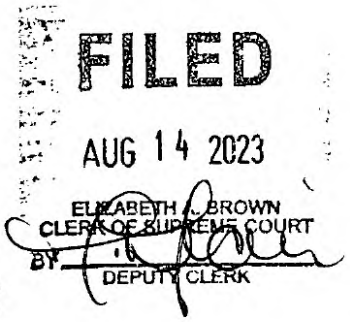
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ZAFFERINE AMIT MCGILBRA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85105-COA



ORDER OF AFFIRMANCE

Zafferine Amit McGilbra appeals from a judgment of conviction, pursuant to a jury verdict, of murder in the second degree with the use of a deadly weapon. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Clancy Shaun Christopher was outside the Regional Transportation Commission (RTC) bus station in downtown Reno when RTC security told him to leave because he was disrupting patrons at the station. Christopher, who had alcohol with him, left the bus station and walked across the street to an alley. Shortly after, McGilbra drove into the alley, parked, exited his car, and walked towards Christopher.

As McGilbra approached, Christopher appeared to be dancing and making gestures at McGilbra. They came together and exchanged items. Christopher reached his arm out to McGilbra, appearing to push or strike McGilbra in the chest, and McGilbra slapped Christopher's hand away as the two continued exchanging words. After the brief verbal exchange and first physical encounter, the two men walked up the alley together and towards an empty dirt lot adjacent to the alley. Christopher entered the lot and began throwing rocks in the air, rubbing dirt in between his hands, and speaking loudly to McGilbra. McGilbra did not enter the lot

at first. McGilbra appeared to be walking back towards his car but changed direction towards a hole in the fence that was the only entrance into the lot.

Reno Police Detective Chad Crow, the lead detective assigned to the case, testified that he reviewed the RTC video surveillance footage. Though the camera view was partially obstructed at times, Detective Crow recounted that the video appeared to show the following events transpire: McGilbra entered the lot through the hole in the fence; by returning to the lot, it appeared that McGilbra agreed to fight Christopher; McGilbra initiated physical contact with Christopher by pushing him in the chest; McGilbra tackled Christopher to the ground and McGilbra raised his arms while the two were on the ground; and, eventually, McGilbra stood up and raised his arms again, throwing something towards the ground, likely a rock. Detective Crow testified that these portions of the video were inconsistent with McGilbra's subsequent statements that a rock slipped out of his hand and that he did not want to fight Christopher.

A witness who lived on the second floor of an apartment building that faced the empty dirt lot observed the confrontation between McGilbra and Christopher from his apartment window. The witness testified that he saw McGilbra raise a rock over his head and strike Christopher in the head with it. McGilbra again raised the rock above his head, but the witness yelled out his open window at McGilbra to stop. McGilbra dropped the rock to the ground and walked back towards his car. McGilbra drove off, leaving Christopher prone in the dirt. People nearby rushed to the scene, found Christopher on the ground and badly injured and bleeding, and called the police to report a fight involving a battery with a rock. Witnesses also gave a vehicle description and license plate number to the 9-1-1 dispatcher.

Police officers responded and discovered Christopher lying in the dirt with blood all over his face. Police also found a rock that was larger than a softball next to Christopher. The rock looked like it was out of place and was covered in blood and hair. Christopher was transported to the hospital and paramedics noted that he had a major skull fracture. He was admitted into the Intensive Care Unit and placed on full life support.

In addition to providing the vehicle description and license plate number, witnesses described McGilbra as a Black male adult, approximately 230 pounds, and 6 feet tall. Reno police located one of the vehicle's registered owners and learned she was in a relationship with McGilbra. McGilbra was found the next day in a nearby apartment, which he exited and agreed to speak with Detective Crow. Detective Crow recorded the interview and testified that McGilbra was very slow to move when exiting the apartment, appearing to favor one side when walking. When asked whether he had an accident, McGilbra first said he had a slip-and-fall, then later said he was in a fight several days before.

McGilbra agreed to go to the police station for an interview. During the interview, McGilbra admitted he was in a fight but claimed he would not be the one to start a fight. He also claimed that he repeatedly told Christopher he did not wish to fight. Detective Crow testified that he informed McGilbra that he was seen throwing a rock at Christopher's head. McGilbra did not deny this; instead, he seemed to acknowledge it. McGilbra implored Detective Crow to only charge him with battery, explaining that the rock might have slipped out of his hands as he was trying to throw it away. McGilbra also stated that he had only struck Christopher with his fists, not the rock. McGilbra told Detective Crow that Christopher swung at him first, but Detective Crow corrected McGilbra by reminding him he

was responsible for first pushing Christopher in the chest, which led to the two men fighting on the ground. McGilbra did not deny this. Following the interview, McGilbra was formally arrested.

Christopher died several days after the attack from blunt force injuries sustained to his head, including brain swelling and bleeding around his brain. The medical examiner testified that Christopher suffered multiple injuries, including a depressed skull fracture, brain hemorrhaging, and several fractures and tissue injuries to his head and face. The examiner also testified that the injuries she observed could be consistent with damage caused by the rock found near Christopher's body. She further testified that in her experience and training, she had never seen such injuries caused only by a person's fist. Christopher never provided a statement to police due to his injuries. Following Christopher's death, McGilbra was charged with murder with the use of a deadly weapon.

McGilbra's jury trial lasted five days. During opening statements, McGilbra stated that Christopher had a history of inciting interactions, calling people names, and that Christopher was drunk on the day of the altercation. McGilbra also stated that he only hit Christopher's face with his fists. McGilbra recounted that Louise Mangum, Christopher's self-proclaimed girlfriend, stuck out her foot and blocked the rock that McGilbra had thrown, preventing it from hitting Christopher. McGilbra also claimed that he never wanted to fight Christopher, but that Christopher incited the violence between them by calling McGilbra racially charged names and throwing small rocks towards him. McGilbra's defense theory was that he did not act intentionally or willfully, nor did he unlawfully kill anyone; instead, he asserted that he reacted to danger.

McGilbra did not testify, but he did call an expert witness to opine about the effects of his criminal history on his mental health. McGilbra's expert, a forensic psychiatrist, reviewed McGilbra's previous treatment records, his past medical records including mental health records, past records from three correctional facilities, video surveillance footage of the altercation, Christopher's autopsy report, video from McGilbra's police station interview, and McGilbra's own statements from his interview with the expert. Based on her review of this evidence, the psychiatrist diagnosed McGilbra with PTSD and testified that McGilbra did not react well to threats of danger because of his PTSD and history of being violently attacked, shot at, and stabbed. She testified that as a victim of previous physical assaults, McGilbra becomes hypervigilant to potential injury, so he often will not turn his back to threats of danger. During closing arguments, McGilbra reiterated how his history of violent experiences and attacks made him hypervigilant and how this case was the "story of reaction to danger." McGilbra characterized the altercation as a spontaneous fight where no one challenged or called out anyone. Lastly, McGilbra explained that this case was about his level of culpability, seemingly admitting that he did have some culpability.

Sixteen witnesses testified for the State. including the witness who lived at the nearby apartment, the other witnesses at the scene, police officers who responded to the 9-1-1 calls, RTC's security officers, RTC's surveillance video manager, forensic and medical experts, and the lead detective on the case. Physical evidence was admitted that linked McGilbra to the crime, including evidence recovered from his apartment and from inside the vehicle he drove off in. The physical evidence included McGilbra's blue sweatshirt, which he was seen wearing in surveillance footage;

McGilbra's shoes, which had Christopher's blood on them; and the steering wheel from the vehicle, which also had Christopher's blood on it. Christopher's blood and hair were also on the rock that was found next to him when paramedics and police arrived at the scene.

The State also introduced the audio and video recordings and the rock. The audio clips in evidence consisted of McGilbra's statements during his initial contact with officers at the apartment, during his interview at the police station with Detective Crow, and during phone calls made while McGilbra was in custody. Detective Crow testified that McGilbra could be heard stating he was going to try to plead temporary insanity and that he beat up Christopher for trying to steal from him.

Various legal issues arose during trial starting with jury selection. During voir dire, juror 18, an African American, was preliminarily selected. McGilbra is also African American. After initial questioning by the district court, the State questioned juror 18 about whether he could make a decision based on facts and evidence but not based on sympathy for McGilbra. Juror 18 responded that he could. The State followed up with a hypothetical, posing a scenario of a trial for a speeding violation where the individual on trial was found to have gone two-to-three miles per hour over the speed limit. The State asked juror 18, if he were on the jury for the speeding violation trial, could he follow the law (and convict) if the State proved beyond a reasonable doubt that the individual was driving over the speed limit. This time juror 18 responded, "I mean, not for a speeding ticket." The State ended this line of questioning and moved on. The State asked juror 18 what was pictured on the sweatshirt he was wearing. The juror responded that the picture was from the movie *Boyz n the Hood* and that he was a fan of the movie.

McGilbra questioned juror 18 and the rest of the jury panel next. Juror 18 was asked whether he could sit in judgment at the end of the presentation of the case by both sides and feel like he has done justice. He responded, "I'm not sure. I'm not sure about it, to be honest." After his response, McGilbra stopped questioning juror 18. McGilbra eventually asked the jurors what they thought about people who present a defense based on some kind of mental health issue. The question was probing whether the prospective jurors thought that someone with this type of defense was just trying to make an excuse for what happened. McGilbra saw juror 18 nodding and focused the questioning on him, asking, "Do you feel that way? That . . . they're not trying to take responsibility for something they did, they are trying to offer an excuse." Juror 18 replied, "Yeah, I don't know." McGilbra's counsel did not question the juror further nor about the *Boyz n the Hood* movie and later passed the jury for cause.

Next, the district court asked each side to exercise their peremptory challenges. The State exercised its third peremptory challenge to excuse juror 18, and McGilbra immediately raised a *Batson*[1] challenge. The court explained the three-step process under the Nevada Rules of Criminal Procedure[2] when a *Batson* challenge is made to a peremptory

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[1]*Batson v. Kentucky*, 476 U.S. 79 (1986).

[2]*See* N.R.Cr.P. 17(4)(B) ("A *Batson* challenge made during a peremptory strike must follow this three-step process: First, the opponent of the peremptory strike must make a prima facie showing that a peremptory challenge has been made on the basis of race or other recognized suspect classification. Second, if that showing has been made, the proponent of the peremptory strike must present a classification-neutral explanation for the strike. Third, the court must hear argument and determine whether the opponent of the peremptory challenge has proven

strike. The court asked McGilbra to make a prima facie showing that the State's peremptory challenge to juror 18 was made on the basis of race or other suspect classification. McGilbra stated the following: "[Juror 18] is the only African-American member of the panel. Start with that. So he is a member of the suspect class. Second of all, he provided no answers that the State challenged and/or made any comment about, . . . or asked further questions as follow-up about."

The district court told the State that it must present a race-neutral explanation for its peremptory strike. The State explained the basis for its strike was the juror's sweatshirt and the picture shown on it, which it thought was inappropriate for court attire, and that it had struck another prospective juror similarly attired with a hooded sweatshirt. The State specifically raised issue with juror 18's sweatshirt because it was a hooded sweatshirt that had a *Boyz n the Hood* depiction on it. The prosecutor indicated he was familiar with the movie and that it is a violent film that depicts police in a very negative light, and the lead actor in the film is a rapper who released a song entitled "F[ ] the Police" before the release of the film. The prosecutor stated he had struck another prospective juror for also wearing a hooded sweatshirt and stated that this type of attire signals a lack of respect for the criminal process. The prosecutor also explained that he did not have a chance to follow up on the juror's statement that he would have a hard time sitting in judgment and that McGilbra's counsel did not follow up either, but that the statement was concerning. The prosecutor

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purposeful discrimination. The court shall clearly state the reasons supporting its determination regarding the peremptory strike.").

said that he did not follow up because the juror's statement was made during McGilbra's voir dire, and the State's opportunity had passed.

The district court asked McGilbra to respond to the State's purported race-neutral reasons for its strike. McGilbra stated that there were a couple of female jurors wearing hooded sweatshirts and none of them had been challenged. McGilbra also responded that *Boyz n the Hood* is an award-winning movie that is in the Library of Congress as a film of great historical value. McGilbra further stated that his argument that the State's challenge was based on a suspect class was only bolstered given that the movie was released in the 1990s and the movie's cast was predominantly African American. Lastly, McGilbra stated that there were other jurors in the panel "wearing torn jeans and other things like that," indicating that the State's race-neutral explanation regarding juror 18's hooded sweatshirt was "merely a subterfuge and it is not an actual reason for excusing somebody." McGilbra, however, did not challenge the State's other purported bases for the strike, including the description of the movie as violent and depicting police in a bad light, nor that one of the film's lead actors performed or wrote a song using an epithet towards police in its title. McGilbra also failed to challenge the State's assertion that it was concerned with juror 18's indication that he would have a hard time sitting in judgment of another person.

The State responded to McGilbra, stating that it did not see female jurors wearing hooded sweatshirts and that if any other juror was wearing the *Boyz n the Hood* sweatshirt or other depictions of crime-based movies, it would still cause concern. The State further commented that

> when you come to jury duty, this is something that is not an everyday occurrence, and there would be

> a reason why you would wear a sweatshirt like that.
>
> . . .
>
> So it is the fact that it is a movie that paints police in a very negative light that causes me great concern.

The argument ended following the State's final comment.

The district court announced its ruling on McGilbra's *Batson* challenge stating, "First, the fact that [juror 18] was wearing a hoodie and [the State] finds that disrespectful is unpersuasive to this Court and does not factor into this Court's decision." The court further stated, "The question for this Court is whether [the State] would be justified in pre-empting a non-[B]lack juror for the same reason and be justified in doing so. And this Court finds that he would be justified in doing so." The court said bias related to law enforcement was an issue in the jury selection process, that McGilbra did not challenge the State's description of the movie as depicting law enforcement in a very negative light, also found that the State was not motivated in substantial part by discriminatory intent, overruled McGilbra's challenge, citing *Flowers v. Mississippi*,[3] and excused juror 18. There was no description put on the record about the racial and ethnic composition of the prospective jury except that juror 18 was the only African American.

An issue also arose at trial as to Detective Crow's testimony, specifically his reference to a "jail call," and McGilbra's resulting motion for

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[3]The district court quoted the Supreme Court when it held that "[t]he ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." 588 U.S. ___, ___, 139 S. Ct. 2228, 2244 (2019) (internal quotation marks omitted).

a mistrial. Further, other issues arose with regard to the district court's settling of several jury instructions.

At the conclusion of trial, the jury found McGilbra guilty of murder in the second degree with the use of a deadly weapon. McGilbra was sentenced to serve consecutive prison terms totaling 18 years to life in the aggregate.

McGilbra raises three issues on appeal. He asserts that the district court (1) erred in denying his *Batson* objection following the State's peremptory challenge striking the only African-American member of the prospective jury panel, (2) abused its discretion in denying his motion for a mistrial following Detective Crow's reference to a "jail call" during his testimony, and (3) abused its discretion in rejecting McGilbra's proposed jury instructions and overruling his objections to the State's jury instructions. We disagree in most part and address each argument in turn.

The district court did not clearly err in overruling McGilbra's Batson *objection*

McGilbra argues that the district court erred in applying the standards enunciated in *Batson* given that juror 18 was the only African-American member of the jury venire. McGilbra also argues that the State's race-neutral explanation was pretextual, so his objection should have been granted. Lastly, McGilbra argues the district court's error was structural, and that his judgment and conviction should be reversed and the case remanded for a new trial. The State responds that the district court correctly applied *Batson* because the State offered several race-neutral reasons for its peremptory strike and that the district court correctly found that McGilbra failed to meet his heavy burden to show that the State's strike was motivated by purposeful discrimination.

Under *Batson*, when an objection is made following a peremptory challenge to remove a prospective juror, a district court must follow a three-step process to determine whether the challenge to remove the juror was unconstitutional. 476 U.S. at 93-100; *see also Williams v. State*, 134 Nev. 687, 689, 429 P.3d 301, 305 (2018). "First, the opponent of the peremptory strike must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Williams*, 134 Nev. at 689, 429 P.3d at 305 (internal quotation marks omitted). Second, once the opponent makes a prima facie showing, the other party "must present a race-neutral explanation for the strike." *Id.* at 689, 429 P.3d at 306. Third, "the court should hear argument and determine whether the opponent of the peremptory strike has proven purposeful discrimination." *Id.* Importantly, step three requires the district court to provide a thorough discussion of its reasoning after review of both parties' arguments and address if the defendant has met his or her burden of persuasion. *Id.* at 693, 429 P.3d at 308 (holding that the district court's bare conclusion, "I don't find the State based it on race," was inadequate to satisfy the requirements of step three of *Batson*); *see also Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

A district court is in the best position to rule on a *Batson* challenge, so its ultimate determination is reviewed deferentially for clear error. *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30; *see also Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (noting that in reviewing a *Batson* challenge, the district court's decision on the ultimate question of discriminatory intent is accorded great deference on appeal). Under the clear error standard, a reviewing court must ask whether, in viewing "the entire evidence, it is left with the definite and firm conviction

that a mistake has been committed." *Snyder v. Louisiana*, 552 U.S. 472, 487 (2008) (Thomas, J., dissenting) (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)) (internal quotations marks omitted); *see also Sanchez v. State*, No. 66964, 2016 WL 3856575, at *6 (Nev. July 14, 2016) (Order of Reversal and Remand).

After hearing McGilbra's response to step one of the *Batson* inquiry, the district court moved to step two by asking the State to respond, thereby impliedly finding that step one was satisfied. The State gave its race-neutral reasons. The district court allowed McGilbra an opportunity to counter pursuant to step three of *Batson*. The State had the opportunity to respond to McGilbra's argument. The court then recessed to deliberate about the challenge.

The district court found the State would be justified for preempting a non-Black juror for the same reasons that the State chose to preempt juror 18. McGilbra argues that the district court labeled the State's argument "unpersuasive" regarding juror 18's hooded sweatshirt. However, the State's race-neutral explanation need not be persuasive. *See Diomampo*, 124 Nev. at 422, 185 P.3d at 1036 (noting that the second step of the *Batson* inquiry "does not demand an explanation that is persuasive, or even plausible" (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995)). Moreover, in addition to the actual hooded sweatshirt, the court pointed specifically to the State's concern with the *Boyz n the Hood* image on juror 18's sweatshirt and the film's meaning as argued by the State. The district court also highlighted that McGilbra did not challenge the State's argument that the image on juror 18's sweatshirt shows support for a film that depicts law enforcement in a very negative light.

On appeal, McGilbra does not directly challenge the district court's findings as to step two. McGilbra maintains the State's argument that wearing a hooded sweatshirt shows a lack of respect for the court process was dismissed by the district court as unpersuasive and that the district court ignored his counterargument about the historical value of the film on juror 18's sweatshirt. The State argues that it gave three race-neutral reasons for its peremptory challenge. Although the district court deemed the first of those reasons unpersuasive, and did not address the third one (juror 18 stating he would have a hard time sitting in judgment), the second reason regarding the image on juror 18's sweatshirt suggesting a negative view of law enforcement is still sufficiently race-neutral to satisfy the State's burden under step two of *Batson*. *See Diomampo*, 124 Nev. at 422, 185 P.3d at 1036 (noting that "[w]here a discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral" (alteration in original) (quoting *Ford v.* State, 122 Nev. 398, 403, 132 P.3d 574, 578 (2006)).

Turning to step three of the *Batson* inquiry, McGilbra argues that the district court's conclusion was wrong, but he does not argue that the court stated the law incorrectly or misapplied the legal standard. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that courts follow the "principle of party presentation" on appeal, which requires the litigants to frame the issues); *Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) (same); *Pelkola v. Pelkola*, 137 Nev. 271, 273, 487 P.3d 807, 809 (2021) (same). Therefore, McGilbra was required to show that the State's race-neutral explanation was pretext for discrimination and the district court's finding was clearly erroneous. *See McCarty v. State*, 132 Nev. 218, 226, 371 P.3d 1002, 1007 (2016). Under step three, the district

court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a *Batson* objection." *Id.* at 227, 371 P.3d at 1008 (internal quotation marks omitted). The court must determine whether the defendant has proven purposeful discrimination. *Id.* Essentially, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30.

The Supreme Court further explained the role of the trial court in this process. Specifically, the trial court must consider the State's "race-neutral explanations in light of all relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 588 U.S. at ___, 139 S. Ct. at 2243. The court can look to the prosecutor's credibility and demeanor when considering the State's race-neutral explanations. *Id.* at ___, 139 S. Ct. at 2243. Notably, determinations of the prosecutor's credibility and demeanor lie within the trial judge's province. *Id.* at ___, 139 S. Ct. at 2244.

Here, the district court's decision to overrule McGilbra's objection was based in part on its finding that the State would have similarly been justified in exercising a peremptory strike to a non-African-American juror for the same reasons that it was justified in striking juror 18. The court referenced the entire jury selection process when it also highlighted the "immeasurable amount of time" courts spend asking prospective jurors about their contacts with, knowledge of, and relationships with police officers, seemingly giving credibility to the State's concern with the meaning of the *Boyz n the Hood* depiction on juror 18's sweatshirt. Moreover, the district court recognized that "numerous jurors" were asked about bias related to police officers, and one juror was in fact

excused for stating he would not be able to give a lay person's testimony the same weight as an officer's testimony.

Importantly, the district court noted that McGilbra did not challenge the State's characterization of *Boyz n the Hood* as a film that depicts law enforcement in a very negative light, and McGilbra still does not challenge on appeal the State's characterization at trial that the film casts law enforcement in a negative light besides indicating that the film has historical significance. Further, he has not challenged the State's argument that a separate race neutral reason for the strike was that the juror indicated he might not be able to sit in judgment. We also note that McGilbra did not file a reply brief. *See generally Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").

The district court's conclusions as to step three of *Batson* indicate that the court found the State's race-neutral explanation for the peremptory strike to be credible, and the record on appeal is adequate such that we defer to the district court's determination. *See Flowers*, 588 U.S. at ___, 139 S. Ct. at 2244 (holding that an appellate court is to give great deference to the trial court's findings when evaluating the third step in *Batson*). Juror 18's status as the only African-American juror on the panel at the time he was stricken does not alone qualify as a sufficient basis to grant McGilbra's *Batson* objection, and McGilbra fails to demonstrate any actual discriminatory motive or pretext in the State's challenge to juror 18. *See Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30 (holding that "the use of

peremptory challenges will not be held unconstitutional solely because it results in a racially disproportionate impact . . . proof of racially discriminatory intent or purpose is required").

Nevertheless, district courts are reminded "to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." *Flowers*, 588 U.S. at ___, 139 S. Ct. at 2243. The Court in *Flowers* noted that *Batson* not only sought to protect the rights of defendants and jurors, but it was also intended to enhance public confidence in the fairness of the criminal justice system. *Id.* at ___, 139 S. Ct. at 2242. Therefore district courts need to be very careful to properly implement step three of *Batson*.

The district court here carefully followed the steps enunciated in *Batson*, applied the new Rules of Criminal Procedure, gave each side the opportunity to present its arguments, took the time to consider each side's arguments and evidence during a recess before reaching its determination, and rejected one of the State's three purported race-neutral justifications for its strike. While not perfect, this demonstrates the district court's sensitive handling of the *Batson* inquiry and the principles restated in the *Flowers* opinion. Because McGilbra failed to prove that the State's race-neutral explanation was pretextual and that the district court clearly erred, we conclude that the district court did not err by overruling McGilbra's *Batson* objection. *See Easley v. Comartie*, 532 U.S. 234, 242 (2001) (stating that in applying the clear error standard, a reviewing court "will not reverse a lower court's finding of fact simply because we would have decided the case differently").

The district court did not abuse its discretion in denying McGilbra's motion for a mistrial

McGilbra argues that the district court erred in denying his motion for a mistrial based on Detective Crow's statement referencing a "jail call." The call was included on a thumb drive admitted into evidence as the State's Exhibit 55. McGilbra stated that Detective Crow used the term "jail call" to describe the exhibit, despite being aware of the district court's pretrial order not to reference that the calls McGilbra made were from jail. Further, McGilbra argues that the error was compounded based on a note from a juror asking the court what specific testimony the jury was required to disregard after the court advised the jury that the answer from Detective Crow was stricken. The State responds that Detective Crow's inadvertent reference to a "jail call" was harmless beyond a reasonable doubt and therefore the denial of McGilbra's motion for a mistrial was not an abuse of discretion.

Detective Crow's challenged testimony was given in response to a question during the State's direct examination. Detective Crow was shown Exhibit 55 after he testified that he reviewed recorded telephone calls made by McGilbra. Detective Crow observed Exhibit 55 and testified that he was familiar with the exhibit's thumb drive. When asked how he was familiar with the thumb drive, Detective Crow responded, "This would be the thumb drive containing a jail call." McGilbra immediately objected, and the district court excused the jury so that it could hear McGilbra's objection.

After hearing argument by each side, the district court concluded that Detective Crow's testimony lacked any vindictiveness towards McGilbra, and his reference to a "jail call" was not willful. The court also concluded that the State did not display any deliberateness,

vindictiveness, or misconduct. The court found that the video of the police station interrogation already admitted into evidence revealed that McGilbra was in custody and at one point was placed in handcuffs, which was "clearly visible on the video as viewed by the jury." McGilbra was also told he was going to be arrested during the video interview. The district court denied McGilbra's motion for a mistrial, returned the jury to the courtroom, and instructed the jury without repeating the words "jail call" that Detective Crow's statement was to be stricken from the record.

The next day of trial, a juror submitted a question asking the district court which portion of Detective Crow's testimony was stricken from the record. After Detective Crow finished his testimony and after receiving a rough transcript of the testimony, the district court proposed a response to the juror question clarifying its admonishment to the jury. The proposed answer was submitted without objection from McGilbra and reaffirmed the direction to disregard the one statement from Detective Crow.

A district court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *See Mortensen v. State*, 115 Nev. 273, 281, 986 P.2d 1105, 1111 (1999) (holding that the "[d]enial of a motion for mistrial can only be reversed where there is a clear showing of an abuse of discretion" (internal quotation marks omitted)); *Jones v. State*, 95 Nev. 613, 619, 600 P.2d 247, 251 (1979). Evidence of a criminal defendant's status in jail raises an inference of guilt and could have a prejudicial effect on the defendant, but this type of error is not always prejudicial. *See Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). Courts have consistently held that a reference to a defendant being in custody, though potentially prejudicial, does not always warrant a mistrial. *See Rose v. State*, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007); *see also Ramirez v.*

State, No. 73074, 2019 WL 2339455, at *6 (Nev. May 31, 2019) (Order of Affirmance) (holding that the State's witness's reference to the defendant being in jail did not warrant a mistrial because the reference was fleeting and did not taint the defendant's Sixth Amendment right to a fair trial); *see also Chandler v. State*, 92 Nev. 299, 300-01, 550 P.2d 159, 160 (1976) (holding that the appellant's brief appearance in handcuffs before the jury was harmless error because the error did not affect the appellant's substantial rights given his confessions to the crime and other evidence of his guilt).

The district court did not abuse its discretion in denying the motion for a mistrial. First, Detective Crow's statement lacked vindictiveness towards McGilbra based on his complete testimony, and his reference to the jail call was not willful. Detective Crow did not make any further reference to a jail call or to McGilbra being in custody other than the one reference, thus the single reference was fleeting and inadvertent. Moreover, Detective Crow never stated that McGilbra was ever in custody.

Second, as the district court alluded to, the jury had already seen the State's video recording of the police station interrogation. McGilbra stipulated to the admission of the video recording, which included audio of McGilbra being told multiple times that he was going to be arrested. The district court correctly concluded that Detective Crow's single, inadvertent, and fleeting statement to a "jail call" was harmless and did not affect McGilbra's substantial rights because the interrogation video had already revealed that McGilbra was being charged and inferred he was

in custody. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").[4]

Lastly, the district court cured any mistake or confusion caused by Detective Crow's statement by instructing the jury to ignore that portion of his testimony. Contrary to McGilbra's argument that the juror's note compounded the problem, the juror's question gave the district court another opportunity to clear up any confusion and remind the jury the next day what statement by Detective Crow should be ignored. Therefore, we conclude that the district court did not abuse its discretion in denying McGilbra's motion for a mistrial.

The district court did not abuse its discretion in rejecting most of McGilbra's proposed jury instructions and in overruling his objections to the State's jury instructions

McGilbra argues that the district court erroneously denied and/or refused his proposed jury instructions regarding his theory of defense (heat of passion/voluntary manslaughter), consideration of circumstantial evidence, and reasonable doubt. McGilbra also argues that the district court erred in overruling his objections to the State's jury instructions, but he fails to address these objections and makes no argument in support of his claim. Thus, he has waived any argument about his objections to the instructions given. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant

[4]We note that any error caused by the district court's denial of McGilbra's motion for mistrial was also ultimately harmless based on McGilbra's expert witness's testimony, which came after Detective Crow's challenged statement. McGilbra's expert referenced his criminal history and past experiences in correctional facilities. *See* NRS 178.598.

authority and cogent argument; issues not so presented need not be addressed by this court.").

A district court holds broad discretion in settling jury instructions. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). A district court's decision to provide a particular instruction to the jury is reviewed on appeal "for an abuse of discretion or judicial error." *Id.* "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.*

McGilbra argues that several of his proposed instructions were correct and accurate statements of the law but were still refused. He also argues that some of his instructions were necessary to present his theory of defense (heat of passion/voluntary manslaughter) and were supported by caselaw and the testimony of his expert witness, but still refused by the district court.

We discern no abuse of discretion by the district court in refusing to accept McGilbra's proposed jury instruction two, and instructions four through six for several reasons, but we agree with McGilbra as to instruction three. First, we conclude that the district court correctly refused McGilbra's proposed instruction number two with its alternate definition of reasonable doubt because NRS 175.211(2) specifically prohibits any definition of reasonable doubt other than the definition provided for in NRS 175.211(1).

Second, McGilbra's proposed instruction three was rejected by the district court as unnecessary after hearing argument by both sides. As to McGilbra's proposed instruction three, to the extent he argues that the instruction should have been given as an inverse instruction to support his heat of passion theory of defense, we agree that the district court was

required to give the inverse instruction. *See Guitron v. State*, 131 Nev. 215, 229, 350 P.3d 93, 102 (Ct. App. 2015) (stating that "the district court may not refuse to give a proposed defense instruction simply because it is substantially covered by other instructions given"). However, even though the district court abused its discretion in refusing to give McGilbra's proposed instruction three, the error is harmless because the jury was otherwise properly instructed and substantial evidence established McGilbra's guilt and supports the jury's verdict. *See id.* at 230-31, 350 P.3d at 102-03. Considering the strong evidence, "we are convinced beyond a reasonable doubt the verdict was not attributable to the court's refusal to give the inverse instruction." *See id.* at 231, 350 P.3d at 103.

Third, turning to McGilbra's proposed instruction four, the record shows that the district court carefully and deliberately analyzed the applicable legal authority on the voluntary manslaughter instruction. We conclude that the district court was correct in its ultimate determination that its intended instruction comported with Nevada caselaw,[5] and so McGilbra's proposed instruction four was not required.

Fourth, we conclude that the district court did not abuse its discretion in rejecting McGilbra's proposed instruction number five on interpretation of evidence. The district court properly rejected that instruction because the jury would properly be instructed on reasonable doubt. *See Hooper v. State*, 95 Nev. 924, 927 & n.3, 604 P.2d 115, 117 & n.3 (1979).

Finally, we conclude that the district court did not abuse its discretion in refusing McGilbra's proposed instruction number six on

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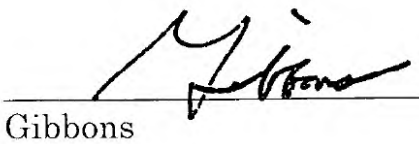
[5]*See Crawford v. State*, 121 Nev. 744, 121 P.3d 582 (2005).

circumstantial evidence because it similarly determined that it could be confusing and incorrect given that the jury would already be instructed on reasonable doubt and circumstantial evidence, and McGilbra's additional circumstantial evidence instruction was unnecessary. *See Bailey v. State*, 94 Nev. 323, 325, 579 P.2d 1247, 1249 (1978); *see also Earl v. State*, 111 Nev. 1304, 1308, 904 P.2d 1029, 1331 (1995) (holding that a district court does not commit reversible error when it refuses a jury instruction that is substantially covered by other instructions).

Therefore, we conclude that although the district court abused its discretion in rejecting McGilbra's proposed jury instruction three as an inverse instruction, the error was harmless, and the district court did not abuse its discretion in rejecting McGilbra's remaining proposed jury instructions.[6]

Accordingly, we

ORDER the judgment of conviction AFFIRMED.[7]



_____, C.J.
Gibbons

[6]Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

[7]The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.

SILVER, Sr.J., concurring:

I write separately to point out that district courts should take copious notes during jury selection of answers given by prospective jurors so the court can fully analyze challenges for cause and *Batson* challenges. Had that happened here, when McGilbra made his *Batson* challenge, instead of relying on the parties, in my view, the district court could have sua sponte struck prospective juror 18 for cause because during jury selection, the prospective juror answered that he could not sit in judgment of another person. *See Weber v. State*, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (providing a prospective juror should be removed for cause where the "juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (internal quotation marks omitted)), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017). Moreover, when McGilbra's counsel asked the prospective juror whether he could sit in judgment at the end of the presentation of the case by both sides and feel like he has done justice, the prospective juror responded, "I'm not sure. I'm not sure about it, to be honest." *See Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 179 (2014) (holding a district court erred by denying a for-cause challenge against a potential juror who was equivocal as to whether she could be impartial).

Unfortunately, for purposes of the *Batson* peremptory challenge before us, the majority and concurrence/dissent are constrained to analyze only what the prosecutor and defense counsel mention during their exchange. Here, there was a lot of discussion about potential jurors' views of law enforcement and juror 18's hoodie with a depiction of a movie. Had the district court simply made a complete record of how that juror answered in totality during jury selection and not just ruled on the attorneys'

exchange during the challenge, it certainly could have streamlined jury selection and this appellate review. Accordingly, I respectfully concur.

Silver, Sr.J.

WESTBROOK, J., concurring in part and dissenting in part:

I agree with the majority's conclusion that a mistrial was not required following a detective's inadvertent reference to a "jail call" during his trial testimony. I also agree with the majority in its analysis of McGilbra's jury instruction challenges. However, I part company with the majority on the *Batson* issue because I do not believe that the district court properly applied step three of the analysis, which required it to "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'" to determine whether McGilbra met his burden of proving discriminatory intent. *See Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

Even when the evidence is sufficient to sustain a conviction, as it clearly is in this case, a "conviction cannot stand when the State engages in discriminatory jury selection" in violation of the Equal Protection Clause. *Conner v. State*, 130 Nev. 457, 462, 327 P.3d 503, 507 (2014). "When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.'" *Miller-El v. Dretke*,

545 U.S. 231, 238 (2005) (omission in original) (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)). Discriminatory jury selection injures the defendant, the excluded juror, and the greater community at large by undermining the public's confidence in our judiciary. *Batson*, 476 U.S. at 87.

"[T]he exclusion of even one veniremember based on membership in a cognizable group is a constitutional violation." *Watson v. State*, 130 Nev. 764, 775-76, 335 P.3d 157, 166 (2014). An inference of intentional discrimination can be found by considering "the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." *Id.* at 776, 335 P.3d at 167.

In *Watson*, the Nevada Supreme Court noted that if the State "used its strikes to remove *all* African Americans" from the jury venire, this fact would give rise to an inference of intentional discrimination. *Id.* at 780, 335 P.3d at 169 (emphasis added). In this case, an inference of discrimination was raised because, at the time of McGilbra's *Batson* challenge, the State had removed the *only* African American juror from the venire.

Watson further recognized that an inference of discrimination can be made by demonstrating that "the case itself is sensitive to bias." *Id.* at 776, 335 P.3d at 167. A case may be sensitive to bias where the crime involves cross-racial violence, and where the State strikes potential jurors who are the same race as the defendant. *See, e.g., Johnson v. California*, 545 U.S. 162, 167 (2005) (acknowledging "the highly relevant circumstance that a black defendant was charged with killing his White girlfriend's child," (internal quotation marks omitted), where the State struck all

prospective African American jurors from the venire); *Batson*, 476 U.S. at 97 (recognizing that the Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black"); *United States v. Hill*, 643 F.3d 807, 840 (11th Cir. 2011) ("The fact that the defendants are the same race as the struck jurors is another circumstance that can be relevant . . . .").

Here, it is undisputed that both the defendant, Zafferine McGilbra, and juror 18 were African American. Likewise, the crime in this case involved cross-racial violence—a charge of open murder by an African American man against a white male victim—and the district court was aware from McGilbra's pretrial motion in limine that the victim "had a history of unprovoked verbal abuse and *racial remarks*." (Emphasis added.) At a pretrial *Hallmark* hearing to address whether McGilbra could present expert testimony from Dr. Piasecki on McGilbra's mental state, the court heard that the victim allegedly made "racial slurs" that McGilbra deemed threatening, and the district court acknowledged those alleged racial slurs both during the *Hallmark* hearing and in a subsequent order permitting Dr. Piasecki to testify about McGilbra's mental state. The State was aware that an alleged racial slur would be admitted in evidence, and even used its opening statement to inform the jury that McGilbra told police the victim "called him a 'dick-sucking N-word,' a racial slur" and would not apologize. In a case that *everyone* knew involved cross-racial violence and an alleged racial slur that immediately preceded that violence, the State's decision to strike the only African American juror from the venire raised a clear inference of discrimination.

Against this backdrop, McGilbra made a *Batson* challenge when the State struck juror 18. McGilbra pointed out that juror 18 was the "only African-American member of the panel," and that the State failed to challenge him for cause based on any of his answers, nor did it follow up with him regarding any supposed concerns.

After McGilbra made a prima facie showing of discrimination at step one, the district court proceeded to step two and asked the State to proffer a neutral reason for striking juror 18. The State responded that it struck him for his "inappropriate" attire that signaled "a lack of respect for the criminal process."

> *The basis for that strike was the – what I found to be a sweatshirt that I thought was inappropriate for court attire.* It was a hooded sweater. It had a "Boyz N The Hood" depiction on it. I was familiar with what the movie was, that's why I asked him about it.
>
> I don't know if Your Honor is familiar with that movie but it is a very, I would say, violent movie from the early 1990s. It depicts police in a very negative light. It stars Ice Cube, who was known at the time for the song called "F the Police," with his rap group.
>
> *I also struck Chance Cera for the same reason. He was wearing a hooded sweatshirt. I just don't think that's appropriate attire to come into the courtroom in this. And, to me, that signals to me a lack of respect for the criminal process.*
>
> *And so that was the basis for my decision.*

(Emphases added.)

The State initially claimed it struck juror 18 because his choice of clothing showed disrespect for the criminal process. But after identifying juror 18's disrespectful hoodie as the "basis of [its] decision," the State suddenly came up with a *second* justification for its strike:

> Oh. There was – and I didn't get a chance to follow up, but he did make a statement, something to [the] effect that he couldn't sit – he had a hard time sitting in judgment, or he raised his hand.
>
> I didn't get a chance – Mr. Picker didn't really follow up with it. It caused me concern, but I didn't really get a chance to follow up because my opportunity was done.

In response, McGilbra pointed out that the State had left a couple of female jurors on the panel who had also been wearing hoodies, along with other people wearing torn jeans, which undermined its proffered justification for the strike. *See Miller-El*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."). McGilbra further pointed out that the movie, *Boyz n the Hood*, was an award-winning historical movie that had been placed in the Library of Congress, and that juror 18 testified that he understood the movie to be about "boys in the hood" (in contrast to the *State's* belief that the movie depicted police in a violent light). Moreover, given the length of time since the movie came out, and the fact that the movie had a "predominantly black, African-American cast," McGilbra argued that the State's reliance on the movie to justify the strike was a pretext for discrimination. *See Cooper v. State*, 134 Nev. 860, 864-65, 432 P.3d 202, 206-07 (2018) ("[W]e are concerned that by questioning a veniremember's support for social justice movements with indisputable racial undertones, the person asking the question believes that a certain, cognizable racial group of jurors would be unable to be impartial . . . ." (internal quotation marks omitted)).

In response, the State asserted that it "didn't see any females with a hooded sweatshirt on" and then identified a third rationale, that it was actually the *content* of juror 18's hoodie that justified the strike:

> [I]f it had been on anybody, it would have caused me concern. To me, it's – when you come to jury duty, this is something that is not an everyday occurrence, and there would be a reason why you would wear a sweatshirt like that. In my mind, it's a wild guess, it may be a film of cultural significance.
>
> If it had been a movie about a serial murder, that's of cultural significance, that also would have caused me concern.
>
> *So it is the fact that it is a movie that paints police in a very negative light that causes me great concern.*

(Emphasis added.)

When defense counsel asked if he could have the last word (since McGilbra had raised the *Batson* challenge and bore the burden of proof), the court denied this request and determined that the State would get the last word. *Cf. Conner*, 130 Nev. at 465, 327 P.3d at 509 ("A district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual."). As a result, McGilbra did not argue further, and the court proceeded to step three of the *Batson* framework.

At step three, the district court's task was to determine whether it was "more likely than not" that purposeful discrimination had occurred. *Williams v. State*, 134 Nev. 687, 691-92, 429 P.3d 301, 307 (2018) (internal quotation marks omitted). The district court was required to "'undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available' and '*consider all relevant circumstances*' before ruling on

a *Batson* objection and dismissing the challenged juror." *Id.* at 691, 429 P.3d at 307 (emphasis added) (quoting *Conner*, 130 Nev. at 465, 327 P.3d at 509 (internal quotation marks omitted)). Those "relevant circumstances" would necessarily have included any evidence giving rise to an initial inference of discrimination, such as "the disproportionate effect of peremptory strikes . . . and whether the case itself is sensitive to bias." *Watson*, 130 Nev. at 776, 335 P.3d at 167. Other relevant circumstances would have included

> (1) the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained in the venire, (2) the disparate questioning by the prosecutors of struck jurors and those jurors of another race or ethnicity who remained in the venire, (3) the prosecutors' use of the jury shuffle, and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

Williams, 134 Nev. at 692, 429 P.3d at 307 (internal quotation marks omitted) (quoting *McCarty v. State*, 132 Nev. 218, 226-27, 371 P.3d 1002, 1007-08 (2016)). However, the district court failed to consider *any* of those circumstances in issuing its ruling.

Instead, the district court considered *just one* of the State's proffered justifications—the content of juror 18's hoodie—and determined that it was race neutral, because the State would have been justified in striking a nonblack juror for wearing the same hoodie:

> First, the fact that [juror 18] was wearing a hoodie and [the State] finds that disrespectful is unpersuasive to this Court and does not factor into this Court's decision.
>
> As the Court and as counsel, we spend immeasurable amount of time asking prospective

> jurors about their contacts with, knowledge of, and relationships with law enforcement.
>
> This case is no exception.
>
> Numerous questions were asked of numerous jurors about bias related to law enforcement.
>
> The Defense even challenged [another juror], who this Court ultimately excused, because he indicated an inability to give a lay person's testimony the same weight as law enforcement testimony.
>
> Here [the State] indicates the Boyz N The Hood sweatshirt shows support for a film that depicts law enforcement in a very negative light, a statement that was not challenged by [McGilbra].
>
> The question for this Court is whether [the State] would be justified in pre-empting a non-black juror for the same reason and be justified in doing so. And this Court finds that he would be justified in doing so.
>
> Just as the Defense challenged [that other juror], the State can preempt [juror 18].
>
> Pursuant to Flowers versus Mississippi, at 139 Supreme Court 228, 2019, the ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent.
>
> This Court finds that [the State] was not motivated in substantial part by discriminatory intent. And the challenge posed by the Defense is overruled.

Although the court made a factual finding that the State's initial justification was "unpersuasive," the court neglected to consider how that finding might impact whether the State's *other* explanations were pretextual. Instead, the court determined that the State's "unpersuasive" initial justification "does not factor into this Court's decision." And by focusing on only *one* of the State's purported justifications for the strike,

while ignoring the other two, the court neglected to "consider all relevant circumstances" as it was required to do at step three. *Conner*, 130 Nev. at 465, 327 P.3d at 509 (internal quotation marks omitted).

As the United States Court of Appeals for the Ninth Circuit explained in similar circumstances:

> *A court does not need to find all of a prosecutor's race-neutral reasons pretextual to find impermissible racial discrimination.* The relevant inquiry for *Batson* purposes is whether race was a substantial motivating factor. If a prosecutor supplies enough reasons for a strike, it may well be likely that one of those reasons is plausible. But it remains the case that implausible justifications may (and probably will) be found to be pretexts for purposeful discrimination. *Courts applying the Batson procedure therefore cannot stop investigating after finding one of a prosecutor's multiple proferred* [sic] *reasons plausible.*

Currie v. McDowell, 825 F.3d 603, 613-14 (9th Cir. 2016) (emphases added) (citations and internal quotation marks omitted) (finding that a state appeals court "unreasonably determined the facts by analyzing only one of [the State's] justifications" for pretext).

The majority contends that affirmance is appropriate because "McGilbra did not challenge the State's characterization" that *Boyz n the Hood* depicts law enforcement in a negative light. But this does not render the State's explanation any less pretextual. The State initially moved to strike juror 18 because his hoodie showed disrespect for court proceedings. It was only after defense counsel pointed to similarly situated nonblack jurors who were allowed to remain on the panel despite wearing hoodies that the State claimed that it was not just juror 18's casual *style* of clothing, but rather the *content* of his hoodie that caused it "great concern." The State's evolving explanation for the strike was evidence of pretext, which

the district court failed to consider. *See Miller-El*, 545 U.S. at 246 ("When defense counsel called him on his misstatement," "he suddenly came up with Field's brother's conviction as another reason for the strike. It would be difficult to credit the State's new explanation, which reeks of afterthought." (citation omitted)); *McCarty*, 132 Nev. at 229, 371 P.3d at 1009-10 (finding pretext where the State "did not offer its alternative explanation until after McCarty attacked its first race-neutral explanation as pretextual").

Furthermore, even though the State claimed it was concerned about the content of juror 18's hoodie because the State believed that the movie "paints police in a very negative light," the State did not ask juror 18 *any* follow-up questions about whether *he* saw the police in a negative light, or whether *he* agreed with the State's belief that the movie painted police in a negative light.[8] Although the State took the time to tell the court that the movie starred Ice Cube, whose rap group wrote the song "F the police," the State did not bother to *ask* juror 18 if he even *listened* to Ice Cube's music. *Cf. Flowers v. Mississippi*, ___ U.S. ___, ___, 139 S. Ct. 2228, 2249 (2019) (stating that the "failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"

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[8]Although it was not raised in the district court, upon reviewing the record it appears that the State asked follow-up questions to other jurors who had expressed a negative opinion or experience with law enforcement. However, the State never asked juror 18 any such follow-up questions despite relying on a movie that purportedly depicted law enforcement in a negative light. *See Williams*, 134 Nev. at 692, 429 P.3d at 307 (noting that disparate questioning by prosecutors between the struck jurors and those jurors of another race who remained on the venire is a relevant factor when assessing whether purposeful discrimination had occurred).

(internal quotation marks omitted)); *Kesser v. Cambra*, 465 F.3d 351, 364 (9th Cir. 2006) (finding pretext where prosecutor failed to ask a juror further questions about her work or interpersonal experiences when he claimed to be concerned about her attitude). Rather, the State relied on its own preconceived notions about a predominantly African American cast movie as a justification to strike the only African American juror from the venire, in a case where an African American man was on trial for murdering a white man who allegedly directed racial slurs at him.

Although the majority relies on the State's third proffered reason for the strike—that juror 18 might not be able to sit in judgment—as a basis to affirm, the district court did not make any findings as to the veracity of this explanation and "we cannot assume that the district court credited" it. *See, e.g.*, *Williams*, 134 Nev. at 693, 429 P.3d at 308. Additionally, juror 18 did not state that he was unable to sit in judgment; rather, when defense counsel asked him a compound question about whether he could "sit in judgment, *and at the end of the case, feel like you've done justice*," (emphasis added), juror 18 replied, "I'm not sure. I'm not sure about it, to be honest." Was juror 18 "not sure" that he could sit in judgment? Or was juror 18 not sure if he would "feel like [he'd] done justice" after doing so? It is entirely unclear from his response. Yet, the State failed to follow-up with additional questions. And the State only offered this justification *after* stating that it struck juror 18 because he was wearing a hoodie, an explanation the district court found "unpersuasive."

Regardless of whether McGilbra could have made additional arguments demonstrating pretext, it was the district court's obligation at step three to "undertake a sensitive inquiry" and "consider all relevant circumstances" when evaluating pretext, *Conner*, 130 Nev. at 465, 327 P.3d

at 509 (internal quotation marks omitted), which necessarily included the fact that the State struck the *only* African American juror, in a case that was so obviously sensitive to racial bias, for at least one reason the court deemed unpersuasive. By ignoring these relevant circumstances and evaluating only one of the State's proffered justifications, the district court clearly erred at step three. *See Currie*, 825 F.3d at 613-14. And because I believe that the district court clearly erred when it denied McGilbra's *Batson* challenge, I respectfully dissent.

_____, J.
Westbrook

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Alternate Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk