IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAY CHARLES BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81645-COA

FILED

JUL 23 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Ray Charles Brown appeals from a judgment of conviction, pursuant to a jury verdict in a capital murder trial, for conspiracy to commit robbery, burglary while in possession of a firearm, first-degree murder with use of a deadly weapon, first-degree kidnapping with use of a deadly weapon, three counts of robbery with use of a deadly weapon, assault with a deadly weapon, and coercion with use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Three men robbed a Lee's Liquor store in Las Vegas.[1] One of the men shot and killed a store employee. Store surveillance cameras captured the entire incident. Police released the footage to the media seeking the public's help in identifying the three men. The shooter was later identified as Brown, who was charged and tried for the robbery-murder.

During jury selection, the venire was comprised of 32 prospective jurors—five of which were African American.[2] Each party

[1]We recount the facts only as necessary for our disposition.

[2]Another veniremember who is not at issue in this appeal may have been of partial African-American descent. However, she answered that she was Caucasian on her juror questionnaire, so we treat her as such.

21-21300

received nine peremptory strikes. Relevant to this appeal are two *Batson*[3] challenges: one challenge against the State's peremptory strikes of prospective jurors 258 and 246, and an additional challenge to the State's strike of prospective juror 660. All of these jurors were African American, as is Brown.[4]

Brown's first challenge essentially argued that these strikes showed a pattern of discrimination because the State used the majority of its strikes up to that point against African Americans. Before the district court made a ruling on the first prong, it asked for input from the State. The district court confirmed that the State was moving to step two of the three-part *Batson* test to provide a race-neutral reason for the strikes.

The State first addressed its strike of juror 246 and explained that he hesitated when asked if he could decide Brown's fate. The State also brought up juror 246's prior experiences with law enforcement, which the juror characterized as unfair. Finally, the State noted that juror 246 had multiple family members serving prison sentences and how he still saw value in having relationships with them. For juror 258, the State argued that she was highly emotional and had significant animus against law enforcement based on her lengthy negative history with law enforcement. Further, her fiancé had an altercation with police resulting in him losing a leg.

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

[4]At least one other African-American veniremember was dismissed for cause.

After the State gave its reasons for the strikes of jurors 246 and 258, the district court did not address the third prong of *Batson*. Instead, the district court made its ruling:

> As to the first prong, I don't believe that simply stating that they exercised two of their [first three] challenges as to African Americans is enough. I think there has to be something more sufficient for the Court to make a determination that there's a discriminatory purpose on behalf of the State.
>
> However, . . . the State did concede step one by going on to step two and stating their race-neutral reasons. And I'm going to make a finding that the State has . . . satisfactorily stated their race-neutral reasons, and so I'm going to deny the challenge.

For the second challenge, Brown again argued that the State engaged in a pattern of discriminatory strikes. He claimed there was a clear pattern because after the State struck juror 660, it had utilized three of its eight strikes against African-American jurors, eliminating 60 percent of the African-American veniremembers. The State again gave a race-neutral reason before the district court made a finding under the first prong. The prosecutor noted that juror 660 gave rambling answers to voir dire questions and randomly admitted, without a pointed question from either party, that he was fired from both the post office and Amazon for getting high while working. Without requesting or hearing any argument under the third prong, the district court summarily denied the challenge under the first prong: "at this time the Court's going to make a determination that the first step hasn't been met and deny the *Batson* challenge."

The jury was then empaneled[5] and trial began. The jury convicted Brown of all counts. At the penalty phase, the jury determined that the mitigating circumstances outweighed the aggravating circumstances and rendered a special verdict of life in prison with the possibility of parole. Brown received an aggregate life sentence with the possibility of parole after 628 months, or 52-1/3 years.

On appeal, Brown argues, among other things,[6] that the district court erred in denying his two *Batson* challenges, warranting reversal and

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[5]The record does not reflect the racial composition of the empaneled jury. However, Brown states in his opening brief that one African American served on the jury. This was not contested by the State.

[6]Brown additionally contends that the district court violated his constitutional rights and abused its discretion in admitting a video of Brown in custody wearing shackles and admitting two unduly suggestive and unreliable out-of-court identifications. We disagree.

The video of Brown in shackles was apparently less than one minute long and was taken immediately after his arrest as he was walking with his normal gait. It was highly relevant and probative because the identity of the shooter in the Lee's Liquor footage was the primary issue at trial. *See* NRS 48.015; NRS 48.025; NRS 48.035(1). The shooter in the footage has a bowlegged gait, similar to Brown's gait as seen in the video of him walking while shackled. Furthermore, there is no record or assertion that the jury viewed the video more than once, and the jury was instructed on the presumption of innocence. We thus see no error in the admission of the video. *See generally Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (holding that while informing the jury that a defendant is in jail raises an inference of guilt, informing that a defendant has been arrested or incarcerated at a different time is not erroneous, especially where the evidence of guilt is overwhelming); *Lucas v. State*, 791 S.W.2d 35, 56-57 (Tex. Crim. App. 1989) (holding that admission of a defendant in shackles was not unconstitutional where the focus of the video was something other than the defendant's custody status and the jury was instructed on the presumption of innocence); *Summers v. State*, 122 Nev.

remand for a new trial. Specifically, he claims that the district court erred in its conclusions under the first prong of *Batson* and failed to provide any findings under the first and third prongs for both of his challenges as required under *Williams v. State*, 134 Nev. 687, 429 P.3d 301 (2018). Brown concedes that the State satisfied prong two for each challenge. The State counters that Brown failed to prove purposeful discrimination under prong three. Additionally, as to the district court's determination under the third prong, the State curiously contends that the district court gave Brown "substantial time to make his arguments before rendering its ultimate decision," which it claims the court made after carefully reviewing all factors relevant to the third prong.

We review the district court's *Batson* determination for clear error. *Williams*, 134 Nev. at 689, 429 P.3d at 306. However, if the district court does not "clearly spell out" its "reasoning and determinations," we afford the district court little deference and review "the cold record . . . ." *Matthews v. State*, 136 Nev. 343, 346, 466 P.3d 1255, 1260 (2020) (internal quotation and citation omitted).

1326, 1333, 148 P.3d 778, 783 (2006) (presuming that juries follow district court orders and instructions).

Admission of the out-of-court identifications was also not error. Police asked Lakatie and Patricia Armstrong if they knew the men depicted in the Lee's Liquor surveillance footage. Both were well acquainted with Brown—Lakatie was the mother of Brown's children, and Patricia is Lakatie's mother—so these identifications were reliable. *See Bias v. State*, 105 Nev. 869, 872, 784 P.2d 963, 965 (1989). Both women made their identifications separately, so there was no risk of one influencing the other to make an identification and therefore the identification was not unnecessarily suggestive. *Thompson v. State*, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009). Thus, these additional claims are without merit.

Batson v. Kentucky created a three-pronged test for federal and state trial courts to use in determining if a peremptory strike qualifies as illegal discrimination: (1) the *Batson* challenger "must make a prima facie showing that discrimination based on race [or other cognizable group] has occurred" under "the totality of the circumstances," (2) the burden then shifts to the proponent of the peremptory strike to "provide a race-neutral explanation" for the strike, and (3) "the district court must" provide the challenger with an opportunity to argue against the State's reason to ultimately "determine whether the [challenger] in fact demonstrated purposeful discrimination" on the merits. *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) (citing *Batson*, 476 U.S. at 96-98); *Williams*, 134 Nev. at 692, 429 P.3d at 308. However, when the peremptory proponent offers a race-neutral explanation before the trial court rules on the first step, the first step becomes moot and the trial court must move to the third step. *Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

Here, in response to the first *Batson* challenge, the State gave an explanation before the district court ruled on the first prong. The district court then summarily denied the challenge at the second prong by simply noting that the State had satisfactorily stated its reasons. The record does not show that Brown was permitted to argue under the third prong. *See Williams*, 134 Nev. at 692, 429 P.3d at 308. For the second challenge, the State again offered a race-neutral explanation under prong two before the district court ruled on the first. This time, however, the district court summarily denied the challenge under the first prong. Accordingly, our focus will be the third prong for the first challenge, and prongs one and three for the second challenge. However, we take this opportunity to note that the district court should provide analysis for each prong in the *Batson*

inquiry. *Cooper v. State*, 134 Nev. 860, 864 n.4, 432 P.3d 202, 206 n.4 (2018) (observing that it is a best practice for the district courts to go through the entire *Batson* framework to create an adequate record on appeal, even if the court finds the challenger did not satisfy the first prong).

Prong One—Prima Facie Inference of Purposeful Discrimination

To meet step one, a challenger must make a prima facie (i.e. threshold) showing of discriminatory intent. *Id.* at 862, 432 P.3d at 204. This minimal threshold showing is not "onerous," and does not require prevailing on the merits. *See id.* at 862,432 P.3d at 205. However, a *Batson* challenger must do more than point out that a member of a protected class was struck; "something more is required." *Watson v. State*, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014) (internal quotation marks omitted).

One way to satisfy prong one is by demonstrating a pattern of discriminatory strikes. *Williams*, 134 Nev. at 690, 429 P.3d at 306. A prima facie pattern can be demonstrated by showing a significant percentage of the proponent's strikes were used against a cognizable group, which only made up a small fraction of the overall venire. *See Cooper*, 134 Nev. at 862-63, 432 P.3d at 205. For example, the State using "40 percent of its peremptory challenges (2 of 5) to remove 67 percent of the African Americans (2 of 3)" who made up "13.04 percent of the venire (3 of 23)" establishes a prima facie case of racial discrimination. *Id.* at 862, 432 P.3d at 205.

In this case, the State exercised two of its initial three peremptory strikes, or 66.7 percent, against prospective jurors 246 and 258, and Brown brought his first *Batson* challenge to these strikes. The figure here (2/3) is a similar figure to that in *Cooper* (2/5). The African-American venire composition here (15.63 percent) is also similar to that in *Cooper* (13.04 percent). For the second *Batson* challenge, the State used its eighth

peremptory strike against juror 660, bringing the tally of African-American veniremembers struck using peremptories to three out of eight. So 37.5% of the State's peremptories up to that point were used to strike 60 percent of the total number of African Americans, who made up 15.63 percent of the venire. These figures are substantially similar to those in *Cooper*, which was sufficient to meet step one. Therefore, we conclude that the district court clearly erred as to step one for each *Batson* challenge. A pattern of strikes may be demonstrated by showing that a significant fraction of prospective jurors from a cognizable group are struck, especially where, as here, they make up a small portion of the venire, and only a threshold showing is necessary. *See Cooper*, 134 Nev. at 862, 432 P.3d at 205.

Additionally, for each challenge, the State offered its reasons for the strikes under the second prong before the district court made any ruling on the first prong. The district court correctly noted for the first challenge involving jurors 246 and 258 that the first step was moot because the State proffered race-neutral reasons before the district court ruled. However, the district court did not properly address the first prong for the second *Batson* challenge to the strike of juror 660. Similar to the first challenge, the State gave a race-neutral reason *before* the district court ruled under the first prong. This should have resulted in a finding that the first prong was moot. *See Kaczmarek*, 120 Nev. at 332, 91 P.3d at 29; *Williams*, 134 Nev. at 690-91, 429 P.3d at 306-07 ("Where, as here, the State provides a race-neutral reason for the exclusion of a veniremember before a determination at step one, the step-one analysis becomes moot and we move to step two."). Therefore, this step is satisfied by default for each challenge.

Erroneous denial at step one generally mandates reversal. *See Cooper*, 134 Nev. at 865, 432 P.3d at 207. However, the State was able to give its race-neutral reasons for the strikes in each challenge. Therefore, we review steps two and three for each challenge. *See generally id.* at 864, 432 P.3d at 206 (explaining that the appellate court may not review a *Batson* inquiry "when a *Batson* objection is erroneously rejected at step one and the record does not clearly reflect the State's reasons for its peremptory strikes . . . .").

To conclude, the district court erred in its determinations under the first prong for each challenge. For the first challenge of jurors 246 and 258, the district court did not credit that Brown had made a prima facie showing of a pattern of discrimination. However, the court correctly noted that this step was moot because the State offered its prong-two reasons for the strike before there was any ruling on the first prong. For the second challenge of juror 660, the district court, again, erroneously denied Brown's prima facie showing of a pattern of discriminatory strikes. The State again offered its prong-two reasons before the district court made any prong-one findings. This time, however, the district court did not correctly treat the first step as moot because the court ruled that Brown did not meet prong one, despite being mooted by the State's race-neutral explanation under the second prong, which was improper. We therefore review the second and third prongs for each challenge.

Prong Two—Race-Neutral Explanation

A satisfactory race-neutral explanation for the strike "does not demand an explanation that is persuasive, or even plausible." *Kaczmarek*, 120 Nev. at 333, 91 P.3d at 29 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). The reason need only be facially neutral. *McCarty v. State*, 132 Nev. 218, 226, 371 P.3d 1002, 1007 (2016).

With regard to the first challenge, the State noted to the district court that prospective juror 258 was emotional and unsure if she could be impartial towards law enforcement due to her extensive history and her situation with her fiancé. For juror 246, the State noted to the district court that this juror hesitated when asked if he could sit as a juror to decide Brown's fate and his negative history with law enforcement. And for the second challenge, the State provided that juror 660 was rambling in his answers to questions and had twice been fired for getting high on the job. These reasons appear facially race-neutral. They do not incorporate the race of either juror or any other cognizable trait. As such, we conclude that the State offered race-neutral reasons for each challenge and Brown does not contest the district court's conclusion as to this prong on appeal.

Prong Three—Race-Neutral Explanation Pretext for Purposeful Discrimination

Under the third prong, the *Batson* challenger "bears a heavy burden" and must demonstrate "that the State's facially race-neutral explanation is pretext for discrimination." *McCarty*, 132 Nev. at 226, 371 P.3d at 1007. This burden requires the challenger to provide "some analysis of the relevant considerations . . . sufficient to demonstrate that it is more likely than not that the [proponent] engaged in purposeful discrimination." *Id.*

"The district court . . . plays an important role during step three" because it must "undertake a sensitive inquiry into such circumstantial and direct evidence of intent . . . and 'consider *all relevant circumstances*' before ruling . . . ." *Id.* at 227, 371 P.3d at 1008 (emphasis added) (quoting *Batson*, 476 U.S. at 93). Because of the critical nature of prong three, the Nevada Supreme Court has "repeatedly implored district courts to . . . *clearly spell out their reasoning and determinations*."

Williams, 134 Nev. at 689, 429 P.3d at 306 (emphasis added). Without findings under step three, this court will not defer to the district court's *Batson* determination. *Matthews*, 136 Nev. at 345, 466 P.3d at 1260 ("[T]he district court's failure to articulate its reasoning . . . makes it impossible for us to give its decision deference.").[7]

Part of the sensitive inquiry includes "giving the defendant the opportunity to challenge the State's proffered race-neutral explanation as pretextual." *Williams*, 134 Nev. at 692, 429 P.3d at 308 (citations omitted); *Matthews*, 136 Nev. at 345, 466 P.3d at 1259. Without argument from the *Batson* challenger, there is an aura of judicial bias permeating the *Batson* inquiry. *Williams*, 134 Nev. at 692, 429 P.3d at 308. After argument, the district court must clearly spell out its findings, because without clearly explained findings "[i]t is almost impossible for this court to determine if the reason for the peremptory challenge is pretextual . . . ." *Hawkins v. State*, 127 Nev. 575, 579, 256 P.3d 965, 968 (2011). It is legal error to

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[7]The Nevada Supreme Court delineated a non-exhaustive list of factors for district courts to consider to aid in this sensitive inquiry:

> (1) the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained in the venire, (2) the disparate questioning by the prosecutors of struck jurors and those jurors of another race or ethnicity who remained in the venire, (3) the prosecutors' use of the "jury shuffle," and (4) "evidence of historical discrimination against minorities in jury selection by the district attorney's office."

Williams, 134 Nev. at 692, 429 P.3d at 307 (quoting *McCarty*, 132 Nev. at 226-27, 371 P.3d at 1007-08).

conflate "*Batson*'s second and third steps into one . . . ." *Purkett*, 514 U.S. at 768.

In *Williams*, the district court immediately denied a *Batson* challenge after the State offered a race-neutral explanation without engaging in the sensitive inquiry required under prong three. 134 Nev. at 692, 429 P.3d at 307-08. Even after the challenger requested the district court to address the third step, it merely provided, "I don't find the State based it on race." *Id.* at 693, 429 P.3d at 308. The *Williams* court noted that the *Batson* challenger should not have to request the district court to address prong three. *Id.*

Similarly, in *Matthews*, the Nevada Supreme Court reversed a judgment of conviction for failure to provide adequate findings under the third prong of *Batson* after summarily denying a challenge at step two. 136 Nev. at 349, 466 P.3d at 1262. However, the parties in *Matthews* were given opportunity to argue under the third step, so the Nevada Supreme Court could engage in a review of prong three as to the non-demeanor portion of the record. *See id.* at 346, 466 P.3d at 1260.

To reiterate, the onus is on the district court to conduct a proper *Batson* inquiry. This includes delineating clear findings after the challenger is given an opportunity to argue that the proponent's reason is pretext.

Here, the district court failed to conduct a "sensitive inquiry" under *Batson*'s third prong for either of Brown's challenges. The district court did not spell out its findings under the third prong as to pretext or the validity of Brown's claims of purposeful discrimination. It did not hear argument from Brown after the State offered its race-neutral reasons. The third step in *Batson* is meant to provide the challenger an opportunity to

rebut the State's race-neutral reasons as pretext. *See Williams*, 134 Nev. at 692, 429 P.3d at 308. Failure to do so violates *Williams* and *Matthews*. Without further argument from Brown, addressing his challenge under the third prong is tenuous, if not "almost impossible . . . ." *Hawkins*, 127 Nev. at 579, 256 P.3d at 968; *Matthews*, 136 Nev. at 346, 466 P.3d at 1260. As the Nevada Supreme Court pointed out in *Williams*, the onus is on the district court to conduct a proper *Batson* inquiry, especially at the third step. 134 Nev. at 692, 429 P.3d at 308 (noting that the parties should not be forced to "ask the district court to conduct step three of the *Batson* analysis"; rather, it is the district court that must provide "the defendant the opportunity to challenge the State's proffered race-neutral explanation as pretextual").

The district court summarily denied Brown's first *Batson* challenge at step two, and erroneously denied his second *Batson* challenge as to step one; therefore, Brown was not given a meaningful opportunity to meet his burden. Other jurisdictions treat this as a denial of due process. *See United States v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987) (explaining that it is a denial of due process where the trial court fails to permit a defendant to respond to the State's race-neutral reasons under the third prong of *Batson*). The district court's determinations are therefore clearly erroneous.

The importance in following *Batson* cannot be understated. The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. *Batson*, 476 U.S. at 87. "Discriminatory jury selection is particularly concerning in capital cases where," as here, "each juror has the power to decide whether the defendant is deserving of the ultimate penalty, death."

McCarty, 132 Nev. at 224-25, 371 P.3d at 1006. Due to the unique harm that manifests from an erroneously denied *Batson* challenge, a violation of *Batson* is structural error. *Rivera v. Illinois*, 556 U.S. 148, 160 (2009); *see also Diomampo*, 124 Nev. at 423, 185 P.3d at 1037 ("Discriminatory jury selection in violation of *Batson* generally constitutes 'structural' error that mandates reversal.").

Remedy

Even though a violation of *Batson* is structural error, there is no clearly defined appellate remedy for a *Batson* violation. Although the Nevada Supreme Court generally reverses and remands for a new trial after determining a *Batson* challenge was erroneously denied, this is not the sole remedy available.

In *Libby v. State*, the Nevada Supreme Court determined that the district court erred in denying a defendant's *Batson* challenge at the first step because he made a legally-sufficient, prima facie threshold showing of gender discrimination. 113 Nev. 251, 255, 934 P.2d 220, 223 (1997). There, the *Libby* court was confronted with the question of whether a new trial or retrospective *Batson* hearing was appropriate on remand, where the State had not yet offered a race-neutral reason and there was no inquiry under the third prong. *Id.* at 258, 934 P.2d at 224. The *Libby* court noted that "the lapse of time may present more difficulties than the usual *Batson* hearing," but remanded for an evidentiary hearing so long as the district court deemed it feasible. *Id.* If the passage of time made a retrospective *Batson* hearing impossible, then the district court was instructed to "vacate defendant's convictions and schedule a new trial." *Id.* On appeal for the second time, the Nevada Supreme Court reiterated that the retrospective *Batson* hearing was not meaningless because the district court deemed it feasible, even though eight years had passed since the

original trial and the retrospective hearing. *Libby*, 115 Nev. 45, 56, 975 P.2d 833, 840 (1999) (*Libby II*); *see also Goad v. State*, 137 Nev., Adv. Op. 17, 488 P.3d 646, 661 (Ct. App. 2021) (remanding for a retrospective competency hearing if feasible).

Other jurisdictions have used retrospective hearings as a *Batson* remedy. In *People v. Johnson*, the California Supreme Court noted that while it was "unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons," it was possible to hold a retrospective hearing on prongs two and three almost eight years later because "the court and parties have the jury questionnaires and a verbatim transcript of the jury selection proceeding to help refresh their recollection." *People v. Johnson*, 136 P.3d 804, 806-07 (Cal. 2006). Similarly, the Ninth Circuit ordered a retrospective hearing for an erroneous denial at the second prong. *United States v. Thompson*, 827 F.2d 1254, 1262 (9th Cir. 1987) (remanding for a post-trial *Batson* hearing for prongs two and three). The Ninth Circuit held that it is a due process violation to deny a *Batson* challenge at the second step without giving a defendant an opportunity to be heard under the third. *Id.* at 1256. So as a proper way to ensure that the defendant received all process that he was due, the Ninth Circuit ordered a retrospective *Batson* hearing.

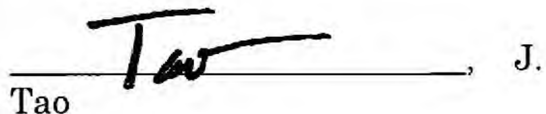
Additionally, "[r]emanding a case for the district court to make a determination on a specific issue is not a novel practice for a Nevada reviewing court." *Goad*, 137 Nev., Adv. Op. 17, 488 P.3d at 662 n.21 (citing *Harvey v. State*, 136 Nev., Adv. Op. 61, 473 P.3d 1015, 1019 (2020)). Such practice is not uncommon to remedy errors with respect to post-trial

motions and sentencing. *See Harvey*, 136 Nev., Adv. Op. 61, 473 P.3d at 1019; *Echeverria v. State*, 119 Nev. 41, 44, 62 P.3d 743, 745-46 (2003).

We thus conclude that the appropriate remedy in this case is a retrospective *Batson* hearing. Similar to *Johnson*, the parties and the district court will have the benefit of jury questionnaires and a verbatim transcript and recording of the jury selection proceeding to know exactly what was said. *See* 136 P.3d at 806-07. Additionally, because this case was tried in January 2020, minimal time has elapsed since trial and therefore, such a hearing is feasible. Accordingly, we

ORDER the judgment of conviction VACATED AND REMAND this matter to the district court for a retrospective *Batson* hearing, and if the district court concludes that Brown has proven that the State's proffered reasons for any of the three strikes was pretext, the district court shall order a new trial; otherwise the judgment of conviction is reinstated.[8]

______________________, C.J.
Gibbons


______________________, J.
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[8]Given our disposition, we do not reach the merits of Brown's remaining contentions.

cc: Hon. Michelle Leavitt, District Judge
Hofland & Tomsheck
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk