IN THE SUPREME COURT OF THE STATE OF NEVADA

ABEL PEREZ-ESCOBEDO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37997

FILED

JUL 31 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of trafficking in a controlled substance. The district court sentenced appellant to two concurrent prison terms of 18 to 45 months. The district court further ordered appellant to pay fines in the amount of $2,000.00 for each count.

First, appellant contends the district court erred by rejecting his objection to the prosecutor's use of peremptory challenges to strike two Hispanic venirepersons in violation of Batson v. Kentucky.[1] More specifically, appellant argues that the State's explanation for the exercise of the peremptory strikes was pretextual.

Pursuant to Batson and its progeny, there is a three step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) upon a prima facie showing, the proponent of the peremptory challenge has the burden of providing a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the trial court must decide whether the proffered explanation is merely a pretext for purposeful

[1]476 U.S. 79 (1986).

racial discrimination.[2] The ultimate burden of proof regarding racial motivation rests with the opponent of the strike.[3] The trial court's decision on the question of discriminatory intent is a finding of fact to be accorded great deference on appeal.[4]

Our review of the record on appeal reveals that the district court did not err in rejecting appellant's objection to the prosecutor's use of peremptory challenges to strike two Hispanic venirepersons. As to the first venireperson, the State noted that he had a prior misdemeanor conviction for possession of stolen property, and as to the second venireperson, the State noted that he was related to the appellant. The prosecutor offered race-neutral explanations, and appellant failed to carry his burden of establishing a racial motivation for the strikes by proving that the explanations were pretextual. Accordingly, we conclude that appellant's contention lacks merit.

Next, appellant contends the State committed prosecutorial misconduct during opening argument by stating that the jury had "to determine whether Mr. Perez-Escobedo's [drug] business stays open." The district court denied appellant's motion for a mistrial. Appellant argues that the prosecutor's comment was not relevant.

Initially, we note that "it is within the sound discretion of the trial court to determine whether a mistrial

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[2]See id. at 96-98; see also Purkett v. Elem, 514 U.S. 765, 767 (1995); Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996).

[3]See Purkett, 514 U.S. at 768.

[4]See Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (plurality opinion); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998); see also Doyle, 112 Nev. at 889-90, 921 P.2d at 908.

is warranted. Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal."[5]

The district court struck the prosecutor's comment from the record, and admonished the jury to disregard it. We must presume that the jury followed that instruction.[6] Moreover, even assuming that the prosecutor's comment was improper, where this court concludes "without reservation that the verdict would have been the same in the absence of error," the error complained of is harmless and will not warrant reversal on appeal.[7]

In the instant case, we note that at trial, a confidential informant testified that appellant sold her trafficking amounts of methamphetamine on two occasions as part of a buy set up by the police, that a tape recording of appellant selling the methamphetamine to the confidential informant was admitted into evidence, and that appellant was in possession of marked money that was used in the drug transaction after the transaction was completed. We therefore conclude that any error was harmless beyond a reasonable doubt.

Appellant next contends that the district court erred by allowing the State to ask a witness if the witness's daughter was an intravenous drug user. The witness had been called by the defense to testify that she did not believe that

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[5]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) (citations omitted).

[6]See Lisle v. State, 113 Nev. 540, 558, 937 P. 2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on other grounds, 114 Nev. 221, 954 P.2d 744 (1998).

[7]Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

the confidential informant used in this case was a truthful person. During cross-examination by the prosecutor, the witness testified that her daughter had previously been an intravenous drug user, and that the witness believed that the confidential informant was the person who got her daughter involved in drugs. This line of questioning was intended to expose the witness's possible bias. "A district courts' discretion to curtail cross-examination into a witness's possible bias is limited. Counsel must be permitted to elicit any facts which might color that witness's testimony."[8] We conclude that the State's questioning was not improper, and that the district court did not, therefore, err by allowing it.

Appellant next contends that the district court erred by refusing a proffered jury instruction on the procuring agent defense. Although a defendant is entitled to a jury instruction on his theory of the case, no matter how weak or incredible,[9] "[a]n instruction must be given only if there is evidence to support it."[10] Appellant's defense at trial was that he was not present when the confidential informant purchased the drugs. This theory is wholly inconsistent with a procuring agent defense, and we conclude that the district court did not err by refusing the proffered instruction.

Finally, appellant contends that the district court should have struck the entire jury panel. Specifically,

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[8]Jackson v. State, 104 Nev. 409, 412, 760 P.2d 131, 133 (1988) (citation omitted).

[9]Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal quotation and citations omitted).

[10]Krueger v. State, 92 Nev. 749, 755, 557 P.2d 717, 721 (1976).

appellant argues that the panel was tainted because during voir dire the State asked whether members of the panel had opinions about controlled substances and the law governing controlled substances. Appellant, however, has not provided any relevant authority in support of his contention that the remedy for improper questioning at voir dire is for the district court to strike the entire panel. Accordingly, we need not consider it.[11] Moreover, we note that the scope of questioning at voir dire is left to the sound discretion of the district court.[12] Appellant has not demonstrated that the district court abused its discretion.

Having considered all of appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Matthew J. Stermitz
Elko County Clerk

[11]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

[12]Oliver v. State, 85 Nev. 418, 424, 456 P.2d 431, 434-35 (1969).