IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN LAWRENCE DIXON, Appellant, v. **STATE OF NEVADA,** Respondent.	Docket No. 77535 District Court No. 18-6963

RESPONDENT'S ANSWERING BRIEF

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A. TABLE OF CONTENTS

B. TABLE OF AUTHORITIES

Cases

C. JURISDICTIONAL STATEMENT

The State agrees with Mr. Dixon's jurisdictional statement. The district court entered a judgment of conviction on November 19, 2018, to which Mr. Dixon timely appealed under NRAP 4.

D. ROUTING STATEMENT

Under NRAP 17(11) (questions of first impression), the Supreme Court should retain this case because the State asks this Court to adopt the Dual Motivation Doctrine with regard to *Batson* challenges. Furthermore, the State also asks this Court to not allow reversal of a conviction if a *Batson* challenge should have issued but no actual prejudice resulted because that juror was only an alternate who did not deliberate.

E. STATEMENT OF THE ISSUES

I. Whether the District Court failed to hold a *Batson* hearing and, if

so, the appropriate remedy.

II. Whether the district court erred by applying the dual motivation doctrine under *Batson*.

III. Whether trial cures any *Batson* challenge error when a *Batson* challenge is issued to only the alternate juror and that alternate juror does not deliberate with the jury.

F. STATEMENT OF THE CASE

The State charged Mr. Dixon with child endangerment, a gross misdemeanor, and first degree arson. (Appellant's Fast Track Appendix[1] (AFA) 6-7 (Judgment of Conviction). At the preliminary hearing, the justice court only bound over on fourth degree arson, which is attempted arson. After a jury trial, the jury found Mr. Dixon guilty of fourth degree arson, but not guilty of child endangerment. Mr. Dixon timely appealed the conviction through a fast track appeal. This Court then ordered a full briefing.

G. STATEMENT OF THE FACTS

On December 13, 2017, Mr. Dixon and his girlfriend of sixteen years, Melissa Mayden, were together in Winnemucca doing errands and fighting

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[1] There exist two page numbers in this appendix: one set for the transcript page number and one set for the appendix's page numbering at the bottom of the page. The State uses through its brief the page number of the appendix at the bottom of the pages to avoid confusion with earlier pages.

over title to a truck. (Respondent's Appendix Volume One (RA) 10:21-12:12.) While driving into town, Mr. Dixon declared that he wanted the title in his mother's name and not in Ms. Mayden's name. (RA 12:12-13:12.) Mr. Dixon then informed Ms. Mayden that he would be breaking up with her shortly after his court date a month later, setting off an argument. (RA 14:20-15:18.)

After several small arguments after finishing their errands, that night Mr. Dixon then approached Ms. Mayden who was laying in her son's bedroom (RA 19:7-15.) Mr. Dixon wanted to talk about their relationship, but Ms. Mayden knew Mr. Dixon had been drinking, and she did not want to argue with him in that state. (RA 19:17-20:24.) Ms. Mayden recognized Mr. Dixon becoming angry as he pressed the argument about their relationship, and he demanded that she leave the house. (RA 21:1-24.)

Ms. Mayden owned one-half of the house from which Mr. Dixon demanded that she leave. (RA 22:15-16.) She said, "it's my house, too, and it's my kids' house," and otherwise refused to leave. (RA 22:18-22.) Mr. Dixon, growing angrier, asserted that the house was his and demanded she leave. (RA 22:23-24.)

Ms. Mayden, recognizing Mr. Dixon's increasing rage because of the obscene names he called her, felt scared and ran away to the bathroom to

hide from Mr. Dixon because it was a "nonobvious spot." (RA 23:1-24.) Ms. Mayden then ran back to the living room when she heard her children screaming "bloody murder," and discovered her mirror and a portion of her house was on fire. (RA 24:11-25:22.) While Ms. Mayden did not hear it, her daughter saw Mr. Dixon take a propane torch to the mirror, light it and the house on fire, declaring, "this bitch is going to burn." (RA 91:1-92:11.) Through a series of questions on cross-examination, Mr. Dixon agreed he set the mirror on fire, which had caught, but disagreed with the size of the flames and extent of the damage to the house. (RA 160-170.)

Jury trial commenced on September 19, 2018, and the jury was selected that morning. After it was selected, the State and Mr. Dixon were afforded one final preemptory challenge for the final, alternative juror without any challenges. (AFA 16:14-17:9.) The State preempted Mr. Raul Lara, one of the final three potential alternates. (AFA 17:10-12.) Mr. Dixon made a *Batson* challenge to the preemption, to which the State made a brief statement regarding gender and gave a race- and gender-neutral reason for striking Mr. Lara. (AFA 17:21-18:5.) The State briefly explained its reasoning—it knew the two remaining females and felt they would be better jurors based on their reputation in the small community. (AFA 18:2-5.) The State had no

information regarding Mr. Lara and accordingly struck him in favor of the two preferable jurors. (*Id.*) The record does not show a protracted silence, but it may be inferred from the dialog. (AFA 17:18-21.)

Regardless, the State previously asked the court to slow down jury selection prior to this exchange due to it being the State's attorney's first time in a jury trial, (AFA 13:17-24,) and the State proffered a race- and gender-neutral answer, (AFA 18:2-5.) The State's silence, no matter how prolonged, did not acquiesce to Mr. Dixon's *Batson* challenge, based on the District Court judge's final ruling on this matter. (AFA 19:5-8.) The District Court judge found the reason provided by the State was a "[neutral] explanation that was clear and reasonably specific."[2] (AFA 19:6-8.) Ms. Shelly Graham did not deliberate with the jury nor have any influence on its deliberations. (Respondent's Appendix Volume 2.)

H. STATEMENT OF THE STANDARD OF REVIEW

When reviewing a conviction for *Batson* deficiencies, "[b]ecause the trial court's findings on the issue of discriminatory intent largely turn on evaluations of credibility, they are entitled to great deference and will not be

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[2] The appendix uses the word "mutual" but the District Court meant "neutral," which makes sense in the context of a *Batson* challenge.

overturned unless clearly erroneous." *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004) (footnote omitted). The district court is in the best position to rule on a *Batson* challenge, so its determination is reviewed deferentially, for clear error. *Williams v. State*, 134 Nev. ___, ___, 429 P.3d 301, 306 (2018); *see Flowers v. Mississippi*, No. 17-9572, 2019 WL 2552489, at *10 (U.S. June 21, 2019) (noting trial judges enforce *Batson* "first and foremost" because "America's trial judges operate at the front lines of American justice.")

I. SUMMARY OF THE ARGUMENT

The record indicates that a *Batson* hearing was appropriately held by the District Court, and that it found a race-neutral reason for striking the alternative juror in this case. Further, even if this Court disagrees, no actual prejudice resulted to Mr. Dixon because that juror did not ultimately serve on the jury nor deliberate with its members. Structural error cannot exist when the possible error does not support the structure. Because there is no actual prejudice to Mr. Dixon, this Court should affirm the conviction.

J. ARGUMENT

1. The District Court appropriately held a *Batson* hearing and determined there was a race-neutral reason for striking the alternative juror.

At trial, Mr. Dixon challenged the State's preemptory challenge of an alternative juror, Mr. Raul Lara, alleging the State struck that juror based on his race. Mr. Dixon then raised a *Batson* challenge,[3] and the District Court heard the challenge and allowed the State to respond. After its response, Mr. Dixon's counsel argued the *Batson* challenge with the District Court judge, who found a race-neutral reason for striking the alternative juror. The District Court did not address the gender issue raised by the defense, and this will be discussed below.

a) Batson *hearing*

Nevada trial courts are directed to follow a three-step process when faced with a *Batson* challenge outlined in *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). This process requires:

> (1) [T]he 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

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[3] *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

> whether the opponent of the challenge has proved purposeful discrimination.

The first step is moot if the State provides its reasons before the court determines a prima facie case. *Id.* While the State's reasons for its challenge do not need to be "persuasive or even plausible, . . . [a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." *Id.* at 403-04. Accordingly, the second and third steps are intertwined with each other, insofar as hearing the prosecutor's reasoning for the challenge and his or her credibility for giving that reason. *See Flowers v. Mississippi*, 2019 WL 2552489 at *11 ("The Court has explained that 'the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.'") (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208, 170 L. Ed. 2d 175 (2008)).

The third step requires a "sensitive inquiry" into whether there was discriminatory intent. "[W]here the district court makes its decision before hearing such argument from the defendant, it raises concerns as to the fairness of the proceeding." *Williams*, 134 Nev. at ___, 429 P.3d at 308.

This Court, in its order directing full briefing, directed the parties to address the district court's failure to hold a hearing pursuant to *Batson*. With

respect, the State disagrees with this Court's underlying assumption: that the District Court actually failed to hold a *Batson* hearing. It did, but it focused on the original race-based challenge.

In this case, Mr. Dixon made his *Batson* challenge. Without an explicit ruling on the prima facie case, the District Court invited the State to respond. After the State's response, Mr. Dixon's counsel and the District Court argued the issue, and the Court found the State did not strike Mr. Lara based on his race. Mr. Dixon's counsel appeared to change his challenge from race to gender after the State gave its reason and the District Court does not appear to have kept up with this moving target.

However, to the extent that this Court directed the parties to discuss the district court's failure to hold a hearing based on gender,[4] it appears Mr. Dixon's counsel did not make his intention for challenging the State's preempt clear enough for the District Court. Mr. Dixon's counsel, while arguing, could have made a better record or declare he was challenging the State's strike based on gender so that the District Court could better

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[4] While *Batson* prohibits race-based preemptory challenges, the United States Supreme Court later prohibited gender-based preemptory challenges in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140–43, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Claiming *Batson* as prohibiting both race- and gender-based preemptory challenges appears to be a misnomer in the local legal community. *See* AFA 19:6-7. This *Response* will use *Batson* throughout, but recognizes the distinction between the two United States Supreme Court cases.

understand.

b) Remedy

When a prosecutor strikes a juror "motivated in substantial part by discriminatory intent," and the district court fails to conduct a *Batson* hearing, this ordinarily constitutes clear or structural error, mandating reversal. *Snyder*, 552 U.S. at 485; *Williams v. State*, 134 Nev. at ___, 429 P.3d at 310.

As discussed further in this brief, the State will argue that there exists no structural error under these facts. First, the prosecutor's explanation was not motivated by any discriminatory intent. Second, neither the challenged or alternative juror deliberated with the jury. Accordingly, Mr. Dixon cannot show how he may have been actually prejudiced. If the alternative juror was never part of the structure that found Mr. Dixon guilty, there cannot be structural error.

2. A mixed response suffices when at least one reason provided is race- and gender-neutral.

Mr. Dixon challenged the State's preemptory challenge of a Latino alternative juror, Mr. Raul Lara. The State provided a succinct answer that mentioned a gender-based reason for striking the juror as well as a race- and gender-neutral reason for striking Mr. Lara. The State's prosecutor stated he

did not have sufficient information to know whether Mr. Lara would make a good juror, but stated he thought both remaining female jurors would make good jurors based on his knowledge of Ms. Graham and Ms. DeLong. Accordingly, the State struck the juror on which he did not have sufficient information.

Batson challenges require a three-step process, as explained above. The appellate court grants "great deference" to the lower court's finding regarding a *Batson* violation. *Watson v. State*, 130 Nev. 764, 775, 335 P.3d 157, 165 (2014).

This issue of first impression in the *Batson* context involves what some courts call the "Dual Motivation Doctrine." *See Howard v. Senkowski*, 986 F.2d 24 (2d Cir.1993) (applying the dual motivation doctrine announced by the United States Supreme Court in other equal protection cases to the *Batson* framework). This doctrine examines whether the party who struck a juror for an impermissible reason would have done so even in the absence of the impermissible reason. *Id.* at 30; *see also McCormick v. State*, 803 N.E.2d 1108, 1112 (Ind. 2004).

While never directly held by the United States Supreme Court, this doctrine is apparent from their standard of law first used in *Snyder v.*

Louisiana, which borrowed analysis from *Hunter v. Underwood*,[5] a case where the Supreme Court determined whether a law violates the equal protection clause of the Fourteenth Amendment. In *Snyder*, the Supreme Court noted the parallels between the equal protection analysis framework and *Batson*, and then noted once "a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative." *Snyder*, 552 U.S. at 485. The *Snyder* Court decided not to hold this same standard to *Batson* challenges, but opened the door to a dual-motivation analysis. *Id.* Other United States Supreme Court cases have since carried this standard, including *Foster v. Chatman*, 578 U.S. ___, ___, 136 S. Ct. 1737, 1754, 195 L. Ed. 2d 1 (2016), and *Flowers*, 2019 WL 2552489. Both of these cases noted the standard for reversal is whether the prosecutor was "motivated in substantial part by discriminatory intent." *Id.*

Here, the record provides both an impermissible and permissible reason to strike a juror: the State emphasized the importance of the permissible reason to strike the alternative juror: he knew more about the female alternatives rather than Mr. Lara. The District Court heard the State's

[5] 471 U.S. 222, 228, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985).

reasons for striking a juror and decided its reason for striking Mr. Lara was not discriminatory. Based on this ruling, the District Court determined the prosecutor did not strike because of Mr. Lara's race. Because the District Court heard argument on race and gender reasons, this Court should affirm the District Court's decision because Mr. Dixon failed to demonstrate clear error.

3. The alternative juror did not deliberate with the jury, which renders any error harmless.

The record fails to demonstrate how denying Mr. Dixon's *Batson* challenge affected the trial. The alternative juror was the only juror on which Mr. Dixon challenged the State's preemptory strikes. If there was error by the District Court, which the State does not concede, it was subsequently rendered harmless without deliberation by the alternative juror.

This second issue of first impression requests this Court to hold that structural error does not apply to alternative jurors that ultimately do not deliberate with the other jurors after a denied *Batson* challenge. This holding is echoed by other jurisdictions. *Carter v. Kemna*, 255 F.3d 589, 592 (8th Cir. 2001) (in a habeas corpus decision, this court agreed in *dicta* that when no alternative juror serves, a court could "reasonably believe the improper

exclusion of an alternate juror is not a structural error because it is clear the error never affected the makeup of the petit jury that decided to convict the defendant."); *Nevius v. Sumner*, 852 F.2d 463, 468 (9th Cir. 1988); *State v. Carter*, 889 S.W.2d 106, 109 (Mo.App.1994) (Eastern District) (when no alternative jurors deliberate, "*Batson* does not stand for the proposition there is a Constitutional right to be an alternate juror."); *People v. Stephens*, 255 A.D.2d 532, 532–33, 682 N.Y.S.2d 398, 398 (1998).

The Eighth Circuit Court in *Carter v. Kemna*[6] compared a series of Federal Circuit Courts of Appeal when it was written in 2001 to this issue. It noted the Sixth Circuit Court held any *Batson* challenge constituted structural error, despite whether that alternative juror deliberated, but the *Carter v. Kemna* Court also noted the Seventh, Fourth, and Ninth Circuit Courts of Appeal disagreed with the Sixth Circuit Court on similar grounds that the State advocates in this brief.

One interesting case this Court should adopt as Nevada's test comes from the Supreme Court of Minnesota. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). In this short, ninety-five word disposition, the Minnesota

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[6] 255 F.3d 589, 592 (8th Cir. 2001). The State notes the full case citation where there could be confusion with *State v. Carter*, 889 S.W.2d 106, 109 (Mo.App.1994), which is also cited in this brief.

Supreme Court held the appellant is required to demonstrate "*actual prejudice resulted* from the failure to dismiss" a juror after a *Batson* challenge was denied. *Id.* (emphasis in original). In that case, the stricken juror was an alternate and the record did not show he could have played any role in deciding the defendant's verdict.

The State concedes that a juror struck by a prosecutor motivated in substantial part by discriminatory intent creates structural error mandating reversal if that denied *Batson* challenge affects the make-up of the jury who deliberates. There can be no clear error under these facts.

Mr. Dixon does not show any "actual prejudice" in the district court denying the *Batson* challenge. On one hand, the stricken juror, Mr. Lara, never served on the jury—even as an alternate. He was excused the morning of the first day. On the other hand, the alternative juror who replaced Mr. Lara never served in deliberation either. As per the analysis used in *Ford*, the alternate juror could have possibly had discussions with jurors, but no evidence demonstrates that she did. And even if the alternative juror had discussions with other jurors, she was admonished throughout the trial not to discuss the case, and that constitutes improper conduct. In essence, trial cured any error that existed.

To be clear, the State does not advocate that parties should not make *Batson* challenges for an alternate juror. On the contrary, a party should make a *Batson* challenge when that party believes the opposing party struck an alternate juror for race- or gender-related reasons. Rather, the State argues an appeal over a denied *Batson* challenge regarding an alternate juror should be affirmed when an appellant cannot show actual (or even potential) prejudice resulting from the district court's denial of the *Batson* challenge. If the alternate had deliberated, this would be a different discussion.

But Mr. Lara did not. Even if the *Batson* challenge had been granted and Mr. Lara stayed on the jury, he would have been an unused alternate. Mr. Dixon was found guilty by an agreed upon, unbiased jury who heard all the evidence. Mr. Dixon's conviction should be affirmed.

K. CONCLUSION

> To be sure, the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations. That is entirely understandable, and mistaken explanations should not be confused with racial discrimination. But when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling. So it is here.

Flowers, 2019 WL 2552489 at *16. Like the *Flowers* court explained, the

prosecutor made a mistaken explanation that cannot be easily discerned by the cold record during his first trial. To be clear, the undersigned, who was the prosecutor below, had no discriminatory intent based on race or gender. The district court found the prosecutor's explanation sufficient though, and denied the *Batson* challenge for a juror who did not serve and would not be needed for deliberations.

Accordingly, because Mr. Dixon fails to show actual prejudice based on the district court denying the *Batson* challenge, and the alternative juror never deliberated with the jury who decided Appellant's guilt, this Court should affirm the lower court's judgment of conviction and dismiss this appeal. No structural error exists when the alternative juror is not part of the structure.

Dated June 28, 2019

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VERIFICATION

I hereby certify that I have read this appellate brief, entitled, "Respondent's Answering Brief" and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), although it does exceed 15 pages, it complies with the word count and line count of the appellate rules.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. The document was prepared in Word. There are 21 typed pages, 4086 words in this brief. The brief has been prepared in Word, proportionally spaced type, 14 point Book Antiqua with 2.0 line spacing.

Dated June 28, 2019.

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