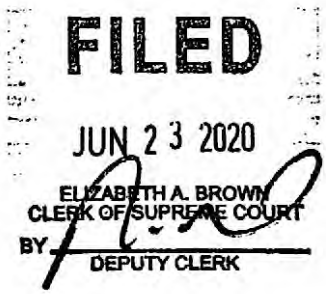
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL WHITFIELD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78738-COA



ORDER OF AFFIRMANCE

Michael Whitfield appeals a judgment of conviction, pursuant to a jury verdict, of one count of battery with the use of a deadly weapon causing substantial bodily harm and three counts of obtaining or possessing a credit or debit card without the cardholder's consent. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Robert Ash was walking towards the Eldorado Hotel and Casino in Reno, Nevada.[1] Whitfield approached him from behind, wearing a black coat with a fur hood, and the two exchanged profanities. Whitfield took a gun out of his front left pocket and shot Ash twice in the legs. One shot severed Ash's femoral artery, causing profuse bleeding. Another shot shattered Ash's hip and femur. Ash was unarmed. Whitfield ran away, and Ash screamed that he was going to get him for what he did.

Ash told first responders that "Heavy"—the nickname for Whitfield—had shot him in the legs. As officers approached, witnesses told them that the suspect was an African-American male wearing a black jacket with a fur hood, and officers briefly observed Whitfield running away. Officers later found Whitfield walking near the Reno Royal Motor Lodge.

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

The manager of the motel pointed officers towards a stairwell where Whitfield was hiding. The officers arrested Whitfield on the second floor of the motel and, in the stairwell, they found a black jacket with a fur hood and several credit or debit cards inside of the pockets of the jacket. The cards belonged to four different people, none of whom was Whitfield. Whitfield told the arresting officers that his name was Tony Huckbottom, a false name and not one of the names on the cards.

Officers obtained surveillance footage from the Third Street Flats, an apartment complex near the scene of the shooting, which showed an individual who matched witness descriptions of the shooter leaving the scene. Officers also obtained surveillance footage from the Eldorado Hotel and Casino, which showed the shooting and the shooter also matched witness descriptions. Using a police dog, officers found a gun hidden inside of a wheel well of a vehicle that was located near the motel where Whitfield was arrested. Bullet casings found at the scene of the shooting matched the gun found by officers. Ash was released from the hospital and was wheelchair bound.

The State charged Whitfield by complaint with one count of battery with a deadly weapon causing substantial bodily harm and four counts of obtaining or possessing a credit or debit card without the cardholder's consent. At a preliminary hearing, Ash testified that Whitfield shot him twice in the legs. He further testified that Whitfield was wearing a jacket with a fur hood, but did not testify as to the color of the jacket. Ash was cross-examined by Whitfield. At the time of the preliminary hearing, Ash was in custody at the Washoe County jail. Ash and his wife later moved to Sacramento, where they remained homeless and without cell phones.

The State, pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, moved in the district court for action to procure Ash's attendance at Whitfield's trial. The district court granted the State's motion and forwarded its order to the Superior Court of California for the County of Sacramento, requesting that it issue a summons for Ash to testify in Nevada. The superior court issued an order to show cause for Ash to contest the summons, and the State coordinated with the Sacramento County District Attorney's Office to serve Ash.

Ash waived any hearing in the superior court, which then issued a summons for Ash to testify at Whitfield's trial. The State provided Ash with information he would need to make travel arrangements. The State spoke with Ash's mother-in-law, Cindy Montoya, and the plan was for Ash to spend the night at her home in Sacramento before traveling to Reno five days before the trial was set to begin. On the day Ash was supposed to travel to Reno, however, Montoya went to his tent and could not find him. The record is silent as to what happened to Ash.

The next day—four days before trial commenced—the State moved to admit the preliminary hearing transcript under the former testimony exception to the rule against hearsay. The State argued that Ash was unavailable and that it had made reasonable efforts to procure his attendance at trial. When trial commenced, the district court first addressed the State's motion to admit the preliminary hearing transcript. Outside the presence of the jury, Whitfield argued that the State did not exercise reasonable diligence in procuring Ash's attendance because relying on Ash's mother-in-law was not a reasonable effort. The only suggestion Whitfield offered to procure Ash's attendance at trial was for the State to

order California law enforcement to search for Ash. The State noted that it did not have power to order California authorities to commence an investigation. The district court orally granted the State's motion, finding that the State met its due diligence requirements.

During voir dire, the district court asked prospective jurors whether they had any experience with the Washoe County District Attorney's Office. Pamela Standridge answered that she had interacted with the district attorney's office when she wanted to give up her adopted children and that her experience with the district attorney's office was not "negative[ ] per se," but that "the experience could have been better." Standridge noted that the negative part of interacting with the district attorney's office was the expense of retaining counsel. She also claimed that, ten years earlier, her identity was stolen and that she filed a police report, but the police never followed through with an investigation or prosecution.

The State struck Standridge from the jury. Whitfield raised a *Batson* challenge, but did not provide any initial argument as to why the strike was discriminatory. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that striking a juror because of the juror's race violates the Equal Protection Clause). In response to the challenge, the State averred that Standridge had made comments that were negative towards the district attorney's office, as well as the police department. The district court found that the State presented a race-neutral explanation for the strike and asked if Whitfield had any argument as to either a discriminatory purpose for the strike or for purposeful discrimination. Whitfield contended that Standridge was the only African-American on the jury, had stated that she could be neutral, and had stated that she had no animosity towards the

police department or the district attorney's office. The district court reiterated that it believed that there was a race-neutral explanation for the State's peremptory challenge—i.e., that Standridge expressed that her experience with the district attorney's office could have been better—and denied Whitfield's *Batson* challenge. Whitfield did not argue that the State's race-neutral explanations were pretexts for purposeful discrimination.

After the State's opening statement, Ash's testimony was read into the record using the preliminary hearing transcript, which included Whitfield's cross-examination of Ash. When asked who shot him during the preliminary hearing, Ash noted, "[t]hat motherfucker right there." He clarified that he meant, "Heavy," which is Whitfield's nickname, and pointed to the defendant. Ash had also noted that during the shooting, Whitfield had on a jacket with a fur hood.

The State called Detective Shormany Herrera, who worked for the Reno Police Department's Robbery and Homicide unit. Detective Herrera testified that he obtained surveillance footage from the Eldorado Hotel and Casino and the Third Street Flats, which showed the shooting and Whitfield fleeing the scene, respectively. Detective Herrera added that, based upon the surveillance footage and his investigation, Whitfield was the shooter. He testified that he collected Whitfield's clothing to compare with the surveillance footage. Detective Herrera also visited Ash in the hospital, and after showing him pictures of Whitfield, Ash identified Whitfield as the shooter. Whitfield did not object to any of this testimony.

The jury found Whitfield guilty of battery with the use of a deadly weapon resulting in substantial bodily harm, as well as three counts of obtaining or possessing a credit or debit card without the cardholder's

consent. The jury acquitted Whitfield of one count of obtaining or possessing a credit or debit card without the cardholder's consent.[2] The district court imposed an aggregate sentence of 84 to 228 months in prison.

On appeal, Whitfield contends that (1) the district court erred in denying his *Batson* challenge, (2) the State did not use reasonable efforts in procuring Ash's attendance at trial, and therefore, the preliminary hearing transcript was inadmissible, (3) Detective Herrera's testimony that his investigation revealed that Whitfield was the shooter in surveillance footage invaded the province of the jury, and (4) cumulative error warrants reversal. We disagree.

The district court did not clearly err in denying Whitfield's Batson challenge

Whitfield contends that the district court erred in denying his *Batson* challenge. Whitfield alleges that the State violated *Batson* when it used a peremptory strike to exclude Standridge, an African-American, from the jury. The State argues that Standridge expressed negative experiences with the Washoe County District Attorney's Office and the Reno Police Department and thus the State had a race-neutral explanation for striking Standridge. The State adds that Whitfield did not argue below, nor on appeal, that the State's race-neutral explanation was pretext for discrimination. We agree with the State.

"The Equal Protection Clause of the United States Constitution prohibits any party from utilizing a peremptory challenge to strike a juror based on race." *Cooper v. State*, 134 Nev. 860, 861, 432 P.3d 202, 204 (2018). When a defendant asserts a *Batson* challenge to the State's use of its

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[2]On appeal, Whitfield does not challenge the sufficiency of the evidence supporting his convictions for obtaining or possessing a credit or debit card without the cardholder's consent.

peremptory strikes, the district court evaluates the challenge using a three-part test:

> (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.

Diomampo v. State, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) (citing *Batson*, 476 U.S. at 96-98)). "In reviewing a *Batson* challenge, the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Id.* at 422-23, 185 P.3d at 1036-37 (internal quotation marks and alteration omitted). The proponent of the *Batson* challenge has the ultimate burden of demonstrating that the prosecution's race-neutral explanation is pretextual such that "it is more likely than not that the State engaged in purposeful discrimination." *McCarty v. State*, 132 Nev. 218, 226, 371 P.3d 1002, 1007 (2016). The court reviews the district court's determination on discriminatory intent for clear error. *Id.* "An implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." *Ford v. State*, 122 Nev. 398, 404, 132 P.3d 574, 578 (2006).

Here, the district court asked prospective jurors whether they had any experience with the Washoe County District Attorney's Office. Standridge noted that her experience with the district attorney's office was not "negative[ ] per se," but that the experience "could have been better." Standridge also noted that, ten years earlier, she had her identity stolen

and although she went to the police station to file a report, the police never followed through with an investigation.

The State struck Standridge. Whitfield raised a *Batson* challenge, but did not initially argue that the strike was discriminatory. In response, the State averred that Standridge made comments that were negative towards the district attorney's office, as well as the police department. After the State offered an explanation, the district court asked Whitfield to show either a discriminatory purpose for the strike or purposeful discrimination (i.e., the district court noted that Whitfield had "kind of folded" the first and third steps of *Batson* together). Whitfield contended that Standridge was the only African-American on the jury, stated that she could be neutral, and stated that she had no animosity towards the police department or the district attorney's office. Standridge, however, did not make these actual statements during voir dire. The district court found that there was a race-neutral explanation for the State's peremptory challenge, and denied Whitfield's *Batson* challenge.

We conclude that the district court did not clearly err for four reasons. First, the district court found that the State's explanation for the strike was race-neutral, and Standridge unequivocally stated that her experience with the district attorney's office "could have been better." Second, when asked to show purposeful discrimination, the only argument Whitfield offered—that accurately depicts the record[3]—was that

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[3]Below and on appeal, Whitfield contends that Standridge stated "she could be fair and impartial to both sides" if she were chosen for the jury and "she had no animosity towards the District Attorney's Office." However, the portion of the record cited by Whitfield to support this was his *argument* in

Standridge was African-American. Third, the district court found that an African-American juror was empaneled.[4] Finally, Whitfield did not show that the State had a racially discriminatory purpose or intent in excluding Standridge.[5] *See Kaczmarek v. State*, 120 Nev. 314, 335, 91 P.3d 16, 30 (2004). Based upon these facts—as well as Standridge's comments that her

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response to the State's peremptory strike and the record does not show that Standridge herself made these statements.

[4]The district court noted on the record that one empaneled juror—Randi Jones—appeared to be African-American, but that her juror questionnaire did not allow her to identify her race. The district court also noted that other jurors appeared to be of Asian and Hispanic ethnicity. The district court gave both parties a chance to comment in this regard, and neither party rebutted the district court's statements. Neither party referenced the district court's finding on appeal.

[5]The supreme court has provided the following factors to determine whether a race-neutral justification for a peremptory challenge is pretext for discrimination:

> (1) the similarity of the answers to voir dire questions given by [minority] prospective jurors who were struck by the prosecutors and answers by [nonminority] prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of [minority] and [nonminority] prospective jurors, (3) the use by the prosecutors of the "jury shuffle," and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

Diomampo, 124 Nev. at 422 n.18, 185 P.3d at 1036 n.18 (quoting *Ford*, 122 Nev. at 405, 132 P.3d at 578-79 (alterations in original)). Both below and on appeal, Whitfield provided neither argument nor evidence to show that the State's race-neutral explanation was pretext for discrimination. Instead, Whitfield argues that by simply making the *Batson* challenge, he has adequately argued that the State engaged in purposeful discrimination. This is insufficient under *Ford*. 122 Nev. at 405, 132 P.3d at 578-79.

experience with the district attorney's office could have been better and the police had not investigated a previous crime committed against her—the State had a plausible race-neutral explanation for striking Standridge, and Whitfield did not meet his burden of showing that this race-neutral explanation was pretext for discrimination.

Thus, we conclude that the district court did not clearly err in denying Whitfield's *Batson* challenge.

The State exercised reasonable diligence in procuring an unavailable witness's attendance at trial

Whitfield contends that the State did not exercise reasonable diligence in procuring Ash's attendance at trial in violation of his Confrontation Clause rights under the Sixth Amendment. Whitfield concedes that he was represented by counsel at the preliminary hearing, but argues that he did not have an adequate opportunity to cross-examine Ash, and that the State did not make reasonable efforts to procure Ash's attendance at trial. Whitfield concludes that this purported error created a structural error requiring reversal and remand for a new trial.

The State argues that it exercised reasonable diligence in seeking to procure Ash's attendance pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, codified at NRS 174.395 through NRS 174.445. The State notes that it (1) moved for and obtained a summons from the Superior Court for the County of Sacramento for Ash to testify at Whitfield's trial, (2) coordinated with the Sacramento County District Attorney's Office to serve Ash, (3) provided Ash with information to make travel accommodations, and (4) remained in contact with Ash's mother-in-law, his only known relative. The State adds that Ash waived a hearing in the superior court. The State

further contends that Whitfield offered no viable suggestions as to how to procure Ash's attendance at trial. We agree with the State.

The "[u]se of preliminary hearing testimony without a showing that the State made a good faith effort to procure the witness's attendance violates a criminal defendant's Sixth Amendment right to confront witnesses, thereby implicating his or her constitutional rights." *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008), *abrogated on other grounds by State v. Eighth Judicial Dist. Court* (*Baker*), 134 Nev. 104, 107, 412 P.3d 18, 22 (2018). This court reviews whether the district court properly admitted preliminary hearing testimony in a criminal case as a mixed question of law and fact. *Id.* at 646-47, 188 P.3d at 1131-32. "As a mixed question of law and fact, we will give deference to the district court's findings of fact but will independently review whether those facts satisfy the legal standard of reasonable diligence." *Id.* at 647, 188 P.3d at 1132.

"For testimony from a preliminary hearing to be admitted at trial, [(1)] the defendant must have been represented by counsel at the preliminary hearing, [(2)] he must have had the opportunity to cross-examine the witness, and [(3)] the witness must be unavailable for the trial." *Miranda-Cruz v. State*, Docket No. 70960 (Order of Reversal and Remand, December 28, 2018).

A declarant is unavailable if he is "[a]bsent from the hearing and beyond the jurisdiction of the court to compel appearance and the [State] has exercised reasonable diligence but has been unable to procure the declarant's attendance . . . ." NRS 51.055(1)(d). The supreme court has "interpreted the requirement that the State 'exercise[ ] reasonable diligence' to mean that the State must make reasonable efforts to procure a witness's attendance at trial before that witness may be declared unavailable."

Hernandez, 124 Nev. at 645, 188 P.3d at 1130-31 (alteration in original). "What constitutes reasonable efforts to procure a witness's attendance must be determined upon considering the totality of the circumstances." *Id.* at 650, 188 P.3d at 1134. The supreme court "also has stated that a prosecutor's efforts were reasonable where 'it [was] unlikely that the additional efforts suggested by [the defendant] would have led to the witnesses' production at trial.'" *Id.* at 651, 188 P.3d at 1135 (quoting *Quillen v. State*, 112 Nev. 1369, 1376, 929 P.2d 893, 898 (1996)).

Here, based on the totality of the circumstances, we conclude that the district court did not err in concluding that the State used reasonable efforts to procure Ash's attendance at trial. The State (1) moved for and obtained a summons with the superior court for Ash to testify in Nevada, (2) coordinated with the Sacramento County District Attorney's Office to successfully serve Ash, (3) provided Ash with information to make travel arrangements, and (4) remained in contact with Ash's mother-in-law, his only known relative. The State was under the impression that Ash would arrive in Reno on January 23, 2019, which was days before trial commenced on January 28. The State contacted Ash's mother-in-law, who did not know where Ash was currently located. Furthermore, although Whitfield offered that the State should have ordered law enforcement to search for Ash,[6] the State does not have the authority to order California's law enforcement agents to commence an investigation.

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[6]We note that Whitfield specifically stated that the State should "send an authority, an investigator or a law enforcement officer *from the sister jurisdiction* to the location and see if you can find Mr. Ash and secure his attendance." (Emphasis added.) Based on the record, nobody involved in the proceedings knew Ash's location and, moreover, no plan was presented as to how law enforcement would be able to find Ash. The only person that

We conclude that the State exercised reasonable efforts—and therefore reasonable diligence—in attempting to procure Ash's attendance at trial. Thus, we conclude that the district court did not err in finding that the State was reasonably diligent in attempting to procure Ash's attendance at trial. As such, the district court properly admitted the preliminary hearing transcript at trial.[7]

Detective Herrera's testimony did not invade the province of the jury

Whitfield avers that Detective Herrera invaded the province of the jury by testifying that based upon his investigation, he had concluded that Whitfield was the shooter shown in the surveillance footage. Whitfield relies upon cases from other states to support his argument. *See Cuzik v. Commonwealth*, 276 S.W.3d 260, 265-66 (Ky. 2009); *Gordon v. Commonwealth*, 916 S.W.2d 176, 179-80 (Ky. 1995); *People v. Cyrus*, 848 N.Y.S.2d 67 (App. Div. 2007). Whitfield also contends that Detective Herrera testified to the ultimate issue of guilt. Whitfield asserts that this

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had contact with Ash was his mother-in-law, and the record shows that she went to Ash's last known location and did not know Ash's current whereabouts, and Whitfield never questioned her credibility.

[7]Whitfield also argues that "the Magistrate did not provide for adequate cross-examination [of Ash]." Whitfield provides no authority or cogent argument to show that he was deprived of an adequate opportunity to cross-examine Ash at the preliminary hearing. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed [on appeal]."). The record also shows that Whitfield cross-examined Ash at the preliminary hearing. *See Chavez v. State*, 125 Nev. 328, 338, 213 P.3d 476, 483 (2009) ("[W]e have observed that the Confrontation Clause guarantees an opportunity for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (internal quotation marks omitted)). Thus, we conclude that this argument is without merit.

error created structural error, requiring reversal and remand for a new trial.

The State contends that the three cases cited by Whitfield are inapposite to this case, and that Herrera only testified regarding the police investigation and did not testify to an ultimate issue. The State also argues that even if this evidence was erroneously admitted, any such error was harmless. We agree with the State.

Because Whitfield did not object to Herrera's testimony at trial, we review for plain error. *See United States v. Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015) (applying the plain error standard of review because the defendant failed to object to an officer's testimony that potentially invaded the province of the jury). Under plain error review, the "appellant must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (internal quotation marks omitted). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome)." *Id.* at 51, 412 P.3d at 49 (internal quotation marks omitted). Structural error is waived if not preserved at trial. *Id.* at 51 n.3, 412 P.3d at 49 n.3 (citing *Neder v. United States*, 527 U.S. 1, 7 (1999)).

In *Burnside v. State*, the supreme court addressed an argument analogous to Whitfield's and concluded that police officer testimony describing surveillance footage did not invade the province of the jury because the officers used independent evidence to confirm the identity of the person in the video. 131 Nev. 371, 388, 352 P.3d 627, 639 (2015). "Generally, a lay witness may testify regarding the identity of a person

depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Rossana v. State*, 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997) (internal quotation marks omitted).

Here, after reviewing independent evidence—namely, Whitfield's clothing and Ash's identification of Whitfield as the shooter—Detective Herrera testified he was able to identify Whitfield as the shooter in the surveillance footage. Based upon the reasoning of *Burnside*, Detective Herrera's testimony was not erroneously admitted because he used other evidence to identify Whitfield, which included Ash's identification of Whitfield as the shooter.[8] 131 Nev. at 388, 352 P.3d at 639 ("This is not a situation where the detectives independently identified [the defendants], which would require that they have some prior knowledge or familiarity with the men or were qualified experts in videotape identification.").

For these reasons, we conclude that Whitfield has not shown that the district court erred, plainly or otherwise, in admitting this testimony because this argument is without merit.

Cumulative error does not warrant reversal

Whitfield contends that cumulative error warrants reversal. The State avers that no error occurred at trial. We agree with the State.

Cumulative error requires errors to cumulate. *See Burnside*, 131 Nev. at 407, 352 P.3d at 651 ("[B]ecause [appellant] demonstrated a single error[,] . . . there are not multiple errors to cumulate."); *accord United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000). Here, Whitfield

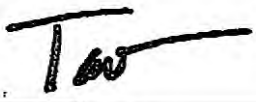
[8]Whitfield also ignores the testimony of Reno Police Department Officer Aaron Flickinger, who testified that the surveillance video footage matched witness descriptions of Whitfield.

has not shown any error occurred at his trial. Thus, reversal for cumulative error is unwarranted.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



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Tao

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Bulla

cc: Hon. David A. Hardy, District Judge
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Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk