

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DEMON MORGAN,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 70424

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PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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PETITION FOR REHEARING

COMES NOW Chief Deputy Public Defenders SHARON G. DICKINSON and NADIA HOJJAT, on behalf of appellant, JOHN DEMON MORGAN, and pursuant to NRAP 40, petitions this Court for rehearing of the Opinion issued on 05/03/18. This petition is timely filed with 18 days of the filing of the Opinion. NRAP 40(a)(1). It is based on the following memorandum of points and authorities and all papers and pleading on file herein.

DATED this 18 day of May, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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Sharon G. Dickinson, Bar #3710
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POINTS AND AUTHORITIES

I. JURISDICTION

John Morgan brings this Petition for Rehearing because the Panel “overlooked or misapprehended” a material question of law or a material fact in the record and/or “overlooked, misapplied or failed to consider controlling authority.” NRAP 40(c).

II. ARGUMENT

ISSUE II: Subsection C and D

A. Panel misunderstood John’s Issue II regarding use or lose peremptory challenges.

Under Issue II subsection C, John argued:

C. Use or lose peremptory challenge procedure deprived John meaningful use of his peremptory challenges and unreasonably restricted voir dire. (Emphasis added).

Court decided this issue as: “The district court did not abuse its discretion in determining the **manner in which voir dire was conducted.**” (Emphasis added) Opinion:14. Although intertwined, these issues are different.

B. Peremptory challenge procedure used by court denied John the meaningful use of peremptory challenges.

“Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.” NRS 175.021(1). NRS 16.030(4) explains the process for using peremptory challenges. Panel found NRS 16.030(4)

illustrative but overlooked the first sentence which leads to a material misapprehension of the law. Opinion:16.

The first sentence of NRS 16.030(4) sets the tone for understanding the following sentences. The omitted language in NRS 16.030(4) indicates:

The judge may require that the clerk draw a number of names to form a panel of prospective jurors equal to the sum of the number of regular jurors and alternate jurors to be selected and the number of peremptory challenges to be exercised.

Although the word “may” suggests the actions are permissive rather than mandatory, when read together with the remaining language of NRS 16.030(4) it is clear that the trial court in this case should have passed 23 jurors for cause before the parties used any peremptory challenges.

NRS 16.030(4) “confers a substantive right” thereby making careful examination of the wording important. See *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988). In interpreting NRS 16.030, Court presumes “every word, phrase, and provision” in the statute has meaning. *Mangarella v. State*, 117 Nev. 130, 133 (2001).

NRS 16.030(4) states in pertinent part:

The judge may require that the clerk draw a number of names to form a panel of prospective jurors equal to the sum of the number of regular jurors and alternate jurors to be selected and the number of peremptory challenges to be exercised. The persons whose names are called **must** be examined as to their qualifications to serve as jurors. If any persons on the panel are excused for cause, they **must** be replaced by additional persons

who must also be examined as to their qualifications...When a sufficient number of prospective jurors has been qualified to complete the panel, each side shall exercise its peremptory challenges out of the hearing of the panel by alternately striking names from the list of persons on the panel. After the peremptory challenges have been exercised, the persons remaining on the panel who are needed to complete the jury shall, in the order in which their names were drawn, be regular jurors or alternate jurors. (Emphasis added).

By requiring the court to qualify a sufficient number of jurors *before* the parties begin using peremptory challenges “out of the hearing of the panel by alternately striking names from the list of jurors on the panel,” the Legislature indicated that the number of prospective jurors on the list used must equal the sum of regular jurors, alternates, and peremptory challenges. Thus, in this case, the parties would begin using *all* peremptory challenges *after* 23 prospective jurors were qualified and passed for cause rather than piecemeal as occurred here. This interpretation comports with the purpose of voir dire which is to “enable litigants to obtain enough information to make an intelligent decision whether to exercise a peremptory challenge.” *State v. Williams*, 123 Ore. App. 547, 551 (1993).

The Legislature’s intent is further confirmed by the last sentence of NRS 16.030(4) which indicates “the persons remaining on the panel who are needed to complete the panel shall, in the order in which their names were

drawn, be regular or alternate jurors.” Thus, the first 12 remaining on the list are the jury and the next would be the alternate.

The unpublished Gyger¹ order approved the above outlined procedure when finding the purpose behind voir dire and the use of peremptory challenges is to ensure parties are able to rank the *comparative fairness* of potential jurors who are not yet seated. *See Section C.* The same jury selection procedure was used in *Skilling v. United States*, 561 U.S. 358, 362 (2010).² This procedure ensures litigants have a full opportunity to make an intelligent decision when using peremptory challenges.

At oral argument, prosecutor admitted that the procedures used for jury selection in John’s trial may create a problem she called: “Sorry Charlie you are out of luck.” When the trial court does not first qualify all jurors who could be called, the parties do not know anything about the next person who may be called to fill the vacant seat after a peremptory challenge is used. The prosecutor said that although you could ask the newer juror

¹ Gyger v. Sunrise Hosp. & Med. Ctr., LLC, 58972, 2013 WL 7156028, at *2 (Nev. Dec. 18, 2013). Decision made by three judge panel, Justice Hardesty, Parraguirre, Cherry.

² In *Skilling*, the trial court required 400 jurors fill out lengthy pre-trial questionnaires and initially excused those with bias or tainted by pre-trial publicity. Of the remaining prospective jurors, 90 were selected for the venire. “[C]ourt [then] qualified 38 prospective jurors, a number sufficient, allowing for peremptory challenges, to empanel 12 jurors and 4 alternates.” *Id.* 359.

questions, unless you could find a reason to remove the new juror for cause and if you were out of peremptory challenges then "Sorry Charlie you are out of luck." Clearly, such a procedure does not comport with seating a fair and impartial jury.

Due process requires trial court follow procedures codified in the state's statutes for the selection of the jury. See *Ross v. Oklahoma*, 487 U.S. 81 (1988). But due process requires more. Due process requires a *meaningful* chance to question jurors for bias and it requires a *meaningful* use of peremptory challenges. See *United States v. Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979)(lack of valuable information on bias reduced the number of challenges for cause or the meaningful use of peremptory challenges); *United States v. Sams*, 470 F.2d 751, 754 (5th Cir. 1972)(struck-jury method is the fairest method for allowing a defendant an opportunity to make a full choice of the use of his peremptory challenges). The process used in John's case did not provide him with a meaningful chance of voir dire and the use of his peremptory challenges.

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C. Peremptory challenge procedure used by court unreasonably restricted voir dire.

The Panel found the trial court did not unreasonably restrict voir dire by distinguishing the Gyger facts from those in this case.³ Opinion:17-18. Panel indicated that in Gyger the trial court only questioned the initial 13 jurors called rather than the entire venire as occurred here. The standard of review used in Gyger was plain error because the defendant did not initially object to procedures used. Here, John objected.

Although the trial court in this case asked general questions of the entire venire, only 3 of the prospective jurors who replaced the original 13 answered: Juror #28 was a defendant in a civil case (II:451); Juror #31 was a victim of a crime (II:461-62) and Juror #40 was a victim and previously on a jury. (II:443-44;463). Four prospective juror replaced did not respond to any of the trial court's general questions: Jurors #27, #36, #37, and #40.

Also, the general questions⁴ court asked did not include personal identifying information, such as information on jobs or retirement, family,

³ On appeal, State did not address Gyger and the Gyger facts relied on by the Panel are not in the Gyger order. Order:17-18.

⁴ Asked juror if they: were convicted of a felony, not a U.S. citizen, acquainted with lawyers, defendant, court, anyone at D.A.'s office, know witnesses, know about the case, not able to follow instructions given, unable to be fair and impartial, understood the defendant was presumed innocent, engaged in law enforcement, relative engaged in law enforcement, served as a juror before, party to a lawsuit, accused of a crime, victim of a crime.

length of time living in Clark County, and other experiences. The subsequent voir dire by the parties allowed for more in-depth discussions about topics addressed during court's general questioning and personal questions.

The general questions asked by the court were not likely to reveal potentially prejudicial information or bias like in *Gyger* where when the last juror was placed in the jury box, "Sunrise's counsel informed the court that Bilicki, a veterinarian, had previously exchanged business referrals with the husband of a paralegal of Sunrise's counsel," *Gyger at 1**. The *Gyger* Court found that had the party known of the juror's relationship with the paralegal's husband they would have used a peremptory challenge to remove this juror. The *Gyger* Panel concluded:

The purpose of voir dire is to ensure that a fair and impartial jury is seated, *Whitlock*, 104 Nev. at 27, 752 P.2d at 212, and the voir dire process used in this case worked directly against this purpose by forcing the parties' attorneys to guess about the comparative fairness of potential jurors who were not yet seated. We conclude that even though the parties were permitted to question potential jurors, the purpose and effectiveness of this questioning was unreasonably restricted by the district court's voir dire process.

Court further asked: "Is there anyone who has such a sympathy, prejudice or bias related to age, religion, race, gender or national origin that they feel would affect their ability to be open-minded, fair and impartial jurors?" II:412.

Gyger at *2. However, it was not just the voir dire process it was also the use or lose peremptory challenge procedure that violated due process.

The focus in the Gyger Order was safeguarding the voir dire process along with the use of peremptory challenges procedures to ensure a fair and impartial jury was seated. By using a process that eliminated a party's chance to use a peremptory challenge against a juror they thought may not be fair to their client and further questioning may be fruitless, the system worked directly against the purpose of seating a fair and impartial jury. However, the Panel misunderstood that the peremptory challenge procedures used in Gyger and here are exactly the same because in both cases some jurors were seated without the parties having full knowledge as to the background of the replacement jurors.

D. Prejudicial error.

While the judiciary's inherent powers include governing its own procedures and promulgating rules, the Legislature did not invade judicial prerogatives by enacting NRS 16.030. *Whitlock* at 211-12. Rather than being an encroachment on judicial power, NRS 16.030 "confers a substantive right to reasonable participation in voir dire by counsel...". *Id.* The *Whitlock* Court held it would "not attempt to abridge or modify a substantive right" as provided in NRS 16.030. *Id.*; NRS 2.120. The

Whitlock Court recognized that Nevada historically accords parties “meaningful opportunities for involvement in the voir dire of prospective jurors. *Whitlock* at 211-12.

Here, the published decision abridges John’s rights as conferred by the Legislature by allowing a trial court to require a party to use or lose a peremptory challenge before all the potential jurors who would be seated in his jury are qualified and before all for cause challenges were made.

John was prejudiced because the trial court’s general questioning of the jurors was insufficient to weed out all bias and prejudice thereby leaving the more personal questions to the parties during their voir dire. John was only allowed to question the 13 selected jurors and was required to re-question each new addition juror when a peremptory challenge was exercised. This procedure does not follow NRS 16.030(4) and does not lead to a meaningful use of peremptory challenges.

The procedures used here were not only erroneous but also structural error because the trial court denied John his substantial right as provided under NRS 16.040(4).

ISSUE II: Subsection B in Opening and A in Reply

In footnote 8, the Panel decided Issue III by indirectly holding it was *not error* for the trial judge to repeatedly instruct the jury that the parties in

this case were "At the same starting line." Opinion:2;10-11.. The Panel found court later gave instructions correctly directing the jury on the presumption of innocence. However, in making this ruling the Panel overlooked and misapprehended a material question of law and fact: (1) legally the parties are not at the same starting line, and (2) the jury indicated they misunderstood the burden and presumption.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law," *Coffin v. United States*, 156 U.S. 432, 453 (1895). The defendant is entitled to a presumption of innocence and has no burden while the government bears the full burden of proof beyond a reasonable doubt in every case and enjoys no such presumption of guilt. Thus, the parties are *not* at the same starting line and to tell the jury so is error.

By holding that such a clearly inaccurate legal statement is not error, Panel now opens the floodgates for other parties to use the "at the same starting line" argument and this instruction will permeate the courthouse, tainting other criminal trials. Therefore, John asks the Panel to hold that the instruction given by the Judge that the parties are at the "same starting line" was error.

The next question then would be whether this error requires reversal. Panel indirectly suggested it was harmless by finding the trial court later instructed the jury on the proper presumption of innocence and burden of proof and there was no evidence which indicated that the jury ignored its instructions. Opinion:10.

However, the record reveals that the Judge's erroneous instruction *did* affect the jurors and confused them as to the presumption and the burden. This is seen when Prospective Juror #026, in discussing whether the Defendant had to prove his innocence, said, "I thought it was **a back and forth.**" III:553. Thus, there was confusion.

Furthermore, the trial court not only told the jurors the parties were at the same starting line, she specifically made hand motions indicating the parties were in a race to present evidence. Thus, the Judge emphasized the incorrect statement of law to the jury by making hand gestures which suggested a back and forth race car movement. John made a record of these actions: "When talking to a couple of the jurors Your Honor started asking them about whether the defense and the State- I believe Your Honor made some sort of reference to a race. And Your Honor had your hands next to each other and kind of indicating what-kind of like GoCars, **one moving forward, one moving back.**" II:468.

Prospective Juror #026, when discussing her understanding of the law, did not disagree with the burden and the presumption, but instead thought that a back and forth accurately depicted the legal concept. This is because the Judge twice gave this instruction and visual demonstration to the jury. II:415-418. As Juror #026 was confused, other jurors may also have found it confusing.

Thus, the Judge's actions and words created a misperception that believing the parties to be at the same starting line *is* exactly what presuming the defendant is innocent means. Although the court later instructed the jury on the correct legal definition, the jury could reasonably assume that the correct legal definition *included* the "same starting line" requirement. Accordingly, Panel's analysis should not center on whether the jury deliberately disregarded the subsequent instructions, but whether the jurors could believe the Judge's erroneous instructions and the subsequent instructions meant the same; the later instruction being a rewording of the same concept as in the first – the "same starting line" concept.

"Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law. *Crawford v. State*, 121 Nev. 744, 754 (2005). Accordingly, the trial court should have advised the jurors that her "at the same starting line" statement was incorrect. However,

the Judge never corrected the misconception she created. Even when Prospective Juror #026 clearly articulated the exact concerns the defendant voiced in his objection, the Judge did not then take the opportunity to instruct the jury that the *parties are not at the same starting line* and that there should not be an expectation of a “back and forth.”

Where the jury was *never* expressly told that the parties are not at the same starting line, it cannot be presumed that they understood the subtle legal distinctions and that they completely disregarded the incorrect statement of law that was given to them on more than one occasion during the trial. *Hymon v. State*, 121 Nev. 200, 211 (2005)(we presume jury follows instructions).

ISSUE III

Panel determined trial court properly sustained State’s objection to John’s argument that “Maria Verduzzco is still a manager at the AM/PM,” by concluding John misstated the facts. Opinion:24-25. Court decided “Maria never testified that she was still the manager of the convenience store at the time of trial.” Opinion:25.

However, several questions asked of Maria inferred she still worked at the same AM/PM. Further, the Judge did not simply tell the jury that there

was no evidence presented whether Maria currently worked there, she told them that "She is not." IV:87. This was a fact not in evidence.

Maria testified that on 10/30/14 she was working as the manager at AM/PM. III:662-64. Maria referred to her employment numerous times in the present-tense during her testimony.

Q: So can you explain to the ladies and gentlemen of the jury some things that you would do as manager on a daily basis?

A: I will do paperwork, scheduling and then we clean still and-

Q: --make sure everything is okay.

Q: Make sure everything in the store is okay?

A: Is fine and clean and nice.

Q: All right. Do you also still check out customers?

A: Yes. III:664.

...

Q: Can you describe for the—the jury where your office is in relation to like the front of the store?

A: In the back. III:666.

...

Q: All right. So is there a wall that separates you from the store when you're in your office?

A: Yes.

Q: And do you sit at a desk when you do your paperwork?

A: Yes. III:666-667.

...

Q: As a manager you're familiar with how that video works?

A: Yes. III: 676.

Later, John asked Maria to identify some pictures of the store: “[T]his is a clear and accurate depiction of your store...” III:707. Maria responded “Yes.”

Based on these questions and testimony, while it is true Maria never said “she was still the manager,” she also did *not* say she was no longer a manager at the store. In fact, throughout her entire testimony, Maria referred to the incident in the past-tense, but described aspects relating to her employment in the present-tense, strongly implying she still worked at the store.

So when John argued “Maria Verduco is still the manager at the AM/PM” there *was* evidence to suggest this was true. In fact, there were whole sections of testimony suggesting it was true. And, it was never said in any document or in any testimony that Maria did not currently work at the AM/PM.

Accordingly, Defense Counsel correctly argued her recollection of the facts which, in the manner presented, suggested Maria was still a manager at the AM/PM. As demonstrated at the bench conference, the State explained that they knew she did not work there due their own personal knowledge. IV:916. This was not evidence presented to the jury.

Defense Counsel tried numerous times at the bench conference to explain this to the court:

COURT: Now, I would rather you correct it as opposed it coming from the Court, okay?

MS. HOJJAT: What would the Court like me to say at this point?

THE COURT: Just say that-I'll sustain the objection and just tell them that I misspoke, she is not currently the manager but she was the manager.

MS. HOJJAT: And, Your Honor, that's just not what the testimony was.

MS. GRAHAM: Yes, it was.

MS. HOJJAT: She never said I'm not-

THE COURT: Okay. Then I'm gonna go ahead and tell them, okay?

MS HOJJAT: Your Honor, I am happy to say I'm sorry, I misspoke. Maria Verduzco was the manager of the AM/PM. I'm happy to-

THE COURT: She is-

MS. HOJJAT—that

THE COURT—not-there is no evidence that she is the manager now.

MS. HOJJAT: The Court is injecting evidence into this-

THE COURT: There is-

MS. HOJJAT: --trial that did not-

THE COURT: --you did it. Now I'm gonna allow you to correct it. Now you can correct it or I can correct it for you. You pick.

IV:917-918.

After being told at the bench to correct the statement said to the jury, Defense Counsel said: "And I'm sorry ladies and gentlemen, the evidence was Maria Verduzco was a manager at AM/PM. I misspoke." IV:837. The court then said, "And the rest" and interjected, advising the jury, "And she is not—there's no evidence that she is currently the manager." IV:837.

This interjection was not made in a manner to suggest that there had been confusion, but rather suggesting that counsel was deliberately being dishonest with the jury. When counsel moved for a mistrial and again tried to explain to the trial court that there was no testimony that Maria no longer worked at the AM/PM, court said: "I'm going to suggest that you take a memory course then..." IV:843.

In reality, the record shows Defense Counsel's memory was correct. There was never any testimony that Maria no longer worked at the AM/PM. The testimony was, at best, ambiguous, and the court should have instructed the jury to rely on their own recollections of the evidence presented because the jury is the judge of the facts. Instead, the Court interjected facts that were not in evidence into the case into defense counsel's closing.

Prejudicial error occurred because court's interjection of facts not in evidence undermined defense counsel's credibility by making it appear that counsel was deliberately deceiving or misleading the jury as to the testimony. Trial court admonished counsel in front of the jury as if forcing her to admit a lie. This disparaged the defense in the eyes of the jury and unfairly prejudiced the defendant. *See Butler v. State*, 120 Nev. 879 (2004).

The Sixth Amendment right to counsel and the right to Due Process include the right of a criminal defense attorney to make a closing argument without restrictions which infringe on the adversarial fact-finding process. *Herring v. New York*, 422 U.S. 853, 858 (1975)(denial of the right to make a closing argument is denial of the right to present a defense). The Court's improper limitation of argument warrants several. *See Jean v. State*, 27 So.3d 784 (Ct. of App. Florida 2010). "The limitation of the scope of closing affects the 'trial process itself' and is subject to a constitutional harmless error analysis." *State v. Osman*, 366 P.3d 956, 968 (2016)(internal cite omitted).

This Court has held that "It is one thing to argue 'fair inferences from the record' and quite another to argue 'the existence of facts *not* in the record.'" *Glover v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 125 Nev. 691, 705–06 (2009). In light of multiple present-tense statements

by Maria about her employment at AM/PM, it was a fair inference from the record that she was still employed there. As noted, there was absolutely *no* testimony that she did not work at the AM/PM any longer. This was after vehement objections from the defense at the bench urging the Judge that this evidence was never presented and asking the Court to instruct the jury to rely on their own recollections of what the evidence was. The Judge simultaneously discredited the defense and violated *Glover* by interjecting facts not in evidence into the case.

CONCLUSION

Based on the foregoing, this Court should grant rehearing in the instant case.

Respectfully submitted,

PHILIP J. KOHN
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for hearing complies with the formatting requirements of NRAP32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

It has been prepared proportionally spaced typeface using Times New Roman in 14 font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 4,222 words which does not exceed 4,667.

DATED this 18 day of May, 2018.

Respectfully submitted,

PHILIP J. KOHN
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By: /s/ Nadia Hojjat
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18 day of May, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DEMON MORGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70424

FILED

MAY 03 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction, pursuant to a jury verdict, of robbery and misdemeanor battery. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Affirmed.

Howard Brooks, Public Defender, and Sharon G. Dickinson, Deputy Public Defender, Clark County,
for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Krista D. Barrie, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE DOUGLAS, C.J., GIBBONS and PICKERING, JJ.

OPINION

By the Court, DOUGLAS, C.J.:

In this appeal, we consider whether the district court made multiple errors from the time it held the competency hearing for appellant John Demon Morgan to when it entered a judgment of conviction. In particular, after first considering whether the district court erred with respect to Morgan's competency hearing, we consider whether the delay in

Morgan's subsequent transfer to a psychiatric facility for the purpose of restoring competency to stand trial warranted dismissal of the charges. Next, we consider whether the district court erred with respect to jury selection and closing arguments. Finally, we consider whether there was sufficient evidence for Morgan's conviction. We conclude that the district court did not commit any error during the time frame at issue and there was sufficient evidence for Morgan's conviction.¹ Furthermore, with respect to jury selection, although the district court properly overruled Morgan's challenge to the State's strike of a prospective juror, we take this opportunity to hold that striking a prospective juror based on sexual orientation is impermissible under the United States and Nevada Constitutions. Accordingly, we affirm Morgan's conviction.

FACTS AND PROCEDURAL HISTORY

On October 30, 2014, Maria Verduzco was working as a manager at an AM/PM convenience store when she saw a man grab a package of mixed nuts and put them into his pocket. Maria approached the man while he was at the checkout counter trying to pay for another item and asked him if he could please take out what he had placed into his pocket. The man told Maria to "get the f _ _ _ out of [his] face," and as she backed up in response, he approached and hit her in the chest.² Maria fell to the ground, got up, and hit the man's backpack with a stick as he left the store. The man's backpack ripped and containers of soup fell out. Maria

¹As there are no errors to cumulate, Morgan's argument that cumulative error warrants reversal lacks merit.

²Such action was depicted in the surveillance video, and Morgan admitted to this action in his opening statement.

called the police and indicated where the man departed. Police detained the man and identified him as Morgan. The State then charged Morgan by way of criminal complaint and information with one count of robbery and one count of battery with intent to commit a crime.

On December 1, 2014, Morgan was removed from his initial arraignment hearing for spitting, and a competency hearing was set for later that month. However, because the two court-appointed competency examiners reached opposite conclusions, the district court ordered a third evaluation and continued the competency hearing. After the third examiner found Morgan competent, he challenged his competency by requesting another hearing.

In February 2015, at the competency hearing, Morgan called only one witness to testify—the single examiner who had found him incompetent. Although the other two examiners who had found Morgan competent did not testify at the hearing, neither Morgan nor his counsel requested their presence. The district court relied on the evaluations from the two court-appointed examiners who were not present at the hearing to find Morgan competent to proceed with trial proceedings.

Thereafter, Morgan pleaded not guilty to both counts. Morgan's counsel subsequently requested another competency evaluation, and thus, the matter was sent back to competency court. Because two examiners then found Morgan incompetent to proceed with adjudication, the district court ordered that he be transferred to Lake's Crossing Center for the purposes of treatment and restoring competency to stand trial.

While waiting over 100 days in the Clark County Detention Center for his scheduled transfer to Lake's Crossing Center, Morgan filed a motion to dismiss due to the delay of his transfer. The district court denied

his motion, despite the fact that all agreed that the time frame to transfer Morgan to Lake's Crossing Center had not been met.

In February 2016, a three-day trial ensued. During jury selection, Morgan moved to strike the jury venire and requested an evidentiary hearing because there were only 3 African-Americans in the 45-person venire. The district court denied Morgan's motion. Morgan renewed his motion for an evidentiary hearing after the district court discovered that one of the African-American veniremembers was ineligible to serve on the jury. The district court initially denied Morgan's renewed motion but subsequently held a hearing to determine the merits of his motion, and the district court again denied Morgan's motion.

In conducting voir dire, the district court explained that it would first ask the jury panel general questions before the parties could request to strike jurors for cause. The district court further explained that it would then seat 13 of the remaining individuals from this panel inside the jury box and the parties would take turns asking questions. If both parties passed for cause after questioning, a party could chose to exercise a peremptory challenge on their turn. However, the district court stated that the parties would lose their peremptory challenge if they decided not to use it. Morgan opposed this "use or lose" method of exercising peremptory challenges, to no avail. Subsequently, the State used a peremptory challenge to strike juror no. 24, one of the two identifiable gay veniremembers.³ Morgan challenged the State's strike based on sexual

³Juror no. 24 revealed his sexual orientation by answering, "[h]e's an artist," after the State inquired about his partner's employment. Juror no. 11 replied to the State's same inquiry by answering, "[h]e is the head of props for a Broadway show in New York."

orientation because the State asked juror no. 24 whether he said "boyfriend, girlfriend or married," in response to the juror's reply when asked about relationship status. The State justified its strike by explaining that juror no. 24 expressed an approval of the media's criticism towards police. Morgan contended that other jurors shared the same view on police criticism in the media, but that these individuals served on the jury because they were heterosexual. The district court, however, denied Morgan's challenge.

In the opening statements, Morgan asked the jury to find him guilty of misdemeanor battery only, but not robbery. The defense theory was that, although Morgan inexcusably hit Maria, he had no intent to rob the convenience store because he tried to pay. During closing arguments, the district court required Morgan to correct his statement that Maria was still a manager at the AM/PM convenience store because of the lack of evidence validating his statement of fact.

Ultimately, the jury found Morgan guilty of robbery and misdemeanor battery. The district court sentenced Morgan to serve his two counts concurrently for a maximum of 120 months with a minimum parole eligibility of 26 months and 533 days' credit for time served. Morgan now appeals.

DISCUSSION

The district court did not err with respect to Morgan's competency hearing

Morgan contends that the district court violated his constitutional right to due process and his statutory right to cross-examine the two examiners who had initially found him competent.⁴ We disagree.

⁴Morgan also asserts a violation of his Sixth Amendment right to cross-examination. However, he fails to provide relevant authority. See

We point out that the district court subsequently found Morgan incompetent prior to trial and conviction, as he desired, and we further conclude that because Morgan failed to object below, the court-appointed competency examiners were not required to testify at the competency hearing.

Because Morgan never objected at his competency hearing that the two examiners who had found him competent were not present, we review the alleged error for plain error. *See Calvin v. State*, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006) (stating that failure to object to the exclusion of witness testimony at a competency hearing elicits plain error review).

"In conducting a plain-error analysis, we must consider whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights." *Id.* at 1184, 147 P.3d at 1101. In considering whether error exists, "[i]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Olivares v. State*, 124 Nev. 1142, 1147, 195 P.3d 864, 868 (2008) (internal quotation marks omitted).

Nevada has provided that "[i]f the court finds that further competency proceedings are warranted, it 'shall appoint two [certified] psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant.'" *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev.

Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

118, 122, 206 P.3d 975, 978 (2009) (quoting NRS 178.415(1)).⁵ Following the completion of the examinations, “at a hearing in open court, the court that orders the examination must receive the report of the examination.” *Id.* at 123, 206 P.3d at 978 (quoting NRS 178.415(2)). After the court receives the reports of the examinations, it “shall permit counsel for both sides to examine the person or persons appointed to examine the defendant.” *Id.* (quoting NRS 178.415(3)). This requirement “does not compel the participation of the court-appointed competency examiners at the competency hearing.” *Id.* at 123 n.5, 206 P.3d at 978 n.5. However, the parties may subpoena the court-appointed examiners to require their appearance at the competency hearing. *See id.* Moreover, “[b]y providing counsel for both sides with full and complete copies of the competence examination reports [prior to the competency hearing], the prosecuting attorney and the defense counsel will be afforded a meaningful opportunity to be heard during the competency hearing.” *Id.* at 125, 206 P.3d at 979. At the competency hearing, “[t]he court shall [] permit counsel to introduce other evidence and cross-examine one another’s witnesses.” *Id.* at 123, 206 P.3d at 978 (citing NRS 178.415(3)). Finally, “[the court] shall enter its finding as to competence.” *Id.* (citing NRS 178.415(4)).

Here, plain error does not exist because under *Scarbo*, neither Morgan nor the State subpoenaed the two court-appointed examiners who had initially found him competent, and thus, their presence at the competency hearing was not required. As a result, the court could only

⁵The Legislature revised NRS 178.415 substantially in 2017. *See* 2017 Nev. Rev. Stat., ch. 480, § 1 at 2996. However, because Morgan committed his crimes in 2014, we address the version of the statute in place at that time.

permit Morgan's counsel to cross-examine the witnesses present at the hearing. Moreover, defense counsel received the examination reports prior to the competency hearing, affording Morgan due process and the opportunity to subpoena the examiners, if he so desired. Therefore, the district court did not err with respect to Morgan's competency hearing.

The district court did not err by rejecting Morgan's motion to dismiss the charges

In Morgan's motion to dismiss, he relied upon a proposed consent decree, order, and judgment that the United States District Court for the District of Nevada approved, involving a federal civil action filed by three Clark County Detention Center inmates (collectively, plaintiffs) against the administrator of the Nevada Division of Public and Behavioral Health, the director of Lake's Crossing Center, and the director of the Nevada Department of Health and Human Resources (collectively, defendants). *See Burnside v. Whitley*, No. 2:13-CV-01102-MMD-GWF (D. Nev. Jan. 28, 2014). The plaintiffs alleged that the defendants failed to provide court-ordered treatment to incompetent criminal defendants, in violation of the Due Process Clause of the Fourteenth Amendment. Because the parties agreed to resolve the lawsuit, the court issued an order pursuant to the parties' agreed-upon terms. Pursuant to the federal order, the defendants were to transport incompetent detainees for competency treatment within 7 days of receiving a court order. Here, Morgan argued that because he waited over 100 days for his transfer to Lake's Crossing Center, violation of the federal order warranted dismissal of the charges against him. However, the district court found that it was necessary to balance the interests of Morgan, whom the examiners deemed to be a danger to himself and to society, with the interests of the community. Thus, the district court found dismissal to be an extreme remedy. Instead, the

district court determined that the proper remedy was to order compliance with the federal order and order Morgan's transfer to Lake's Crossing Center within 7 days, and it ultimately denied Morgan's motion.

Morgan argues that the district court erred in denying his motion to dismiss the charges due to the length of delay in transporting him to Lake's Crossing Center, in violation of a federal court order and his right to due process. We disagree and conclude that the delay in Morgan's transfer to Lake's Crossing Center did not require dismissal of the charges.

This court will not disturb a district court's decision on whether to dismiss a charging document absent an abuse of discretion. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (reviewing the dismissal of an indictment). Dismissal is an extreme sanction; however, "dismissal with prejudice at the state level is most appropriate upon a finding of aggravated circumstances and only after a balancing of its deterrent objectives with the interest of society in prosecuting those who violate its laws." *State v. Babayan*, 106 Nev. 155, 173, 787 P.2d 805, 817, 818 (1990) (emphasis omitted).

After balancing deterrent objectives with society's interest in prosecuting criminals, pursuant to *Babayan*, it follows that a violation of the federal order by those who are not parties to the case at hand did not amount to aggravated circumstances warranting the extreme sanction of

dismissing Morgan's charges.⁶ Therefore, the district court did not abuse its discretion in denying Morgan's motion to dismiss the charges.⁷

The district court did not err with respect to jury selection

Morgan contends that: (1) the district court committed structural error when it allegedly made a ruling on his motion to strike the jury venire before conducting an evidentiary hearing, (2) he was entitled to a new venire, (3) the district court abused its discretion in determining the manner in which voir dire was conducted, and (4) the district court erred in overruling his *Batson* challenge.⁸ We disagree with each of Morgan's contentions in turn.

⁶In addition to the federal order, Morgan also relied upon distinguishable cases inapplicable to his case, and he now alternatively argues for the first time on appeal, without providing any relevant authority, that he should be awarded 10 days' credit for each day over 7 that he remained in confinement. We decline to address this issue. See *State v. Powell*, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006) ("Generally, failure to raise an issue below bars consideration on appeal." (internal quotation marks omitted)); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so present need not be addressed by this court.").

⁷After considering Morgan's argument that the State's information was impermissibly vague and violated his Sixth Amendment right to be informed of his charges, we conclude that the information adequately notified Morgan of the charges he was expected to defend, and thus, the district court did not abuse its discretion in denying his motion to dismiss the charges or alternatively plead particular facts. See *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (stating that this court will not disturb a district court's decision on whether to dismiss a charging document absent an abuse of discretion).

⁸Morgan additionally contends that the district court made statements during voir dire that denied him the presumption of innocence. See *Watters v. State*, 129 Nev. 886, 889, 313 P.3d 243, 246 (2013) ("The

The district court did not commit structural error when Morgan moved to strike the jury venire

Morgan argues that the district court committed structural error when he moved to strike the jury venire, which mandates reversal of his conviction under *Buchanan v. State*, 130 Nev. 829, 335 P.3d 207 (2014). We disagree.

This court reviews de novo whether the district court's actions constituted structural error. *See Barral v. State*, 131 Nev. 520, 523, 353 P.3d 1197, 1198 (2015). This court has held that "when a defendant moves the court to strike a jury venire, and the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion." *Buchanan*, 130 Nev. at 833, 335 P.3d at 210.

Here, the district court's actions did not violate *Buchanan*. The court initially denied Morgan's first challenge to the jury panel and request for a hearing because it believed that the veniremembers were randomly

presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (internal quotation marks omitted)); *see also* NRS 175.201 (providing that a criminal defendant is presumed innocent until the State proves otherwise beyond a reasonable doubt). The record demonstrates that the district court instructed the jury on the proper presumption of innocence and burden of proof shortly after the alleged error occurred. Further, after the jury was empaneled, the district court again correctly instructed the jury on the proper presumption of innocence. Finally, at the conclusion of trial, the jury was given the correct instructions on the burden of proof and the presumption of innocence. Because the district court properly instructed the jury, and no evidence indicated that the jury ignored its instructions, Morgan was not denied the presumption of innocence. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) ("A jury is presumed to follow its instructions." (internal quotation marks omitted)).

chosen. Morgan renewed his motion for a hearing a few hours later because one of the three African-American veniremembers was not eligible to serve on the jury. Initially, the district court denied Morgan's renewed motion, but after the State brought the method by which the jury commissioner selects potential jurors to the district court's attention and Morgan stated that he would like to have a hearing with the jury commissioner to determine how the jury panels are assembled, the district court decided to allow the jury commissioner to testify in order to resolve the issue. The district court set the matter for hearing despite the fact that it knew that the jury commissioner did not inquire about race, creed, or color. After a hearing on the merits, the district court once again denied Morgan's motion to disqualify the jury panel. Based on the district court's actions, the district court met the requirements set forth in *Buchanan*, and thus, did not commit structural error warranting reversal.

Morgan was not entitled to a new venire

Morgan argues that he was entitled to a new venire because: (1) African-Americans are a distinctive group, (2) African-Americans were not fairly represented in the venire, and (3) the underrepresentation of African-Americans was due to systematic exclusion. In particular, Morgan argues that because 11.8% of Clark County residents are African-American,⁹ the 45-person venire should have included at least 5 African-Americans, not 3. Although we agree that African-Americans are a distinctive group, we disagree with Morgan's remaining contentions.

⁹The State does not challenge the accuracy of this percentage obtained from the United States Census Bureau.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee "a venire selected from a fair cross section of the community." *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

To demonstrate a prima facie violation of the fair-cross-section requirement, the defendant must show:

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

Id. at 940, 125 P.3d at 631 (internal quotation marks and emphases omitted).

Under the first prong, the parties correctly agree that African-Americans are a distinctive group in the community. *See id.* Accordingly, we address the remaining contested prongs.

Under the second prong, to determine whether the representation of African-Americans in the venire is fair and reasonable, this court calculates the absolute and comparative disparities.¹⁰ *See Evans v. State*, 112 Nev. 1172, 1187, 926 P.2d 265, 275 (1996) (stating that "a comparative disparity well below 50% is unlikely to be sufficient [to show

¹⁰"Unlike the absolute disparity, the comparative disparity takes into account the size of the group in addition to the absolute difference between the group's proportionate representation in the community and its representation in the jury pool." *Evans v. State*, 112 Nev. 1172, 1187 n.15, 926 P.2d 265, 275 n.15 (1996).

underrepresentation]" (citing *State v. Lopez*, 692 P.2d 370, 377 (Idaho Ct. App. 1984) (holding that "a comparative disparity well over 50% is strong evidence of underrepresentation" and "[a] comparative disparity of about 50% may or may not be adequate to show such underrepresentation, depending in part upon the size of the group in question," and concluding that an absolute disparity of 5% and comparative disparity of 61%, taken together, were sufficient to show that the underrepresentation in the venire was not fair or reasonable) (internal quotation marks omitted))). Here, African-Americans comprised of 6.7% of the 45-person venire. This mathematically results in an absolute disparity of 5.1% and a comparative disparity of 43.2%.¹¹ Therefore, the given disparities here fail to sufficiently show underrepresentation. Because the second prong proves fatal for Morgan, analysis of the third prong is unnecessary. Based on the foregoing, Morgan failed to demonstrate a prima facie violation of his Sixth Amendment right to a venire composed of a fair cross section of the community, and thus, Morgan was not entitled to a new venire.

The district court did not abuse its discretion in determining the manner in which voir dire was conducted

The district court explained to the parties how it would conduct voir dire. First, the district court would ask the jury panel 20 basic questions. The parties could then request to strike jurors for cause. After removing jurors for cause, the district court would seat 13 individuals inside the jury box. Once the 13 individuals were seated, the State would have the opportunity to ask its questions. Then the defense would have its turn to ask its questions. Once the defense concluded its questions, the parties would approach the bench and the district court would ask whether they

¹¹Morgan miscalculates the comparative disparity to be 56.4%.

passed the prospective jurors for cause. If any individuals were excused for cause, their open seats would be filled with a new prospective juror. The next round of questioning would then begin. If both the State and the defense passed for cause, the district court would ask the State for its peremptory challenge. Each side would have four peremptory challenges, and one for the alternate juror. If the State chose to exercise its first peremptory challenge and the juror was excused, that juror's seat would be filled by the next juror in the venire. Each party's opportunity to use a peremptory challenge would alternate, but if a party waived the peremptory challenge on their turn, they would lose it.

Morgan opposed the district court's "use or lose" method of peremptory challenges by arguing that he should be allowed to exercise all of his peremptory challenges on the worst prospective jurors, although he conceded that multiple courts utilize this use or lose method. Morgan relied on *Gyger v. Sunrise Hospital & Medical Center, LLC*, Docket No. 58972 (Order of Affirmance, December 18, 2013), an unpublished civil order, to support his position that it is error to require a party to exercise a peremptory challenge without knowing the next juror in the pool. In response to Morgan's opposition, the district court stated that he should pay attention to the 20 questions it would ask.

Morgan asserts that the district court unreasonably restricted his use of peremptory challenges during voir dire by requiring the parties to use or lose such challenges before qualifying 23 potential jurors.¹² We

¹²Morgan additionally argues that in rejecting several questions he posed in voir dire, the district court denied his right to effective assistance of counsel and due process and, thus, the district court placed unreasonable restrictions on the scope of voir dire. "The court shall conduct the initial

disagree and conclude that the district court did not abuse its discretion in determining the manner in which voir dire was conducted, as *Gyger* is distinguishable from this case.

"[T]he scope of voir dire and the method by which voir dire is pursued are within the discretion of the district court." *Salazar v. State*, 107 Nev. at 985, 823 P.2d at 274 (internal citations and quotation marks omitted). "If the offense charged is punishable by imprisonment . . . , each side is entitled to four peremptory challenges." NRS 175.051(2). "The State and the defendant shall exercise their challenges alternatively, in that order. Any challenge not exercised in its proper order is waived." NRS 175.051(3). Further, each side is entitled to one peremptory challenge for an alternate juror. NRS 175.061(5). In examining prospective jurors, NRS 16.030(4) is illustrative:¹³

The persons whose names are called must be examined as to their qualifications to serve as jurors. If any persons on the panel are excused for cause, they must be replaced by additional persons who must also be examined as to their

examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted." NRS 175.031. We conclude that the district court did not unreasonably restrict the scope of Morgan's supplemental examination during voir dire and, thus, did not abuse its discretion because review of the record reveals that although the district court rejected several questions Morgan posed, he was still able to exercise the line of questioning on other occasions during voir dire. See *Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991) (stating that we review the scope of voir dire for an abuse of discretion).

¹³Although this statute pertains to trial by jury in civil practice, "[t]rial juries for criminal actions are formed in the same manner as trial juries in civil actions." NRS 175.021(1).

qualifications When a sufficient number of prospective jurors has been qualified to complete the panel, each side shall exercise its peremptory challenges out of the hearing of the panel by alternately striking names from the list of persons on the panel. After the peremptory challenges have been exercised, the persons remaining on the panel who are needed to complete the jury shall, in the order in which their names were drawn, be regular jurors or alternate jurors.

Here, the court examined the 45-person panel of prospective jurors as to their qualifications by asking 20 general questions before excusing 5 jurors for cause. This occurred prior to seating 13 individuals inside the jury box. Thus, only qualified individuals were selected to sit in the jury box, and the court replaced any juror who was removed with another who was also previously qualified. Further, the court agreed to ask certain questions that the parties requested before each side was allowed to individually voir dire the remaining panel members. Therefore, the district court did not unreasonably restrict supplemental examination and, thus, did not abuse its discretion by employing the use or lose method of peremptory challenges.

Moreover, *Gyger*, the unpublished civil order Morgan relied on below, is distinguishable from this case. In *Gyger*, the district court sat the 12 prospective jurors in the jury box *before* voir dire examination began. Thus, when the court would replace an excused juror, the district court would first question the newly seated juror before counsel would begin their questioning. This court concluded that the use or lose method of peremptory challenges the district court employed unreasonably restricted the voir dire process because "[t]he purpose of voir dire is to ensure that a fair and impartial jury is seated and the voir dire process used in this case worked directly against this purpose by forcing the parties' attorneys to guess about

the comparative fairness of potential jurors who were not yet seated.” (Internal citation omitted.) Although *Gyger* and the case at hand employed the same use or lose method of peremptory challenges, employing this method *after* the court conducts its initial examination of prospective jurors sets this case apart from *Gyger*. Therefore, in rejecting the application of *Gyger* in the instant case, and employing its chosen method of voir dire, the district court did not abuse its discretion.

The district court properly overruled Morgan’s Batson challenge

The State used its second peremptory challenge to strike prospective juror no. 24, an identifiably gay member. Morgan made a *Batson* challenge against the State’s strike based on sexual orientation. Although the district court never made a finding as to whether Morgan made out a prima face case of discrimination, it denied Morgan’s challenge.¹⁴ Before addressing Morgan’s contention that the district court erred in overruling his *Batson* challenge based on sexual orientation, we take this opportunity to first address whether sexual orientation should be recognized under *Batson*—a novel issue before this court. In answering in the affirmative, we align this court with the Ninth Circuit.

“[T]he use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause

¹⁴Morgan contends that the district court prejudged his *Batson* challenge and that this amounted to structural error under *Brass v. State*, 128 Nev. 748, 291 P.3d 145 (2012). However, we conclude that Morgan’s contention lacks merit because he concedes that the *Batson* hearing occurred prior to removing prospective juror no. 24. See *Brass*, 128 Nev. at 750, 291 P.3d at 147 (holding “that when a defendant asserts a *Batson* violation, it is structural error to dismiss the challenged juror prior to conducting the *Batson* hearing because it shows that the district court predetermined the challenge before actually hearing it”).

of the United States Constitution.” *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) (citing *Batson v. Kentucky*, 476 U.S. 79, 86 (1986)). The scope of *Batson* has been expanded “to prohibit striking jurors solely on account of gender.” *Watson v. State*, 130 Nev. 764, 774, 335 P.3d 157, 165 (2014) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-43 (1994)). Although the United States Supreme Court has yet to address whether *Batson* extends to sexual orientation, the United States Court of Appeals for the Ninth Circuit concluded in the affirmative. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014). In reaching its decision, the Ninth Circuit first established that classifications based on sexual orientation are subject to heightened scrutiny, and the court further concluded that equal protection prohibited striking a juror on this basis. *Id.* at 484. The court elucidated how “[g]ays and lesbians have been systematically excluded from the most important institutions of self-governance.” *Id.* Moreover, “[s]trikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as underserving of participation in our nation’s most cherished rites and rituals.” *Id.* at 485. Such strikes “deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.” *Id.* In sum, “[t]he history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes [led] [the Ninth Circuit] to conclude that *Batson* applies to peremptory strikes based on sexual orientation.” *Id.* at 486. We take this opportunity to adopt *SmithKline*’s holding and expand *Batson* to sexual orientation.

In addressing whether the district court erred in overruling Morgan’s *Batson* challenge based on sexual orientation, “the trial court’s

decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Diomampo*, 124 Nev. at 422-23, 185 P.3d at 1036-37 (internal quotation marks omitted). Thus, "we will not reverse the district court's decision unless clearly erroneous." *Watson*, 130 Nev. at 775, 335 P.3d at 165 (internal citation and quotation marks omitted).

"We evaluate an equal-protection challenge to the exercise of a peremptory challenge using the three-step analysis set forth by the United States Supreme Court in *Batson*." *Id.* at 774, 335 P.3d at 165. Accordingly, this court engages in the following 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).

In establishing a prima facie case of discrimination under the first step of the *Batson* analysis, "the opponent of the strike must show that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Watson*, 130 Nev. at 775, 335 P.3d at 166 (internal quotation marks omitted). This step is not onerous and "the opponent of a strike is not required to establish a pattern of strikes against members of the targeted group." *Id.* (emphasis omitted). However, "[w]here there is no pattern of strikes against members of the targeted group to give rise to an inference of discrimination, the opponent of the strike must provide other evidence sufficient to permit an inference of discrimination based on membership in the targeted group." *Id.* at 776, 335 P.3d at 166. Thus, the opponent of the strike must provide "something more" to satisfy the first

step. *Id.* (internal quotation marks omitted). For example, "circumstances that might support an inference of discrimination include, but are not limited to, 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. To successfully establish a prima facie case of discrimination based on sexual orientation, the opponent of the strike may produce evidence that "[the prospective juror] was the only juror to have identified himself as gay on the record, and the subject matter of the litigation presented an issue of consequence to the gay community." *SmithKline*, 740 F.3d at 476. However, even though striking one or two gay individuals "may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury." *Id.* (internal quotation marks omitted).

Here, juror no. 24 was not the only juror to have identified himself as gay on the record. The State did not use a peremptory strike against the other identifiable gay member, and thus, this individual served on the jury. Accordingly, there is no pattern of strikes against gay members, no disproportionate effect of peremptory strikes, and no disparate treatment of gay members. With regard to the nature of the State's questions and statements during voir dire, although the prosecutor inquired about juror no. 24's relationship status by asking him whether he said "boyfriend, girlfriend or married," which prompted juror no. 24 to answer "partner," the prosecutor intended to inquire about his marital status and not his sexual orientation, despite not phrasing the question as "married, single, [or] divorced," as the prosecutor did with other prospective jurors. Finally, the nature of Morgan's criminal case did not involve an issue

sensitive to the gay community. Therefore, because we are not convinced that the totality of the circumstances gave rise to an inference of discrimination, Morgan failed to make out a prima face case of discrimination.

Further, the State, as the proponent of the peremptory challenge, provided a neutral explanation for the challenge that proved it did not engage in purposeful discrimination. After the State asserts a neutral explanation for its peremptory challenge, "the defendant bears a heavy burden in demonstrating that the State's facially []neutral explanation is pretext for discrimination." *Conner v. State*, 130 Nev. 457, 464, 327 P.3d 503, 509 (2014). Thus, "to carry that burden, the defendant *must* offer some analysis of the relevant considerations which is sufficient to demonstrate that it is more likely than not that the State engaged in purposeful discrimination." *Id.* Relevant considerations include, "(1) the similarity of answers to voir dire questions given by veniremembers who were struck by the prosecutor and answers by those veniremembers of another [sexual orientation] who remained in the venire," and "(2) the disparate questioning by the prosecutors of struck veniremembers and those veniremembers of another [sexual orientation] who remained in the venire." *Id.* Additionally, "[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." *Id.* (internal quotation marks omitted). "The court should evaluate all the evidence introduced by each side on the issue of whether [sexual orientation] was the real reason for the challenge and then address whether the defendant has met his burden of persuasion." *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

Here, the prosecutor provided the district court with a neutral explanation for striking prospective juror no. 24. The State contended that juror no. 24's response during voir dire indicated an approval of the media's criticism of the police, because after the prosecutor asked who had strong feelings about the criticism of police officers portrayed in the media, juror no. 24 responded that he felt "that it's about time that the police officers . . . are being charged" and that he thought "it's gone on way too long that [the police officers have] been able to abuse the public." In response to the State's neutral reason for striking prospective juror no. 24, Morgan argued that the State's reason was pretextual because prospective juror no. 27 shared a similar view concerning police criticism in the media, but he was heterosexual and served on the jury.¹⁵ The district court overruled Morgan's *Batson* challenge after it determined that the State had reason to strike juror no. 24, and after it discredited Morgan's argument that sexual orientation was the real reason for the strike.

On appeal, Morgan additionally argues that heterosexual prospective juror no. 31 similarly expressed concern about police in the media but served on the jury. Thus, Morgan contends that the State's justification was implausible. The record reflects that prospective juror no. 24 had a stronger opinion on police criticism than prospective juror nos. 27 and 31, and thus, juror no. 24 provided a dissimilar answer when compared to the heterosexual veniremembers who served on the jury. Moreover, review of the record indicates that the State asked the other identifiable gay veniremember who served on the jury whether he was "married, single, [or] divorced," instead of phrasing the question "boyfriend, girlfriend or

¹⁵For this reason, Morgan's argument that the court showed judicial bias by not allowing him to counter the State's neutral reason fails.

married,” and thus, the State did not engage in disparate questioning. Therefore, Morgan failed to demonstrate that the State’s neutral explanation for striking prospective juror no. 24 was pretextual. Accordingly, the district court properly overruled Morgan’s *Batson* challenge.¹⁶

The district court did not err with respect to closing arguments

In Morgan’s closing argument, his counsel stated: “What else did we hear during this trial? Maria Verduzco is still a manager at the AM/PM” The district court sustained the State’s objection because evidence was not produced at trial that Maria was still the manager at the convenience store. Accordingly, upon the district court’s instruction, Morgan corrected his previous statement to the jury.

Morgan argues that his constitutional rights to effective assistance of counsel were denied when the court demanded that his counsel correct the alleged misstatement.¹⁷ Conversely, the State contends that

¹⁶Morgan next argues that the district court erred in denying his separate motions for a mistrial based on testimony from two witnesses. However, after review of the record, we conclude that Morgan’s argument lacks merit, and thus, the district court did not abuse its discretion in denying Morgan’s motions. *See Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (stating that this court will not disturb the district court’s decision to deny a motion for a new trial absent an abuse of discretion).

¹⁷Morgan additionally argues that during closing argument, the State engaged in prosecutorial misconduct warranting reversal. After review of the record, we conclude that the alleged prosecutorial misconduct does not warrant reversal. *See Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (“A prosecutor’s comments should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.” (internal quotation marks omitted)).

because Morgan misstated the facts, the district court did not abuse its discretion by demanding correction. We agree with the State and conclude that the district court acted within its discretion when it required Morgan to correct his misstatement of fact.

“[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process.” *Herring v. New York*, 422 U.S. 853, 857 (1975). However, “[t]his is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained.” *Id.* at 862. Accordingly, this court reviews a district court’s “rulings respecting the latitude allowed counsel in closing arguments for an abuse of discretion.” *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 704, 220 P.3d 684, 693 (2009) (internal citation omitted). A fundamental legal and ethical rule is that neither the prosecution nor the defense may argue facts not in evidence. *See id.* at 705, 220 P.3d at 694. “The trial court has an array of measures available to deal with improper argument by counsel.” *Id.* at 702, 220 P.3d at 692.

Here, Maria never testified that she was still the manager of the convenience store at the time of trial. Because Morgan failed to elicit such testimony during cross-examination, the district court did not hinder his ability to participate in the adversary factfinding process by requiring him to correct his misstatement of fact. Therefore, the district court did not abuse its discretion and did not deny Morgan his right to effective assistance of counsel.¹⁸

¹⁸Because the court’s action was appropriate, the district court further did not abuse its discretion by denying Morgan’s motion for a mistrial based on his statement concerning Maria. *See Domingues v. State*, 112 Nev. 683,

There was sufficient evidence for Morgan's conviction.

Morgan argues that there was insufficient evidence for his conviction because no merchandise was recovered and the State failed to present evidence that the convenience store was missing inventory. We disagree.

"The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution." *Jackson v. State*, 117 Nev. 116, 122, 17 P.3d 998, 1002 (2001) (internal quotation marks omitted). It is well established that the jury determines the weight of the evidence and credibility of the witnesses. *State v. Thompson*, 31 Nev. 209, 217, 101 P. 557, 560 (1909).

Here, testimony and surveillance video provided sufficient evidence to support the jury's verdict. First, Maria testified that she saw a man, whom she identified in open court as Morgan, put a package of mixed nuts into his pocket, and when she asked if he could please take the nuts out of his pocket, he cursed at her. Maria further testified that when she stepped back in response, Morgan approached and made her feel nervous before he hit her. In addition to the nuts, Maria testified that she saw Morgan conceal containers of soup in his backpack after reviewing the surveillance video and that at no time did he pay the cashier.

Second, an officer also identified Morgan in open court as the perpetrator and testified that he saw a package of mixed nuts fall out of

695, 917 P.2d 1364, 1373 (1996) (stating that this court will not disturb the district court's decision to deny a motion for a new trial absent an abuse of discretion).

Morgan's pocket when Morgan fell to the ground at the time of arrest. The officer further testified that he grabbed the nuts, despite the fact that they were never impounded.

Finally, surveillance video showed Morgan place a package of mixed nuts into his pocket. Video also showed Morgan place a container of red soup into his bag but place a container of yellow soup on the counter, showing that he only intended to pay for the container of yellow soup.

Although Morgan highlights the lack of recovered merchandise, the jury was properly instructed that the State was not required to recover or produce the proceeds of the alleged robbery at trial. Further, the surveillance video alone negated any need for the State to present evidence that the convenience store was missing inventory. Therefore, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of robbery and misdemeanor battery beyond a reasonable doubt. See NRS 200.380(1) (defining robbery as "the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury . . . "); NRS 200.481(1)(a) (defining misdemeanor battery as "any willful and unlawful use of force or violence upon the person of another").

CONCLUSION

We conclude that: (1) the district court did not err with respect to Morgan's competency hearing; (2) the district court did not err by rejecting Morgan's motion to dismiss the charges; (3) the district court did not commit structural error when Morgan moved to strike the jury venire; (4) Morgan was not entitled to a new venire; (5) the district court did not abuse its discretion in determining the manner in which voir dire was conducted; (6) the district court properly overruled Morgan's *Batson*

challenge, despite the fact that *Batson* applies to peremptory strikes based on sexual orientation; (7) the district court did not err with respect to closing arguments; and (8) there was sufficient evidence for Morgan's conviction. Based on the foregoing, we affirm Morgan's judgment of conviction.

Douglas C.J.
Douglas

We concur:

Gibbons J.
Gibbons

Pickering J.
Pickering