IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS DIAZ, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83984-COA

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

Nicholas Diaz, Jr., appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit oppression under the color of office and oppression under the color of office. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Diaz was employed with the Las Vegas Metropolitan Police Department as a corrections officer at Clark County Detention Center.[1] On February 21, 2020, Diaz was assigned to the seventh-floor unit for the 6:00 p.m. to 6:00 a.m. shift. Tywan Howell, the inmate who was identified as the victim in the proceedings below, was held in the unit to which Diaz was assigned. At approximately 3:00 a.m. or 4:00 a.m. on February 21, Howell woke up frustrated that he was still in custody because he was under the impression that he was supposed to have been released the day before. Howell began to yell, kick the cell door, and eventually pressed the emergency button located inside his cell. Diaz went to Howell's cell window to check on the emergency call and Diaz was allegedly unresponsive to Howell's requests for release. Diaz returned to the operations desk.

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

At the desk, Diaz called another corrections officer who was assigned to the second-floor unit. Shortly thereafter, the officer came up to the seventh floor to join Diaz. Diaz and the other officer entered Howell's cell. They closed the door behind them, but not fully to avoid locking themselves inside. Then, Diaz and the other officer twisted Howell's arm, pushed him to the floor, and kicked him. Following the incident, Diaz allegedly ignored Howell's request to file a grievance and see a nurse. After the officers had changed shifts and Howell had returned from a scheduled court appearance, Howell saw a nurse and spoke with one of the sergeants. Later, a detective questioned Howell and arranged for him to be taken to the hospital to be evaluated, and pictures were taken of his injures. The extent of Howell's injuries was contested at trial, but at a minimum, Howell sustained a knot or bump on his forehead.

Diaz and the other officer, his co-defendant, were both charged in the Las Vegas Justice Court with (1) battery-misdemeanor, (2) conspiracy to commit oppression under the color of office-gross misdemeanor, and (3) oppression under the color of office-felony.[2] Diaz was not held in custody and was released on bail with electronic monitoring and ordered not to have contact with the victim. Subsequently, on July 22, 2020, Diaz and his co-defendant were bound over to the Eighth Judicial District Court on two of

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[2]We note that Diaz was charged along with his co-defendant, and they were tried together. It appears that at trial there was some overlap in the presentation of their respective defenses, or some coordination in the presentation of their cases. We note that the State does not challenge any of Diaz's arguments on appeal based on waiver, except for the alleged charging error in the criminal information that was not raised by his co-defendant. For purposes of this order, unless otherwise indicated, we refer to Diaz individually instead of to the defense in general, even though at times they acted jointly.

the charges, conspiracy to commit oppression under the color of office and oppression under the color of office.[3] The criminal information charged Diaz with both offenses. Under the charge for oppression under the color of office, the criminal information provided three theories of liability: 1) directly committing the crime, and/or (2) aiding or abetting in the commission of this crime, and/or (3) conspiracy to commit the crime. Diaz did not object in the proceeding below to the sufficiency of the criminal information.

Diaz had his initial arraignment on July 31, 2020, wherein he pleaded not guilty and invoked his right to trial within 60 days under NRS 178.556. The district court set the trial for October 12, 2020. Although the trial setting was past 60 days for a speedy trial, Diaz agreed to a one-time extension of the 60 days so that the court could set the trial for the earliest available date. Later, despite the parties and court being ready to proceed in October and subsequent dates, the court rescheduled the trial five times due to the COVID-19 pandemic restrictions imposed by the Eighth Judicial District Court.[4] The record reflects that Diaz eventually objected to the fact that the trial was not within 60 days. Trial commenced on July 26, 2021, less than a year after Diaz's initial arraignment.

On the morning of the first day of trial, the State disclosed 31 photographs of the victim's alleged injuries. Diaz moved to exclude the

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[3]Diaz was scheduled for a bench trial on April 27, 2022, on his battery charge in the Las Vegas Justice Court. The record does not provide an outcome of the trial and this charge is not before us on appeal.

[4]The district court cited to Eighth Judicial District Court Administrative Order 20-24 as the basis for the delay, which states, in relevant part: "By way of AO 20-23, jury trials currently scheduled to begin prior to November 30, 2020, were continued. All District Court jury trials, including short jury trials, remain continued through January 11, 2021."

photographs as they were untimely disclosed on the day of trial, or in the alternative, a continuance for him to seek an expert to opine on the injuries allegedly depicted in the photographs. Diaz agreed that the State did not violate any discovery agreement or request, or act in bad faith for the untimely disclosure, and acknowledged that 3 or 4 of the 31 photographs were likely relevant to the victim's injuries.[5] The district court admitted three photographs because the parties were on notice of Howell's alleged injuries from the police report that was disclosed to both parties, and the injuries described therein were consistent with the three photographs.

After considering and resolving other pretrial matters, jury selection commenced. Diaz's counsel conducted voir dire on behalf of the co-defendants.[6] During voir dire, defense counsel did not inquire about race until examining prospective juror number 58. Defense counsel asked prospective juror number 58 whether her shared race with the victim would affect her ability to render a verdict:

> Mr. Becker: So can we agree . . . that race, background, ethnicity should not play a role in how we dispense justice in a courtroom, is that fair to say?
>
> Prospective juror no. 58: Yeah. That is very fair to say.

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[5]The State explained that it discovered the photographs the day before trial, and upon discovering them, it contacted defense counsel. The delay was caused by the fact that the photographs were saved under a different event number to maintain confidentiality since the Internal Affairs Bureau was involved. And although the photographs were referenced in the initial police report, they were not included with the report.

[6]Thus, we refer to defense counsel where appropriate. We note that Diaz's co-defendant's counsel waived voir dire and passed for cause because Diaz's counsel had covered it.

> Mr. Becker: Okay. There's an interesting part of the dynamic here and that the accuser is an African American male. . . . And the defendants are Latino, right?
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> Prospective juror no. 58: Okay.
>
> Mr. Becker: Can we agree that the fact that there's an African American and/or Latinos involved, that race and ethnicity should not play a role in rendering a verdict.
>
> Prospective juror no. 58: Yeah. I can agree with that. Yeah.
>
> Mr. Becker: Okay. Thank you very much. And that you would not let it?
>
> Prospective juror no. 58: No, I wouldn't.

At the close of voir dire, Diaz exercised his peremptory challenges on prospective juror number 49 and then prospective juror number 58.[7] Although the record is unclear as to the overall composition of the jury, the State raised a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge, pointing out that two prospective jurors on which Diaz exercised two of his peremptory challenges were African American females, and by striking them, there is a prima facie showing that the peremptory challenges had been made on the basis of race. Diaz, applying step two of *Batson*, argued that both the prospective jurors' employment in regulatory compliance was similar to that of the detective that investigated Howell's grievances, which would cause them to give more weight to the detective's testimony during trial. Diaz also cited to the prospective jurors' responses to questions during voir dire, which demonstrated an implicit bias towards the State's

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[7]The district court permitted each party to exercise four peremptory challenges. Diaz and his co-defendant jointly exercised their peremptory challenges.

presentation of its case. In addressing Diaz's race-neutral explanation under step three of *Batson*, the State disagreed, arguing that the prospective jurors were employed in regulatory compliance, not internal criminal investigation, and that Diaz's race-related questions were directed almost exclusively at prospective juror number 58.

The district court ultimately sustained the State's *Batson* objection under step three. In considering the three-step *Batson* analysis, the district court found that the State made a prima facie showing that the peremptory challenges were based on race and that Diaz provided race-neutral explanations for his challenges. Under the third step, the district court determined that the State proved that Diaz's peremptory strikes were pretext for racial discrimination.

Following jury selection, trial commenced. The State called on the victim, who testified as to the incident, the injury he sustained to his forehead, and identified Diaz as the perpetrator in open court. Then, the State called on four additional witnesses: Devonte Thames, Officer Donnell Jones, Sergeant Daniel Holm, and Detective Danny Tapia. Thames and Jones testified that they saw Diaz enter the victim's cell. Sergeant Holm testified that video surveillance confirmed that Diaz entered the cell and that he observed a knot on the victim's forehead when he spoke to him. Finally, Detective Tapia testified that he observed a circular ball on the victim's forehead. Diaz called the doctor who treated Howell, who had to read his medical notes into the record because he could not remember treating the victim. Diaz did not testify. At the close of the presentation of cases, the parties convened to discuss the jury instructions. Diaz disputed jury instruction number 13, which provided the definition of "malice" pursuant to NRS 193.0175. Diaz argued that the definition

unconstitutionally shifted the burden of proof because he would have to proffer an explanation to rebut any inference of malice. The district court admitted the instruction on the basis that the definition was an accurate statement of the law and that it had never been overruled by any case addressing NRS 193.0175. The jury was also provided with jury instruction number 5, which articulated that the State bears the burden of proof, and that the defendant is presumed innocent until the contrary is proven.

At the end of its deliberation, the jury found Diaz guilty of conspiracy to commit oppression under the color of office (count one) and guilty of oppression under color of office (count two). As to count one, the court sentenced Diaz to one year at the Clark County Detention Center, with a suspended sentence, and placed him on probation for a period not to exceed one year. As to count two, the district court sentenced Diaz to a maximum of 3 years and minimum 1 year in the Nevada Department of Corrections, with a suspended sentence, and placed him on probation not to exceed 2 years, with the sentence and probationary term to run concurrently to count one's sentence and probationary term.

On appeal, Diaz presents this court with six arguments: (1) his right to a speedy trial was violated, (2) the district court abused its discretion in admitting the late disclosure of the three photographs, (3) the district court erred in sustaining the State's *Batson* challenge, (4) the district court abused its discretion in permitting the jury instruction defining "malice" and "maliciously," (5) that there was charging error in the criminal information because there are multiple theories of liability that the jury could have relied on to convict him, and (6) that these errors cumulate to undermine the conviction.

The district court did not violate Diaz's right to a speedy trial

Diaz argues that his constitutional right to a speedy trial was violated under the factors in *Barker v. Wingo*, 407 U.S. 514 (1972).[8] "In evaluating whether a defendant's Sixth Amendment right to a speedy trial has been violated, this court gives deference to the district court's factual findings and reviews them for clear error, but reviews the court's legal conclusions de novo." *State v. Inzunza*, 135 Nev. 513, 516, 454 P.3d 727, 730-31 (2019). Constitutional challenges are reviewed de novo. *Rico v. Rodriguez*, 121 Nev. 695, 702, 120 P.3d 812, 817 (2005).

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." *Inzunza*, 135 Nev. at 516, 454 P.3d at 731 (quoting U.S. Const. amend. VI). The United States Supreme Court established a four-part balancing test for evaluating a claimed constitutional speedy trial violation in *Barker*, 407 U.S. at 530-33, which was later clarified in *Doggett v. United States*, 505 U.S. 647, 651-54 (1992). The district court must weigh four factors when determining if there is a constitutional violation: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Inzunza*, 135 Nev. at 516, 454 P.3d at 731 (citing *Barker*, 407 U.S. at 530). However, these are not "hard and fast rule[s]" to apply, and each case must be decided on its

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[8]On appeal, Diaz only raises the argument that his constitutional right to a speedy trial was violated. Diaz did not raise a statutory speedy trial violation under NRS 178.556. Even if he had, Diaz did not move the district court to dismiss his criminal information for the violation. Thus, we only address Diaz's argument that his constitutional right to a speedy trial was violated. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (stating we address the issues the parties present).

own facts. *Id.* (alteration in original) (citing *United States v. Clark*, 83 P.3d 1350, 1354 (11th Cir. 1996)). Additionally, no one factor is determinative, but rather, they are "related factors which must be considered together with such other circumstances as may be relevant." *Id.* (quoting *United States v. Ferreira*, 665 F.3d 701, 705 (6th Cir. 2011)).

Since the record reflects that Diaz maintained his invoked speedy trial status, and eventually objected to the later trial continuances, and is now arguing a violation of the federal constitutional right to a speedy trial, we consider the *Barker-Doggett* factors in concluding that Diaz failed to demonstrate a speedy-trial violation requiring reversal.

Length of delay

First, to trigger a *Barker-Doggett* analysis, the length of delay must be presumptively prejudicial. *Inzunza*, 135 Nev. at 516, 454 P.3d at 731. "A post-accusation delay meets this standard 'as it approaches one year.'" *Id.* (quoting *Doggett*, 505 U.S. at 652 n.1). The length of delay beyond a year correlates with the degree of prejudice the defendant suffers. *Id.* at 517, 454 P.3d at 731.

Here, the trial was delayed by less than a year. Diaz was arraigned on July 31, 2020, and his trial began on July 26, 2021. Since the delay did not surpass a year, the delay is not presumptively prejudicial, and this factor does not weigh in Diaz's favor. *See id.* at 516, 454 P.3d at 731.

Reason for delay

The reason for delay is the focal inquiry in a speedy trial challenge and focuses on whether the government is responsible for the delay. *Id.* at 517, 454 P.3d at 731. The district court's finding on the reason for delay and its justification is reviewed with considerable deference. *Id.* at 517, 454 P.3d at 732. "[A] more neutral reason such as negligence or

overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* (quoting *Barker*, 407 U.S. at 531). The COVID-19 pandemic is a "neutral (and justifiable) reason" for delay. *Belcher v. State*, No. 82255, 2022 WL 1261300, at *5 (Nev. Apr. 27, 2022) (Order of Affirmance) (citing *Inzunza*, 135 Nev. at 517, 454 P.3d at 731-32 (looking to whether the State intentionally caused the delay)).[9]

Here, the district court's reason for delay was due to restrictions imposed on the courts for conducting jury trials during the COVID-19 pandemic. The district court cited to Eighth Judicial District Court Administrative Order 20-24 as the basis for the delay. Because the COVID-19 pandemic is a neutral and justifiable reason for the delay, and the district court's finding on the reason for delay is given much deference, this factor also does not weigh in favor of Diaz's claim. *See Belcher*, 2022 WL 1261300, at *5.

Assertion of the right

The third factor is whether the appellant asserted his right to a speedy trial. *Inzunza*, 135 Nev. at 518, 454 P.3d at 732; *see also Barker*, 407 U.S. at 531-32 (explaining that "[t]he defendant's assertion of his speedy

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[9]*See also United States v. Olsen*, 995 F.3d 683, 693 (9th Cir. 2021) (holding that a "global pandemic that has claimed more than half a million lives in this country . . . falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health"), *amended and superseded on denial of reh'g en banc*, 21 F.4th 1036 (2022); *United States v. Smith*, 460 F. Supp. 3d 981, 984 (E.D. Cal. 2020) ("Almost every court faced with the question of whether the general COVID-19 considerations justify an ends-of-justice continuance and exclusion of time [from speedy-trial considerations] has arrived at the same answer: yes.").

trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of his right"). It is not disputed here that this factor weighs in favor of Diaz because he invoked his speedy trial right and never waived it.

Prejudice to the defendant

Finally, the fourth factor considers the prejudice to the appellant. *Inzunza*, 135 Nev. at 518, 454 P.3d at 732. The district court should evaluate harms that the speedy-trial right is meant to protect against, the most important being "the possibility that the defense will be impaired." *Id.* (quoting *Barker*, 407 U.S. at 532 ("[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system."). "[I]mpairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can be rarely shown." *Id.* (quoting *Doggett*, 505 U.S. at 655); *see also Tiffany v. State*, No. 49817, 2010 WL 3270232, at *3 (Nev. Apr. 13, 2010) (Order of Affirmance) ("A defense is prejudicially impaired by a delay if defense witnesses are unable to recall accurately events of the distant past." (internal quotation marks omitted)). Thus, the prejudice factor may weigh in favor of defendants even if they failed to make an affirmative showing that the delay weakened their ability to elicit specific testimony. *Inzunza*, 135 Nev. at 519, 454 P.3d at 732. But failure to seek dismissal of the charges against them based on a speedy-trial violation weighs against a finding of prejudice. *Belcher*, 2022 WL 1261300, at *5.

We conclude that Diaz does not provide evidentiary proof how his defense was impaired or how he was prejudiced by the fact that the treating doctor could no longer remember treating the victim. *See Sheriff, Clark Cty. v. Berman*, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983) ("Bare

allegations of impairment of memory, witness unavailability, or anxiety, unsupported by affidavits or other offers of proof, do not demonstrate a reasonable possibility that the defense will be impaired at trial or that defendants have suffered other significant prejudice."). Even if this court were to impose a presumption of prejudice, the State argues that this presumption is rebutted by the fact that the doctor was able to read his notes into the record, on which he could be examined. *See Inzunza*, 135 Nev. at 519, 454 P.3d at 733; *see also Tiffany*, 2010 WL 3270232, at *3 (holding that the defendant was not prejudiced by a trial delay because she had available evidence to impeach witnesses for any inconsistencies in their testimony).

Based on all four factors, Diaz does not establish a speedy trial violation that would warrant reversal. The length of the delay was less than a year, the reason for delay (COVID-19 pandemic) was neutral and justifiable, and Diaz was not prejudiced by the delay. Therefore, Diaz failed to demonstrate a constitutional speedy-trial violation.

Diaz was not prejudiced by the disclosure of the three photographs

Next, Diaz argues that the district court abused its discretion in admitting 3 of the 31 photographs that the State disclosed on the first day of trial. "[A] district court's decision to admit or exclude evidence [is reviewed] for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (wiretapped phone call); *see also Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013) (prior-bad-act evidence); *Hawkins v. State*, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006) (hearsay).

NRS 174.235(1)(c) requires the State to allow inspection of "[b]ooks, papers, documents, tangible objects . . . which the prosecuting attorney intends to introduce during the case in chief." In addition, NRS 174.295(1) provides that the State has an ongoing obligation to promptly

notify the defendant about the existence of additional material encompassed by NRS 174.235. Further, "[t]he district court has broad discretion in fashioning a remedy under this statute; it does not abuse its discretion absent a showing that the State acted in bad faith or that the nondisclosure caused substantial prejudice to the defendant which was not alleviated by the court's order." *Evans v. State*, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

Diaz did not assert that the State violated any discovery agreement or request. Further, he accepted that the State disclosed the photographs as soon as it learned of them, thus, he does not allege that the State acted in bad faith. And despite the unavoidably late disclosure of the photographs, the States maintains that no substantial prejudice resulted to Diaz because the district court only admitted three photographs, which showed Howell's injuries were consistent with the police report. Additionally, Diaz was not unfairly prejudiced by the evidence because he was on notice of the victim's alleged injuries and that photographs were taken of the victim because they were mentioned in the police report disclosed to him. We conclude that the district court did not abuse its discretion in admitting the three photographs. Furthermore, any error was harmless because there was eyewitness testimony on the victim's injuries independent of the photographs. *See Rowland v. State*, 118 Nev. 31, 43, 39 P.3d 114, 122 (2002) (concluding that an error in admitting a statement into evidence was "harmless because there was overwhelming evidence when the numerous eyewitness testimonies are considered"); *see also* NRS 47.040(1); *Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999)

(noting that an error is harmless if in absence of the error the outcome would have been the same).

The district court did not err in sustaining the State's Batson *challenge*

Diaz argues that the district court erred in sustaining the State's *Batson* challenge because the State did not meet its burden under prong three of the *Batson* three-step process. "Appellate review of a *Batson* challenge gives deference to [t]he trial court's decision on the ultimate question of discriminatory intent" and is reviewed for clear error. *Hawkins*, 127 Nev. at 577, 579, 256 P.3d at 966, 967 (alteration in original) (internal quotation marks omitted); *see also Williams*, 134 Nev. at 689, 429 P.3d at 306.

A district court must engage in a three-step analysis when considering a *Batson* challenge. *Williams*, 134 Nev. at 689, 429 P.3d at 305 (citing *Batson*, 476 U.S. at 93-100). First, the opponent of the peremptory strike "must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Id.* (internal quotation marks omitted). Second, if the showing has been made, the proponent of a peremptory strike must present a race-neutral explanation for the strike. *Id.* at 689, 429 P.3d at 306. Finally, the court should hear arguments and determine whether the opponent of the peremptory strike has proven purposeful discrimination. *Id.*

Under the third prong, the *Batson* challenger "bears a heavy burden" and must demonstrate "that the [proponent's] facially race-neutral explanation is pretext for discrimination." *McCarty v. State*, 132 Nev. 218, 226, 371 P.3d 1002, 1007 (2016). This burden requires the challenger to provide "some analysis of the relevant considerations . . . sufficient to

demonstrate that it is more likely than not 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, 96). 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 v. State*, 136 Nev. 343, 345, 466 P.3d 1255, 1260 (2020).

Part of the sensitive inquiry includes "giving the [*Batson* proponent] the opportunity to challenge the [*Batson* opponent's] proffered race-neutral explanation as pretextual." *Williams*, 134 Nev. at 692, 429 P.3d at 308; *Matthews*, 136 Nev. at 345, 466 P.3d at 1259. Without argument from the *Batson* proponent, there is a concern as to the fairness of 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*, 127 Nev. at 579, 256 P.3d at 968. It is legal error to reduce "*Batson*'s second and third steps into one." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

In this case, the State is the proponent of the *Batson* challenge, and Diaz is the opponent of the challenge, requesting that his preemptory challenges be upheld. For purposes of the *Batson* three-step analysis, the

State had to make a prima facie showing that a peremptory challenge was exercised on the basis of race, Diaz had to provide a race-neutral explanation, and finally, the district court would need to determine whether the State showed purposeful discrimination. At issue here is whether the State satisfied the third step of showing that Diaz's race-neutral explanation was a pretext for racial discrimination.

Under step three of *Batson*, the district court recognized that this case was sensitive to bias because the victim is African American and Diaz is Latino. Further, the court found that the demeanor of the two jurors did not support striking them, their employment was sufficiently different from that of the investigating detective, and juror number 58 neutrally and appropriately answered the questions related to race. Under *Morgan v. State*, 134 Nev. 200, 213, 416 P.3d 212, 225 (2018), the district court determined that there was a disproportionate effect of the peremptory strikes because defense counsel's nature of questioning and statements given caused disparate treatment and targeted potential African American jurors in a case that was already sensitive to bias. The district court concluded by stating that it "takes into account the totality of the circumstances, including but not limited to everything I've already said: the nature of the case here itself, the makeup—racial makeup of the parties; the racial makeup of the ven[i]re; and the questioning that 'potentially targeting' the questioning as identified by the State."

Diaz requested that the district court keep prospective juror number 58 but to strike prospective juror number 49, since the State did not object to the peremptory strikes until they reached prospective juror number 58. The court denied this request, finding that both prospective jurors were to be kept on the jury because the State could not have identified a pattern

of discriminatory intent until Diaz sought to strike prospective juror number 58. Diaz argued that the court's ruling would create a disproportionate effect on the jury since it would be comprised of three African Americans. Additionally, Diaz raised the argument that since he provided a race-neutral explanation under step two, the district court should not have even considered step three. The court disagreed and reiterated its decision under *Williams*, which required the court to weigh the race-neutral explanations given for each juror in step three.[10]

Finally, in weighing the totality of the circumstances against the race-neutral explanations provided by Diaz, the district court determined that Diaz's race-neutral explanations were not persuasive in light of the jurors' responses during voir dire, and therefore, the State's argument of purposeful discrimination prevailed. *See Conner v. State*, 130 Nev. 457, 466, 327 P.3d 503, 510 (2014) ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination."); *cf. Matthews*, 136 Nev. at 347, 466 P.3d at 1261 (finding that the State's explanation for the peremptory strike on a prospective juror was belied by the record because the juror's responses to questions did not support the State's assertions). Because the district court's decision on discriminatory intent is given deference, and the court properly applied the *Batson* three-step process, the district court did not err in sustaining the State's *Batson* objection. *See Hawkins*, 127 Nev. at 577, 256 P.3d at 966 ("Appellate review

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[10]Diaz's argument that the district court need not have considered step three in the *Batson* analysis when he had tendered a race-neutral explanation is not supported by *Williams*, which held that the district court needs to give the opponent of the peremptory strike the opportunity to challenge the proponent's proffered race-neutral explanation. *See Williams*, 134 Nev. at 692, 429 P.3d at 308.

of a *Batson* challenge gives deference to [t]he trial court's decision on the ultimate question of discriminatory intent." (alteration in original) (internal quotation marks omitted)).

The district court did not abuse its discretion in giving jury instruction number 13

Next, Diaz argues that the definition of "malice" in jury instruction number 13 unconstitutionally shifted the burden of proof. Whether an instruction correctly states the law is reviewed de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). When the jury was given an erroneous jury instruction, this court will not reverse the judgment of conviction if the error is harmless. *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). "An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent of the error." *Id.* (internal quotation marks omitted). Additionally, this court presumes that the jury follows the district court's orders and instructions. *Id.*

While Diaz contends that the malice instruction unconstitutionally shifted the burden of proof, reviewing the challenged instruction shows that it accurately reflects Nevada's statute for defining malice and does not shift the burden of proof. Jury instruction number 13 states the definition of malice as it is defined in NRS 193.0175:

> 'Malice' and 'maliciously' import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

Diaz does not cite to any relevant legal authority that supports that the instruction unconstitutionally shifts the burden of proof, so this court need

not consider the issue. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6 (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Even assuming jury instruction number 13 should not have been given because of Diaz's concern regarding shifting the burden of proof, the error was harmless beyond a reasonable doubt "in light of the other proper instructions provided to the jury, the jury's verdict as a whole, and the evidence in this case." *Collman v. State*, 116 Nev. 687, 712, 7 P.3d 426, 442 (2000). Here, the district court provided the jury with the correct burden of proof in instruction number 5.[11] Additionally, the victim identified Diaz as the perpetrator in open court and testified to his forehead injury. The State corroborated the victim's testimony with photographs of the injuries and the testimony from four witnesses. Therefore, the alleged error was harmless beyond a reasonable doubt in light of the proper instruction on the burden of proof, the strong evidence of guilt adduced at trial, and the jury's verdict.

The criminal information was sufficient to put Diaz on notice of the State's theories of liability, and we need not conduct a "plain error" review

Diaz further argues that there was a charging error in the criminal information. He argues that "the State mistakenly charged an improper gross misdemeanor theory of liability under [count two], undermining the felony conviction."

We initially point out that Diaz failed to object to the criminal information below. Typically, the failure to preserve an error, even an error

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[11]Jury instruction number 5 provides, in relevant part: "The [d]efendants are presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant(s) are the person(s) who committed the offense."

that has been deemed structural, forfeits the right to assert it on appeal. *Jeremias v. State*, 134 Nev. 46, 48, 412 P.3d 43, 50 (2018) (citing *United States v. Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in a criminal as well as civil cases by the failure to make timely assertion of the right . . . ." (internal quotation marks omitted))). But this court has the discretion under NRS 178.602 to address an error if the error was plain and affected the appellant's substantial rights. *See* NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

In this case, count one is the gross misdemeanor charge of conspiracy, for which Diaz was convicted and sentenced within the sentencing range for a gross misdemeanor. Count two, the felony charge, sets forth alternative theories of liability, including conspiracy. While it is correct that it is unclear under what theory the jury found Diaz liable under count two, he fails to demonstrate error and does not argue how this affected his substantial rights. We need not consider arguments not cogently presented. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6 (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority); *see* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Nevertheless, Diaz asks for a reversal, so we briefly address his argument.

A criminal information will not be set aside unless the accused can affirmatively demonstrate that the information is so insufficient that it "results in miscarriage of justice or actually prejudices him in respect to a

substantial right." *Laney v. State*, 86 Nev. 173, 177, 466 P.2d 666, 669 (1970). A verdict or plea cures mere technical defects in an information, unless it is apparent that the information has resulted in prejudice to the defendant. *Id.* at 178, 466 P.2d at 669. An information is sufficient, especially when its sufficiency is questioned for the first time on appeal, unless "it is so defective that by no construction, within the reasonable limits of the language used, can it be said to charge the offense for which the defendant was convicted." *Id.* at 178, 466 P.2d at 670. Further, an information is sufficiently clear to enable the defendants to prepare a defense when it makes specific reference to the entire statute under which the defendant was charged. *Id.* at 179, 466 P.2d at 670.

Additionally, NRS 173.075(2) provides that "[i]t may be alleged in a single count . . . that the defendant committed it by one or more specified means." "The accused must prepare a defense to all means by which it is alleged the crime was committed" and the State "need only prove one of the alternative means in order to sustain a conviction." *State v. Kirkpatrick*, 94 Nev. 628, 630, 584 P.2d 670, 671-72 (1978). A criminal information that charges the defendant under three theories of liability—directly committing the act, aiding and abetting the principal in committing the act, or conspired with the principal in committing the act—is permitted when there is evidence to support at least one of the theories. *Desai v. State*, 133 Nev. 339, 341 n.4, 398 P.3d 889, 892 n.4 (2017) ("Because we conclude that there was sufficient evidence to convict [the defendant] under an aiding and abetting theory of liability, we do not discuss the other two theories of liability.").

Here, the criminal information charged Diaz with conspiracy to commit oppression under the color of office under NRS 197.200 (count one);

and oppression under the color of office under NRS 197.200 (count two). Under the second count, the criminal information provided three theories of liability: (1) directly committing the crime; and/or (2) aiding or abetting in the commission of the crime; and/or (3) conspiracy to commit the crime. Because the information makes specific reference to the entire statute to which Diaz was charged under, details each theory of liability, and at least one is supported by substantial evidence, the jury properly found him guilty. *See Kirkpatrick*, 94 Nev. at 630, 584 P.2d at 671-72. To the extent that he argues that the gross misdemeanor conspiracy charge caused confusion with count two's alternative theories of liability, we conclude that the criminal information, under both counts, was sufficient to put Diaz on notice of the crimes he was charged with.

Having determined that there is no "error" and that Diaz's substantial rights were not affected, we find "plain error" review is unnecessary under NRS 178.602. *See Green*, 119 Nev. at 545, 80 P.3d at 95 ("Here, we conclude that the district court erred in its instructions to the jury regarding its consideration of the lesser-included offense. But we also conclude that the error did not affect Green's substantial rights. We therefore hold that this error did not constitute "plain error" under NRS 178.602 . . . ."). However as noted above, there was no error. *See generally Jeremias*, 134 Nev. at 48, 412 P.3d at 50.

The court need not address Diaz's cumulative error argument

Finally, Diaz claims that all the alleged errors raised in this appeal considered cumulatively rendered his trial and conviction unfair. Even where multiple errors are harmless individually, their cumulative effect may violate a defendant's right to a fair trial. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008); *see also United States v. Rivera*, 900

F.2d 1462, 1471 (10th Cir. 1990) ("[C]umulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Because we find no error in any of Diaz's claims, the doctrine of cumulative error is inapplicable in this case and does not warrant reversal. *See McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009) (holding that without meritorious claims of error, the doctrine of cumulative error will not apply).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Joseph Hardy, Jr., District Judge
Goodwin Law Group, PLLC
Las Vegas Defense Group, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk