IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VINCENT CLINTON AUSTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77664-COA

FILED

JUN 0 3 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Vincent Clinton Austin appeals from a judgment of conviction entered pursuant to a jury verdict of two counts of burglary, two counts of invasion of the home, two counts of grand larceny, invasion of the home while in possession of a firearm, burglary while in the possession of a firearm, and grand larceny of a firearm. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

First, Austin claims the district court erred by denying him "a diverse venire resulting in a predominantly white jury." He appears to argue that the district court erred by rejecting a fair-cross-section challenge[1] and a *Batson*[2] challenge. And he asserts that he raised his fair-cross-section challenge during a bench conference that occurred prior to jury voir dire. However, the record provided for our review demonstrates that

[1]*See Duren v. Missouri*, 439 U.S. 357 (1979).

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

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the bench conference was not transcribed,[3] Austin did not make a record of the bench conference during the course of the trial, and Austin expressly waived any *Batson* challenges. Given this record, we are unable to review Austin's fair-cross-section claim, *see Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980), and we conclude Austin has not demonstrated that his *Batson* claim gives rise to plain error, *see Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018), *cert. denied*, 139 S. Ct. 415 (2018).

Second, Austin claims the district court demonstrated judicial bias by interrupting his opening statement. He argues that the following exchange cast "the defense in a poor light and rendered a substantially unfair trial ambiance."

> MR. LIPPMANN: Yes, Your Honor. Ladies and gentlemen of the jury, I'm going to do it a little more old school. I've got my notes. And I encourage you during this time, during the presentation of the evidence -- that's by the way not evidence -- take your notes. Okay. That's what you're going to rely on. Okay? Because memory's faulty sometimes. Okay.
>
> THE COURT: Counsel, they can rely on their own memory. It's up to them.

Austin did not object to the district court's comment, and we conclude he has not demonstrated plain error. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48; *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) ("[The] remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that

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[3]In the opening brief, Austin's counsel acknowledges that the bench conference was not transcribed and he does not claim that the district court failed to record the bench conference.

the judge has closed his or her mind to the presentation of all the evidence.").

Third, Austin claims the district court erred by allowing the State to admit evidence of the bad acts he committed while under surveillance despite the fact it had previously ruled that such evidence would not be admissible. He further argues that the district court advocated for the State by allowing the State to make inquiries and/or commentaries about his conduct while under surveillance. However, the record that Austin relies upon to support his claims does not demonstrate that he objected to the State's examination or the witness's testimony, nor does it demonstrate that the State's inquiries and/or comments violated the district court's evidentiary ruling. Accordingly, we conclude Austin has not demonstrated plain error. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

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

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. David M. Jones, District Judge
Lipp Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk