IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 88464-COA

ORDER OF AFFIRMANCE

Ray Charles Brown appeals from a district court order reinstating a judgment of conviction. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.[1]

Brown was convicted of first-degree murder with the use of a deadly weapon (among eight other counts) and sentenced to life in prison with the possibility of parole after 628 months. During his trial, the State used three of its nine peremptory strikes to remove three of the five Black venirepersons in the jury pool.[2]

Brown first raised a *Batson*[3] challenge after the State struck Jurors 246 and 258. In his argument, he pointed out that those two strikes accounted for 40 percent of the Black jurors in the jury pool. However, the district court failed to properly analyze and rule on a *Batson* challenge by

[1]The Honorable Deborah L. Westbrook, Judge, did not participate in the decision in this matter.

[2]Although the technical term is "venirepersons" before the jury is seated, we use the term "juror" colloquially for ease of reading.

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

failing to make sufficient findings on step one, and it failed to conduct the step-three "sensitive inquiry" to determine whether the State's race-neutral reasons were pretext for purposeful discrimination. *Brown v. State*, No. 81645-COA, 2021 WL 3140295, at *6-7 (Nev. Ct. App. July 23, 2021) (Order Vacating Judgment and Remanding). Brown raised a second *Batson* challenge after the State struck Juror 606, and likewise, the district court failed to conduct the required sensitive inquiry for step three.

On appeal, we concluded that the district court failed to follow the appropriate *Batson* hearing procedure. *Brown*, 2021 WL 3140295, at *7. We vacated the judgment of conviction and remanded the case to the district court with instructions to perform a retrospective step-three *Batson* hearing. *Id.*

On remand, the district court held a hearing using the juror questionnaires, trial transcripts and video recordings, and the parties' briefs and oral arguments. It entered a detailed written order finding that Brown did not meet his burden of showing that the State's offered reasons for striking the three jurors were pretext for purposeful discrimination. It then reinstated the judgment of conviction. Brown now appeals from that order, arguing three points.

First, Brown argues that the district court erred when it found that it could effectively hold a retrospective *Batson* hearing. The State responds that this court ordered the retrospective *Batson* hearing, and Brown did not challenge that order through a petition for rehearing in this court or a petition for review in the supreme court.

In our prior disposition, we concluded that "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." *Brown*, 2021 WL 3140295, at *7. Therefore, the State is correct that we ordered the district court to hold the retrospective *Batson* hearing, and the district court lacked any discretion to determine whether the hearing would be feasible.

Thus, our decision that a retrospective *Batson* hearing was feasible is the law of the case and, to effectively challenge our decision, Brown must show that our order was clearly erroneous and would produce a manifest injustice. *See Litchfield v. Tucson Ridge Homeowners Ass'n*, 140 Nev., Adv. Op. 57, 555 P.3d 267, 270 (2024) ("Under the law-of-the-case doctrine, a legal decision made at one stage of a criminal or civil proceeding should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court." (internal quotation omitted)); *see also Hsu v. County of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (holding that the law-of-the-case doctrine applies to appellate proceedings).

The law-of-the-case doctrine applies only if an issue is actually addressed and decided by the appellate court. *See Recontrust Co. v. Zhang*, 130 Nev. 1, 8, 317 P.3d 814, 818 (2014). A court may revisit a prior decision only if "the prior decision was clearly erroneous and would result in manifest injustice if enforced." *Litchfield*, 140 Nev., Adv. Op. 57, 555 P.3d at 270-71 (quoting *Hsu*, 123 Nev. at 630, 173 P.3d at 729).

Here, beyond general complaints of infeasibility and unfairness, Brown does not adequately support his argument or show why this court's prior decision was clearly erroneous and would result in a manifest injustice if enforced, and thus, we need not consider the argument further. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987)

(explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

However, even if we were to consider his argument, it is still unpersuasive. We used two pillars of support when we ordered the district court to perform a retrospective hearing. *Brown*, 2021 WL 3140295, at *7. First, we relied on opinions from the Nevada Supreme Court, the California Supreme Court, and the United States Court of Appeals for the Ninth Circuit, all of which ordered trial courts to conduct retrospective *Batson* hearings. *See Libby v. State (Libby I)*, 113 Nev. 251, 258, 934 P.2d 220, 224 (1997); *People v. Johnson*, 136 P.3d 804, 807 (Cal. 2006); *United States v. Thompson*, 827 F.2d 1254, 1262 (9th Cir. 1987). Further, all of those opinions ordered retrospective *Batson* hearings years after the initial trial took place. *See, e.g.*, *Libby I*, 113 Nev. at 253, 934 P.2d at 221 (directing the *Batson* hearing to be held eight years after the trial); *Johnson*, 136 P.3d at 807 (holding the *Batson* hearing seven years after the trial); *Thompson*, 827 F.2d at 1262 (holding the *Batson* hearing two years after the trial). And although the Nevada Supreme Court in *Libby I* instructed the district court to conduct the hearing only if it was feasible, the district court subsequently found that it was and performed the hearing. *See generally Libby v. State (Libby II)*, 115 Nev. 45, 48, 975 P.2d 833, 835 (1999). Thus, the passage of time, by itself, especially considering the availability of verbatim transcripts and an audio-visual recording of the proceedings, is not sufficient to show that this court's prior decision to order a retroactive *Batson* hearing was clearly erroneous.

Second, this court found a retrospective *Batson* hearing analogous to other retrospective hearings and determinations, and that remanding to the district court for such proceedings was "not a novel

practice for a Nevada reviewing court." *Brown*, 2021 WL 3140295, at *7 (quoting *Goad v. State*, 137 Nev. 167, 183, 488 P.3d 646, 660 (Ct. App. 2021)). Moreover, in *Goad*, we ordered a district court to determine whether it could perform a meaningful retrospective competency hearing. 137 Nev. at 185, 488 P.3d at 662. We also held that "[a] retrospective competency hearing is 'feasible' if there is sufficient evidence available to reliably determine a defendant's competence at or around the time reasonable doubt [as to competency] arose." *Id.* at 183, 488 P.3d at 661.

Turning to Brown's assertion that it was not feasible for the district court to make findings on the third step of the *Batson* challenges, we conclude this assertion lacks merit and is belied by the record. When evaluating this step, the district court reviewed the verbatim transcripts, jury questionnaires, and an audio-visual recording of the jury voir dire. Further, the determination occurred four years after the original trial, which is still a shorter time period than the eight years in *Libby I & II* and the seven years in *Johnson*. Thus, recognizing the unique difficulty in performing a retrospective *Batson* analysis, the prior caselaw combined with the resources the district court used in this case leads to the conclusion that this court's prior order was not clearly erroneous and would not produce a manifest injustice. Additionally, the depth of the findings in the district court's order plainly shows that a hearing was feasible. Thus, Brown has not met his burden of establishing that this court's order was clearly erroneous and its enforcement would produce a manifest injustice, and this argument accordingly provides him no relief.

Next, Brown argues that the district court applied the wrong burden and that the State, as a matter of policy, has the burden of persuasion during a retrospective, step-three *Batson* analysis to show that

its offered reasons were not pretext for purposeful discrimination. The State responds that the burden of persuasion ultimately rests with the opponent of the strike.

This court reviews a district court's legal conclusions de novo. *State v. Inzunza*, 135 Nev. 513, 516, 454 P.3d 727, 731 (2019). If the district court does not apply the correct legal standard in reaching its decision, this court owes no deference to that legal error. *In re Guardianship of B.A.A.R.*, 136 Nev. 494, 496, 474 P.3d 838, 841 (Ct. App. 2020).

"When analyzing a *Batson* challenge at trial, a district court must engage in a three-step process." *Williams v. State*, 134 Nev. 687, 689, 429 P.3d 301, 305 (2018). "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 that showing has been made, the proponent of the peremptory strike must present a race-neutral explanation for the strike." *Id.* at 689, 429 P.3d at 306. "Finally, the court should hear argument and determine whether the opponent of the peremptory strike has proven purposeful discrimination." *Id.*

For a *Batson* challenge, "the defendant ultimately carries the burden of persuasion to prove the existence of purposeful discrimination, [and] [t]his burden of persuasion rests with, and never shifts from, the opponent of the strike." *Johnson v. California*, 545 U.S. 162, 170-71 (2005) (internal quotation marks and citation omitted); *see also Purkett v. Elem*, 514 U.S. 765, 768 (1995) (same); *Rice v. Collins*, 546 U.S. 333, 338 (2006) (same). "It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving

purposeful discrimination." *Johnson*, 545 U.S. at 171 (quoting *Purkett*, 514 U.S. at 768).

Further, the Nevada Supreme Court has addressed the topic of a retrospective *Batson* hearing and held that a district court may perform such a hearing. *See Libby I*, 113 Nev. at 258, 934 P.2d at 224 (citing *Thompson*, 827 F.2d at 1262). And neither *Libby I* nor *Thompson* stand for the proposition that there is a different burden for step three of a *Batson* challenge if it is performed retrospectively. *See id.* at 257, 934 P.2d at 224 (reaffirming that the State's only burden is to provide a neutral reason for the use of peremptory strikes during the second step of the analysis); *see also Thompson*, 827 F.2d at 1260-61 (concluding that part of the adversarial process is the defense's argument to the court after the prosecution has given its race neutral reasons). Likewise, this court previously stated that Brown had the burden of proving that the State's proffered reasons were pretextual. *Brown*, 2021 WL 3140295, at *7 (recognizing that Brown had the burden to prove the State's reasons were pretextual).

Here, Brown's policy argument that the burden should rest on the State is unpersuasive. The United States Supreme Court has repeatedly held that the burden always rests with the party opposing the preemptory strike, *see Purkett*, 514 U.S. at 768; *Rice*, 546 U.S. at 338, which the district court emphasized in its written order. Brown focuses on the difficulty a defendant faces with a retrospective *Batson* hearing, and he urges this court to find that difficulty warrants shifting the burden of persuasion to the State. In light of the previous decision by the Supreme Court and the Nevada Supreme Court in which those courts concluded the burden of persuasion on the third step rests with a defendant, Brown is not entitled to relief based on this argument. *See Libby II*, 115 Nev. at 54, 975

P.2d at 839 ("[T]he trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991))); *see also Thompson*, 827 F.2d at 1262 (same).

Further, this court already determined that it was Brown's burden to prove purposeful discrimination, and Brown has not demonstrated that the law of the case should not apply to this issue. *See Litchfield*, 140 Nev., Adv. Op. 57, 555 P.3d at 270. Therefore, we conclude that the district court did not err when it determined that Brown had the burden of showing that the prosecution engaged in purposeful discrimination.[4]

Lastly, Brown argues that the district court erred when it found that he did not meet his burden of showing that the State's offered reasons were pretext for purposeful discrimination for each of the three struck jurors. The State responds that the district properly found the stated reasons were not pretext for discrimination and that it provided detailed justifications for all of its findings.

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 v. State*, 132 Nev. 218, 226, 371 P.3d 1002, 1007 (2016) (citing *Hawkins v. State*, 127 Nev. 575, 578-79, 256 P.3d 965, 967 (2011)). This burden requires the challenger to provide "some analysis of the relevant considerations . . . sufficient to

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[4]Additionally, as we explain below, the district court's findings provide ample evidence in support of its conclusions, and there is no doubt that Brown would not have prevailed in his challenges even if the State had the burden to prove the lack of purposeful discrimination.

demonstrate that it is more likely than not that the [proponent] engaged in purposeful discrimination." *Id.* This requires the district court then to engage in a "sensitive inquiry" into all circumstances surrounding the peremptory strike to determine if there was discriminatory intent. *Williams*, 134 Nev. at 691, 429 P.3d at 307.

The Nevada Supreme Court has 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."

Id. at 692, 429 P.3d at 307 (quoting *McCarty*, 132 Nev. at 226-27, 371 P.3d at 1007-08). This inquiry is necessary for appellate review because, without an adequate record of the district court's findings, the appellate court cannot engage in "meaningful, much less deferential review." *Id.* at 693, 429 P.3d at 308.

Starting with Juror 246, the district court found that Brown did not meet his burden to show that the State's proffered reasons were pretext for purposeful discrimination. The district court considered the State's offered, race-neutral reasons, which focused on the fact that Juror 246 (1) hesitated when asked whether he had concerns about sitting in judgment of another individual, (2) equivocated about whether his past experience with law enforcement after being charged with a crime would affect his impartiality, (3) stated that he had family members who were the subject of

an ongoing police investigation, and (4) stated he had a family member who was injured by law enforcement. Further, the district court found that the State never offered Juror 246's skin-color comment as an explanation for striking that particular juror—contrary to Brown's allegations.

The district court found in its written order that the State's reasons were credible and supported by the record, and that there was nothing nefarious in the prosecutor's intent. It not only analyzed the juror's responses, but it compared them to the other non-struck jurors, who had otherwise neutral or positive opinions about law enforcement. And because we defer to the district court's findings in a *Batson* challenge, we conclude that the district court did not err when it found that Brown did not meet his burden to show the State's reason for striking Juror 246 was pretext for purposeful discrimination.

Moving to Juror 258, the district court considered the State's reasons for striking her, which included that she: (1) was currently suing the Las Vegas Metropolitan Police Department for an injury against her fiancé, (2) felt that the police did not adequately investigate her daughter's or mother's sexual assault and her father's murder, and (3) responded in a heavily emotional manner that she did not know if she could be impartial because of those experiences. The district court found those reasons credible and supported by the record, especially given Juror 258's numerous and significant negative interactions with law enforcement.

We also note Brown argues the district court was unable to adequately evaluate Juror 258's demeanor. Determinations regarding a prospective juror's demeanor lie "uniquely within the province of the district court judge." *Williams*, 134 Nev. at 693, 429 P.3d at 308. Here, the district court made specific findings concerning Juror 258's demeanor which

included "[h]er voice becom[ing] shaky as if she was going to cry" and it being "clear [that] the situation with her fiancé was very troubling to her and she had a difficult time discussing it." In its written order, the court relied upon the transcripts (which included the defense counsel agreeing that she was struggling with her emotions) and the audio-visual recording of the voir dire. We conclude the record supports the district court's findings, especially in light of the deference owed to a district court's findings concerning a juror's demeanor. Brown fails to demonstrate the district court was unable to properly evaluate the juror's demeanor or abused its discretion when making the aforementioned findings.

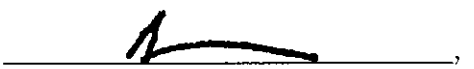
Further, Brown's argument that the district court could not adequately evaluate the juror's demeanor is contrary to the extensive record—which included juror questionnaires, a verbatim transcript, and an audio-visual recording—that the district court used in making its detailed findings. Thus, we defer to the district court when it found that the State's characterization of Juror 258's demeanor in support of its strike was credible. Therefore, we conclude that the court did not err when it found that Brown did not carry his burden to show that the State's offered reasons were pretext for purposeful discrimination.

Regarding Juror 606, the State explained that it struck him because his answers were rambling and largely nonsensical and because he stated that he was fired from the Postal Service for being high on the job. The district court found that the State's explanations were credible and supported by the record. When evaluating the exercise of the peremptory strike on Juror 606, the district court noted Brown's argument that the State had attempted to remove most of the Black jurors from the venire but, even in consideration of that information, the court found that the State's

race-neutral reasons for each strike were valid and that Brown failed to meet his burden of demonstrating that any of those reasons were pretextual. The record supports the district court's findings in this regard.

Thus, we conclude that the district court did not err when it found that Brown did not meet his burden to show that the State's offered reasons were pretext for purposeful discrimination and reinstated Brown's judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 , C.J.
Bulla

 , J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Hofland & Tomsheck
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Eighth District Court Clerk