

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DESTINY DORAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77224-COA

FILED

NOV 21 2019

ELIZABETH A. SROWN
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ORDER OF AFFIRMANCE

Destiny Doran appeals from a judgment of conviction, pursuant to a jury verdict, of grand larceny of a motor vehicle. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Doran was charged with two felonies: Grand Larceny of a Motor Vehicle and Possession of a Stolen Vehicle. Following a three-day jury trial, the jury convicted Doran on both counts. At sentencing, the district court dismissed the possession of a stolen vehicle conviction.¹

On appeal, Doran argues that: (1) the district court committed clear error following a gender-based *Batson* challenge when the prosecutor failed to provide an adequate gender-neutral explanation and the district court failed to make a proper ruling on the challenge, and (2) the district court abused its discretion by denying Doran's motion for mistrial based on cumulative error relating to a police officer's testimony.

First, we consider Doran's *Batson* challenge. When a defendant raises a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objection triggers a three-part-test. *Cooper v. State*, 134 Nev., Adv. Op. 104, 432 P.3d 202, 203-04 (2018). For the first step, the opponent of the peremptory strike must make a prima facie showing that the strike was based on gender.

¹We do not recount the facts except as necessary to our disposition.

19-47048

Watson v. State, 130 Nev. 764, 775, 335 P.3d 157, 166 (2014). Second, the burden shifts to the proponent of the peremptory strike to give a discrimination-neutral explanation for the strike. *Id.* at 774, 335 P.3d at 165. Lastly, the district court determines whether the opponent of the strike has proven the proponent of the strike purposefully discriminated against the juror. *Id.* This court affords “great deference to the district court’s findings regarding discriminatory intent, and we will not reverse unless clearly erroneous.” *Cooper*, 134 Nev., Adv. Op. 104, 432 P.3d at 204 (internal quotation marks omitted).

During voir dire, the State used peremptory challenges to dismiss five potential jurors. In response to the State striking two women in a row with its initial two peremptory challenges, Doran raised a *Batson* challenge. The State explained that it dismissed the first woman because she worked with Northern Nevada Literacy Council and the second woman because she had high blood pressure. The district court subsequently found these challenges were not discriminatory in nature, and noted the venire as a whole was predominantly women. The State used its third peremptory challenge to strike a male juror and its fourth to dismiss another woman. Doran renewed her *Batson* challenge. The State opposed, stating that Doran failed to make a prima facie showing of discriminatory purpose but ultimately offered a gender-neutral explanation (the juror’s nephew worked in the district attorney’s office and had been exposed to the case). The district court again found that Doran failed to show a discriminatory purpose by the State.

Doran argues the State showed a pattern of discrimination by using three of its five peremptory challenges on women. Although Doran concedes two of the State’s three gender-neutral explanations were proper,

Doran claims that the State's explanation for its fourth peremptory challenge was inadequate because the State argued Doran's *Batson* challenge was without merit before it gave a gender-neutral explanation. Further, Doran argues that the district court's findings on her *Batson* challenge were in error because the district court failed to expressly or implicitly credit the State's explanation. We disagree.

A defendant can show a pattern of discrimination by comparing the peremptory challenges against a "cognizable group" to the total number of challenges. *Watson*, 130 Nev. at 777, 335 P.3d at 167; see *Libby v. State*, 113 Nev. 251, 255, 934 P.2d 220, 223 (1997). However, "a better approach would be to compare the percentage of . . . peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire." *Watson*, 130 Nev. at 778, 335 P.3d at 168 (internal quotation marks omitted).

While Doran argues the State used sixty percent of its strikes on women, the district court noted that a majority of the venire were women, and in fact the jury consisted of six women, and the court found there were other reasons for the State's peremptory strikes. Even though the State opposed Doran's renewed *Batson* challenge, it still provided a gender-neutral explanation for its peremptory strike. Specifically, the State explained that it wanted to avoid the appearance of impropriety. Because the State and district court met the procedural requirements of *Batson*, we defer to the district court's determination. Accordingly, we find there was no clear error with the district court's findings regarding Doran's *Batson* challenge.

Next, we consider Doran's arguments regarding her motion for a mistrial based on cumulative error. We review a district court's denial of a motion for mistrial for an abuse of discretion, and will not overturn absent a

clear showing of abuse. *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). The district court may grant a mistrial when some prejudice prevents the defendant from receiving a fair trial. *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). Even though errors may be harmless individually, this court will reverse a conviction if the cumulative effect of harmless errors violates a defendant's right to a fair trial. *Rose v. State*, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007).

During trial, Officer Good testified that Doran refused to speak to him "about the incident or the case." Doran timely objected, and, once outside the presence of the jury, argued that Officer Good's testimony referenced Doran's right to remain silent. The district court sustained the objection, but found Officer Good's answer to be a "mere passing reference" and, therefore, issued a curative instruction to the jury striking that question and answer.

The prosecution is forbidden from commenting on a defendant's right to remain silent. *McGee v. State*, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986). However, a "mere passing reference" to a defendant's right to remain silent does not mandate an automatic reversal. *Diomampo v. State*, 124 Nev. 414, 427, 185 P.3d 1031, 1040 (2008) (internal quotation marks omitted). In *Diomampo*, the court found it was error, which was not harmless beyond a reasonable doubt, when the prosecutor intentionally referenced the defendant's right to remain silent and the district court failed to strike the testimony or offer a limiting instruction. *Id.* at 428, 185 P.3d at 1040. The district court may cure a witness's inadvertent reference to inadmissible evidence by immediately admonishing the jury to disregard the statement. *Rose*, 123 Nev. at 207, 163 P.3d at 417.

Here, the district court immediately sustained Doran's objection to Officer Good's testimony. Further, the district court found that, unlike in *Diomampo*, Officer Good's statement was a "mere passing reference" to Doran's silence. The district court then struck the State's question, Officer Good's answer, and gave a curative instruction to the jury. Thus, we conclude that Doran was not unfairly prejudiced by Officer Good's statement about her silence.

The State then asked Officer Good what charges Doran had been arrested under. Officer Good answered that Doran had been arrested for "Possession of a Stolen Motor Vehicle and Possession of Drug Paraphernalia." Doran again objected and called for argument outside the presence of the jury. At this point, Doran argued that the State had intentionally sought to admit evidence of prior bad acts and moved for mistrial based on cumulative error. The district court sustained Doran's objection to Officer Good's testimony, but denied her motion for a mistrial.

Under NRS 48.045(2), evidence of other crimes, wrongs, or acts are inadmissible to prove the character of a defendant. Prior bad acts are presumptively inadmissible because they are often irrelevant, prejudicial, and force the defendant to defend against unsupported charges. *Newman v. State*, 129 Nev. 222, 230, 298 P.3d 1171, 1178 (2013). "The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because the jury believes the accused is a bad person." *Walker v. State*, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000). A district court's "erroneous admission of evidence is deemed harmless unless it had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Newman*, 129 Nev. at 236, 298 P.3d at 1181 (quoting *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001)).


Here, Doran was not prejudiced by Officer Good's testimony regarding her arrest for possession of drug paraphernalia. While the district court sustained Doran's objection to the testimony, the district court found there was no prosecutorial misconduct and that Officer Good's inappropriate testimony did not warrant a mistrial. The district court struck the question and answer. Further, the district court gave a curative instruction to the jury regarding Officer Good's testimony about drug paraphernalia and renewed its instruction about Doran's silence.


Thus, we conclude that the district court did not abuse its discretion by denying Doran's motion for a mistrial because Officer Good's testimony about Doran's silence and drug possession were both struck from the record and the jury was given curative instructions after each instance. Further, any potential errors were harmless beyond a reasonable doubt in view of the overwhelming evidence against Doran. *See Newman*, 129 Nev. at 237, 298 P.3d at 1181.


Finally, we conclude, in light of the gravity of the crime charged, that no cumulative error occurred that warrants reversal because the issue of guilt is not close and the errors are not major. *See Rose*, 123 Nev. at 211, 163 P.3d at 419.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Lynne K. Simons, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk