

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRANCE SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40780

**FILED**

**AUG 26 2004**

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

Terrance Smith appeals from a judgment of conviction entered upon jury verdicts of guilty on nine of ten counts of criminal misconduct related to a series of alleged sexual assaults.<sup>1</sup> Smith contends that: (1) the State's exercise of its peremptory challenges at trial to exclude women from the jury violated his right to equal protection; (2) the trial court committed prejudicial error in excluding evidence of the victim's mental health records; and (3) the trial court erred in denying Smith's motion for a mistrial based on juror misconduct. We affirm. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

FACTS AND PROCEDURAL HISTORY

The State charged Terrance Smith by way of criminal information with two counts of sexual assault, three counts of sexual assault with the use of a deadly weapon, and separate individual counts of attempted sexual assault with the use of a deadly weapon, first-degree kidnapping, battery with the use of a deadly weapon, battery with the intent to commit a crime and robbery. More particularly, the State alleged that on May 8, 2002, Smith sexually and physically assaulted Sharron

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<sup>1</sup>See NRAP 3B.

Corral at her apartment and, upon leaving, absconded with some of Corral's belongings.

Corral testified at trial that on May 8, 2002, around 1:00 a.m., Smith came to her apartment for a meal and a shower. As on previous occasions, she helped Smith because he was homeless and she "felt sorry for him." According to Corral, Smith approached her after his shower, demanded sex, became physically abusive in response to her refusal of his advances, punched her numerous times and, finally, sexually assaulted her. She asserted that, over the course of five hours, Smith subjected her to repeated acts of sexual assault and administered a series of beatings, threatened to kill her with a kitchen knife and letter openers and attempted to strangle her. Smith finally left around 5:30 a.m. to 6:00 a.m., after threatening to kill Corral if she called police. Shortly thereafter, she sought help from her apartment manager, who called 911. The police arrived and Corral was taken to the hospital.

Smith's version of the events was markedly different from that provided by Corral. Smith testified that he met Corral prior to May 8, 2002, and that they engaged in consensual sex on numerous occasions. His only interest in Corral was that she bought him food, cigarettes and alcohol, and gave him a place to stay. Smith testified that he left Corral's apartment the morning of May 7, 2002, and returned at 1:00 a.m. on May 8, 2002. According to Smith, he showered and Corral performed consensual oral sex upon him, after which he went to sleep. At some point, she awakened Smith by kicking him off the bed. Infuriated by this turn of events and her laughter, Smith began to beat Corral about the face, arms and body. Smith stated that the fighting eventually stopped, he prepared something to eat but, while he was eating, Corral lunged at

him with a knife. Smith told her to put the knife down, again lost his temper, proceeded to administer yet another beating and, finally, left the apartment. Smith testified that he never forced Corral to engage in sex with him.

The medic and police officer that responded to the 911 call described Corral's appearance at the scene, including blackened bloodshot eyes and a bloody and swollen face, with blood on her arms and hands. They also described her as frightened, shaken and crying. Corral initially told police that her boyfriend had beaten her up, but later stated that she was sexually assaulted.

A sexual assault nurse examined Corral at the hospital. The nurse testified that Corral was cooperative, alert and able to answer questions during the examination. The nurse noted injuries consistent with nonconsensual sex, which included a bruised and abraded cervix and increased redness of the introitus. Laboratory analysis confirmed the presence of Smith's semen on four items: vaginal swabs, oral swabs, fingernail swabs, and denture swabs.

The jury found Smith guilty on nine of the ten counts set forth in the information, after which the district court imposed the following sentences: count I, sexual assault, life in prison with parole eligibility after ten years; count II, sexual assault with a deadly weapon, consecutive life sentences with parole eligibility in ten years on each sentence; count III, sexual assault with a deadly weapon, consecutive life sentences with parole eligibility in ten years on each sentence; count IV, sexual assault, life in prison with parole eligibility after ten years; count V, sexual assault with a deadly weapon, consecutive life sentences with parole eligibility in ten years on each sentence; count VI, attempted sexual assault with use of

a deadly weapon, consecutive 43 to 192 months sentences; count VIII, battery with the use of a deadly weapon, 24 to 96 months imprisonment; count IX, battery with the intent to commit a crime, 36 to 156 months imprisonment; and count X, robbery, 35 to 156 months imprisonment. The jury exonerated Smith on count VII, which charged him with first-degree kidnapping. Some of the sentences as to the various counts were imposed consecutively, others concurrently. The district court also ordered Smith to pay a \$25.00 administrative assessment fee and a \$150.00 DNA analysis fee, and to submit to DNA testing. The district court awarded Smith credit for 222 days of time served prior to the imposition of his sentence. Smith filed his timely notice of appeal.

### DISCUSSION

#### Jury selection

The district court allowed each side eight peremptory challenges in aid of jury selection. The State exercised five of its eight peremptory challenges, all of which excused women members of the jury panel, one of whom was of African-American descent. Ultimately, the district court seated nine men and three women on the jury.

The State excused Jurors 64, 81, 159, 181 and 173. The State waived its fourth peremptory challenge before dismissing Jurors 181 and 173, and then waived its remaining two challenges. Smith lodged non-specific general objections to the State's dismissal of Jurors 159 and 173, and lodged no objections to the State's three other peremptory challenges.

After the district court dismissed the remaining venire and administered the oath of service to the jury, Smith made a formal record

regarding the two objections, arguing violations of Batson v. Kentucky<sup>2</sup> and J.E.B. v. Alabama.<sup>3</sup> More particularly, Smith objected to the State's use of its third challenge to excuse Juror 159 based upon claims of race discrimination, and objected to the use of the State's sixth challenge to excuse Juror 173 based upon a pattern of gender discrimination. As to prospective Juror 159, the State explained its challenge based upon her statements that she might be distracted during the trial by issues at home. The State justified its actions concerning Juror 173 on the ground that she demonstrated timidity in responding to voir dire questioning. Neither Smith nor the district court requested gender-neutral explanations for the other challenges. Based upon the State's representations, the district court overruled Smith's objections to the State's peremptory challenges without specific findings.

Smith contends that the State's exercise of five peremptory challenges, all of which excluded women from the jury, established a prima facie case of gender discrimination, which violated the Equal Protection Clause.<sup>4</sup> He has lodged no assignment of appellate error concerning the district court's ruling on his objection to the challenge based upon racial considerations. Thus, we will only reach Smith's allegations of gender discrimination.

In J.E.B., the United States Supreme Court applied the three-part race-based peremptory challenge analysis of Batson,<sup>5</sup> to gender-based

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<sup>2</sup>476 U.S. 79 (1986).

<sup>3</sup>511 U.S. 127 (1994).

<sup>4</sup>U.S. Const. amend. XIV, § 1.

<sup>5</sup>476 U.S. at 96-98.

peremptory challenges.<sup>6</sup> “Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”<sup>7</sup>

The Court stated:

[A] party alleging gender discrimination must make a prima facie case showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. When an explanation is required, it need not rise to the level of a “for cause” challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual.<sup>8</sup>

The trial court should consider all relevant circumstances in determining whether a party has established a prima facie case of gender discrimination.<sup>9</sup> These circumstances may include a questionable pattern of strikes or particular statements or questions by a party during voir dire.<sup>10</sup> A trial court’s decision as to discriminatory intent represents a finding of fact, which we will accord great deference on appeal.<sup>11</sup> Procedurally, once a party to a criminal trial makes a prima facie showing

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<sup>6</sup>J.E.B., 511 U.S. at 129-31, 144-45.

<sup>7</sup>Id. at 130-31.

<sup>8</sup>Id. at 144-45 (citation omitted).

<sup>9</sup>Id.

<sup>10</sup>Batson, 476 U.S. at 97.

<sup>11</sup>Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771 (1997).

of discriminatory intent concerning a peremptory challenge and the party challenging the prospective juror provides an explanation for the strike, the trial court is then charged with making findings as to whether the explanation is race or gender-neutral or merely pretextual.<sup>12</sup> “[A] trial court’s findings will not be overturned unless they are ‘clearly erroneous.’”<sup>13</sup>

We conclude that no findings concerning the formal objections to the State’s peremptory challenges were required because Smith’s objections under Batson were untimely. In Rhyne v. State, relying upon federal case authority concluding that a Batson objection must occur before empanelment of the jury,<sup>14</sup> we held that the failure to timely object to a party’s actions at trial precludes review of a Batson issue on appeal.<sup>15</sup>

Smith lodged non-specific general objections to two of the State’s five peremptory challenges during jury selection. While the exclusive use of peremptory challenges to excuse women from a jury may sufficiently demonstrate, at least prima facie, a pattern of discrimination,

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<sup>12</sup>J.E.B., 511 U.S. at 144-45; Batson, 476 U.S. at 96-98.

<sup>13</sup>Libby v. State, 115 Nev. 45, 55, 975 P.2d 833, 839 (1999) (quoting Hernandez v. New York, 500 U.S. 352, 369 (1991)).

<sup>14</sup>118 Nev. 1, 11-12 n.26, 38 P.3d 163, 170 n.26 (2002) (citing to Dias v. Sky Chefs, Inc., 948 F.2d 532, 534 (9th Cir. 1991) (“Batson objections must occur as soon as possible, preferably before the jury is sworn”); Chambers v. Johnson, 197 F.3d 732, 735 (5th Cir. 1999) (holding that a timely Batson challenge is one asserted before the venire is dismissed); U.S. v. Parham, 16 F.3d 844, 847 (8th Cir. 1994) (holding that Batson challenges are untimely where made after empanelment of the jury and dismissal of the venire)).

<sup>15</sup>118 Nev. at 11, 38 P.3d at 170.

Smith never articulated such a claim until after the district court empanelled the jury and jeopardy had attached. Thus, consistent with Rhyne, once the district court formally seated the jury, Smith had effectively waived any objection to the State's use of its peremptory challenges. We, therefore, need not further address whether the State's reasons for its peremptory challenges meet the test established under J.E.B.<sup>16</sup>

#### Victim medical records

Smith subpoenaed Corral's mental health records in preparation for trial. One of the medical service providers refused to comply and Smith moved to compel production of the records, which documented delusional ideations of violence on numerous occasions. The State opposed the application on relevancy grounds and based upon a claim of privilege. Smith replied that the State had no standing to invoke Corral's medical records privilege and that he was entitled to the records under his Sixth Amendment right to confront his accuser. The district court held a hearing on the motion and rendered its ruling shortly before commencement of trial. Although the court excluded admission of any of the mental health records from evidence, it permitted Smith to cross-examine Corral concerning record entries from May 8, 2002. Accordingly, the district court sealed all of Corral's records except those relating to the

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<sup>16</sup>We note in passing that the State's gender-neutral explanations were sufficient to justify the district court's conclusion that no Batson/J.E.B. violation occurred as to Jurors 159 and 173. Because the Batson/J.E.B. objections were untimely, we do not reach the question as to whether the gender-neutral explanations as to two of the prospective jurors were sufficient to address Smith's argument that the State engaged in a pattern of gender discrimination in the use of its five challenges.



day in question. The order effectively excluded any reference to record entries concerning hallucinogenic or delusional ideations documented before and after May 8, 2002, including May 10, 2002.

Smith contends that the district court erroneously excluded evidence or testimony concerning Corral's mental health records because the records were probative of Corral's ability to comprehend and relate the truth. The State argues that the district court properly excluded Corral's mental health records because they were irrelevant to her credibility as a witness.

Determinations regarding the relevance and admissibility of evidence are left to the discretion of the trial court.<sup>17</sup> The trial court may exclude evidence which is "otherwise admissible if its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury."<sup>18</sup> We will only set aside a trial court's ruling to exclude evidence if it is manifestly wrong.<sup>19</sup>

"Evidence that is not relevant is not admissible."<sup>20</sup> NRS 48.015 defines "relevant evidence" as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

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<sup>17</sup>Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996).

<sup>18</sup>Sherman v. State, 114 Nev. 998, 1006, 965 P.2d 903, 909 (1998); see NRS 48.035(1).

<sup>19</sup>Sherman, 114 Nev. at 1006, 965 P.2d at 909.

<sup>20</sup>Desert Cab v. Marino, 108 Nev. 32, 35, 823 P.2d 898, 899 (1992); NRS 48.025.

A party may not use extrinsic evidence regarding specific acts to attack a witness's credibility; however, specific conduct may be the subject of cross-examination.<sup>21</sup> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."<sup>22</sup> "The mental stability of a witness [is] relevant to credibility if it is connected to the subject of the litigation and affects the ability of the witness to testify."<sup>23</sup>

Smith's counsel stated during oral argument before this court that he sought admission of Corral's mental health records to strengthen his defense that the sex was consensual, not that Corral imagined a non-existent confrontation. Given the totality of evidence, that Corral was badly beaten and sustained injuries consistent with sexual assault, that Smith himself admitted to physically assaulting Corral, and that Corral was lucid during interviews at the scene and at the hospital, the district court could have reasonably determined that a single delusional event within days of the incident, and others more remote in time, were not relevant to undermine the credibility of her perception of the events leading to the instant charges. To explain, Corral's trial testimony was lucid and consistent with statements she gave police following the incident, *i.e.*, that Smith sexually assaulted her. Additionally, testimony from the nurse examiner and the examination results corroborate Corral's recollection of the incident, to wit: the examination documented injuries indicative of nonconsensual sexual activities and the administration of a

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<sup>21</sup>Sherman, 114 Nev. at 1006, 965 P.2d at 909.

<sup>22</sup>Davis v. Alaska, 415 U.S. 308, 316 (1974).

<sup>23</sup>Com. v. Rizzuto, 777 A.2d 1069, 1081 (Pa. 2001).

series of severe physical beatings. Finally, the nurse stated that Corral was cooperative, alert and able to answer questions during the examination. Such being the case, we cannot conclude that the district court's exclusionary order was manifestly wrong.

Juror misconduct

During trial proceedings, the district court learned of possible juror misconduct involving an inquiry addressed to another judge's law clerk by the jury foreman. The district court took sworn testimony on the question outside the presence of the other jurors. The foreman testified that he asked the law clerk if he could conduct outside investigation concerning a medical issue, and that the law clerk responded in the negative. The foreman went on to state that he performed no investigation, but had simply asked whether he could do so. The law clerk testified that she immediately advised the court of the situation. The district court denied Smith's motion for a mistrial based upon the incident.

Smith contends that the district court erred in denying his motion for a mistrial because the jury foreman sought outside information, which demonstrated a failure to follow the district court's instructions.

A district court's decision regarding whether to grant or deny a motion for a mistrial is well within its sound discretion and will not be disturbed on appeal absent a clear showing of abuse.<sup>24</sup> We have previously held that the district court is not required to grant a motion for a new trial for every incident of jury misconduct.<sup>25</sup> "[A] new trial must be

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<sup>24</sup>Lane v. State, 110 Nev. 1156, 1163, 881 P.2d 1358, 1363-64 (1994).

<sup>25</sup>Id. at 1164, 881 P.2d at 1364.

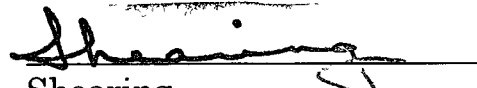
granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted.”<sup>26</sup>

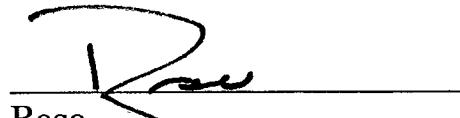
Here, the district court was satisfied that the juror obtained no outside information and no prejudice resulted in connection with the juror’s inquiry. Given the record generated on this issue, we conclude that the district court did not abuse its discretion in denying Smith’s motion for a mistrial.

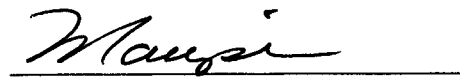
CONCLUSION

In light of the above, we reject Smith’s assignments of error on appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, C.J.  
Shearing

 \_\_\_\_\_, J.  
Rose

 \_\_\_\_\_, J.  
Maupin

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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<sup>26</sup>Id.