IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO A. CRUZ A/K/A FRANCISCO CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55976

FILED

JUN 20 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, attempted robbery with the use of a deadly weapon, second-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, assault with the use of a deadly weapon, and discharging a firearm out of a motor vehicle. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Francisco Cruz and his codefendants Angel Perez and Omar Ayala attended an illegal street race and attempted to rob a car belonging to another group of men, then started shooting at them, killing one person. Cruz and his codefendants were apprehended shortly after the incident. Cruz admitted to the police that he went to the race to rob someone because he needed money, that he brought a gun and fired into the air, that he aimed at a group of men and fired two shots, and that he fired out of the passenger side of the vehicle he was in because someone said they were being followed. After the joint trial of Cruz and his

codefendants, Cruz was convicted of multiple offenses.[1] This appeal followed.

Cruz argues that (1) the district court abused its discretion in denying a motion to dismiss the jury venire based on improper comments made by a codefendant's attorney; (2) the district court erred in rejecting his Batson v. Kentucky, 476 U.S. 79 (1986), challenge; (3) the prosecutor engaged in repeated misconduct that deprived him of his right to due process and warrants a new trial; (4) the jury was not properly instructed on the bases for second-degree felony murder; and (5) cumulative error warrants reversal. For the following reasons, we affirm the district court's judgment of conviction.

Voir dire

Cruz argues that the comments Perez's counsel made during voir dire about the propriety of racial profiling, particularly of Mexicans, were so racially charged that the jury pool could not have ignored them. Cruz contends that because he is of Mexican descent, the spillover of these statements deprived him of his right to due process and a fair trial and destroyed his presumption of innocence. Cruz argues that the district court should have granted the defense counsel's unanimous request to empanel a new jury.[2]

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[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

[2]While Cruz also refers to the district court's failure to grant his request for a mistrial, neither Cruz nor any of his codefendants moved for a mistrial.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. U.S. Const. amend. VI; U.S. Const. amend. XIV § 1; Nev. Const. art. 1, § 3. This "means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982).

"'Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" Morgan v. Illinois, 504 U.S. 719, 729 (1992) (alteration omitted) (quoting Ristaino v. Ross, 424 U.S. 589, 594 (1976)). Voir dire is a means for the district court "'to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence.'" Id. at 730 (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion)). "The Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." Id. at 729.

During voir dire, Perez's counsel acknowledged that nobody wants to admit that he or she is racist and stated that while he would not identify himself as racist, he agrees with racial profiling at airports, which some might consider racist. Perez's counsel followed this statement by listing beliefs held by some individuals concerning persons of Latino descent to determine if any of the jurors believed any of the statements and to test the jurors' fairness and impartiality. During the jurors' responses to the statements, one juror indicated that Perez's counsel was being irritating and another noted that the statements were loaded and bigoted. After the conclusion of Perez's counsel's voir dire, Cruz's counsel

indicated that his questioning was going to be brief and the jury applauded.

Another attorney representing Perez asked the court to dismiss the entire jury panel because the jury's applause indicated that they had grown tired and frustrated by Perez's counsel's voir dire, and noted that two of the jurors approached the bench to express their frustrations. He argued that, as a result, the jury panel would be prejudiced against his client and the defense attorneys in this case. Perez's counsel agreed and apologized, stating that he was unprofessional when he questioned the panel. He stated that he prejudiced not only his own client but also the codefendants in their presentation of the case. He then asked the court to consider dismissing the panel.

The district court denied the motion, indicating that she did not believe that there was any spillover effect, and while the jury was frustrated, any prejudice had not reached the level of having to dismiss the entire panel. The court also reminded counsel that each had 20 preemptory strikes. The court then canvassed the potential jury members regarding any possible prejudice, telling the jurors that the attorneys were doing their jobs and asking the jury if any of them felt prejudiced against the defendants because of the actions of the court or the attorneys. The jury did not respond, indicating that there was no prejudice.

We conclude that Perez's counsel's statements did not impermissibly taint the jury pool. Perez's counsel's comments regarding racial profiling did not concern the presumption of innocence, but rather constituted Perez's counsel's strategy to determine if any of the jurors were racially biased by encouraging jurors not to be politically correct in expressing their true feelings. Although Perez's counsel may have

behaved inappropriately and made improper racial comments, the district court properly canvassed the jurors, and all indicated that they would remain fair and impartial and that they were not prejudiced against the defendants. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (the jury is presumed to follow the district court's orders and instructions). Moreover, Cruz has not demonstrated that the jurors who were eventually sworn in and who served during Cruz's trial were in any way biased against the defense or that any bias against Perez's counsel spilled over to him or to his attorney. We conclude that Cruz's claim that he did not receive a fair and impartial jury is without merit, and the district court did not abuse its discretion by determining that the entire jury venire need not be stricken.

Batson challenge

Cruz contends that the district court erred in denying his Batson challenge when he alleged that two African-American jurors were stricken based on a pretextual explanation. We disagree.

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court concluded that using peremptory challenges to exclude prospective jurors based on their race is unconstitutional under the Equal Protection Clause of the United States Constitution. See Diomampo v. State, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008). A Batson challenge requires the district court to employ a three-step analysis:

> (1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination.

Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). When reviewing a challenge under Batson, this court affords great deference to the district court's decision on the question of discriminatory intent. Diomampo, 124 Nev. at 422-23, 185 P.3d at 1036-37.

In this case, the defense made a Batson challenge based upon the State's use of two peremptory challenges to strike two African-American jurors. The initial step in a Batson challenge is moot in circumstances such as this, where the State announces its reasons for a peremptory challenge before the district court has determined if the opponent of the challenge made a prima facie showing of discrimination. Ford, 122 Nev. at 403, 132 P.3d at 577. Here, the State argued that it was excluding jurors who were liberal or young, and pointed out that there was still diversity among the final jurors. The State contended that it did not want to empanel young jurors because the defendants were young and there was an argument that the defendants' age affected their ability to make rational decisions. The State also did not want jurors with liberal personalities who are more likely to be lenient towards a 16-year-old defendant.

As to the State's peremptory challenge to the first juror, the State explained that she was only 18 years old and she had what appeared to be a hand-drawn Playboy bunny tattoo on her wrist, which indicated to the State that she was either immature or had a liberal personality. The State was also concerned that the tattoo could have had a gang connotation. Finally, the juror indicated that she had fired both a nine-millimeter and a .45 caliber gun and both times she was not firing at a range or at a target. As to the second juror, the State assessed that he was liberal because he was a male artist with two earrings. Further, the

State noted that he indicated that he owned a .50 caliber Desert Eagle gun because it was sexy.

After evaluating the State's explanation, the district court denied Cruz's Batson challenges, determining that Cruz had not made out a prima facie case of discrimination and that there was nothing systematic with respect to race about the State's peremptory challenges. The district court judge went on to note that this began as one of the most diverse jury panels that she had ever seen and the jury selected was one of the most diverse that she had ever worked with. We agree with the district court's assessment. We conclude that a racially discriminatory intent was not apparent from the explanations offered by the State because the State's race-neutral explanations were plausible. See King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000) (excluding a juror due to youth and inexperience was a race-neutral explanation); Washington v. State, 112 Nev. 1067, 1071, 922 P.2d 547, 549 (1996) (finding it permissible to strike an African-American juror for his job, education, and lack of children). Considering the State's race-neutral explanations and the diverse jury that ultimately resulted from voir dire, we conclude that Cruz has not met the burden of proving purposeful discrimination. Accordingly, the district court did not abuse its discretion in overruling Cruz's Batson challenges.

Prosecutorial misconduct

Cruz further contends that the district court abused its discretion when it failed to declare a mistrial after repeated instances of prosecutorial misconduct so infected the trial with unfairness that he was

denied his right to a fair trial.[3] Cruz contends that the prosecutor engaged in misconduct when he persisted in laughing as an improper means to comment on the veracity of the witness, and when he impermissibly suggested that the codefendants were gang members by referring to the style of their shooting as "gangsta" style.

We consider two factors in evaluating prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we determine whether the conduct was improper. Id. If we conclude that the conduct was improper, we next decide whether the improper conduct warrants reversal. Id. "With respect to the second step of this analysis, [we] will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Id. The relevant inquiry is whether the prosecutor's conduct so infected the proceedings with unfairness as to result in a denial of due process. Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). We must consider the context of the conduct and note that the criminal conviction is not to be lightly overturned based on a prosecutor's conduct alone. Id. Moreover, an improper statement is harmless if the verdict would have been the same without the statement. Cf. Witherow v. State, 104 Nev. 721, 724-25, 765 P.2d 1153, 1155-56 (1988).

Cruz takes issue with the prosecutor's laughter during the testimony of two witnesses. The prosecutor first laughed during the testimony of a defense witness who had seen Perez, one of Cruz's codefendants, with a gun. The defense objected to the laughter, and the

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[3]Cruz again refers to the district court's failure to grant a mistrial, yet neither Cruz nor any of his codefendants moved for a mistrial.

district court admonished the prosecutor not to laugh and told the jury to disregard the laughter. The prosecutor later chuckled again during the questioning of a prosecution witness concerning Perez's response to being told that someone had been shot at the scene. The defense again objected and the district court admonished the jury to disregard the laughter. The district court then instructed the jury to disregard any of the attorneys' moods or reactions.

While we conclude that the laughter was improper, we further conclude that Cruz has failed to demonstrate how he was prejudiced by any alleged laughing when both instances were directed at Perez and the district court admonished the jury to disregard the laughter. We cannot agree that the prosecutor's conduct so infected the proceedings with unfairness as to result in a denial of due process. Because of the substantial evidence of guilt, we conclude that the prosecutor's laughter was harmless as the verdict would have been the same without the laughter.

Cruz also takes issue with the prosecutor's reference to the style in which the gun was shot as "gangsta" style. However, because Cruz did not provide this court with a reference to the prosecutor's remark but only with a reference to the objection to the remark, we decline to consider this issue. See NRAP 28(e)(1) ("Every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.").

Second-degree felony murder jury instruction

Cruz argues that the jury was not properly instructed on second-degree felony murder. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision

for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Because the instructional error alleged here involves a question of law, we review the instruction for judicial error. Rose v. State, 127 Nev. ___, ___, 255 P.3d 291, 295 (2011). When a jury has been given an erroneous jury instruction, we will not reverse the judgment of conviction if the error is harmless. Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). "An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Id. (quotation omitted). "Additionally, we presume that the jury followed the district court's orders and instructions." Id.

"The felony-murder rule makes a killing committed in the course of certain felonies murder, without requiring the State to present additional evidence as to the defendant's mental state." Rose, 127 Nev. at ___, 255 P.3d at 295. In Rose, we addressed the use of the merger doctrine as a tool to restrict the scope of the felony-murder rule in the second-degree murder context when the underlying felony is not a crime independent of the killing itself. Id. at ___, 255 P.3d at 296. We held that "assaultive-type felonies that involve a threat of immediate violent injury merge with a charged homicide for purposes of second-degree felony murder and therefore cannot be used as the basis for a second-degree felony-murder conviction." Id. at ___, 255 P.3d at 293. Because the determination of whether a felony may be assaultive is based on the manner in which the felony was committed, we held that courts must leave this inquiry to the jury. Id.

Pursuant to the indictment and the jury instructions,[4] the possible predicate felonies that could be used to obtain a second-degree

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[4]The jury was instructed that Cruz was guilty of murder if

> Defendants did then and there willfully, feloniously, without authority of law, kill [the victim], a human being, by shooting at and into the body of [the victim] with a deadly weapon, to-wit: a firearm; defendants being responsible under one or more of the following principles of criminal liability, to wit: (1) by defendants directly committing the killing with premeditation and deliberation, and with malice aforethought and/or (2) by defendants aiding or abetting others with the intent that one of their numbers would commit the killing with premeditation and deliberation, and with malice aforethought, by accompanying others to the crime scene where one or more of their numbers pointed a gun at [the victim] and shot at and into the body of [the victim] and/or (3) by defendants directly engaging in a felony which is likely to endanger life, to-wit: battery with use of a deadly weapon and/or assault with use of a deadly weapon and/or discharging a firearm out of a vehicle and the death of [the victim] occurring during the commission of said crimes and/or (4) by defendants aiding and abetting others with the intent that one of their numbers would commit the crime of battery with use of a deadly weapon and/or assault with use of a deadly weapon and/or discharging a firearm out of a vehicle by accompanying each other to the crime scene where one or more of their numbers pointed a gun at [the victim] and shot at and into the body of [the victim] while the others added strength to numbers and/or acted as a lookout and/or acted as the getaway driver, thereafter, defendants and the

continued on next page . . .

murder conviction under the felony-murder rule were: aiding and abetting the commission of a crime, assault with a deadly weapon, battery with a deadly weapon, discharging a firearm from a vehicle, and conspiracy to commit a dangerous felony such as robbery. Alternatively, the jury could find second-degree murder based on malice aforethought. Our adoption of the merger doctrine potentially removes three of the six bases for the conviction—assault with a deadly weapon, battery with a deadly weapon, and discharging a firearm from a vehicle—depending on whether the jury finds those felonies to be assaultive in nature based on the manner in which the felonies were committed. See Rose, 127 Nev. at ___, 255 P.3d at 297-98 (stating that a felony is assaultive in nature if it "involves a threat of immediate violent injury").

Concerning the remaining bases for the second-degree murder conviction—malice, aiding and abetting, and conspiracy—we conclude that

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. . . continued

> others leaving the crime scene together, defendants and the others encouraging one another throughout by actions and words, defendants acting in concert throughout.

The district court also instructed the jury on conspiracy as the basis for murder, explaining that conspirators are legally responsible for a co-conspirator's general intent crimes if the crimes were a probable and natural consequences of the conspiracy even if not part of the plan or if the conspirator was not present. In addition, the jury was instructed that second-degree murder "is Murder with malice aforethought, but without the admixture of premeditation and deliberation, or, where an involuntary killing occurs in the commission of an unlawful act, which in its consequences, naturally tends to take the life of a human being or is prosecuted with felonious intent."

a rational trier of fact would have found Cruz guilty of second-degree murder based on malice absent the error. "[M]alice, as applied to murder, 'does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.'" Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 582-83 (1992) (quoting Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27). "Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner." Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975). Malice supports Cruz's conviction because Cruz fired shots into a crowd of people who had not provoked him in complete disregard for their lives. Because it is clear that the conviction was supported by malice, we determine that the error in the jury instruction was harmless.

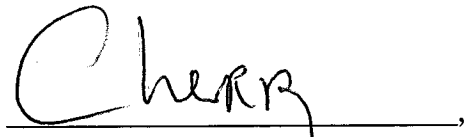
Cumulative error

Cruz argues that cumulative errors resulted in substantial prejudice sufficient to mandate a new trial. Cumulative error may deny a defendant a fair trial even if the errors, standing alone, would be harmless. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). "When evaluating a claim of cumulative error, we consider the following factors: '(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). The errors raised by Cruz in this case, when considered cumulatively, do not warrant relief. The issue of guilt in this case was not close, and the only legitimate errors asserted was prosecutorial misconduct in the form of laughter that was not directed at Cruz, but at a codefendant, and improper instruction to the jury that was harmless. While the crime

charged was serious, we cannot conclude that cumulative error warrants reversal. A defendant is not entitled to a perfect trial, merely a fair one. Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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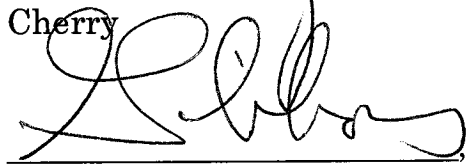

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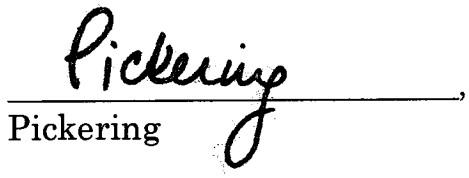

_____, J.
Pickering

cc: Hon. Jackie Glass, District Judge
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Clark County District Attorney
Eighth District Court Clerk