IN THE SUPREME COURT OF THE STATE OF NEVADA

SHOD N. WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46744

FILED

FEB 22 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, finding appellant, Shod N. Walker guilty of second degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

In this case, we consider whether the district court abused its discretion and committed reversible error in denying Walker's motion to strike his jury venire based on (1) a fair cross-section claim for underrepresentation of African-Americans and (2) discriminatory use of peremptory strikes in violation of Batson v. Kentucky.[1] We conclude that the district court did not abuse its discretion or commit reversible error, because Walker failed to provide sufficient evidence to prove his fair cross-section claim and the State did not act in a discriminatory manner in exercising its peremptory challenges at trial. Accordingly, we affirm Walker's conviction.

FACTS AND PROCEDURAL HISTORY

On April 28, 2003, Simone Hirst was found dead in the Lejac Apartments in Las Vegas, Nevada. A witness, David Smith, reported to the Las Vegas Metropolitan Police Department that Hirst had been

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

walking with an African-American male known as "Shadow" the night Hirst died. Smith stated that on the night of the murder, Shadow emerged from behind the Lejac Apartments, indicating that the police would be there soon because a girl was "dead or that he had killed her." Smith identified Shadow as Walker. Walker was charged with first-degree murder with the use of a deadly weapon. However, during the first trial, the district court declared a mistrial because a juror had been conducting his own independent inquiries as to the cause of Hirst's death.

At Walker's second trial on the same charge, counsel for the defense made a motion to strike the jury panel on the bases that (1) it underrepresented African-Americans and (2) violated Batson. As to the underrepresentation claim, counsel for the defense argued that because there were only two African-American jurors in the jury venire, it did not represent a fair cross-section of the community.

As to the Batson challenge, the State offered race-neutral reasons for dismissing two African-American jurors, Ms. Wassen and Mr. Hibbler, from the jury venire. Specifically, as to Mr. Hibbler, the State claimed that "[t]hroughout a questioning, at least by the [S]tate, he had his arms folded in front of him which is a concern of mine that he's not receptive to what the [S]tate has to say." The State also asserted, as race neutral justifications for excusing Mr. Hibbler, that he had pigtails, had lived in Las Vegas for only four years, and inquired if he had to return after a court-excused jury break. As to Ms. Wassen, the State argued that she appeared to be sympathetic to the defendant and did not appear to have the stomach for a murder case involving explicit photographs. Walker's counsel claimed that the reasons given for dismissing the African-American jurors were pretextual.

The district court found for the State on both the fair cross-section claim and the Batson challenge. Walker was subsequently sentenced to restitution and a minimum of 120 months to life, plus an equal and consecutive term of 120 months to life for the use of a deadly weapon. This appeal followed.

DISCUSSION

Fair cross-section claim

Walker argues that his jury venire, which included two African Americans out of a total of 55 individuals,[2] did not represent a fair cross-section of the African-American community in Clark County, which violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. In this, he contends that the source pool from which jurors in Clark County are chosen should be expanded. The State, on the other hand, argues that the use of the Department of Motor Vehicles (DMV) licensed driver lists, which are used to select jurors in the district from which a case originates, necessarily yield a fair cross-section of the population because (1) driver's licenses are issued independent of racial and socio-economic barriers and (2) the DMV does not discriminate in issuing driver's licenses.[3] The State also contends that Walker failed to provide any evidence that African-Americans were systematically excluded from his jury venire.

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[2]Walker does not provide the size of the jury venire in his brief. However, the joint amicus brief from the federal public defender, Nevada Attorney's for Criminal Justice, and the American Civil Liberties Union of Nevada indicates that the jury venire consisted of 55 individuals.

[3]Walker counters that selecting jury venires based on DMV licensed driver lists discriminates on the basis of socio-economic status.

We recently held in Williams v. State that a defendant is entitled to a jury venire that is "selected from a fair cross-section of the community."[4] However,

> [t]he Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community. Instead, the Sixth Amendment only requires that "'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'"[5]

Accordingly, random variations in the jury selection process are permissible "as long as the jury selection process is designed to select jurors from a fair cross-section of the community."[6] Specifically, in order to demonstrate a prima facie violation of the requirement that a venire comprise a fair cross-section of the community, the United States Supreme Court in Duren v. Missouri stated that the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation

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[4]121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

[5]Id. at 939-40, 125 P.3d at 631 (quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996) quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

[6]Id. at 940, 125 P.3d at 631.

> is due to systematic exclusion of the group in the jury-selection process.[7]

In addition, we noted that "[e]ven in a constitutional jury selection system, it is possible to draw venires containing no (0%) or one (2.5%) African American in a forty-person venire. It is equally possible that the same venire could contain six (15%) to eight (20%) African-Americans."[8]

We conclude that Walker did not provide sufficient information regarding the makeup of his jury venire or the percentage of African-Americans in Clark County to prove either the second or third prong of the Duren test. Specifically, Walker failed to indicate the size of his jury venire or the total number of jurors of any race or ethnic group that appeared for jury service, and he offered no evidence that the use of DMV lists results in the systematic exclusion of African Americans from jury venires in Clark County. We also conclude that it is within the range of normal variation that occurs in a constitutional jury selection system to have two African-Americans in a pool of 55 jurors. In addition, defense counsel conceded during oral argument that, while he made an offer of proof at trial, he failed to request an evidentiary hearing. Accordingly, we conclude that the district court did not abuse its discretion or err under Duren in refusing to grant Walker a new jury venire.

Batson challenge

Walker argues that the State excluded African Americans from his jury venire, in violation of Batson. Specifically, as to Mr. Hibbler, Walker argues that Mr. Hibbler's pigtails were a racial characteristic and

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[7]439 U.S 357, 364 (1979) (emphases added)); cited in Williams, 121 Nev. at 940, 125 P.3d at 631 and Evans, 112 Nev. at 1186, 926 P.2d at 275.

[8]Williams, 121 Nev. at 941, 125 P.3d at 632.

the fact that Mr. Hibbler had his arms folded was not a reason to excuse him. Walker further argues that the fact that the State did not excuse a Caucasian juror with unbraided ponytails proves racial motivation. As to Ms. Wassen, Walker asserts that because the district court denied the State's challenge for cause, "the only remaining reason for excluding [Ms. Wassen] was her race." He also argues that other jurors, like Ms. Wassen, indicated that they were squeamish about gory photographs but were not excused on that basis. Walker argues that the juror that was most vocal about his objection to graphic photographs was not African-American and was not dismissed from the jury. The State, in response, argues that it had sufficiently plausible race-neutral explanations for its peremptory challenges.

In Batson v. Kentucky, the United States Supreme Court held that the use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States Constitution.[9] It outlined a three-pronged test for determining whether discrimination occurred in jury selection. Specifically, (1) the defendant must show that discrimination based on race has occurred based on the totality of the circumstances, (2) the prosecution then must provide a race-neutral explanation for its peremptory challenges, and (3) the district court must determine whether the defendant, in fact, demonstrated purposeful discrimination.[10] In Purkett v. Elem, the United States Supreme Court explained that "[t]he second step of this process does not demand an explanation that is

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[9]476 U.S. 79, 96-98 (1986).

[10]Id.

persuasive, or even plausible."[11] The race neutral explanation "is not a reason that makes sense, but a reason that does not deny equal protection."[12] In addition, we held in Ford v. State that "[w]here a discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral."[13] We concluded, however, that "[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination."[14] We have further noted that "'[t]he very purpose of peremptory strikes is to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias.'"[15] In reviewing a Batson challenge, "'[t]he trial court's

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[11]514 U.S. 765, 767-68 (1995).

[12]Id. at 769.

[13]122 Nev. 398, 403, 132 P.3d 574, 578 (2006).

[14]Id. In this, we note that the relevant factors in determining whether a race-neutral justification for a peremptory challenge is merely pretextual are:

> (1) the similarity of answers to voir dire questions given by African-American prospective jurors who were struck by the prosecutors and answers by non-black prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of African-American and non-black prospective jurors, (3) the use by the prosecutors of the "jury shuffle," and (4) the evidence of historical discrimination against minorities in jury selection by the district attorney's office.

Id. at 405, 132 P.3d at 578-79 (footnote omitted).

[15]Id. at 409, 132 P.3d at 581 (quoting Miller-El v. Dretke, 545 U.S. 231, 292-93 (2005) (Thomas, J. dissenting)).

decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.'"[16]

We conclude that the district court's finding that the State did not dismiss Mr. Hibbler or Ms. Wassen because they were African-American was not clearly erroneous.[17] Specifically, neither the fact that the State failed to dismiss a Caucasian juror with a ponytail nor the fact that jurors other than Ms. Wassen objected to graphic photographs provide sufficient proof that the State engaged in purposeful discrimination. We conclude that the State advanced a number of separate and independent race-neutral justifications for its peremptory challenges that were persuasive, plausible, and nondiscriminatory. The State advanced four independent reasons for dismissing Mr. Hibbler. Walker appears to place unwarranted emphasis on the fact that the State mentioned Mr. Hibbler's pigtails, given that the State provided three other justifications for excluding him.[18] As to Ms. Wassen, the State claimed that she appeared sympathetic to Walker which distinguishes her from other jurors that merely objected to graphic photographs. Accordingly, we conclude that discriminatory intent was not inherent in the State's

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[16]Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)).

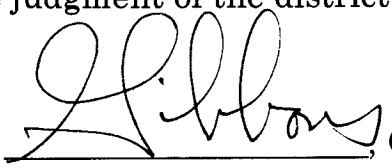
[17]Hernandez, 500 U.S. at 364-69.

[18]In this, we are persuaded by the State's arguments that (1) "[t]he Prosecutor only referenced the hair style when he was attempting to describe the juror to the Judge in such a way that would allow the Judge to know whom the Prosecutor was referring to" and (2) "[w]hile the Prosecutor placed some weight on the fact that the [prospective] juror had pigtails, in truth, it was this fact combined with the juror's attitude, body language, and relative newness to Las Vegas that gave the Prosecutor concern." (Emphasis added).

justification for its peremptory challenges and the district court did not abuse its discretion in rejecting Walker's Batson challenge.

We therefore conclude that the district court properly denied Walker's motion for a new jury venire.[19] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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Gibbons

_____, J.
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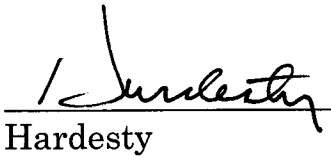

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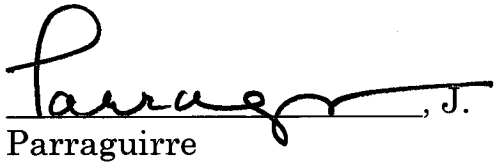

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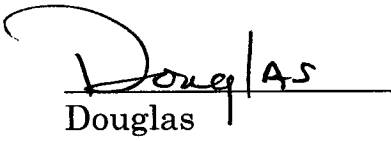

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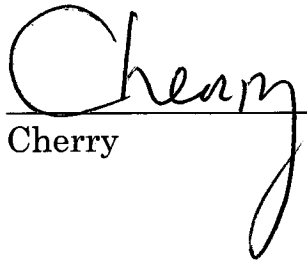

_____, J.
Cherry

_____, J.
Saitta

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Federal Public Defender/Las Vegas
Eighth District Court Clerk

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[19]The State also contends that Walker's motion was untimely. We conclude that this argument is without merit.