, and by which party.

Thus, although Payton challenged juror no. 19 for cause, much of the legal argument pertaining to that challenge was conducted off-the-record, and we cannot ascertain the full basis either for the challenge or for the district court's denial of it. Furthermore, after the district court

denied Payton's for-cause challenge, we are unable to tell whether Payton had any unused peremptory challenges available that he could have used to excuse juror 19 anyway. *See State v. Fouquette*, 67 Nev. 505, 519-20, 221 P.2d 404, 412 (1950) ("Even if [a for cause challenge] had been made and erroneously disallowed, appellant could not have been prejudiced thereby, because, at the time of the completion and acceptance of the jury, he had not exhausted his peremptory challenges. By his own act in not setting aside any of the jurors when he had the power to do so, it is rendered clear that he had a jury satisfactory to himself." (citations omitted)).

Notably, in his appeal briefing Payton does not even allege that he had exhausted his peremptory challenges and had none available to use on juror no. 19. Accordingly, we are unable to conclude that any error occurred regarding the selection of juror no. 19 or, if any error occurred, whether Payton suffered any prejudice from it. *See Cuzze v. Univ. & Cmty. Coll. Sys. Of Nev.*, 123 Nev. 598, 608, 172 P.3d 131, 135 (2007) ("we presume that missing portions of the record support the district court's decision").

We further conclude the district court did not abuse its discretion by denying Payton's motion to exclude Dr. Gavin's expert testimony, as Dr. Gavin's testimony assisted the jury in determining whether the victim was strangled, and her testimony was not so inflammatory that it was more prejudicial than probative. *See Perez v. State*, 129 Nev. ___, ___, 313 P.3d 862, 867 (2013). Moreover, the district court did not abuse its discretion by refusing to give Payton's proposed

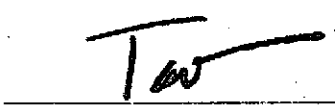
jury instructions regarding evidence susceptible to more than one interpretation for home invasion. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Finally, viewing the evidence in the light most favorable to the prosecution, we conclude that the jury's verdict is supported by substantial evidence. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

We therefore,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

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