IN THE SUPREME COURT OF THE STATE OF NEVADA

CEDRIC O'NEAL HOWARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40443

FILED

OCT 0 7 2003

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

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary. The district court adjudicated appellant Cedric O'Neal Howard a habitual criminal and sentenced him to life imprisonment with the possibility of parole after ten years. The court further ordered Howard to pay a $25 administrative assessment and a $150 DNA analysis fee and to submit to genetic marker testing.

Howard first challenges whether his sentence as a habitual criminal, pursuant to NRS 207.010(1)(b)(2), of life imprisonment with parole after ten years constitutes cruel and unusual punishment. Howard argues that his sentence is unconstitutionally disproportionate to his crime, which he characterizes as no more than a "glorified petit larceny." He notes that the evidence adduced at trial shows only a daytime taking of a drill and holesaw kit from an unlocked, unoccupied, commercial vehicle, which had been parked in a garage, and a subsequent foot chase by private citizens that ended in Howard's apprehension by police within one hour and without harm to person or property. This issue lacks merit.

This court has consistently afforded the district court wide discretion in its sentencing decisions.[1] We will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[2] Moreover, "'[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather it forbids only extreme sentences that are "grossly disproportionate" to the crime.'"[3] In considering whether a sentence is grossly disproportionate to an offense, a court must consider not only the gravity of the current offense, but also the seriousness of a defendant's criminal history.[4]

The record in this case shows that between 1975 and 1990, Howard had suffered numerous felony convictions, including six for burglary. He had been adjudicated a habitual criminal and given a life sentence. He had been granted and failed several terms of parole and was just re-paroled within weeks of committing the instant offense. Considering Howard's serious criminal history as well as the instant

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[1]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[2]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[3]Ewing v. California, ___ U.S. ___, ___, 123 S. Ct. 1179, 1186-87 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

[4]Id. at ___, 123 S. Ct. at 1189-90.

crime, we conclude that there is no gross disproportionality in the sentence imposed in this case.[5]

Next, Howard, who is African American, alleges that the district court erred in overruling his objection, made pursuant to Batson v. Kentucky,[6] and allowing the State to use its final peremptory challenge to excuse venireperson 681 ("Ms. King"), who was the sole African American in the panel of potential jurors at Howard's trial.

Under the equal protection analysis set forth in Batson, once the opponent of a peremptory challenge makes a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to give a race neutral explanation (step two).[7] If such an explanation is given, then the trial court must decide (step three) whether the opponent has proved purposeful racial discrimination.[8]

Here, the district court determined that Howard made out a prima facie case of racial discrimination with respect to the use of the

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[5]Cf. id. at ___, 123 S. Ct. 1179 (upholding prison sentence of 25 years to life, imposed pursuant to California's three-strikes law, for theft of three golf clubs); Lockyer v. Andrade, ___ U.S. ___, 123 S. Ct. 1166 (2003) (concluding that the California Court of Appeals did not violate clearly established Eighth Amendment law when it affirmed defendant's sentence, imposed pursuant to California's three-strikes law, of two consecutive terms of 25 years to life in prison for two thefts of videotapes with a total value of approximately $150); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life imprisonment sentence, imposed pursuant to Texas' recidivist statute, for obtaining approximately $121 by false pretenses).

[6]476 U.S. 79 (1986).

[7]Purkett v. Elem, 514 U.S. 765, 767 (1995).

[8]Id.

peremptory challenge to excuse Ms. King. The prosecutor offered her reasons for the peremptory challenge, and the court overruled Howard's objection. Thus, as the State concedes, the preliminary -- or first-step -- issue of whether Howard made a prima facie showing is moot.[9]

Our review of the prosecutor's explanations at the second-step of the Batson analysis shows no error. The second Batson step "does not demand an explanation that is persuasive, or even plausible."[10] "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[11] Here, the prosecutor gave the following explanations for excusing Ms. King: (1) Ms. King had negative experiences with law enforcement (2) she had expressed an unwillingness to serve as a juror; and (3) the prosecutor disliked Ms. King's response to a voir dire question regarding whether she agreed with the adage, "The truth takes few words."[12] We conclude that these reasons

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[9]Hernandez v. New York, 500 U.S. 352, 359 (1991); accord Grant v. State, 117 Nev. 427, 434, 24 P.3d 761, 766 (2001); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998); Doyle v. State, 112 Nev. 879, 888, 921 P.2d 901, 907 (1996).

[10]Elem, 514 U.S. at 768.

[11]Hernandez, 500 U.S. at 360.

[12]As discussed infra, another attorney, on the prosecutor's behalf, offered an additional race-neutral reason based on Ms. King's alleged bias against security guards. However, we perceive no basis to consider his assertions in the Batson analysis.

We further note that at the Batson hearing defense counsel asserted that, during an unreported bench conference which preceded the formal hearing, the prosecutor had claimed to want to excuse Ms. King because she was "racist." The record does not support such a belief about Ms. King. However, we note that the prosecutor did not set forth this reason

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do not inherently indicate an intent to discriminate and are sufficient to satisfy the State's burden under step two.

We now turn to the third step in the Batson analysis, in which the persuasiveness of the explanation becomes relevant and the trial court must determine whether the opponent of the peremptory challenge has carried his burden of proving purposeful discrimination.[13] "At [this] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[14] "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible."[15] A trial court's credibility finding may be influenced by "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy"; as well as other factors.[16] Because the trial court's findings on the issue of discriminatory intent largely turn on

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. . . *continued*
during the Batson hearing, and according to defense counsel's statements at that hearing, the district court had already rejected the reason as a basis to allow the peremptory challenge. Therefore, whether the prosecutor made the statement remains relevant only to the third-step issue of whether she was credible in asserting race-neutral motives.

[13]Elem, 514 U.S. at 768.

[14]Id.

[15]Miller-El v. Cockrell, 537 U.S. ___, ___, 123 S. Ct. 1029, 1040 (2003).

[16]Id. at ___, 123 S. Ct. at 1040.

evaluations of credibility, they are entitled to great deference,[17] and will not be overturned unless clearly erroneous.[18]

Unfortunately, in the instant case, the district court declined to make a record of its reasoning at the third step of the Batson analysis. Instead, the court overruled Howard's objection, stating, in relevant part:

> My ruling is that I'm going to grant your challenge. Let me explain. Once – and I'm reading here from the text that I have – once a prima facie case is established, and I think it has been, the challenged party need only offer facially nondiscriminatory reasons. The reasons need not be persuasive or even plausible. . . . Now, also pursuant to the case law, I'm not required to make specific findings beyond the ruling of the objection.

It is apparent from this statement that the district court overlooked our express instruction in Libby v. State directing the district courts of Nevada to "clearly spell out the three-step analysis" when deciding Batson issues.[19] As a result, the record is inadequate to show whether the district court engaged in the required analysis by examining all the evidence on the issue of pretext. The failure to make an adequate record here is particularly significant because certain evidence in the record might also

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[17]Thomas, 114 Nev. at 1137, 967 P.2d at 1118; Doyle, 112 Nev. at 890, 921 P.2d at 908.

[18]Libby v. State, 115 Nev. 45, 55, 975 P.2d 833, 839 (1999) (citing Hernandez, 500 U.S. at 369).

[19]Id. at 54, 975 P.2d at 839. See also Riley v. Taylor, 277 F.3d 261, 286 (3rd Cir. 2001) (recognizing that step three of the Batson analysis requires the court to address and evaluate all evidence introduced by each side on the issue of whether race was the real reason for the challenge and then determine whether the defendant has met his burden of persuasion).

support a conclusion that the prosecutor's race-neutral explanations were pretextual, and we do not know why the district court found the prosecutor's explanations plausible in light of this evidence. Under these circumstances, we will not defer to the district court's ruling on the issue of discriminatory intent.[20]

We agree with the State that the district court could have been convinced that the prosecutor had no discriminatory intent based on her explanation that she wanted to avoid bias against the State stemming from Ms. King's negative experiences with law enforcement.[21] Ms. King's belief that law enforcement might be biased against minorities was not dependent on her race. Further, it does not appear that any of the

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[20]See Miller-El, 537 U.S. at ____, 123 S. Ct. at 1045 ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it. This failure, however, does not diminish [the evidence's] significance."); Riley, 277 F.3d at 285-87 (holding that no deference was owed to the state courts which failed to articulate a sufficient Batson analysis); Jordan v. Lefevre, 206 F.3d 196, 200-02 (2d Cir. 2000) (reversing denial of habeas petition and remanding to district court to hold new hearing because trial court failed to adequately address or make the third-step determination under Batson).

[21]See Doyle, 112 Nev. at 889, 921 P.2d at 908 (recognizing that prosecution's belief that juror's association with criminal justice system causes bias may be valid reason to use peremptory challenge); Jordan, 206 F.3d at 200 (recognizing that negative experience with law enforcement, age, life experience, and demeanor are acceptable race-neutral reasons for challenging prospective jurors); People v. Muriale, 526 N.Y.S.2d 367, 374-75 (Sup. Ct. Crim. Term. 1988) (recognizing that a particular African-American juror's experiences or feelings about race can be considered a neutral explanation for using a peremptory challenge).

impaneled jurors admitted feelings similar to Ms. King's on this subject or that any disparate questioning occurred on the issue.[22]

But the prosecutor's second and third explanations are less plausible. The prosecutor claimed that she wanted to excuse Ms. King because Ms. King expressed an unwillingness to serve as a juror. Our review of the record shows that during the preliminary questioning of the entire venire, the district court inquired generally whether any of the prospective jurors, knowing the trial would last two to three days, thought they could not serve. Ms. King responded that she could not be off work for three days. After individual voir dire by the parties, other potential jurors with concerns about serving were excused for cause, and one was excused pursuant to a defense peremptory challenge. However, one juror ultimately impaneled, juror 698, expressed reservations about her long commute to the court. Later, during individualized voir dire, the prosecutor asked this juror whether her commute would be too prohibitive. In contrast, the prosecutor did not address voir dire to whether Ms. King was willing to serve or the seriousness of her work-related concerns. Nor did she seek to excuse Ms. King for cause. Furthermore, during individualized voir dire by the district court Ms. King indicated that there was no reason she could think of why she would be unable to serve as a fair and impartial juror in this case, and she did not again mention her work-related concerns.

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[22]See King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000) (recognizing that whether any other venireperson impaneled displayed the characteristics of the stricken juror is relevant to issue of discriminatory intent); Walker v. State, 113 Nev. 853, 868, 944 P.2d 762, 772 (1997) (recognizing that whether disparate questioning was made of prospective jurors is relevant to issue of discriminatory intent).

The prosecutor's third explanation came toward the conclusion of the Batson hearing, after the defense had been given an opportunity to prove the pretextual nature of the previously made explanations. The prosecutor stated:

> And I would like to add one additional thing, which is, I really didn't like her answer to my question of "what do you think about the truth takes few words."
>
> And, you know, when you're called to the bench, you don't always think of things off the top of your head. It takes some time to think it over.

This explanation is suspect for several reasons. It was given late in the Batson proceeding. The prosecutor could not have greatly valued the responses to her voir dire question because she did not put the question to all potential jurors, including at least several who were eventually impaneled. Furthermore, at least one other juror of whom the prosecutor asked the question gave an answer similar to Ms. King's answer of "Not all the time." But the prosecutor did not challenge this juror. Specifically, juror 596 answered the question, "It would depend on the situation, I think." Unlike Ms. King, this juror was asked by the prosecutor to explain her answer. To whatever extent Ms. King's answer showed a trait that the prosecutor disliked, the prosecutor did not seek clarification or ignore it as she had done with the impaneled juror's similar answer. This uneven treatment of Ms. King diminishes the credibility of the prosecutor's race-neutral explanation.

To bolster the prosecutor's credibility, the State argues that under Hernandez v. New York[23] the following threat by the prosecutor to walk out of the proceedings demonstrates the veracity of her claims of race-neutral intent:

> Judge, I just wanted to be really clear that the only way you can [sustain the Batson objection] is if you find purposeful racial discrimination by me. And if that's the case, I'm going to need to find another prosecutor to prosecute this case because I can't prosecute in front of Your Honor if you call me a racist.

However, this threat was neither a sua sponte defense to Howard's objection, nor an appropriate one. Moreover, the prosecutor's behavior denotes a lack of respect for the Batson proceeding and its objective of carefully safeguarding the constitutional dictate that laws treat all persons equally. We reject the State's assertion that the prosecutor's threat to quit in fact demonstrates that she must have honored the constitutional dictate protected by such proceedings.

As a final concern, we note that the district court overruled a defense objection and allowed another attorney (who apparently was another deputy district attorney present during the trial but not the prosecutor of record) to argue on behalf of the prosecutor during the Batson hearing. We cannot discern from the record why the district court allowed this other attorney to assert any explanations for the prosecuting attorney's peremptory challenge. "Apparent or potential reasons do not

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[23]See Hernandez, 500 U.S. at 369-70 (recognizing that trial court could have found the prosecutor to be credible in part because he defended his peremptory challenges without being asked to do so).

shed any light on the prosecutor's intent or state of mind when making the peremptory challenge."[24] The question under Batson relates to the prosecutor's actual motives, not *any possible* motives. Because the record is silent as to why or whether the district court relied on the other attorney's assertions in assessing the credibility of the prosecutor's explanations for the peremptory challenge, we cannot be confident that no error occurred in this regard.

In sum, we recognize that often "there will be no single criterion that serves as a basis for the decision whether to excuse a particular venireperson. A characteristic deemed to be unfavorable in one prospective juror . . . may, in a second prospective juror, be outweighed by other, favorable characteristics."[25] While treatment of a potential African-American juror which differs from that of potential non-African-American jurors with similar characteristics raises an inference of purposeful racial discrimination, it does not necessarily prove it.[26] On the other hand, a "'reviewing court's level of suspicion may . . . be raised by a series of very weak explanations,'" and "'[t]he relative plausibility or implausibility of each explanation . . . may strengthen or weaken the assessment of the

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[24]Riley, 277 F.3d at 282.

[25]People v. Andrews, 614 N.E.2d 1184, 1190 (Ill. 1993).

[26]See id.

[other explanations]."'[27] In the end, "'[t]he whole may be greater than the sum of its parts.'"[28]

Despite the apparent dubious nature of the prosecutor's second and third explanations, the district court had discretion to determine, considering all the evidence, that the prosecutor did not intend to discriminate. If the district court had set forth such a determination in reasoned factual findings, addressing all the evidence on the issue, deference by this court would be appropriate. However, our duty on appeal is to ensure that Howard's equal protection claim was not rejected in error, and "deference does not imply abandonment or abdication of judicial review."[29] Here, evidence in the record suggests pretext and thereby raises the specter of discrimination. The district court has yet to adequately address on the record the issue of whether Howard proved discriminatory intent. Accordingly, we

ORDER this matter REMANDED to the district court and we instruct the district court to hold a hearing and make any further analysis and findings necessary to show a reasoned determination on the issue of the prosecutor's state of mind in making the peremptory challenge of Ms. King. The district court should address the issue of whether the prosecutor was motivated by Ms. King's race in light of all the relevant evidence, including any evidence that tends to discredit the prosecutor's

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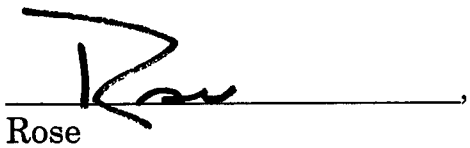
[27]Riley, 277 F.3d at 283 (quoting Caldwell v. Maloney, 159 F.3d 639, 651 (1st Cir. 1998); United States v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991)).

[28]Id. (quoting Maloney, 159 F.3d at 651).

[29]Miller-El, 537 U.S. at ___, 123 S. Ct. at 1041.

explanations.[30] If the district court's ability to properly resolve the issues is unduly hampered due to the passage of time or other circumstances, then the court shall vacate the judgment of conviction and grant Howard a new trial.[31]



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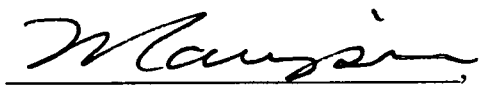

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cc: Hon. John S. McGroarty, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[30]The court should explain whether it has considered the argument that was put forth by the non-prosecuting attorney, and if so, why that evidence is relevant. Further, if the court determines that the prosecutor initially gave the reason that Ms. King was racist, then the court should address the effect of this evidence on its determination.

[31]See Batson, 476 U.S. at 100; Libby v. State, 113 Nev. 251, 258, 934 P.2d 220, 224 (1997).