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Summary of Conner v. State of Nevada, 130 Nev. Adv. Op. 49

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CRIMINAL LAW: JUROR CHALLENGE

Summary:

The Court determined three issues: 1) whether, despite there being sufficient evidence to sustain a conviction, the conviction may stand where the State engages in discriminatory jury selection; 2) how a convicted defendant may sufficiently demonstrate that it is more likely than not that the State engaged in purposeful discrimination; and 3) the responsibilities of the district court when ruling on a *Batson* objection.

Disposition:

After considering all relevant circumstances, a conviction may be overturned upon a showing that the State more likely than not struck at least one prospective juror because of race, even if the evidence would ordinarily be sufficient to support the conviction. A defendant may meet this burden using the following considerations: (1) the similarity of answers to voir dire questions given by jurors who were struck and those of another race who remained; (2) disparate questioning by prosecutors of struck jurors and those of another race who remained; (3) the prosecutors' use of jury shuffling; and (4) evidence of historical discrimination in jury selection. In addition, the district court must undertake a "sensitive inquiry" into both circumstantial and direct evidence available, as well as "all relevant circumstances," before ruling on a *Batson* objection.

Factual and Procedural History:

On June 2, 1985, neighbors heard Beth Jardine enter her Las Vegas apartment with a man. The next day, a maintenance man found Jardine's nude body in her apartment. She had been bludgeoned to death. Forensic tests eliminated Metro Police's prime suspect, and the case went cold until 2006, when DNA tests were performed from vaginal swabs taken before Jardine's autopsy. The DNA matched Charles Reese Connor through the Federal Bureau of Investigation's Combined DNA Index System. Conner's fingerprints were then compared to those recovered from a lamp and bedsheet in Jardine's apartment and determined to match.

Conner initially denied any knowledge of the incident, but eventually confessed and told detectives he hit Jardine with a hammer. At the time, detectives had not told Conner that the weapon used was a hammer. At trial, Conner admitted that he murdered Jardine but contended that it was not premeditated or committed during perpetration of sexual assault because the sex was consensual. Dr. Alane Olson, a Clark County medical examiner, testified that based on her independent review of the original autopsy report, Jardine had between 20 and 25 injuries to her head and neck. After hearing all the evidence, a jury rendered a guilty verdict against Conner for two counts of sexual assault and one count of first-degree murder, and Conner was sentenced to death.

¹ By Kelsey Bernstein

Conner contends that the State failed to prove beyond a reasonable doubt that the sexual intercourse was not consensual or that the murder was willful, deliberate, or premeditated. He also argues that the district court erred by overruling his *Batson* objection during jury selection.

Before Conner's trial, the district court narrowed the venire to 32 prospective jurors. The State exercised nine peremptory challenges, using six of them to remove minority members from the juror pool. After Conner alleged that these challenges established a pattern of racial discrimination, the state provided a race-neutral response to the six challenges, citing either 1) a change of heart about the death penalty between their questionnaire and voir dire questioning, or 2) the outright inability to proscribe the death penalty.

Conner challenged the State's race-neutral reasons with specific regard to Juror 157, and asked for specific race-neutral explanations for the challenges for each of the six jurors. The State then addressed each member individually, but Conner was not given any opportunity to respond. Without making any specific findings as to each challenged veniremember, the district court denied Conner's *Batson* challenge and left the courtroom.

Discussion:

In assessing a sufficiency of the evidence challenge, "a reviewing court must consider all of the evidence admitted by the trial court, *regardless whether that evidence was admitted erroneously.*"² Because a rational juror could conclude that nonconsensual sex occurred and that Conner deliberately and with premeditation intended to kill Jardine, we reject Conner's argument that the State presented insufficient evidence to sustain his conviction.

However, where there was sufficient evidence to sustain a conviction, that conviction cannot stand where the State engaged in discriminatory jury selection. An equal-protection discrimination challenge to the exercise of a peremptory challenge is evaluated under the 3-part *Batson* test: First, the opponent of the challenge must make out a prima facie case of discrimination. Second, the proponent must assert a neutral explanation for the challenge. Third, the trial court must decide whether the opponent of the challenge has proved purposeful discrimination.³ Although in this case, only the third part of the *Batson* test is at issue, a defendant *must* meet its burden of proving prima facie discrimination using considerations that demonstrate it is more likely than not that the State engaged in purposeful discrimination. Some possible considerations include: (1) the similarity of answers to voir dire questions given by jurors who were struck and those of another race who remained; (2) disparate questioning by prosecutors of struck jurors and those of another race who remained; (3) the prosecutors' use of jury shuffling; and (4) evidence of historical discrimination in jury selection.⁴

Under part 3 of the *Batson* test, the district court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and consider all relevant circumstances before ruling on the objection. This inquiry certainly includes giving the defendant an opportunity to challenge the race-neutral explanation for a peremptory challenge as pretextual.

In this case, Conner challenged the State's race-neutral explanation specifically with regard to Juror 157. Following the challenge, the State gave two new explanations, both of which "reeks of afterthought" and are belied by the record. A race-neutral explanation that is belied by

² *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (emphasis in original).

³ *Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

⁴ *Hawkins v. State*, 127 Nev. __, __, 256 P.3d 965, 967 (2011).

the record is evidence of purposeful discrimination. Furthermore, because the district court judge overruled Conner's objections, swore in the jury, and left the courtroom, all the while preventing Conner from responding to the race-neutral explanations offered by the State, the district court failed to undertake a proper *Batson* objection inquiry.

In a concurring opinion, attention is also brought to Dr. Alane Olson's testimony introduction of the statements and opinions of another doctor's autopsy report. The Sixth Amendment prohibits the State from introducing testimonial evidence through surrogate testimony, and in the event of a retrial, the State must carefully consider possible Confrontation Clause issues.

Conclusion:

There was sufficient evidence presented at trial for a reasonable juror to support the conviction. However, applying the 3-part *Batson* objection test, the district court committed clear error in its ruling on Conner's *Batson* objection by preventing him from responding to the race-neutral challenge explanations offered by the State. Therefore, because this error is structural, the judgment of conviction is reversed and remanded to the district court for further proceedings.