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STATE OF NEBRASKA, APPELLEE, V. ROBERT B. NAVE, APPELLANT.

821 N.W.2d 723

Filed October 12, 2012. No. S-11-798.

1. **Juries: Discrimination: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.
2. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews for clear error a trial court's factual determinations whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.
3. **Juries: Discrimination: Equal Protection: Prosecuting Attorneys.** A prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his view concerning the outcome of the case. But the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely because of their race.
4. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. The third step requires the trial court to evaluate the persuasiveness of the justification proffered by the prosecutor.
5. **Juries: Discrimination.** In evaluating a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
6. **Juries: Discrimination: Prosecuting Attorneys: Moot Question.** Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing is moot.
7. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** In determining whether the prosecutor's stated reasons were race neutral, an appellate court does not consider whether the prosecutor's reasons are persuasive. Indeed, while the prosecutor's reasons must be comprehensible, they need not be persuasive or even plausible, if they are not inherently discriminatory.
8. **Juries: Discrimination: Prosecuting Attorneys.** The third step of the inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), involves evaluating the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercised the challenge.

9. ____: ____: ____. The relative number or percentage of African-American jurors peremptorily struck is relevant in determining whether a prosecutor's stated reasons for a strike were pretextual.
10. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness—including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)—an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
11. **Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.
12. ____: ____. While the particular rights delineated under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are absolute, the language used to apprise suspects of those rights is not.
13. ____: ____. Although a suspect can exercise his *Miranda* rights at any point during custodial interrogation, a warning to that effect is not required.
14. **Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to support a conviction, the relevant question for an appellate court 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.
15. **Criminal Law: Conspiracy.** A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.
16. **Controlled Substances: Intent: Evidence.** The quantity of drugs possessed is a relevant factor in determining whether a suspect planned on distributing the drugs.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

I. SUMMARY

The State charged Robert B. Nave with numerous crimes, including first degree murder, criminal conspiracy, and two weapons charges. A jury found Nave guilty on all counts. The district court sentenced Nave to life in prison on the murder conviction and to 75 additional years for the other convictions. Nave argues we must reverse his convictions and sentences because: (1) The prosecutor improperly removed a prospective juror from the jury pool because of the juror's race, and (2) the police did not properly advise Nave of his *Miranda* rights. Nave also argues that the evidence was insufficient to sustain his criminal conspiracy conviction.

We conclude, however, that the prosecutor's reasons for striking the prospective juror were race neutral and, overall, persuasive. And although the *Miranda* warnings did not expressly state that Nave was entitled to appointed counsel before questioning, that information was obviously implied from the warnings which the police read to him. Finally, our review of the record also shows that a rational jury could properly find beyond a reasonable doubt all the essential elements of criminal conspiracy. We affirm Nave's convictions and sentences.

II. BACKGROUND

1. OPERATION "SHEEPDOG"

In major cities across the country, the Federal Bureau of Investigation (FBI) teamed up with local law enforcement agencies to combat gang activity and sales of illegal drugs and weapons. In Omaha, Nebraska, the FBI and the Omaha Police Department, with other agencies, formed the Greater Omaha Safe Streets Task Force (task force). The task force primarily targeted violent gangs and their members. This led to investigations of the gang members' activities, such as robberies and drug sales. This case involved an investigation, known as Operation "Sheepdog," and a failed drug buy on October 22, 2010.

Operation Sheepdog targeted several violent gangs in Omaha in an attempt to discover and shut down their drug suppliers.

FBI Special Agent Gregory Beninato was in charge of the overall strategy for the operation. FBI Special Agent Paris Capalupo assisted Beninato in planning the operation. One part of the operation focused on drug buys at an automotive repair shop (auto shop), located at 24th and I Streets in Omaha. A confidential informant, Cesar Sanchez, owned the auto shop and allowed law enforcement to use it to conduct controlled drug buys. The FBI used another confidential informant, Jorge Palacios, to purchase drugs and weapons, sometimes together with Sanchez. Sanchez and Palacios were both used in the October 22, 2010, incident.

The record shows that surveillance of the auto shop, most notably on September 28, 2010, revealed one of the operation's primary targets, Abdul Vann, and several vehicles (and their occupants) which law enforcement suspected were linked to drug sales. These vehicles included a gray Chevrolet Impala, a white Chrysler Sebring, and a white Yukon Denali. Cesar Ayala-Martinez, a drug courier for a Mexican drug supplier, drove the Denali. Ayala-Martinez had previously sold Sanchez half a kilogram of cocaine, and Palacios, Vann, and Shawn McGuire, another law enforcement target, were present during that buy. The record showed that Ayala-Martinez planned to bring another 1½ kilograms of cocaine to Sanchez on October 22.

2. The Failed Drug Buy

The task force was aware of the October 22, 2010, buy and planned to apprehend the individuals involved. Beninato held a briefing at 9 a.m. the day of the buy with task force members. The briefing provided the task force members with the essential information for the operation; for example, the targets, the overall plan, whether deadly force was authorized, and the proper medical response in case of emergency.

Following the briefing, Beninato and Capalupo met with their confidential informant, Palacios, sometime after 11 a.m., gave him money to purchase cocaine, and placed recording devices on his person. Then the task force members set up surveillance at different locations, with the majority of the members eventually ending up in the area around the auto shop at 24th and I Streets.

Beninato and Capalupo were watching the area from a van. Capalupo was driving, and Beninato was monitoring the radio traffic from other task force members and taking notes regarding their observations. The task force members were looking for the vehicles they had seen earlier in September—the Impala, Sebring, and Denali.

Capalupo testified that on October 22, 2010, he saw four African-American men "in proximity" to the Sebring. Capalupo saw McGuire, the driver of the Sebring, get out of the vehicle wearing all black and a baseball hat. Capalupo saw another man, Kim Thomas, get out of the back seat of the Sebring wearing a black, hooded sweatshirt with multicolored spots. Capalupo saw a third man nearby wearing a white, long-sleeved T-shirt with a khaki-colored shirt over it. Presumably, this man was Vann. And finally, both Beninato and Capalupo testified to seeing a fourth man, Nave, wearing a gray, hooded sweatshirt near the Sebring.

Capalupo testified that at about 1 p.m., he saw Nave pull his hood up, cinch it tight, and draw a pistol out of his waistband. Beninato saw Nave enter the auto shop. The agents broadcast this information over the radio and started to move toward the auto shop.

The only direct evidence as to what occurred inside the auto shop during the drug buy, both before and after Nave entered, was the testimony of Ayala-Martinez. He testified that Sanchez, Vann, and Palacios were all inside Sanchez' office during the drug buy. Ayala-Martinez gave the drugs to Sanchez, who then handed them to Vann. Vann made a telephone call, and 20 minutes later, McGuire entered the office. Vann gave the drugs to McGuire, and Vann and Palacios left. McGuire then left, but left the drugs on a nearby table. At this point, no money had been exchanged. Presumably, the men had left the office under the pretense of bringing back money to complete the sale.

About a minute later, Ayala-Martinez heard the front door of the shop open again. Sanchez apparently glanced out of his office window and then opened a desk drawer to get a gun. At that point, an African-American man in a "gray sweater" came into the office, with his hood drawn tight over his head.

The hooded man saw Sanchez with a gun and immediately shot him two or three times. The hooded man then turned the gun toward Ayala-Martinez and asked where the drugs were. Ayala-Martinez pointed toward the drugs and told him to take them. The hooded man opened the bag, took out the kilogram of cocaine, and left. Ayala-Martinez grabbed the remaining half kilogram and left.

Beninato then saw Nave exit the shop, with his hood down and gun in hand. Beninato believed that Nave was running toward the Sebring. At that point, Nave began firing his weapon, apparently in the direction of Palacios, who was outside. Beninato broadcast a "shots fired" call over the radio and told everyone to close in on the auto shop. Nave, McGuire, and Thomas all got into the Sebring and fled, with task force members in pursuit.

But the suspects' flight was cut short when they crashed into a pickup truck at the intersection of 20th and I Streets. The police apprehended all three suspects and also arrested Ayala-Martinez. Following the arrests, Beninato learned that Sanchez had been shot. Sanchez later died from his wounds.

3. Nave Interrogated, Charged, and Convicted

After Nave's arrest, law enforcement took him to a hospital because he had an elevated heart rate. Police then took Nave to the police station and placed him in an interview room around 8:30 or 9:30 p.m. About 5 or 6 hours later, at about 2:30 a.m., Officer Scott Warner began interviewing Nave. Warner read Nave his rights verbatim from the Omaha Police Department's prepared rights advisory form. Nave stated that he understood those rights and would speak with Warner. Warner then questioned Nave about his reasons for being in Omaha and how he came to be involved in the incident.

Nave attempted to answer those questions, but his answers served only to incriminate himself. Nave stated that he had nothing to do with the crime but that he had gone to a fast-food restaurant in the area around 8 or 8:30 that morning. Nave said that he ate at the restaurant, read the paper, and then was

waiting for a bus to return home when he heard gunshots, saw his friend McGuire, and got into McGuire's car.

The record shows the fast-food restaurant that Nave said he went to was about 87 blocks south and 46 blocks east of where Nave was staying in Omaha. Nave also said he arrived at the restaurant around 8:30 a.m., but the record shows that the shooting occurred around 1 p.m. Nave said he just happened to see his friend McGuire and "dove" into his car when he heard gunshots. Nave denied knowing McGuire's full name and denied there being any conversation in the vehicle after he "dove" in. The State suggested in its case in chief and in closing arguments, persuasively, that this story was incredible and could not be believed.

Following its investigation, the State charged Nave with first degree murder, criminal conspiracy, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Before trial, Nave moved to suppress evidence of his interrogation. Among other things, Nave alleged that Warner failed to fully advise him of his *Miranda* rights. The district court overruled the motion.

During jury selection, Nave made a *Batson* challenge, claiming that the prosecutor had impermissibly struck a prospective juror from the jury pool because of the juror's race. The prosecutor disagreed and set forth his reasons for striking the juror. The trial court found those reasons both persuasive and race neutral. Moreover, the court did not find a pattern of strikes by the prosecutor that indicated any racial discrimination. The court overruled Nave's *Batson* challenge.

Following trial, the jury found Nave guilty on all counts. The court sentenced Nave to life in prison on the murder conviction and an additional 75 years on the other convictions, to be served consecutively.

III. ASSIGNMENTS OF ERROR

Nave assigns, renumbered and restated, that the district court erred as follows:

(1) Overruling Nave's *Batson* challenge because the prosecutor peremptorily struck a prospective juror because of the juror's race;

(2) overruling Nave's motion to suppress his interrogation because the State did not fully advise Nave of his *Miranda* rights; and

(3) accepting the jury verdict on the criminal conspiracy charge because the evidence was insufficient to support the conviction.

IV. ANALYSIS

1. *Batson* Challenge

Nave argues that the prosecutor peremptorily struck a juror because he was African-American and that this action violated the Equal Protection Clause. But our review of the record shows that the prosecutor had valid nondiscriminatory reasons for the strike. We therefore find no merit to this assigned error.

(a) Standard of Review

[1,2] We review de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.[1] We review for clear error a trial court's factual determinations whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.[2]

(b) Analysis

[3] In *Batson v. Kentucky*,[3] the U.S. Supreme Court held that a prosecutor's privilege to strike individual jurors through peremptory challenges was subject to the commands of the Equal Protection Clause. A prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his view concerning the outcome of the case.[4] But the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely because of their race.[5]

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[1] See *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[2] See *id.*

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

[4] See *id.*

[5] See *id.*

[4,5] Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process.[6] First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination.[7] The third step requires the trial court to evaluate the persuasiveness of the justification proffered by the prosecutor.[8] But the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.[9]

Here, the trial court determined that Nave had presented a prima facie case that the prosecutor had exercised the State's peremptory challenge because of the juror's race. The prosecutor then offered his reasons for the strike, which the trial court determined were race neutral and persuasive. On this basis, the trial court overruled Nave's *Batson* challenge.

[6] Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing is moot.[10] Thus, we must determine only whether the prosecutor's reasons were race neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous.[11]

[7] The initial question whether the prosecutor's reasons were race neutral is a question of law that we review de novo.[12]

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[6] See, generally, *id*. See, also, *Snyder v. Louisiana*, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

[7] See *Snyder, supra* note 6. See, also, *Thorpe, supra* note 1.

[8] See *Thorpe, supra* note 1.

[9] See *id*.

[10] See, *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *Thorpe, supra* note 1.

[11] See *id*.

[12] See *Thorpe, supra* note 1.

Put another way, the question is whether the stated reasons, on their face, were inherently discriminatory. In making that determination, we do not consider whether the prosecutor's reasons are persuasive. Indeed, while the prosecutor's reasons must be comprehensible, they need not be persuasive or even plausible, if they are not inherently discriminatory.[13]

The prosecutor offered five reasons, restated, for his strike:

- The juror indicated that he did not trust news reports and that such reports were inaccurate and meant to keep people scared.
- The juror explained that he had a previous run-in with law enforcement when he was falsely accused of possession of marijuana. While the juror did not harbor distrust toward all law enforcement, the juror felt that some law enforcement officers abused their power.
- The juror had a family vacation planned during the trial which he would have to cancel if selected. Although the juror indicated that he was willing to do so, the prosecutor explained that he did not want someone on the jury who was missing a family vacation.
- The juror approached the prosecutor during a break in the jury selection to let him know that he wanted to serve on the jury. The prosecutor had never had a juror ask to serve on a 2-week jury trial and was concerned about the juror's motivation for the request.
- The juror had made a couple of comments during jury selection which made it seem (at least to the prosecutor) that the juror was not taking the proceedings as seriously as he should have.

We conclude that these reasons, on their face, are racially neutral.

Moving on to the third and final step of the analysis, Nave must prove that the trial court clearly erred in finding no purposeful discrimination by the prosecutor. In support of that position, Nave argues that the prosecutor's reasons were not

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[13] See *id*. See, also, *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003), quoting *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

persuasive and were simply a pretext to hide the prosecutor's discriminatory intent to strike the juror because he was African-American.

[8] The trial court, however, found that the prosecutor's reasons "form[ed] a persuasive basis for exercising [the State's] peremptory challenge, independent of race." And although the trial court did not go into great depth regarding *why* it found the prosecutor's reasons persuasive, we review its determination for clear error.[14] This is because of the pivotal role that the trial court plays in evaluating *Batson* claims.[15] The U.S. Supreme Court has explained that the third step of a *Batson* inquiry involves evaluating the prosecutor's credibility and that the best evidence of discriminatory intent "'often will be the demeanor of the attorney who exercise[d] the challenge.'"[16] Such credibility determinations lie within the peculiar province of the trial judge and, "'in the absence of exceptional circumstances,'" require deference to the trial court.[17] And this deference is reflected in our standard of review.[18]

Our review of the record and evaluation of the prosecutor's reasons do not provide the "exceptional circumstances" necessary to reverse the trial court's determination. To be sure, not all of the prosecutor's reasons are particularly persuasive—why the juror's distrust of the media merits being stricken from the jury is unclear, considering that there was no evidence or testimony related to the news in any way. And we do not agree with the prosecutor that the juror's responses indicated that he did not give the proceedings the solemnity they deserved. On the contrary, the juror's responses and overall active participation in the jury selection process show that he took his civic duty seriously.

But we find the prosecutor's other stated reasons persuasive. The prosecutor indicated that he was concerned that the

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[14] See *id*.

[15] See *Snyder, supra* note 6.

[16] *Id*., 552 U.S. at 477.

[17] *Id*.

[18] See *Thorpe, supra* note 1.

juror might distrust law enforcement which, of course, could be detrimental to the prosecutor's case because so many of his witnesses were law enforcement personnel. This concern stemmed from the juror's answer to a question during jury selection regarding feelings toward law enforcement. The juror explained, "Well, I think they, you know, protect and serve, but also I think there are some who, you know, abuse their own power so things can get twisted and turned around all the time. I mean, that's happened to me before." The juror explained further that he had been falsely accused and penalized for possession of marijuana and that he had to go through a diversion program.

The trial court, in restating the prosecutor's reasons for the strike, characterized the juror's responses as indicating a "heightened distrust of law enforcement personnel." This implicit finding of fact was not clearly wrong. Although the juror later explained that he would not hold it against law enforcement in general and that he was an open-minded individual, the prosecutor remained skeptical. And where law enforcement personnel played such a critical role in the prosecution's case, it would be a risk for the prosecution not to exercise a peremptory strike on a juror who showed some mistrust in law enforcement personnel. The trial court was not clearly wrong in finding this reason for striking the juror to be persuasive.

We also find the prosecutor's other stated reasons persuasive. At the beginning of jury selection, the juror stated that he had a family vacation planned during the time of the trial, but that he could probably reschedule it to allow for jury duty. Even so, the prosecutor explained that he did not "want someone here who [was] going to be missing a family vacation just to sit on this jury." Contrary to Nave's assertion, we do not find this reason to be pretextual. The record shows that the prosecutor focused on already-planned events with other non-African-American prospective jurors, and whether it would work a hardship on the juror to miss them, or whether they could be rescheduled. In fact, the prosecutor originally moved to dismiss some of the jurors for cause because of planned events scheduled during the expected 2½-week trial. It appears from

the record that the prosecutor did not move to strike the juror involved here for cause because he was amenable to rescheduling his vacation. But this does not mean that the prosecutor could not later peremptorily strike him for fear that missing his vacation could be a distraction during trial. The court was not clearly wrong in finding this reason persuasive.

The prosecutor was also concerned about the juror's approaching him during a break in jury selection, indicating he had something to say. The record shows that the judge, attorneys, and the juror met in the judge's chambers where the juror explained that he wanted to serve on the jury and that he wanted his voice to be heard. The juror noted that he was the only African-American male in the jury pool and that he thought a jury should include a multitude of races. The prosecutor explained that he had "never had a juror actually approach [him] to let [him] know that they [sic] wanted to serve on a long jury case" and, essentially, that it made the prosecutor uneasy and concerned that the juror might have some hidden agenda. The prosecutor's concern was plausible, and the burden rests on Nave to show a discriminatory purpose.[19] He has not done so.

[9] We also note that both the U.S. Supreme Court and this court have considered the relative number or percentage of African-American jurors peremptorily struck to evaluate whether a prosecutor's stated reasons for a strike were pretextual. For example, in *Miller-El v. Dretke*,[20] the Court concluded:

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. *By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.*

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[19] See *id.*

[20] *Miller-El v. Dretke*, 545 U.S. 231, 266, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (emphasis supplied).

And in *State v. Gutierrez*,[21] we recognized some factors which courts had considered in evaluating the third step of the *Batson* analysis. These included (1) whether members of the relevant racial or ethnic group served unchallenged on the jury and whether the striking party struck as many of the relevant racial or ethnic group from the venire as it could, (2) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation in the venire, and (3) whether there was a substantial disparity between the percentage of its representation on the jury.[22]

Here, the prosecutor peremptorily challenged only two of the four prospective African-American jurors—one of which Nave admitted was proper. Additionally, one African-American individual served on the jury, and Nave struck the other prospective African-American juror. These facts indicate that the prosecutor's reasons for striking the juror were not pretextual.

We conclude that the district court did not clearly err in overruling Nave's *Batson* challenge.

2. The *Miranda* Warnings Were Sufficient

Warner interrogated Nave after his arrest. Warner asked Nave his name and address and then read Nave his *Miranda* rights from the Omaha Police Department's printed "Rights Advisory Form," which consisted of six separate statements:

> Q. I would like to advise you that I am a Police Officer. Do you understand that?
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> . . . .
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> Q. You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that?
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> . . . .
>
> Q. Anything that you may say can and will be used against you in court. Do you understand that?

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[21] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[22] See *id.*

. . . .

Q. You have the right to consult with a lawyer and have the lawyer with you during the questioning. Do you understand that?

. . . .

Q. If you cannot afford a lawyer, the court will appoint one to represent you. Do you understand that?

. . . .

Q. Knowing your rights in this matter, are you willing to talk to me now?

Warner read these rights to Nave verbatim from the form. Nave responded that he understood each statement, and Warner recorded his responses on the form.

Nave argues that the above warnings were deficient because they failed to fully advise him of his *Miranda* rights and that therefore the court should have suppressed his statements made during the subsequent interrogation. Specifically, Nave claims that the police did not inform him that he had a right to appointed counsel both *before* and *during* interrogation and that the police did not inform him that he could exercise that right at any time. But because the warnings provided are sufficient under *Miranda v. Arizona*,[23] we find no merit to this assigned error.

(a) Standard of Review

[10] In reviewing a motion to suppress a statement based on its claimed involuntariness—including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda*—we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[24]

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[23] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[24] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012). See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

(b) Analysis

[11] In *Miranda*, the U.S. Supreme Court sought to ensure that the Fifth Amendment privilege against compelled self-incrimination was protected from the inherently compelling pressures of custodial interrogation.[25] To do so, the Court required law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed.[26]

We recognize that *Miranda* contains language to support Nave's argument. For example, at one point the Court explains that "if police propose to interrogate a person *they must make known to him* that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him *prior to any interrogation*."[27] But *Miranda* also contains language that does not support Nave's argument. For example, the Court explicitly held that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today."[28] That holding does not include any "before" or "prior to" type language. Thus, this issue is not resolved just by examining the language of the *Miranda* opinion.

[12] Since *Miranda*, though, the Court has repeatedly emphasized that while the particular rights delineated under that decision are absolute, the language used to apprise suspects of those rights is not. In *California v. Prysock*,[29] the Court explained that it had "never indicated that the 'rigidity' of *Miranda* extend[ed] to the precise formulation of the warnings given." The Court emphasized that "no talismanic incantation

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[25] See, *Miranda, supra* note 23; *Bauldwin, supra* note 24.

[26] See *id*.

[27] *Miranda, supra* note 23, 384 U.S. at 474 (emphasis supplied).

[28] *Id*., 384 U.S. at 471.

[29] *California v. Prysock*, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981).

was required to satisfy [the] strictures [of *Miranda*].'"[30] Similarly, in *Duckworth v. Eagan*[31] the Court said that "[r]eviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" And most recently, in *Florida v. Powell*,[32] the Court reaffirmed these principles, explaining that while "[t]he four warnings *Miranda* requires are invariable, [the] Court has not dictated the words in which the essential information must be conveyed."

Nonetheless, Nave argues that the warning must expressly indicate that an indigent's right to counsel applies both before and during interrogation. Nave cites to two Arkansas cases for support, but neither is on point. In *Wilkerson v. State*,[33] the issue was not whether "before" or "prior to" type language must be expressly included, but only whether the given warnings advised the suspect that he would be appointed counsel if he could not afford an attorney. The Arkansas Supreme Court found the warning sufficient because it advised the suspect that if he were "'unable to employ a lawyer,'" then one would be appointed for him.[34] Similarly, in *Mayfield v. State*,[35] the Arkansas Supreme Court found only that "[t]he warning . . . did not convey to the appellant the fact that he could have a lawyer free of charge" and was therefore deficient. The *Mayfield* court did not address the issue Nave presents here.

Our research, however, reveals some support, though slight, for Nave's position. For example, in *U.S. v. Wysinger*,[36] the 11th Circuit stated:

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[30] *Id.*

[31] *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (citation omitted).

[32] *Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195, 1204, 175 L. Ed. 2d 1009 (2010).

[33] *Wilkerson v. State*, 365 Ark. 349, 229 S.W.3d 896 (2006).

[34] *Id.* at 354, 229 S.W.3d at 900.

[35] *Mayfield v. State*, 293 Ark. 216, 222, 736 S.W.2d 12, 15 (1987).

[36] *U.S. v. Wysinger*, 683 F.3d 784, 799 (11th Cir. 2012) (emphasis supplied).

> The agent's divergence from the familiar script would put a suspect to a false choice between talking to a lawyer before questioning or having a lawyer present during questioning, when *Miranda clearly requires that a suspect be advised that he has the right to an attorney both before and during questioning*.

And as stated earlier, there is some support for Nave's position in the language of *Miranda* itself.[37]

But we are not persuaded. Other courts which have addressed this exact issue under similar factual circumstances have found the warnings to be sufficient.[38] For example, in *People of Territory of Guam v. Snaer*,[39] law enforcement officers gave this advisement: "'You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned. If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you.'" The appellant contended that although the warnings clearly conveyed his right to an attorney during questioning, they did not convey his right to an attorney *before* questioning. Citing *Prysock*,[40] the Ninth Circuit held that no specific words were required and noted that the warnings explicitly advised the suspect that he had a right to consult with a lawyer and to have a lawyer present while being questioned.[41] The court concluded that "the first part of that sentence read in the context of the latter half of the sentence . . . adequately convey[ed] notice of the right to consult with an attorney before questioning."[42]

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[37] See *Miranda, supra* note 23.

[38] See *People of Territory of Guam v. Snaer*, 758 F.2d 1341 (9th Cir. 1985). See, also, *State v. Moorman*, 154 Ariz. 578, 744 P.2d 679 (1987); *State v. Renfro*, No. CA2011-07-142, 2012 Ohio App. LEXIS 2479 (Ohio App. June 25, 2012).

[39] *Snaer, supra* note 38, 758 F.2d at 1342.

[40] *Prysock, supra* note 29.

[41] See *Snaer, supra* note 38.

[42] *Id*. at 1343.

In addition, our case law supports the conclusion that these warnings were adequate. In *State v. Bauldwin*,[43] we explained that *Miranda* required police officers to notify a suspect that "he has a right to an attorney, either retained or appointed," but made no mention of any required temporal element. In *State v. Williams*,[44] we similarly explained that police officers must tell suspects who are interrogated while in police custody that "they are entitled to the presence of an attorney, either retained or appointed, at the interrogation." Again, we did not require officers to make an express statement that an indigent has a right to an attorney before interrogation. And we further stated that there was "nothing magic about the particular words" used to inform the suspect of the *Miranda* rights.[45]

We conclude that the officer's failure to expressly state that Nave was entitled to appointed counsel before questioning was immaterial. When police told Nave that he had "the right to consult with a lawyer and have the lawyer with [him] during the questioning," that statement impliedly included the right to consult with the lawyer before the questioning. And that is enough under *Miranda*.

[13] Finally, Nave also apparently argues that the warnings were defective for failing to inform Nave that he could exercise his right to counsel at any time. Although a suspect can exercise his *Miranda* rights at any point during custodial interrogation,[46] Nave cites to no authority requiring a warning to that effect. *Miranda* contains no language requiring such a warning,[47] and other courts have rejected similar positions.[48] We likewise reject it. The warnings in this case were sufficient under *Miranda*.

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[43] *Bauldwin, supra* note 24, 283 Neb. at 688, 811 N.W.2d at 279.

[44] *State v. Williams*, 269 Neb. 917, 922, 697 N.W.2d 273, 278 (2005).

[45] *Id*.

[46] See, generally, *Miranda, supra* note 23.

[47] See *id*.

[48] See, e.g., *United States v. Davis*, 459 F.2d 167 (6th Cir. 1972); *U.S. v. Ellis*, 125 F. Appx. 691 (6th Cir. 2005). See, also, 2 Wayne R. LaFave et al., Criminal Procedure § 6.8(d) (2007).

3. Sufficiency of the Evidence

Nave argues that there is insufficient evidence to support his conviction for criminal conspiracy. Specifically, Nave argues that outside of Nave's admitting he knew McGuire, there was no evidence linking Nave to the other actors involved in these events. But our review of the record shows otherwise, and a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. This assigned error has no merit.

(a) Standard of Review

[14] When reviewing the sufficiency of the evidence to support a conviction, the relevant question for an appellate court 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.[49]

(b) Analysis

[15] The State charged Nave with criminal conspiracy; specifically, that he conspired to commit the crime of unlawful possession with intent to distribute a controlled substance. A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.[50]

The State claimed that Nave conspired to possess and then distribute cocaine. In relevant part, Neb. Rev. Stat. § 28-416 (Cum. Supp. 2010) makes it unlawful "for any person knowingly or intentionally . . . [t]o manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance." Cocaine is a controlled substance.[51] So we must affirm Nave's conviction if

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[49] See *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[50] See Neb. Rev. Stat. § 28-202 (Reissue 2008).

[51] See Neb. Rev. Stat. §§ 28-405(a)(4) [Schedule II] (Supp. 2011) and 28-416(7) and (8).

there is evidence from which a rational jury could find beyond a reasonable doubt that he intended to promote or facilitate the crime of possession with intent to distribute cocaine, that he agreed with others to commit that crime, and that he or another coconspirator committed an overt act in furtherance of the conspiracy.

A rational jury could conclude beyond a reasonable doubt that Nave intended to promote or facilitate the crime. Nave stipulated that chemical tests of his hands on October 22, 2010, came back positive for cocaine. Ayala-Martinez testified that Nave came into the auto shop, shot Sanchez, and then asked where the drugs were. Ayala-Martinez testified that Nave grabbed the kilogram of cocaine and left. Beninato testified that as Nave ran out of the auto shop, a white powder, later identified as cocaine, was found in a trail from the shop to where he saw Nave get in the Sebring. Law enforcement later searched the Sebring and found a brick of cocaine, weighing about 900 grams, in the back seat. From these facts, a rational jury could conclude that Nave had possessed cocaine.

[16] A rational jury could also find beyond a reasonable doubt that Nave not only possessed the cocaine, but that he intended to distribute it. The quantity of drugs possessed is relevant to this inquiry.[52] The brick of cocaine weighed about 900 grams. Testimony showed that an ordinary drug buy was for much less, typically 14 or 28 grams per buy. Testimony also showed that a drug user would inject or snort a half gram or less of cocaine per use. At the time, a kilogram of cocaine cost $20,000 to $27,000. A rational jury could find that such a large amount of cocaine was not just for personal use, but that Nave intended to distribute the drug.

But Nave argues that there is no evidence to show that he agreed with others to commit the crime and that therefore, he could not be guilty of conspiracy. But the record contradicts that assertion. Nave got into the same car as McGuire and Thomas, immediately after the crime took place. Before the theft of the cocaine, law enforcement surveillance described

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[52] See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

the four individuals—Nave, Vann, McGuire, and Thomas—as being "in proximity" to each other and the Sebring. One witness also testified that Vann and Thomas had been whispering back and forth near the auto shop and that they "met" with Nave before he entered the shop.

Furthermore, the fact that Nave entered the auto shop specifically demanding the drugs indicates that he was working with the other individuals. Although McGuire and Vann had purchased drugs from Sanchez through Ayala-Martinez before, there is no evidence that Nave was involved in the prior deal. If Nave had not been conspiring with the others to steal and eventually distribute the cocaine, then he likely would not have known that the October 22, 2010, drug buy was going to take place. These facts presented sufficient evidence for a jury to conclude beyond a reasonable doubt that Nave worked with others to commit the crime.

Finally, a rational jury could obviously conclude beyond a reasonable doubt that Nave's actions constituted an "overt act" in furtherance of the conspiracy. As such, the evidence is sufficient to uphold Nave's conviction for criminal conspiracy.

We affirm Nave's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL C. MILLER, APPELLANT.
822 N.W.2d 360

Filed October 12, 2012. No. S-12-019.

1. **Sentences: Due Process: Appeal and Error.** Whether the district court's resentencing of a defendant following a successful appeal violates the defendant's due process rights presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Due Process: New Trial: Convictions: Sentences.** Due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.
4. **Constitutional Law: Due Process: Convictions: Sentences: Appeal and Error.** Since the fear of vindictiveness may unconstitutionally deter a defendant's