IN THE SUPREME COURT OF THE STATE OF NEVADA

JEMAR MATTHEWS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 84339

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction (Jury Trial)
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it involves a jury verdict and conviction for a Category A felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court erred from denying Appellant's Batson challenges.

2. Whether sufficient evidence was presented to support a conviction.

STATEMENT OF THE CASE

The conviction in this case marks the third time that a jury of Nevadans has convicted Jemar Matthews (hereinafter "Appellant"). His first conviction for eleven (11) felony counts, including First-Degree Murder with Use of a Deadly Weapon, was in 2007. Appellant's first conviction was upheld by this Court and had sustained

habeas review until a federal district court granted Appellant's Petition for Writ of Habeas Corpus. Matthews v. Neven, 250 F.Supp.3d 751, 755 (D. Nev. 2017). The federal district court's granting of the petition resulted in Appellant being granted a second jury trial.

The case proceeded to retrial, and on September 15, 2017, the State filed an Amended Information charging Appellant with: Count 1 – Conspiracy to Commit Murder; Count 2 – Murder with Use of a Deadly Weapon; Counts 3 through 5 – Attempt Murder with Use of a Deadly Weapon; Count 6 – Possession of Short Barreled Rifle; Count 7 – Conspiracy to Commit Robbery; Counts 8 and 9 – Robbery with Use of a Deadly Weapon; and Counts 10 and 11 – Assault with a Deadly Weapon. 1 AA 14-19. Appellant's trial began on September 24, 2018. On October 3, 2018, the jury found Appellant guilty on all counts. Appellant was sentenced on December 5, 2018, and a Judgment of Conviction was filed on December 7, 2018.

Appellant filed a timely appeal of his second conviction. Appellant's conviction was vacated by this Court because based on the record, or perhaps lack thereof, this Court should not determine that the Batson challenge should not have been granted. As such, the case was once again remanded for a new jury trial. Remittitur issued on August 3, 2020.

Appellant's third jury trial commenced on November 5, 2021. On November 15, 2021, Appellant was found guilty of Count 1 – Conspiracy to Commit Murder;

Count 2 – First Degree Murder with Use of a Deadly Weapon; Counts 3-5 – Attempt Murder with Use of a Deadly Weapon; Count 6 – Possession of a Short Barreled Rifle; Count 7 – Conspiracy to Commit Robbery; Counts 8-9 – Robbery with Use of a Deadly Weapon; and Counts 10-11 – Assault with Use of a Deadly Weapon. Appellant and the State stipulated that he would be sentenced by the court instead of the jury.

Appellant was sentenced on February 4, 2022. On the First Degree Murder with Use of a Deadly Weapon count, Appellant was sentenced to a life term of imprisonment with the possibility of parole after twenty years and an equal and consecutive term of twenty years for the weapons enhancement for a total of forty years to life. All other counts were ordered to be served concurrently with the murder count. An Amended judgment of Conviction was filed on February 24, 2022.

STATEMENT OF THE FACTS

A. FACTS PRESENTED AT TRIAL

On September 20, 2006, thirty-nine (39) shots were fired at 1271 Balzar Avenue in Las Vegas, Nevada. At the time of shooting began, Mersey Williams, 22 years old, Myniece Cook, 27 years old, and Michel'le Tolefree, 16 years old, and Maurice Hickman, the intended target, were all on the front porch of 1271 Balzar Avenue. Myniece, Michel'le, and Michael fortunately survived the shooting, but the youngest of the four, Mersey Williams, was shot to death.

Mersey, Myniece, Michel'le and Maurice had gathered at 1271 to celebrate Mersey's upcoming birthday. 3 AA 574. While the four were on the porch, Mersey noticed that someone was standing on the side of the house. 3 AA 584. When she pointed it out to the others, Maurice told them all to run. 3 AA 585.

As the group was running, Mersey was shot in the head. 3 AA 587. Myniece, who had been running with Mersey, was shot in the wrist. Mersey and Myniece both fell to the ground. Myniece pretended to be dead as shots continued to be fired, but Mersey did not need to pretend. 3 AA 590. Once the shooting stopped, a woman opened the front door of the house and Myniece ran inside. 3 AA 592. Michel'le, who was with Maurice, testified that she saw four or five guys involved with the shooting. 3 AA 623. She also saw a man leaving the scene with a black top and blue shorts. 3 AA 620.

At the time of the shooting, Melvin Bolden was returning from dinner with his wife and some friends. 3 AA 638. Melvin lived about a block away from 1271 Balzar Avenue. As Melvin was parking his car, an '86 Lincoln Town Car, he heard the gunshots coming from 1271 Balzar Avenue. 3 AA 640-641. Shortly thereafter, four men approached the car and told them to get out. 3 AA 642. One of the men pointed a gun at Melvin's head and told him to get out of the car and leave the keys. 3 AA 644. Melvin described the four individuals as four men wearing dark shirts, pants, and red and black gloves. 3 AA 644. Melvin also saw that two of the men had

visible guns; one had a shotgun while the other had a handgun. 3 AA 661. The four men then drove away in his car.

Around the same time, Officer Cupp and Officer Walter were driving in an unmarked police car that happened to be in the neighborhood. 3 AA 684. They drove towards the gunshots and saw a group of people arguing and the Lincoln Town Car drive off with three of the men. 3 AA 687. The officers followed the Lincoln, which was driving fast and without regards to any of the traffic laws. 3 AA 689. At no point during the pursuit did officers lose sight of the Lincoln. 3 AA 691.

As the car began to slow down on a residential road, the officers see the driver side door swing open and Appellant jumps out of the vehicle as its still moving. 3 AA 692. The officers recognized Appellant from their area command. 3 AA 684. Appellant was wearing a red glove and was holding a firearm which was shorter than a rifle, but larger than a handgun. 3 AA 692-694. Appellant was on 6 six to 7 feet away from the officers and was holding the firearm, so fearing for his safety Officer Cupp struck Appellant with his vehicle. During this episode, officers were able to again recognize the individual as Appellant. 3 AA 696. Appellant then got up and began running away from officers. 3 AA 696.

Officer Walter got out and started to chase Appellant on foot. 4 AA 920. Officer Walter saw Appellant wearing a black shirt, blue shorts, and a red glove. 4 AA 918. The officer chased Appellant, jumped over several fences, but stopped

when he heard gunshots coming from the direction of where he left his car and partner. 3 AA 921. Other patrol officers were in the area, so Officer Walter decided to turn around and run back to where the car was in case Officer Cupp had gotten into a shooting. 4 AA 925. K9 officers had been on the scene and tracked Appellant to a backyard on Jimmy Street. 4 AA 893. Appellant was then arrested.

Officer Cupp ran after one of Appellant's co-conspirators, Pierre Joshlin, as he saw him run out of the Lincoln with a gun in his hand. 3 AA 699. While running, Joshlin turned and pointed the gun at Officer Cupp, so the officer fired three shots. 3 AA 703. Joshlin continued to run. 3 AA 704. Joshlin was found in a dumpster nearby and arrested. 3 AA 707. The black gloves and gun were found in the dumpster. 3 AA 708.

Close to where the Lincoln had crashed, there was a recovered .22 Ruger rifle with its stock barrel cut off and a 30-round magazine clip. 5 AA 979. The .22 caliber bullet was the same size of the bullet that was found during the autopsy of Mersey Williams. 5 AA 985. Gunshot residue was found on Appellant's right palm, left palm, and the back of his left hand. Gunshot residue was also found on the red glove recovered.

In addition to the testimony above, the jury also heard from witness Nicholas Owens who was involved with the shooting that occurred at 1271 Balzar Avenue. Owens knew both Appellant and Joshlin. 5 AA 1037. On September 29, 2006,

Joshlin, Appellant, and Owens were all talking about the murder of one of their friends, Marcus Williams. 5 AA 1039. As the conversation progressed, the three of them became angry about their friend's death and Joshlin asked Owens if he could get some guns. 5 AA 1042.

B. FACTS RELATED TO JURY SELECTION

1. The Voir Dire

a. The court questions the panel

The court began its voir dire by asking the panel general qualifying questions. These are questions that could outright prevent a person from serving on the jury. Appellant argues that in questioning the panel as a whole, the court only asked about felony convictions of any prospective jurors, and that it did not ask about misdemeanor convictions. 1 AA 0099. The assumption here is that a juror who did not disclose a misdemeanor conviction cannot be held responsible for failing to disclose a conviction that they were not asked about. However, evidence will clearly show that the district court later asks the jury panel about any prior arrests.

Appellant focusing on this portion without describing the rest of jury selection is misleading. In the very beginning of jury selection, the district court asked certain questions that would potentially disqualify a person from serving on the jury. The question of whether a person has been convicted of a felony was relevant to establish whether anyone was ineligible to serve as a juror. NRS 6.010 requires that the person

who has a felony conviction may not serve as a juror unless the potential civil rights have been restored. To this question of anyone being convicted of a felony, the panel answered in the negative and none of the potential jurors was removed for cause based on this question. 1 AA 0099.

The district court then sat the first potential thirty-two jurors and asked each of the jurors individual questions about themselves. Once that was completed, the court then asked general questions of the thirty-two potential jurors. One such questions was whether any of the potential jurors or anyone close to them was ever accused of a crime. 1 AA 0185. To this question, the entire jury panel responded in the negative.

b. The court questions Ms. Hughes (Juror 344)

As mentioned above, after asking the initial disqualifying questions to the entire jury panel, the court then asked each of the first thirty-two potential jurors a series of questions. The questions asked of Ms. Hughes (344) were no different from any of the other potential thirty-one jurors. The court asked her the following questions: how long she had lived in Clark County, her educational background, what she did for a living, if there was any reason she could not be a fair and impartial juror, and whether her children would be cared for if she were to serve as a juror. 1 AA 0125.

After the district court completed its individual questions of the potential jurors, the district court proceeded to again ask questions of the thirty-two potential jurors. The court informed them that the questions were to everyone as a whole, and that the potential juror should raise his or her hand if he or she had an answer to the question. 1 AA 0169. Some of the general questions asked were whether any of them had previously served as a juror, whether any of them had ever been a victim of a crime, and most notably here, whether any of them had ever been accused of a crime. 1 AA 185. Ms. Hughes (344) was among the potential thirty-two jurors that indicated she had never been accused of a crime. Id.

c. The State questions Ms. Hughes (344)

Appellant again tries to prove the State's malicious intent by indicating that the State mistakenly referred to Ms. Hughes (344) by the name of another African-American female on the panel. App. Brief, p. 17. The clear implication that Appellant wishes to make is that the mistaken name must be proof of a racist intent. First, this implies that attorneys never make a mistake when it comes to names in jury selection. However, even with the mistake, what is Appellant's insinuation? Appellant noticeably stops short of saying how this seemingly honest mistake is proof of anything at all. Instead, the inclusion and focus on this mistake seems only for the purpose of trying to evoke shock and awe that a person would mix up the names of two potential African-American jurors.

The State first questioned Ms. Hughes (344) on whether she had filled out a juror questionnaire. 1 AA 197. Ms. Hughes (344) indicated that she did not fill one out. The State then followed up by asking if she has any particular feelings about the criminal justice system, to which Ms. Hughes (344) answered that she did not. Id. She was asked about her feelings of law enforcement, and she was asked if she thought she would be a good fit for the jury. 1 AA 198. As this Court would see by the individual questions asked of the other jurors by the State, these questions were asked to nearly every other juror. The questions were not in any way specific to this juror.

d. The district court did not again question the panel after the State's questioning

The sequence of Appellant's brief seems to imply that the court then again asked questions of the panel, but this is not what occurred. As mentioned above, the sequence was qualifying questions, then individualized questions of the panel, general questions of the panel, and then passing the panel to the State for questioning. Thus, the court's question of whether any of the jurors had ever been accused of a crime came prior to the State's questioning. 1 AA 185.

2. The State challenges makes its challenges for cause

a. Ms. Hughes (344) (and others) challenged for cause

Although Appellant has focused entirely on the challenge to Ms. Hughes (344), it is relevant to examine the contemporaneous challenges that were made

because Ms. Hughes (344) was not uniquely situated. Instead, the State made challenges to all the potential jurors that had failed to disclose a prior arrest.

Following questions of the thirty-two member panel by the State, the district court entertained any State challenges for cause. At this junction, the State informed the court that it had run SCOPE (a criminal history database) and checked social media on all potential jurors, and that Ms. Hughes (344), Mr. Becenti (Juror 456), and Mr. Sanchez (Juror 570) appeared to have been previously arrested but did not disclose such arrests to the court. 2 AA 379. The State was exercising a challenge on them for failing to honestly disclose their prior arrests when asked by the court. 2 AA 398. The State also indicated a possible challenge on Mr. Deering (Juror 399) because of comments he made that he would potentially consider things beyond the evidence. Id.

When questioned further on the individual jurors that the State sought to excuse for cause, the State responded that Ms. Hughes (344) had a prior misdemeanor battery domestic violence conviction out of Henderson Municipal Court. 2 AA 395-396. Mr. Becenti (456) had a prior misdemeanor driving under the influence charge the year prior. 2 AA 396. Mr. Sanchez (570) was also challenged because of a prior driving under the influence arrest. The State also exercised a challenge as to a Mr. Lopez (586), who indicated that the criminal justice system

does not work because his brother continually is released from being arrested. 1 AA 399.

b. The defense objects to the challenges for cause

Appellant objected to all of the for cause challenges made by the State. The court entertained a response from Appellant on each of the jurors that was challenged.

When asked about Ms. Hughes (344), Appellant laid the groundwork for his eventual Batson challenge.

COURT: Does the defense have any objection to this challenge for cause?
DEFENSE: Yes, Your Honor.
COURT: Okay. Go ahead.
DEFENSE: Christina Hughes, our concern with Christina Hughes in the challenge is thus: One, she's an African-American female. She said nothing that would suggest she has any bias between both sides. She was very clear that she has no reason, and I quote: "No reason not to be fair to both sides" when asked. 2 AA 401.

Appellant responded first and foremost with the potential juror's race, but he did nothing to address the fact that Ms. Hughes had failed to disclose her prior arrest when asked. Defense goes on to argue against the challenge.

DEFENSE: Okay. And she said no reason not be fair, she could be fair to all parties and didn't say anything else. In terms of this misdemeanor battery DV out of 2015, you know, how many people did we talk to today that said, when Mr. Tanasi was asking them, it says here your race, that was a mistake. Okay. So people make mistakes.
COURT: Yeah. No question.
DEFENSE: No question.
COURT: They do on those questionnaires.
DEFENSE: I'm sorry?
COURT: They do – I Agree, they do all the time on those questionnaires.

DEFENSE: Right. And so, you know, this might be something where maybe she - - my clients don't always know whether, you know, they were convicted or it was reduced - - they don't always know. So I don' think that it's a misdemeanor in and of itself is cause to – I think we can bring her back in without the other jurors here and ask her about that and see what she says about that. If she continues to lie, then we're going to have a different conversation about that. But to raise your hand on a misdemeanor, maybe some people think it's felonies, I don't know. That argument would go with pretty much the other argument –so that's my argument on Ms. Hughes.
COURT: Okay. 1 AA 402.

Appellant then concluded by once again focusing on her race and gender rather than addressing the State's concerns of her non-disclosure.

DEFENSE: Yeah, again, African-American, female, and has indicated she's got the time, she's got high school, she's been in Clark County 10 years, she's a single mother. She's unemployed, she has no reason not to say that she would be a fair and impartial juror with all the questions that were posed to her. So we would object to her being released for cause. 1 AA 402.

c. Court allows additional questioning of the jurors challenged for cause

In response to the State's challenges for cause and the objections made by Appellant, the court called Ms. Hughes (344), Mr. Becenti (456), and Mr. Sanchez (570) back individually for questioning.

Both Ms. Hughes (344) and Mr. Becenti (456) admitted that they had previously been arrested. Mr. Sanchez (570) informed the court that he had never been arrested. Upon further inquiry, it was determined that Mr. Sanchez (570) was never arrested, and the State withdrew its challenge for cause on him. 2 AA 446.

Ms. Hughes (344) acknowledged that she had previously been arrested for a domestic dispute with her mother. 2 AA 427. When asked if that fact would interfere

with her ability to be fair and impartial, Ms. Hughes responded, "I don't think so." 2 AA 428.

Similarly, Mr. Becenti (456) was also called to the courtroom to answer additional questions by the court. When again asked if he had been previously accused of a crime, he responded that he had previously been arrested for a DUI. 2 AA 433. When asked if he could be fair and impartial, he stated in the affirmative that he could. 2 AA 439.

Next, Mr. Lopez (586) was called into the courtroom for some follow up questions regarding his perspectives on the criminal justice system. Ultimately though, he also agreed that he could follow the court's directions in this case.

d. The State continues with its challenges for cause

Upon Ms. Hughes (344) exiting the courtroom, the district court entertained argument from both parties regarding the challenge against her. The State indicated that her failure to disclose "does point to a certain level of untruthfulness." 2 AA 431.

In response, Appellant noted that when she was confronted by the court with the question, she had hesitated. 2 AA 432. Appellant again objected to her removal by arguing that she may have just been confused in her failure to disclose her arrest. Id. Ultimately, the district court denied the State's challenge for cause.

Similarly, when Mr. Becenti (456) exited the courtroom, the State continued with its challenge for cause, but the district court also denied the challenge.

Finally, the State continued with its challenge of Mr. Lopez (586) again stating its concerns regarding his somewhat peculiar thoughts, but the district court pointed out that he said he could be fair to both sides and denied the challenge.

3. The peremptory challenges

Appellant was then given an opportunity to address the panel of thirty-two potential jurors. Appellant did not have any challenges for cause at the conclusion of his questioning. The parties then began to make their peremptory challenges. Prior to seating the jury, Appellant lodged a Batson challenge. 3 AA 494.

At this point, the court entertained arguments regarding the Batson challenge. Although Appellant's brief makes reference as to the order that the State made its challenges, such a record does not appear readily identifiable from the record. In fact, Appellant cites 3 AA 693-697 as footnotes as to the race of the individuals challenged, but those citations clearly refer to trial testimony and not jury selection.

a. Appellant's Batson challenge

Appellant began the Batson challenge by arguing that it was improper for the State to strike Ms. Hughes (344), who was referred to as the African-American that was brought in. 3 AA 495. His support for his challenge was that she ultimately

admitted that she had previously been arrested and that she could be fair and impartial. Id.

According to Appellant, there were only four African-Americans on the panel, but the court corrected him and mentioned that there were five total on the venire. 3 AA 495. Appellant explained that it was problematic that the State struck two African-Americans, the other being Ms. Collins (360). Id. Appellant was concerned by the striking of two of the four African-Americans on the panel. By deduction and through the arguments of counsel, two of the other African-Americans remained on the jury. 3 AA 502.

a. The court inquires about Appellant's prima facie showing that the State's challenges were based on race

Appellant argued that because peremptory challenges were exercised on two out of four African-Americans on the panel, that created a presumption that the motivations of the State's strike were racially motivated. 3 AA 497. Again although it's not entirely clear, based on the statement by the court, it appears that the State exercised only five peremptory challenges, and that two of them were used against Ms. Hughes (344) and Ms. Collins (360). 3 AA 498.

Appellant continued to argue that there were not many African-Americans on the panel as a whole was only 9 percent, which proves that the State's strikes were disproportionate. However, the court noted that the African-American population in Clark County was roughly 10 percent, which Appellant then acknowledged. 3 AA

499. Two of the other jurors that the State used peremptory challenges on were identified as Hispanic. 3 AA 499. Thus, based upon the fact that two of the five peremptory challenges were used on two of the African-Americans, the court found it prudent to have the State proceed to explain its race-neutral reasons for the strikes.

b. The State's race-neutral reasons

The State indicated that it struck Ms. Hughes (344) for the same reasons that it sought to strike her for cause. 3 AA 499. The State noted that it also struck Mr. Becenti (456) who had also failed to disclose his prior arrest. 3 AA 500. The State further pointed out that it had consistently informed the potential jurors that it was necessary for them to inform everyone of any information that may be relevant, and that these two jurors both still failed to disclose their prior arrests. Id. Based upon their failure to disclose information and follow directions, the State had a concern about their ability to follow clear directions given by the court as well as instructions of law. 3 AA 501.

The State further noted the diversity that made it to the jury. It indicated that there were two African-Americans on the jury, Asians, Hispanics, and Caucasians on the jury. 3 AA 502.

The court then asked Appellant for a response to the race-neutral reasons given by the State so that he would have the opportunity to argue that the elimination of Ms. Hughes (344) was purposeful discrimination. 3 AA 503. Appellant's

argument centered on the fact that Ms. Hughes had merely forgotten to mention her prior arrest. 3 AA 505. He further argued that in order to exercise a peremptory challenge against an African-American, there must be cause to do so. 3 AA 506. The district court then pointed out that there is as difference between a for cause challenge and a peremptory challenge.

The State then explained why it had exercised a peremptory challenge on Ms. Collins (360). During the arguments related to Ms. Hughes (344), Appellant acknowledged that the peremptory challenge against Ms. Collins (360) was not a discriminatory act. 3 AA 506. The State explained that it had excused Ms. Collins (360) based on her answers regarding her writing of pre-sentence investigation reports, and her belief that jurors sometimes get their verdicts wrong based upon her review of the files. Appellant responded by arguing that Ms. Collins (360) said she could be fair and impartial despite her answers to the questions. Appellant then fell back on the numbers of jurors as opposed to specific responses to the reasons that the State had actually stricken her. 3 AA 512. Again, Appellant even agreed that the questions of Ms. Collins (360) were not different from the questions posed to any other potential juror.

c. The district court makes a finding that there was no purposeful discrimination

Following the arguments of the parties, the court then made findings based on its observations. The court indicated that it paid close attention to the questioning

and noticed that the questions posed to each of the potential jurors was the same. 3 AA 507. It found that the State's questions to the jurors were not based on any particular juror's background or ethnicity. Id. The district court also found that the State exercised its peremptory challenge for both individuals that had failed to disclose their prior arrests. Id. Based upon all of these factors, the court was satisfied by the State's reasoning towards Ms. Hughes (344) and denied Appellant's Batson challenge.

After entertaining argument regarding Ms. Collins (360), the district court also denied Appellant's Batson challenge. The court found that the juror telling everyone that she works for Parole and Probation but that she knows better than the juries in court that decide the cases was offensive, especially since the court followed up with her that she would have no knowledge of what evidence was actually admitted at the trial. 3 AA 513. The court noted that she basically said her knowledge was superior to what a jury had determined. Id. The court also found that there was a concern as well that she expressed that the system was not fair. 3 AA 516. Based on the totality of the circumstances, the court found that the State had not used its peremptory challenge for a discriminatory intent. Id.

SUMMARY OF THE ARGUMENT

Appellant's primary argument is that the district court erred in denying his Batson challenges, but the district court properly went through the steps as required

and held that the State had appropriately exercised its challenges, and that the challenges were not based on race. The State exercised two peremptory challenges against individuals who chose not to disclose their prior arrests when they were specifically asked. The State also exercised a peremptory challenge against a juror who expressed problems with the system and her faith in juries to reach a correct verdict. Neither of the peremptory challenges that Appellant complains of were because of the race of the potential jurors involved. Appellant also argues that there was insufficient evidence to convict him of the charges, but a rational juror could find him guilty beyond a reasonable doubt.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S BATSON CHALLENGE

Appellant claims that the State dismissed two jurors based on the color of their skin, but there is simply nothing to support this claim. Instead, the record firmly shows that any preemptory strikes were based entirely on race neutral reasons. Rather than engaging in an objective analysis of the jurors stricken, Appellant consistently and obsessively makes race the only focal point. His position ignores the spirit of Batson, and instead seeks to place a heightened burden when a minority juror is challenged without considering any of that potential juror's answers to the questions asked.

The United States Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986). When a Batson challenge is made that alleges the impermissible removal of a juror based on race, the trial court undergoes a three-step analysis to ultimately rule on the challenge. Kaczmarek v. State, 120 Nev. 314, 332-35 (2004). The court must (1) determine if the opponent of the peremptory challenge has made a prima facie showing that the challenge was based on race; (2) if the prima facie showing is made, the proponent of the peremptory challenge must provide a race-neutral explanation for the dismissal; and (3) the trial court must determine whether the opponent has proven purposeful discrimination. Williams v. State, 134 Nev. 687, 689 (2018).

In reviewing a Batson challenge, 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." Walker v. State, 113 Nev. 853, 867-68 (1997). A trial court's decision regarding a Batson challenge will not be overturned unless the decision is clearly erroneous. Libby v. State, 115 Nev. 45, 55 (1999).

Step one – prima facie case

In deciding whether or not the requisite showing of a prima facie case of racial discrimination has been made, the court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire

examination. Batson, 476 U.S. at 96-97; Libby v. State, 113 Nev., at 251, (1997). The party bringing a Batson challenge must, "do more than point out that a member of a cognizable group was struck." Williams v. State, 134 Nev., at 690. Instead the defendant must show that "the totality of circumstances gives rise to an inference of discriminatory purpose." Batson, 476 U.S., at 94. Some considerations the trial court may make when considering whether a prima facie showing has been made could include "the disproportionate effect of peremptory strikes, the nature of the proponents' questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." Watson v. State, 130 Nev. 776 (2014).

Here, Appellant argued that two of the five peremptory challenges that the State exercised were against potential African-American jurors thus creating a prima facie showing of purposeful discrimination. 3 AA 499. Although the district court seemed to question whether a prima facie case had been met, it felt it would be prudent to have the State indicate its race neutral reasons for striking Ms. Hughes (344) and Ms. Collins (360). The entirety of Appellant's argument for a prima facie showing was based on the purposeful discrimination of their race relied upon the number of African-American jurors stricken.

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Step two – race-neutral explanation

In step two, assuming the opposing party makes the above described prima facie showing, the burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation. Williams, 134 Nev., at 691. The reasoning must be race-neutral, but it does not need to be persuasive or even plausible. Diomampo v. State, 124 Nev. 414, 422 (2008). "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Id. The only consideration for the trial court at this stage is to determine whether the reasons given by the proponent of the strike are in fact race-neutral. Williams, 134 Nev., at 691.

The State was provided an opportunity to give its race-neutral reasoning for striking Ms. Hughes (344) and Ms. Collins (360). As to Ms. Hughes (344), the State renewed the same reasoning that it sought to have her challenged for cause. A peremptory challenge was used against Ms. Hughes (344) because when asked by the court if anyone had ever been arrested, she failed to disclose her prior domestic violence arrest. 3 AA 499-501. The State noted, just as Appellant's counsel pointed out, that Ms. Hughes (344) was incredibly hesitant to answer when directly questioned by the court about her prior arrest. Id.

Similarly, the State provided a race-neutral reason for its use of a peremptory challenge on Ms. Collins (360). The State argued that Ms. Collins (360) expressed

some concerning information about her preparation of pre-sentence investigation reports for the Division of Parole and Probation. Ms. Collins expressed a sentiment that her review of the file was superior to the determination of a jury. The State also pointed out its concern about her general sentiment that the criminal justice system is flawed.

During step two of the analysis, the State clearly provided race-neutral reasons for its use of peremptory challenges. Each of the State's explanations were based on reasons entirely free of either of the juror's race. As such, the district court properly proceeded to step three of the analysis.

Step three – "sensitive inquiry"

In step three, "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination." King v. State, 116 Nev. 349, 353 (2000). The court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and 'consider all relevant circumstances before ruling on the Batson objection and dismissing the challenged juror." Conner v. State, 130 Nev. 457, 465 (2014). At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett v. Elem, 514 U.S. 765, 768 (1995).

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other

factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. 322, 339, 123 S. Ct. 1029, 1040 (2003). Nevertheless, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768. The trial court must find that it is more likely than not that the challenge was improperly motivated. McCarty v. State, 132 Nev. 218, 226-227 (2016).

The challenger carries the heavy burden to prove that a race-neutral reason is in fact a pretext for discrimination. Hawkins v. State, 127 Nev. 575, 578-79 (2011). For the challenger to carry the burden, there must be an analysis offered that the peremptory challenge was more likely than not based on purposeful discrimination. Some considerations that may be argued include: "(1) the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained on the venire; (2) the disparate questioning by the prosecutors of struck jurors and those jurors of another race or ethnicity who remained in the venire, (3) the prosecutors' use of the "jury shuffle," and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office." Id., at 578.

Here, the court clearly stated why it was denying each of the Batson challenges. With regards to Ms. Hughes (344), the court found that the State had

asked the same questions of all the jurors, and the questions did not differ based on ethnicity or background. 3 AA 507. Additionally, the court found that the State equally struck both jurors that failed to disclose their prior arrests. Thus, the court ruled that the peremptory challenges were not racially motivated. Id.

On the other juror Ms. Collins (360), Appellant admitted at the time that the State's peremptory challenge was not racially motivated. 3 AA 506. Yet now on appeal, Appellant suddenly argues that the decision to strike Ms. Collins (360) was racially motivated. This is a complete reversal of positions.

However with regards to Ms. Collins (360), the court found that based on the totality of circumstances the Appellant had not met its burden to prove a discriminatory intent. The court again pointed out that the questioning of Ms. Collins (360) was not any different than any of the other jurors (to which Appellant agreed at trial), and the State did not ask questions of her that showed that it was trying to later preempt her. 3 AA 512, 3 AA 515. The court also found that she had made indications that could make both sides nervous when she expressed that her knowledge could be superior to that of the others. 3 AA 516. The court also found that she stated that she did not think the statement was fair, despite working in the system. Therefore, the court properly ruled that the State did not use its peremptory challenge because of a racially motivated reason. Id.

Appellant now argues that the court's inquiry incorrectly focused on the questions asked of the potential jurors, and that the district court erred in not judging the credibility and demeanor of the prosecutors and jurors. However, the district court did not need to consider a specific inquiry into credibility and demeanor because the reasons for the peremptory challenges were clearly established in the record. The peremptory challenges were not based on the juror's demeanor which could have required the court to explain any observations of its own or the reasons for its belief in the proffered reasons. *See* Williams v. State, 134 Nev., at 693.

However, here no such analysis was required because the reasons that the State cited for using its peremptory challenges were plainly in the trial record. Ultimately the court agreed that there was no discriminatory intent because it noticed that all potential jurors were treated equally. The State exercised peremptory challenges on both jurors that failed to disclose prior arrests. The State also struck a juror who the court noticed gave problematic answers, and certainly created concerns for both parties. Although Appellant argues that the State should have struck Mr. Willer, a white juror, Appellant fails to make any relevant comparison between Mr. Willer's answers and the answers of Ms. Hughes (344) or Ms. Collins (360). Simply because the State did not exercise a peremptory challenge against a juror that Appellant thought was problematic does not mean that the peremptory challenges that the State did exercise had any sort of discriminatory intent.

II. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A CONVICTION

The standard of review in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789; Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). It is the jury's function to assess the weight of the evidence and determine the credibility of witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975). A verdict supported by substantial evidence will not be overturned by a reviewing court. Nix v. State, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975).

Here, Appellant makes the same arguments that were made to and rejected by the jury that convicted him. Not only were his arguments rejected in this trial, but they have been rejected in multiple trials. Appellant attempts to cite a federal judge's opinion on the matter, but that judge's opinion is irrelevant to the jury's ultimate verdict in this case because it is the jury, and not a reviewing court (whether state or federal) that is responsible for weighing the evidence and rendering a verdict.

The jury was able to consider the two officers that were patrolling in the area that witnessed the carjacking, and saw Appellant as the driver of the stolen vehicle exit the vehicle and point a gun at them. The jury was able to consider the evidence that Appellant was found hiding in a backyard not far from where the shooting had

taken place. The jury was presented with evidence that officers saw Appellant with a red glove and a short-barreled rifle. Gunshot residence was found on both Appellant and the red glove. Many of the casings from the scene were determined to have been fired by the same short-barreled rifle that officers saw Appellant holding, and the caliber bullet found in the victim was consistent with Appellant's gun.

Moreover, although Appellant correctly points out the consistent testimony of the State's witnesses, there was an additional witness who also testified in this case that had not testified in any prior trials. Nicholas Owens testified that he had spoken to Appellant and co-defendant Joshlin about retaliating for the death of one of their friends. In addition, Appellant was present when Joshlin asked Owens if he could help him procure a firearm. Based upon the evidence once again presented to this jury, a rational trier of fact could determine beyond a responsible doubt that Appellant was guilty of the crimes charged.

CONCLUSION

The State respectfully requests that Appellant's Judgment of Conviction be affirmed.

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Dated this 12th day of September, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 7,085 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate 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 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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.

Dated this 12th day of September, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 12, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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