

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEMONE LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69322

FILED

SEP 20 2016

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and burglary. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

First, appellant Demone Lewis argues the district court erred by denying his motion to strike the jury panel because a potential juror tainted the jury pool. Specifically, he claims the potential juror mentioned the defendant's custody status.¹

"Informing the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom." *Haywood v. State*, 107 Nev. 285,

¹To the extent Lewis argues the jury was tainted by the juror's statements about what he read in the articles, we conclude Lewis failed to preserve this claim below and Lewis failed to demonstrate plain error. See *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); see also *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (under the plain error standard, we determine "whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights").

288, 809 P.2d 1272, 1273 (1991). However, "this type of error is not always prejudicial rather than harmless." *Id.* "When the evidence of guilt is overwhelming, even constitutional error can be comparatively insignificant." *Id.*

During jury selection, the State questioned a potential juror about whether he could be impartial after having read an article about the case shortly after the crime occurred and after having worked where one of the robberies took place. During this exchange, the juror stated "if they've been here, they've been in jail for, what, a little over a year now." Lewis claimed this statement informed the jury of his custody status and he moved to strike the entire jury panel.

The district court concluded the juror's statement was based on speculation, the juror based his comment on an article he read over a year prior, the jury panel knew his knowledge was based on this old article, the defendant was not in jail garb, and it was not reasonable to expect a jury to believe the defendant had not been arrested for a crime of this nature. The district court then denied the motion. We conclude the findings of the district court support its conclusion that the juror's statement was not tantamount to informing the jury the defendant was still in jail. Further, we note there was overwhelming evidence to support the jury verdict and, therefore, any error in not striking the jury panel was harmless beyond a reasonable doubt. *See id.* Accordingly, the district court did not err by denying the motion to strike.

Second, Lewis argues the district court abused its discretion when it denied his *Batson v. Kentucky*, 476 U.S. 79 (1986) challenge. Specifically, he claims the State used a peremptory challenge on the only

African-American juror on the panel and the State's explanation for using the challenge was not race-neutral.

A party may not "challenge potential jurors solely on account of their race." *Watson v. State*, 130 Nev. ___, ___, 335 P.3d 157, 165 (2014) (quoting *Batson*, 476 U.S. at 89). A *Batson* inquiry has three steps: the movant must make a prima facie showing of discrimination, then the challenging party must provide a race-neutral reason for the challenge, and then the district court will determine whether purposeful discrimination has been shown. *Id.* We give great discretion to the district court's findings and will not reverse unless its decision was clearly erroneous. *Id.*

After hearing the motion, the district court concluded Lewis failed to demonstrate a prima facie case and, even if Lewis had demonstrated a prima facie case, the district court found the State provided a race-neutral reason for using its peremptory challenge on the juror. Specifically, the State claimed it used its peremptory challenge on the juror because her brother had been previously convicted of felony forgery, she believed he should not have been convicted, and the State believed she might have problems holding people accountable for their actions. We conclude the findings of the district court were not clearly erroneous and the district court did not abuse its discretion by denying the *Batson* challenge.

Third, Lewis argues the district court erred by limiting his right to present a mere presence defense. Specifically, he asserts the district court abused its discretion by limiting his cross-examination of the detective who interviewed him.


“Although a criminal defendant has a due process right to introduce into evidence any testimony or documentation which would tend to prove the defendant’s theory of the case, that right is subject to the rules of evidence.” *Rose v. State*, 123 Nev. 194, 205 n.18, 164 P.3d 408, 416 n.18 (2007) (internal citations and quotation marks omitted). “Such rules do not abridge an accused’s right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.” *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (internal quotation marks omitted). “The scope and extent of cross-examination is largely within the sound discretion of the trial court and in the absence of abuse of discretion a reversal will not be granted.” *Azbill v. State*, 88 Nev. 240, 246, 495 P.2d 1064, 1068 (1972).


At trial, in support of his mere presence defense, Lewis wished to elicit testimony from a detective that Lewis informed the detective that his codefendant was the driver during the robberies and the car chase. The district court concluded admission of this testimony would violate *Bruton v. United States*, 391 U.S. 123, 126 (1968), and prohibited Lewis from eliciting any testimony from the detective regarding statements Lewis made that implicated his codefendant.


We conclude the district court’s limitation of Lewis’ cross-examination of the detective based on *Bruton* was not arbitrary, nor disproportionate to the purpose of the limitation, and did not limit Lewis’ right to present a defense. Lewis was still able to elicit testimony from the detective about Lewis’ statements to the detective regarding where Lewis stated he was sitting during the robberies and car chase and what he told the detective regarding his involvement in the crimes. Lewis failed to demonstrate that in order to present his mere presence defense it was

necessary to elicit testimony from the detective about Lewis' statements implicating his codefendant. Therefore, we conclude the district court did not abuse its discretion by limiting the cross-examination of the detective and Lewis failed to demonstrate his right to present a defense was violated.

Having concluded Lewis is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. William D. Kephart, District Judge
Law Offices of John P. Parris
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk