IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK DENNIS MCCULLAH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47915

FILED

MAR 27 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with use of a deadly weapon, victim 60 years of age or older. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant Derrick Dennis McCullah to serve two consecutive prison terms of 48 to 120 months.

First, McCullah alleges that the district court erred in denying his motion for a new jury venire. Citing to Brooks v. Beto,[1] McCullah argues that his right to be tried by a jury selected from a venire constituting a fair cross-section of the community was violated because there were no African-Americans on the venire. We conclude that McCullah's allegations are insufficient to show a constitutional violation.

[1]366 F.2d 1 (5th Cir. 1966).

08-07564

"The fair cross-section requirement mandates that 'the . . . venires from which juries are drawn must not systematically exclude distinctive groups in the community.'"[2] However, there is no constitutional requirement that the petit jury "'actually chosen must mirror the community and reflect the various distinctive groups in the population.'"[3] To prove a prima facie violation of the fair cross-section requirement, the defendant must show that a specific racial group is underrepresented in the jury pool due to systematic exclusion of that group in the jury selection process.[4]

In Clark County, the jury venire is randomly selected from a list of licensed drivers provided by the Nevada Department of Motor Vehicles.[5] McCullah has failed to prove a prima facie case of a violation of the fair-cross-section requirement because he has not alleged or provided any evidence that the under-representation of African-Americans on the venire was due to systematic exclusion in the jury-selection process. Accordingly, the district court did not err in denying his motion for a new jury venire.

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[2]Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996) (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

[3]Id. at 1186, 926 P.2d at 274-75 (quoting Holland v. Illinois, 493 U.S. 474, 483 (1990)).

[4]Id. at 1186, 926 P.2d at 275.

[5]EDCR 6.10.

Second, McCullah contends that the district court erred by denying his motion to suppress evidence of the victim's pretrial identification of McCullah as the robber. Specifically, McCullah argues that the show-up identification was overly suggestive because, before identifying McCullah, the victim was told that they were detaining someone that could have been involved in the robbery. Additionally, McCullah argues that the show-up identification was unreliable because the victim saw the assailant for a short period of time under stress and the victim described him as clean-shaven when, in fact, he had facial hair. We conclude that McCullah's contention lacks merit.

In considering whether an out-of-court identification violates a defendant's due process rights, our inquiry is two-part: (1) whether the procedure was unnecessarily suggestive; and (2) whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.[6] The relevant factors for determining whether an identification is reliable include: "the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[7]

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[6]Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990).

[7]Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

Even assuming that the identification was suggestive, the district court did not err in denying the motion to suppress because the identification was reliable. The identification occurred approximately one hour after the crime occurred, the victim had a good opportunity to view McCullah at the time of the crime, and the victim's identification of McCullah was unequivocal. Moreover, we note that, at trial, defense counsel thoroughly cross-examined the victim with respect to the show-up identification, thereby exposing any deficiencies in the procedure to the jurors charged with evaluating the weight and credibility of such testimony.

Third, McCullah contends that there was insufficient evidence to sustain his conviction. Specifically, McCullah notes that the victim's 9-1-1 call and voluntary police statement describe the robber as clean shaven, but McCullah had facial hair. Additionally, McCullah notes that a defense witness testified that he loaned the car used in the robbery to a clean shaven black man named Anthony Marks, and Marks was the one who provided McCullah with the victim's cellular telephone. Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[8]

In particular, we note that the victim, a sixty-two-year-old woman, testified that a man pulled up beside her in the parking lot of the

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[8]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

jewelry store in which she worked. The man had a gun on the seat of his vehicle; he threatened to shoot her and then took her purse, containing her cellular telephone and several hundred dollars in cash. The victim reported the robber's vehicle license plate and physical description to police. The victim unequivocally identified McCullah in a show-up identification and at trial as the individual who robbed her.

Las Vegas Police Officer Robert Whiteley responded to the area where the robbery occurred. Approximately thirty minutes later, a vehicle matching the victim's description was spotted and a felony traffic stop of the suspect vehicle was conducted. Inside the vehicle was the driver Marco Carrillo and one passenger, McCullah. Officer Whiteley testified that he found the victim's cellular telephone in McCullah's pocket.

The driver, Marco Carrillo, a convicted felon on house arrest at the time of the robbery, testified as a defense witness at trial. Carrillo testified that he had loaned the vehicle to a black, clean-shaven man, Anthony Marks, and Marks had the car during the time of the robbery. Carrillo also testified that Marks gave him the victim's cellular telephone and told him to give the phone to McCullah. On cross-examination, Carrillo conceded that he never previously told the police or the district attorney's office about Marks. Despite Carrillo's testimony, the jury could reasonably infer from the evidence presented that McCullah took property by force or fear with the use of a deadly weapon from a victim over 60

years of age.[9] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[10]

Fourth, citing to Crawford v. Washington,[11] McCullah contends that the district court violated his right to confrontation by allowing the State to call for a witness that was not present in the courtroom. In particular, McCullah argues that "[b]y allowing the suggestion to be made in front of the jury that there was even more evidence available, evidence they would not hear and therefore that Mr. McCullah could not, and would not, defend against, the Court violated Mr. McCullah's Right of Confrontation." We disagree.

Preliminarily, we note that McCullah failed to object to the alleged violation of his right to confrontation. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.[12] In Crawford, the United States Supreme Court held that if a witness is unavailable to testify at trial and the out-of-court statements sought to be admitted are "testimonial," the Sixth Amendment Confrontation Clause requires actual

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[9]NRS 200.380(1); NRS 193.165; NRS 193.167(1)(f).

[10]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[11]541 U.S. 36 (2004).

[12]See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

confrontation, i.e., cross-examination.[13] Crawford is inapposite, and McCullah's right to confrontation was not violated, because no testimony was admitted from the witness called but not present. To the contrary, the State rested its case after realizing the witness was not present in the courtroom. Accordingly, no plain error occurred.

Having considered McCullah's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Joseph T. Bonaventure, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[13]541 U.S. 36.