

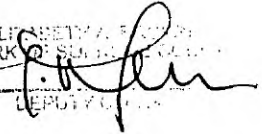
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFREY MICHAEL RICHARDS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83868-COA

FILED

NOV 03 2022

ELIZABETH A. SHERIDAN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

Jeffrey Michael Richards appeals from a judgment of conviction entered pursuant to a jury verdict of two counts of sexual assault of a vulnerable person. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Jury Selection

Richards argues the district court erred by denying four of his five *Batson*¹ challenges to the State's use of peremptory strikes to remove jurors from the venire.² Richards contends the State struck the four jurors due to race or sexual orientation and the district court failed to conduct an appropriate inquiry into his challenges.

The purpose of a *Batson* challenge is to ensure that the State does not violate the Equal Protection Clause of the United States Constitution when using peremptory challenges. *Id.* at 89. It is improper to exercise a peremptory challenge based upon a juror's race, *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008), or sexual orientation,

¹*Batson v. Kentucky*, 476 U.S. 79 (1986).

²The district court granted Richards' fifth challenge and did not allow the State to remove the juror.

Morgan v. State, 134 Nev. 200, 212, 416 P.3d 212, 224 (2018). In reviewing a *Batson* challenge, a trial court must engage in the following analysis:

(1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination.

Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). We review the district court's decision at the first step for clear error. *Cooper v. State*, 134 Nev. 860, 863, 432 P.3d 202, 205 (2019). In the third step, "[t]he district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a *Batson* objection." *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014) (internal quotation marks omitted). This court gives great deference to the trial court's decision on the ultimate question of discriminatory intent. *Diomampo*, 124 Nev. at 422-23, 185 P.3d at 1036-37 (2008).

First, the State struck juror Sanchez. Richards objected and contended that the strike was improper because it appeared that Sanchez was Hispanic and there appeared to be no reason other than her race for the State to strike her.

"[T]he mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under *Batson's* first step; something more is required." *Watson v. State*, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014) (internal quotation marks omitted). Recently, in *Barlow v. State*, Barlow objected to the State's exercise of four peremptory challenges to strike one African American and three Hispanic veniremembers. 138 Nev., Adv. Op. 25, 507 P.3d 1185, 1197 (2022). The district court denied

Barlow's *Batson* challenge. *Id.* The supreme court affirmed the district court, concluding that "[m]erely identifying minority veniremembers struck by the State does not meet the burden of showing an inference of discriminatory purpose" necessary to satisfy the first step of *Batson*. *Id.*

Here, the district court found Richards did not establish a prima facie case of discrimination because the juror's race, standing alone, was insufficient to establish a prima facie case of discrimination. In light of the circumstances in this matter, where Richards failed to demonstrate "something more"—an inference of a discriminatory purpose—the district court did not clearly err by concluding that Richards failed to demonstrate a prima facie case of discrimination, and Richards fails to demonstrate that he is entitled to relief.

Second, the State struck juror Skilling. Richards objected and contended that the strike was improper because it appeared that Skilling was a member of the "LGBTQ" community. Richards requested additional questioning of Skilling to ascertain her sexual orientation, which the district court denied.

The district court noted that it was improper to strike a juror due to the juror's sexual orientation but found that the juror had not identified herself as a member of the LGBTQ community on the record and that questioning of the juror concerning her sexual orientation would not have been appropriate. The district court noted that the subject matter of this case did not present an issue of consequence to the LGBTQ community. Moreover, the district court found Richards did not establish a prima facie case of discrimination because the juror's sexual orientation, standing alone, was insufficient to establish a prima facie case of discrimination. In light of the circumstances in this matter, the district court did not clearly err by concluding that Richards failed to establish a prima facie case of discrimination. *See Morgan*, 134 Nev. at 212-13, 416 P.3d at 225 (providing

examples of how an opponent of a strike may establish a prima facie case of discrimination based on sexual orientation). Therefore, Richards is not entitled to relief based on this claim.

Third, the State struck juror Iwuajoku. Richards objected and contended the strike was improper because Iwuajoku was an African American and there appeared to be a pattern of the State striking members of minority groups. The district court concluded that Richards had made a prima facie case of discrimination and requested the State to respond. The State answered that Iwuajoku stated in her juror questionnaire that she was not proficient in the English language and she offered during questioning that there was something that she did not understand. In addition, the State offered that Iwuajoku appeared nervous and uncomfortable being in the courtroom. The State also noted that she laughed when questioned as to whether a person driving a few miles over the speed limit was unlawful and that indicated to the State that she may have difficulties following the law as a juror. The district court found that the State provided race-neutral reasons for use of a peremptory strike on Iwuajoku.

The district court permitted Richards to reply to the State's reasons and ultimately concluded that he did not demonstrate purposeful discrimination. The district court stated that it also noticed Iwuajoku's nervousness and that her nervousness was more pronounced than others it had observed in a courtroom setting. In addition, the district court found that Iwuajoku was noticeably frustrated by the State's questioning concerning a person driving over the speed limit. We conclude the district court conducted a sensitive inquiry into Richards' challenge and Richards fails to demonstrate that the district court erred by concluding that he was not entitled to relief based on this *Batson* challenge.

Fourth, the State struck juror Hernandez-Lara. Richards objected and noted that Hernandez-Lara was also Hispanic. The district court concluded that Richards had made a prima facia case of discrimination and requested the State to respond. The State answered that it struck Hernandez-Lara because he had been the foreperson on a jury that considered a case which had similar charges to this matter and that jury had been unable to reach a verdict. The State also noted it was concerned that the jurors in this matter may be instructed differently than in the previous case in which Hernandez-Lara served as a juror. The district court found that the State provided race-neutral reasons for use of a peremptory strike on Hernandez-Lara. The district court permitted Richards to reply to the State's reasons, and Richards noted that Hernandez-Lara had asserted that he would be fair. The district court ultimately concluded that Richards did not demonstrate purposeful discrimination and Richards did not allege that the State's race-neutral explanation was merely pretext for discrimination. In light of the circumstances in this matter, we conclude the district court conducted a sensitive inquiry into Richards' challenge and Richards fails to demonstrate that the district court erred by concluding that Richards was not entitled to relief based on this *Batson* challenge.

Accordingly, we conclude that the record demonstrates the district court engaged in the proper analysis of Richards' *Batson* challenges and Richards fails to demonstrate that the district court erred by denying four of his challenges. Therefore, Richards is not entitled to relief based on these claims.

Richards appears to argue on appeal that the district court erred by failing to reconsider its earlier denials of his *Batson* challenges in light of its decision to sustain his fifth challenge after finding a pattern of purposeful discrimination. Richards did not raise this issue below, and

thus, he is not entitled to relief absent a demonstration of plain error. See *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018). To demonstrate plain error, Richards must show “(1) there was error; (2) the error is plain, meaning that it is clear under the current law from a casual inspection of the record; and (3) the error affected [his] substantial rights.” *Id.* at 50, 412 P.3d at 48 (internal quotation marks omitted). The district court sustained Richards’ fifth challenge and allowed the challenged juror to remain on the jury.

Richards does not identify any law that supports his assertion that the district court should have reconsidered its earlier denials of his *Batson* challenges, and thus, he fails to demonstrate error that is plain from the record. In addition, the district court decided to allow the challenged juror to remain on the jury and, as that is one of the remedies available after a finding that a juror was improperly stricken, see *Brass v. State*, 128 Nev. 748, 754 n.5, 291 P.3d 145, 149 n.5 (2012) (stating that remedies following a finding of purposeful discrimination when striking a potential juror “could include allowing her to remain in the jury pool, discharging the entire venire and selecting a new jury, or calling additional jurors to the venire and granting additional peremptory challenges”), Richards does not demonstrate any failure by the district court to reconsider his prior challenges amounted to error affecting his substantial rights. Therefore, Richards is not entitled to relief based on this claim.

Victim’s testimony

Next, Richards argues that the district court erred by denying his request for a mistrial or to strike the victim’s testimony. Richards contends that his right to confront the victim was violated because she was unable to properly answer his questions due to issues with her memory.

We review a district court’s ruling on a motion for mistrial for an abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671,

680 (2006). In addition, “[w]e review a trial court’s evidentiary rulings for an abuse of discretion and the ultimate question of whether a defendant’s Confrontation Clause rights were violated de novo.” *Farmer v. State*, 133 Nev. 693, 702, 405 P.3d 114, 123 (2017).

The “Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial.” *Medina v. State*, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006). Additionally, “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis omitted). Moreover, “it does not follow that the right to cross-examine is denied by the State whenever the witness’ lapse of memory impedes one method of discrediting him.” *Id.* at 19.

The victim testified at trial and Richards had the opportunity to cross-examine her. The victim’s memory lapses did not deprive Richards of his right to confront her. Because Richards did not demonstrate the victim’s responses to his cross-examination questions violated his rights under the Confrontation Clause, he failed to demonstrate that the district court abused its discretion by denying his request for a mistrial or his request to strike the victim’s testimony due to her memory lapses. Therefore, Richards is not entitled to relief based upon these issues.

Motion to suppress

Next, Richards argues that the district court erred by denying his motion to suppress his statements made to a detective. Richards contends the detective downplayed and minimized Richards’ *Miranda*³ rights when explaining those rights to him.

³*Miranda v. Arizona*, 384 U.S. 436 (1966).

“A defendant’s statements made during a custodial interrogation may be admitted at trial only if *Miranda* rights were administered and validly waived.” *Carroll v. State*, 132 Nev. 269, 282, 371 P.3d 1023, 1032 (2016). “[A] trial court’s custody and voluntariness determinations present mixed questions of law and fact subject to this court’s de novo review.” *Id.* at 281, 371 P.3d at 1031. “[W]here the trial court’s determination that a defendant was not improperly induced to make the statement [to police] is supported by substantial evidence, . . . such a finding will not be disturbed on appeal.” *Id.*

The district court conducted a hearing concerning the administration of the *Miranda* warnings to Richards. Richards began conversing with the detective about the victim in this matter. Shortly after the discussion started, the detective stopped the conversation to advise Richards of his *Miranda* rights and stated that he had to get that out of the way before they could continue the discussion concerning the victim. The detective read the rights to Richards, and during the ensuing discussion concerning those rights, Richards corrected a misstatement made by the detective concerning the appointment of counsel. Richards stated that he understood his *Miranda* rights and continued the conversation with the detective. The district court ultimately determined that the record concerning the interrogation demonstrated that an effective *Miranda* warning was provided to Richards and he voluntarily waived his *Miranda* rights. The district court therefore denied Richards’ motion to suppress.

The district court’s determination that Richards was not improperly induced to make a statement to the detective is supported by substantial evidence. Accordingly, we conclude that Richards fails to demonstrate his statement was taken in violation of his *Miranda* rights and that the district court did not err by denying Richards’ motion to suppress evidence.

Expert witness testimony

Next, Richards argues that the district court abused its discretion by permitting expert testimony from Dr. Berhman-Lippert. Expert testimony may be admissible if it satisfies three requirements:

- (1) he or she must be qualified in an area of “scientific, technical or other specialized knowledge” (the qualification requirement);
- (2) his or her specialized knowledge must “assist the trier of fact to understand the evidence or to determine a fact in issue” (the assistance requirement); and
- (3) his or her testimony must be limited “to matters within the scope of [his or her specialized] knowledge” (the limited scope requirement).

Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (alteration in original) (quoting NRS 50.275). “The ‘assistance’ requirement has two components: whether the testimony is (1) relevant and (2) the product of reliable methodology.” *Perez v. State*, 129 Nev. 850, 858, 313 P.3d 862, 867 (2013). “Evidence is relevant when it tends ‘to make the existence of any fact that is of consequence to the determination of the action more or less probable.’” *Id.* (quoting NRS 48.015). “[E]vidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.” NRS 48.035(1). We review a district court’s admission of expert testimony for abuse of discretion. *Perez*, 129 Nev. at 856, 313 P.3d at 866.

First, Richards contends the expert should not have been permitted to testify concerning the victim’s mental difficulties. Richards contends the testimony was not necessary because he did not place that fact at issue and acknowledged the victim had mild mental difficulties.

Richards was charged with sexual assault of a vulnerable person, and whether the victim met the definition of vulnerable person was an element that the State was required to prove at trial. A vulnerable


person is a person over the age of 18 years that “(a) [s]uffers from a condition of physical or mental incapacitation because of a developmental disability, organic brain damage or mental illness; or (b) [h]as one or more physical or mental limitations that restrict the ability of the person to perform the normal activities of daily living.” NRS 200.5092(8). Thus, expert testimony concerning the victim’s mental difficulties and their effect on her was relevant to assist the jury to determine a fact in issue.


Second, Richards contends the expert should not have been permitted to give expert testimony concerning general grooming behavior. Richards contends the expert testimony was inappropriate because the expert testified concerning grooming generally and could not state whether it actually occurred in this case. The Nevada Supreme Court has identified grooming as a technical subject appropriate for expert testimony and stated that it may be relevant depending on the circumstances of the case. *Perez*, 129 Nev. at 856-59, 313 P.3d at 866-68. General opinions are permissible if it is probable that the jury is not well-informed on the subject matter. See *Pineda v. State*, 120 Nev. 204, 213, 88 P.3d 827, 833-34 (2004) (reversing for district court’s error in precluding general expert testimony based on gang culture because it was “quite probable that the average juror” knew little of the concept).

The district court conducted a hearing concerning the expert testimony regarding grooming behaviors. The district court concluded that the expert testimony concerning grooming was relevant to this case, it was reliable, and it was not generally within the knowledge of a layperson. The district court also found that the probative value of the expert testimony on general grooming behaviors was not outweighed by the danger of unfair prejudice and it would assist the trier of fact in determining facts at issue in this matter.

The record supports the district court's determination, and therefore, we conclude that the district court did not abuse its discretion by admitting the expert testimony concerning the victim's mental difficulties and grooming behavior. *See Hallmark*, 124 Nev. at 499, 189 P.3d at 651 (holding that because substantial evidence supported the district court's findings, the district court did not abuse its discretion in determining that an expert witness was qualified to testify). Accordingly, Richards is not entitled to relief based on this claim, and we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Barry L. Breslow, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk