IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEMETRIUS METMET BLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68196

FILED

OCT 19 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of conspiracy to commit robbery, five counts of robbery with use of a deadly weapon, one count of conspiracy to commit kidnapping, one count of burglary while in possession of a firearm, one count of first degree kidnapping with use of a deadly weapon, one count of coercion with use of a deadly weapon, one count of possession of credit or debit card without cardholder's consent, one count of burglary, one count of theft, and two counts of battery with intent to commit robbery. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Demetrius Black asserts that the district court committed the following errors: (1) the district court erroneously rejected Black's challenge to the State's peremptory strikes that he had asserted pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), (2) the district court erroneously admitted hearsay evidence at trial, and (3) the aggregate 420 months-to-life prison sentence imposed by the district court constitutes

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cruel and unusual punishment in violation of the federal and state constitutions.[1]

We conclude that these contentions are meritless.[2] Therefore, we affirm the judgment of conviction.

Black's Batson Challenge

Black argues that the State violated the Fourteenth Amendment's Equal Protection Clause by using its peremptory strikes to remove two African American prospective jurors from the jury panel—i.e., Prospective Juror Nos. 249 and 306.[3] The State violates the Equal Protection Clause when it uses a peremptory challenge to remove a potential juror on the basis of race. *Watson v. State*, 130 Nev. ___, ___, 335 P.3d 157, 165 (2014). When a defendant asserts an equal protection objection to the State's exercise of a peremptory challenge, the objection is evaluated using the three-step analysis outlined by the United States Supreme Court in *Batson*. *Conner v. State*, 130 Nev. ___, ___, 327 P.3d 503, 508 (2014). "First, 'the opponent of the peremptory challenge must make out a prima facie case of discrimination.'" *Id.* (quoting *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006)). Second, "the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge,' that is 'clear and reasonably specific[.]'" *Id.*

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

[2]We have carefully considered Black's other arguments and find they are without merit.

[3]Although the parties refer to the prospective jurors using their names, this order refers to them using their prospective juror numbers. *See, e.g., Conner v. State*, 130 Nev. ___, ___, 327 P.3d 503, 507–11 (2014) (referring to a member of the venire using his prospective juror number).

(citation omitted) (quoting *Ford*, 122 Nev. at 403, 132 P.3d at 577; *Purkett v. Elem*, 514 U.S. 765, 767 (1995)). Third, the district court must determine whether the "[']opponent of the challenge has proved purposeful discrimination.'" *Id.* (quoting *Ford*, 122 Nev. at 403, 132 P.3d at 577).

With regard to *Batson*'s first step, "[t]here is a split of authority as to whether the finding of a prima facie case of discrimination . . . should be reviewed deferentially." *Watson*, 130 Nev. at ___ n.2, 335 P.3d at 166 n.2 (collecting cases). However, our supreme court has explained that at step two, "the reason offered [by the State] should be deemed neutral" if "discriminatory intent is not inherent in the State's explanation[.]" *See Ford*, 122 Nev. at 403, 132 P.3d at 578. Furthermore, at step three of a *Batson* analysis, "[t]his court affords great deference to the district court's factual findings . . . and we will not reverse the district court's decision 'unless clearly erroneous.'" *Watson*, 130 Nev. at ___, 335 P.3d at 165 (citation omitted) (quoting *Diomampo v. State*, 124 Nev. 414, 422–23, 185 P.3d 1031, 1036–37 (2008); *Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004)).

Black has failed to establish a "pattern of strikes" that may be used to establish a prima facie case of discrimination at step one of a *Batson* challenge. This is because the proportion of African Americans who were struck was "roughly parallel" to the proportion of African Americans on the jury panel, given that they constituted approximately 19% of the jury panel (i.e., 6 out of 32 prospective jurors) and the State used roughly 22% of its strikes to remove African Americans (i.e., 2 out of

9 peremptory strikes).[4] Additionally, although it is *possible* that the State waived its seventh and eighth peremptory challenges in response to Black's *Batson* objection, reaching such a conclusion on this record would require the court to engage in sheer speculation.[5]

Furthermore, even if Black met his threshold burden, the State satisfied its burden at step two by advancing race-neutral reasons for striking Prospective Juror Nos. 249 and 306. Specifically, the State asserted that it struck these two prospective jurors because they each had "expressed a significant negative interaction with law enforcement." The State also claimed that it exercised its peremptory challenge on Prospective Juror No. 306 because of his attire, posture, and negative demeanor. The State further averred that it struck Prospective Juror No. 249 because she had been arrested for possession of marijuana and was one of the "youngest members of the panel[.]" Accordingly, the State discharged its obligation at step two by offering reasons that are not "facially discriminatory[.]"[6] *See Conner*, 130 Nev. at ___, 327 P.3d at 508.

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[4]*See Watson*, 130 Nev. at ___, 335 P.3d at 168 (concluding that the defendant failed to make a prima facie case of discrimination when women constituted 56% of the venire and the State exercised 67% of its peremptory strikes against women).

[5]*See Watson*, 130 Nev. at ___, 335 P.3d at 166 (emphasis added) (quoting *Johnson v. California*, 545 U.S. 162, 168 n.4 (2005)) (internal quotation marks omitted) (noting that an inference of discriminatory purpose can be "reached by considering other facts and deducing a *logical* consequence from them").

[6]Black's contention that the State's race-neutral reasons were "neither clear nor specific" is without merit. *Cf. United States v. Jones*, 245 F.3d 990, 993 (8th Cir. 2001) (citation omitted) ("[T]he veniremember's grooming may be a sufficiently race neutral explanation, as may his style

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Lastly, Black failed to bear his "heavy burden" at step three by "demonstrating that the State's facially race-neutral explanation is a pretext for discrimination." *Conner*, 130 Nev. at ___, 327 P.3d at 509. Although the district court afforded Black an opportunity to further develop the record and establish that the State's race-neutral reasons were pretextual, Black declined the court's invitation.[7] Therefore, even assuming that the State's reasons for its differential treatment of Prospective Juror Nos. 306 and 345 (who both had negative experiences with law enforcement) are not persuasive, their disparate treatment is immaterial because Black never contested the State's claim that these two prospective jurors *were both African Americans*.[8] Further, just as Black failed to otherwise challenge the State's reasons for striking Prospective

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of dress[.]"); *McCurdy v. Montgomery Cnty.*, 240 F.3d 512, 521 (6th Cir. 2001) (noting that "body language and demeanor are permissible race-neutral justifications for the exercise of a peremptory [challenge]"), *overruled in part on other grounds by Barnes v. Wright*, 449 F.3d 709, 717–20 (6th Cir. 2006); *Ford*, 122 Nev. at 406–08, 132 P.3d at 580 (upholding the State's peremptory strikes in part because two of the prospective jurors had been arrested for domestic violence); *Leonard v. State*, 114 Nev. 1196, 1205, 969 P.2d 288, 294 (1998) (concluding that a prospective juror's youth and inattentiveness were race-neutral reasons for striking a juror, even though "[t]he degree of his inattentiveness cannot be determined from the record").

[7]*See Hawkins v. State*, 127 Nev. 575, 579, 256 P.3d 965, 968 (2011) ("It is almost impossible for this court to determine if the reason for the peremptory challenge is pretextual without adequate development in the district court.").

[8]*See Ford*, 122 Nev. at 405, 132 P.3d at 578–79 (noting that a comparative juror analysis intended to show racial discrimination requires an analysis of jurors of *different* races).

Juror No. 249 in the proceedings below, he likewise fails to do so on appeal. Accordingly, we uphold the district court's rejection of Black's *Batson* challenge.[9]

The Admission of Recorded Telephone Conversations

Black claims that the district court erroneously admitted hearsay evidence when it allowed the State to play recordings of inculpatory telephone conversations between Black's brother and Jaclyn Downey, one of Black's alleged accomplices.[10] We review a district court's

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[9]Additionally, Black's contention that the district court "summarily overruled" his *Batson* objection is belied by the record. Rather, the district court elicited the State's race-neutral reasons even though it had concluded that Black failed to establish a prima facie case of discrimination. This practice is entirely proper. *See Watson*, 130 Nev. at ___, 335 P.3d at 169 (noting that "[t]he district court's cautionary request that the State give its explanation for the peremptory challenge was laudable").

Moreover, by suggesting that the State's race-neutral reasons were pretextual because it did not question the jurors about their attire and demeanor, Black is attempting to inappropriately shift his burden of developing the record. *See Conner*, 130 Nev. at ___, 327 P.3d at 508 (quoting *Rice v. Collins*, 546 U.S. 333, 338 (2006)) ("['][T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'").

[10]The appellate record does not include transcripts of the recordings at issue. Instead, the parties rely upon portions of *Downey's testimony* that describe those conversations. Accordingly, this court relies on Downey's testimony for the content of those telephone conversations. Moreover, it appears from the record that the statements made by Black's brother during these telephone conversations are not hearsay because they were not offered to prove the truth of the matter asserted. NRS 51.035.

hearsay rulings for abuse of discretion. *Fields v. State*, 125 Nev. 785, 795, 220 P.3d 709, 716 (2009).

We conclude that the district court did not abuse its discretion in admitting these recordings as prior consistent statements under NRS 51.035(2)(b).[11] First, Downey testified at Black's trial, and Black had the opportunity to cross-examine her concerning the recordings. Second, Black does not dispute that the recordings were consistent with Downey's testimony at trial. Third, the telephone conversations occurred *before* Downey was arrested in this case, and the State offered them in order to rebut Black's implied charge that Downey provided false testimony so that she could obtain a lenient plea agreement.[12] Lastly, even if Downey had a different motive to fabricate prior to her arrest, that fact "does not

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[11]NRS 51.035 defines "hearsay" in relevant part as:

> a statement offered in evidence to prove the truth of the matter asserted unless: . . .
>
> 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: . . .
>
> (b) Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

NRS 51.035(2)(b).

[12]*See Cunningham v. State*, 100 Nev. 396, 399, 683 P.2d 500, 502 (1984) (noting that "NRS 51.035(2)(b) was designed to rebut charges of fabrication or improper influencing arising *after* a prior consistent statement was made"); *cf. United States v. Foster*, 652 F.3d 776, 787 (7th Cir. 2011) (concluding that the defendant's opening statement had "impl[ied] that [the declarant's] plea agreement gave him an incentive to lie").

diminish the rehabilitative value of the statement[s]." *See Cunningham v. State*, 100 Nev. 396, 399, 683 P.2d 500, 502 (1984). Thus, we uphold the district court's evidentiary ruling.

Black's Constitutional Challenge to His Prison Sentence

Black challenges his 420-months-to-life aggregate prison sentence, asserting that it violates the Eighth Amendment to the U.S. Constitution and Article 1, Section 6 of the Nevada Constitution. "Regardless of its severity, a sentence that is within statutory limits is not '"cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to the shock the conscience."'"[13] *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 489 (2009) (quoting *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996)).

We conclude that Black has failed to establish that his sentence is "so unreasonably disproportionate to the offense as to the shock the conscience."[14] *Id.* at 348, 213 P.3d at 489 (quoting *Blume*, 112 Nev. at 475, 915 P.2d at 284) (internal quotation marks omitted). First, the fact that Black was convicted of no fewer than 19 felonies weighs

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[13]The parties do not assert that different standards apply to Black's federal and state objections, respectively. Nevertheless, both parties rely upon *Chavez v. State*, 125 Nev. 328, 213 P.3d 476 (2009), for the standard of review, which applied the "shocks the conscience" standard to both state and federal constitutional challenges to a prison sentence. *See Chavez*, 125 Nev. at 347–48, 213 P.3d at 489–90. Accordingly, this court applies the same standard to Black's federal and state constitutional challenges.

[14]Black concedes that his sentence falls within statutory limits, and he does not claim that the sentencing statute is unconstitutional.

heavily in support of his sentence.[15] Second, the violent nature of Black's crimes also justifies his considerably long prison term.[16] Third, Black's extensive juvenile delinquent history further bolsters the district court's decision.[17] Lastly, although Black was only 22 years old when he received this sentence, the district court could have reasonably concluded that

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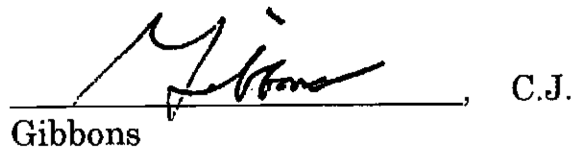
[15]*Cf. United States v. Davis*, 754 F.3d 1205, 1208–10, 1221–22 (11th Cir. 2014) (upholding a lengthy prison term that "amount[ed] to a life sentence," which had been imposed for 17 felony convictions arising out of a series of robberies), *reh'g en banc granted, opinion vacated*, 573 Fed. App'x 925 (11th Cir. 2014), *reinstated in part*, 785 F.3d 498, 500 & n.2 (11th Cir. 2015), *cert. denied* 136 S. Ct. 479 (2015).

[16]Evidence at trial showed that the victims in this case were robbed at gunpoint, and that Black had: (1) held a gun to a victim's head and threatened to shoot her, (2) punched a victim in his face, and (3) hit a victim in her chest and kicked her in the head when she did not immediately relinquish her purse. *Cf. Williams v. Chrans*, 894 F.2d 928, 930, 936 (7th Cir. 1990) (emphasis added) (upholding a sentence of life imprisonment without the possibility of parole because the habeas petitioner had been "convicted three times of armed robbery, a *violent* criminal offense").

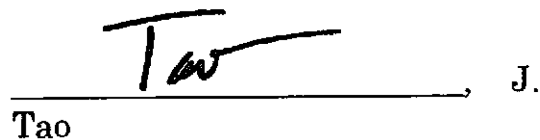
[17]*See Herring v. State*, 691 So. 2d 948, 950, 958 (Miss. 1997) (upholding an aggregate prison sentence of 80 years for certain drug convictions in part because of the defendant's "extensive juvenile record"), *overruled in part on other grounds by Dilworth v. State*, 909 So. 3d 731, 735 n.4 (Miss. 2005); *cf. Johnson v. State*, 122 Nev. 1344, 1353–54, 148 P.3d 767, 773–74 (2006) (upholding the district court's admission of juvenile records during the selection phase of a capital sentencing hearing).

Black's multiple violent felony convictions merited a lengthy prison term.[18] Thus, Black's constitutional challenge fails.[19] Accordingly we,

ORDER the judgment of the district court AFFIRMED.



Gibbons, C.J.



Tao, J.

Silver, J.

cc: Hon. Douglas W. Herndon, District Judge
Nguyen & Lay
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[18]*Cf. Davis*, 754 F.3d at 1221–22 (rejecting an Eighth Amendment challenge to a prison term that "amount[ed] to a life sentence," which had been imposed for "numerous and serious" crimes, even though the defendant was only "eighteen and nineteen years old at the time of the commission of the offenses"); *Glover v. State*, 477 S.W. 3d 68, 71–76 (Mo. Ct. App. 2015) (upholding an aggregate 43-year prison sentence for multiple counts of burglary and related offenses despite the fact that the defendant was only 18 years old when he committed the crimes).

[19]One of Black's arguments is that his sentence is illegal because his 16 prior felony convictions arose out of the same course of events as the instant case. Even if Black's factual theory had any relevance to his constitutional challenge, he has failed to adequately develop the record on this point.