IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VICTOR DAWAINE MCCOY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83158-COA

FILED

JUL 21 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

Victor Dawaine McCoy appeals from a judgment of conviction, pursuant to a jury verdict, of four counts of attempt murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.

McCoy drove past a group of individuals standing outside of an apartment complex, doubled back, exited his car, and fired at least nine rounds into the group.[1] He then got back into his car, sped up, and drove away. Police arrived minutes later and did not locate any injured individuals. McCoy was eventually apprehended and charged with four counts of attempt murder with use of a deadly weapon and two counts of discharging firearm at or into occupied structure, vehicle, aircraft, or watercraft. Following a three-day jury trial, the jury convicted McCoy of four counts of attempt murder with use of a deadly weapon and found him not guilty of the two counts of discharging firearm at or into occupied structure, vehicle, aircraft, or watercraft.

On appeal, McCoy argues that (1) the district court erred by denying his *Batson*[2] challenge to the State's use of a peremptory strike of a

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

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

potential juror, and (2) the district court abused its discretion during the settling of jury instructions by overruling his objection to the flight instruction.

We first address McCoy's *Batson* argument. During voir dire, potential Juror 102 informed the district court that she committed misdemeanor petty theft in California but was convicted of a felony because of her prior offenses.[3] She also told the district court that she believed her case was handled correctly, that nothing about her case would prevent her from being fair to both sides, and that she had no feelings toward the criminal justice system. Juror 102 was the only person convicted of a felony on the venire, and both McCoy and the State passed potential Juror 102 for cause. The State exercised a peremptory strike to remove Juror 102. McCoy raised a *Batson* challenge, noting that Juror 102 is African American, as is McCoy. The district court found that McCoy made a prima facie case of discrimination and requested the State to provide a race-neutral reason.

The State explained that Juror 102 was the only potential juror convicted of a felony and noted that Juror 102's misdemeanor charge rose to the level of a felony because she had prior convictions. Thus, the State commented that, in addition to being a convicted felon, Juror 102 had been prosecuted on more than one occasion. The State also noted that it did not challenge Juror 102 for cause because it would be required to make a showing of prejudice in light of the district court's earlier statements, and that all potential jurors were passed for cause, so Juror 102 was not uniquely situated in that sense.

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[3]The district court determined that Juror 102 was eligible to serve on a jury despite her felony conviction. This determination may have been in error. *See* NRS 6.010.

Immediately after the State offered its race-neutral explanation, and without argument from McCoy that the State's proffered race-neutral reason was pretextual, the district court found that McCoy did not prove purposeful discrimination. The district court highlighted that the State did not engage in a pattern of striking African Americans and found it significant that Juror 102 was the only potential juror convicted of a crime and that she had been prosecuted on more than one occasion. Thus, the district court denied McCoy's *Batson* challenge.

On appeal, McCoy argues that the district court clearly erred in denying his *Batson* challenge because the State's race-neutral reason relied solely on the fact that Juror 102 had been convicted of a felony and that once the State passed Juror 102 for cause, the State's basis for striking Juror 102 could only be pretextual. Further, McCoy highlights that Juror 102 indicated that she could be fair to both parties.

We review a district court's *Batson* determination for clear error. *Williams v. State*, 134 Nev. 687, 689, 429 P.3d 301, 306 (2018). *Batson* 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).[4]

Under prong two, a satisfactory race-neutral explanation for the strike "does not demand an explanation that is persuasive, or even plausible." *Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) (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). Here, the State noted to the district court that Juror 102 was the only juror personally accused of a crime and, because Juror 102 was convicted of a felony based upon multiple offenses, she was the only juror that had been prosecuted on more than one occasion. Thus, we conclude that the district court properly found that the State offered race-neutral reasons for its challenge.

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." *Id.* 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.*

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[4]We decline to address prong one because the State failed to make any argument or cite any authority to support the proposition that the district court erred on prong one or that McCoy's arguments before the district court failed to show a prima facie case of discriminatory intent. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding contentions not supported by relevant authority and cogent argument need not be addressed by this court). Thus, we address only prongs two and three.

at 227, 371 P.3d at 1008 (emphasis added) (quoting *Batson*, 476 U.S. at 93, 96 (internal quotation marks omitted)). 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; *Matthews v. State*, 136 Nev. 343, 345, 466 P.3d 1255, 1259-60 (2020). 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.[5]

Here, the district court made findings that the strike was race-neutral and not pretextual because several circumstances supported the State's explanation. Namely, the juror had a prior felony conviction and multiple prosecutions and interactions with the criminal justice system. Further, that no other jurors had been convicted of a crime. Finally, the court noted that the State did not engage in a pattern of striking African Americans. Thus, the district court essentially complied with the supreme court's directive in *Williams*, 134 Nev. at 689, 429 P.3d at 306, to clearly spell out its reasoning and determinations under the third prong of *Batson* as to why the challenge was race-neutral and not pretextual. The record supports these findings.

Next, we address McCoy's challenge to the flight instruction. When resolving jury instructions, McCoy objected to the flight instruction,

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[5]We note that it appears the district court erred in not giving McCoy a meaningful opportunity to respond to the State's race-neutral reason under the third prong of *Batson*. Nevertheless, we do not reach this issue because McCoy did not object before the district court and did not argue this point on appeal. Even if we did address this issue, it would be reviewed for plain error, and McCoy did not attempt to satisfy the plain-error standard of review. *See Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (noting that an appellant bears the burden of demonstrating that he or she was prejudiced by the plain error).

arguing that there was no flight in this case because the individual in the surveillance video "fired a few shots, got back in the car[,] and drove away." However, the district court, after watching the surveillance video that the State played for the jury, noted that it showed that the vehicle "sped up" and "that it is commonsensical that even someone having heard shots or having seen shots would've been calling the police and that the individual would be leaving the scene to avoid apprehension by the officers or by police coming out." Thus, the district court ruled that the flight instruction would be given.

On appeal, McCoy argues that there was no flight in this case because the evidence shows only "mere leaving" and not flight and that the district court erred in giving the flight instruction because of concern that the jury would infer guilt based on alleged evidence of flight.[6]

We review a district court's decision to give a jury instruction "for an abuse of discretion or judicial error." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* "[A] district court may properly give a flight instruction if

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[6]The flight instruction provides the following:

> The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence. Before considering flight, however, you must be convinced that the defendant was the person who fled the scene of the crime.
>
> The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstance is entitled is a matter for the jury to determine.

the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest." *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). "Flight instructions are valid only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." *Jackson*, 117 Nev. at 121, 17 P.3d at 1001. Because flight instructions are potentially prejudicial, "this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." *Weber v. State*, 121 Nev. 554, 582, 119 P.3d 107, 126 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017).

Here, the State presented evidence that McCoy sped away in his vehicle immediately after he shot at the group of individuals. Additionally, the State presented evidence that police arrived at the scene minutes after the shooting. Thus, some evidence supports at least an inference that McCoy was not merely "going away" or leaving but rather was fleeing the scene. Therefore, we conclude that the district court did not abuse its discretion in giving the flight instruction.

Nevertheless, even if the district court did err in issuing the flight instruction, the error was harmless. First, the jury instruction was self-curing, as it stated, "[t]he flight of a person after the commission of a crime is *not sufficient* in itself to *establish guilt*," and "[t]he weight to which such circumstance is entitled is a *matter for the jury to determine*." (Emphases added.) Thus, the jury instruction simply informed the jurors that flight may be considered when assessing guilt. Second, McCoy does not explain how the averred error resulted in prejudice. *See Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (explaining that nonconstitutional error is harmless unless it had a substantial and injurious

effect on the jury's verdict), *holding modified on other grounds by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). Additionally, any such possible error was harmless as there was overwhelming evidence to support McCoy's guilt, as demonstrated by the detective positively identifying McCoy as the shooter. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., concurring:

I concur in the judgment.

_____, J.
Tao

cc: Hon. Jasmin D. Lilly-Spells, District Judge
Law Office of Michael H. Schwarz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk