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JURY SELECTION: HARMLESS ERROR REVIEW WHEN *BATSON* WARRANTED

SUMMARY

During jury selection for a criminal trial, the State peremptorily struck a prospective alternate juror based on gender in violation of the Equal Protection Clause. Although the district court erred in dismissing the prospective alternate juror, the error was harmless because no alternate juror participated in jury deliberations. Therefore, the defendant's conviction is affirmed.

BACKGROUND

The defendant was on trial for fourth-degree arson and child abuse, neglect, or endangerment. The jury was selected with three prospective alternate jurors remaining. Of these potential alternate jurors, two were female and one was male. The district court allowed both sides to use a peremptory challenge as to these three individuals. The State peremptorily struck the male prospective alternate juror, prompting a *Batson* challenge from the defense because the male was Hispanic and did not indicate an inability to be impartial.² The State, accepting the district court's permission to respond, reasoned that the male was struck to increase the chance of getting more females on the jury. This explanation caused defense counsel to signal the court that the prosecutor's gender-based reasoning also violated *Batson*. Ruling on the challenge, the district court held that the State's explanation was non-discriminatory and excused the male prospective alternate juror. The jury, without an alternate juror participating in the deliberations, convicted the defendant of fourth-degree arson. The defendant appealed his conviction.

DISCUSSION

Peremptory challenges used to discriminate based on race or gender are unconstitutional under the Equal Protection Clause.³ When a party exercises a *Batson* challenge, a district court must use a three-step process in ruling on the challenge.⁴ First, the party opposing the peremptory challenge must make a prima facie showing of discrimination.⁵ Second, if the opposing party meets its burden, the burden shifts to the striking party to provide a non-discriminatory explanation for the challenge.⁶ Lastly, the district court determines whether the opposing party has proven that the potential juror was struck due to purposeful discrimination.⁷ This third step requires a review of all evidence, direct or circumstantial, before ruling on the objection.⁸ The district court's

¹ By Kiley Harrison.

² *Batson v. Kentucky*, 476 U.S. 79 (1986).

³ *Powers v. Ohio*, 499 U.S. 400, 406-409 (1991); *J.E.B. v. Alabama*, 511 U.S. 127, 140-41 (1994).

⁴ *See Batson*, 476 U.S. at 93- 98, 100; *see also Libby v. State (Libby II)*, 115 Nev. 45, 50, 975 P.2d 833, 836 (1999) (applying the *Batson* process to a claim of gender-based discrimination).

⁵ *Libby II*, 115 Nev. at 50, 975 P.2d at 836.

⁶ *Id.*

⁷ *Id.*

⁸ *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014).

ultimate decision is given great deference on appeal and will only be reversed if clear error is present.⁹

In this case, the first step was mooted because the State responded to the defendant's *Batson* challenge with an explanation for striking the juror.¹⁰ Regarding the second step, the State's reasoning for peremptorily striking the juror was gender-based and therefore discriminatory. Thus, the district court erred in excusing the male prospective alternate juror. However, the circumstances of this case warranted harmless-error review.¹¹ This is because the prospective alternate juror did not participate in jury deliberation and therefore did not impact the outcome of the case or interfere with the defendant's right to be tried by a jury selected based on non-discriminatory reasons. Such a determination is consistent with the need to conserve judicial resources and limit the costs of retrial.¹²

CONCLUSION

Despite the district court's clear error in rejecting the defendant's *Batson* challenge to the State's gender-based peremptory challenge used against a prospective alternative juror, the error was harmless because no alternate participated in jury deliberation. Accordingly, the defendant's conviction was affirmed.

⁹ *Williams v. State*, 134 Nev. 687, 688, 429 P.3d 305 (2018).

¹⁰ *See id.* at 690-91, 429 P.3d at 306-07.

¹¹ *Rose v. Clark*, 478 U.S. 570, 579 (1986).

¹² *Williams*, 134 Nev. at 696, 429 P.3d at 310.