

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLOS MCGILLS MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49246

FILED

FEB 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of count 1, second-degree kidnapping; counts 2, 3, and 4, sexual assault; counts 5 and 6, battery; count 7, robbery; and count 8, unlawful taking of a motor vehicle. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The district court sentenced appellant Marlos McGills Moore as follows: count 1, a maximum of 180 months imprisonment with a minimum parole eligibility after 72 months; count 2, life imprisonment, with a minimum parole eligibility after 10 years, to run concurrent with count 1; counts 3 and 4, life imprisonment, with a minimum parole eligibility after 10 years, to run concurrent with counts 1 and 2; counts 5 and 6, 6 months imprisonment, to run concurrent with counts 1, 2, 3, and 4; count 7, a maximum of 180 months imprisonment, with a minimum parole eligibility after 72 months, to run concurrent with count 4; and count 8, 12 months imprisonment, to run concurrent with counts 1, 2, 3, 4, 5, 6, and 7. The district court also assessed various fines, required Moore to register as a sex offender upon his release, and gave him 224 days credit for time served.

This case arises from an incident in which Moore kidnapped, sexually assaulted, beat, and robbed victim Donna Jackson. On appeal,

Moore challenges the jury empanelment, the prosecution's peremptory challenges, and the admission of Jackson's 911 phone call.¹ For the following reasons, we conclude that each of Moore's arguments fails, and therefore we affirm the district court's judgment of conviction. The parties are familiar with the facts of this case, and we recount them only as necessary to explain our decision.

The jury empanelment

Moore contends that the district court violated his constitutional right to a fair trial when, over his objection, it refused to empanel a new jury venire that was more racially representative of the Clark County community. We disagree.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a fair and impartial jury trial from a fair cross-section of the community. U.S. Const. amends. VI, XIV; see Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). A defendant must demonstrate a prima facie case of a Sixth Amendment violation, by showing that (1) the excluded group is distinctive in the community, (2) the county's venires unfairly and

¹Moore also raises additional challenges regarding his conviction: (1) his conviction is unconstitutional because his robbery and kidnapping convictions merge, (2) his convictions are unconstitutional because they violate double jeopardy, (3) the district court violated his right to a speedy trial; (4) the admission of Officer Sanders' testimony and Nurse Adams' testimony and photographs; (5) the evidence of his flight; (6) the district court's limitation of Moore's cross-examination of Jackson; (7) the sufficiency of the evidence; (8) Jury Instructions Nos. 13, 17, and 26; and (9) the district court's limitation of his sentencing statement. We conclude that each of these additional challenges fails.

unreasonably represent the group in relation to the population of the group within the community, and (3) the exclusion is systematic. Williams, 121 Nev. at 940, 125 P.3d at 631.

We conclude that Moore fails to show Clark County systematically excludes African-Americans in its venires. In making this claim, Moore relies solely upon a series of Las Vegas Sun articles from 2005 alleging systematic exclusion and contends that Clark County should use additional sources, such as utility customer lists or voting lists, because DMV records under-represent poorer minorities that cannot afford automobiles. In Williams, however, we rejected similar arguments and concluded that newspaper articles were insufficient evidence to show that Clark County's jury selection process systematically excluded African Americans. Id. at 941 n. 14, 942, 125 P.3d at, 632 n.1, 632-33.

Thus, Moore failed to demonstrate that Clark County systematically excluded African-Americans from his venire because he did not cite to any evidence in the record supporting his argument and reliance on the Las Vegas Sun articles, without any additional concrete or conclusive evidence of systematic exclusion, is insufficient to satisfy the third Williams requirement. Id. at 942, 125 P.3d 632-33.

Peremptory challenge

Moore contends the district court violated his Fourteenth Amendment due process and equal protection rights when it denied his Batson v. Kentucky, 476 U.S. 79 (1986), challenge against the State's exercise of a peremptory challenge to strike one of the three African-American jurors. We disagree. This court gives great deference to a district court's ruling on a Batson challenge because the district court is in the best position to evaluate credibility. See Thomas v. State, 114 Nev.

1127, 1137, 967 P.2d 1111, 1118 (1998) (giving great deference to the district court's decision whether the State's reasons were racially neutral); see Hernandez v. New York, 500 U.S. 352, 365 (1991) (explaining that a trial court's evaluation of credibility is a crucial aspect in deciding a Batson challenge).

A State violates a defendant's Fourteenth Amendment equal protection right when it racially discriminates in the jury-selection process. Batson, 476 U.S. at 84; Thomas, 114 Nev. at 1136, 967 P.2d at 1118. Although the State may use its peremptory challenge for a variety of reasons, it cannot base its challenges on race. NRS 175.051 (peremptory challenges); NRS 175.036 (challenges for cause); Batson, 476 U.S. at 89; See NRS 6.020 (exemptions from jury service). The defendant bears the burden of proving the racially based jury selection by "the existence of purposeful discrimination." Id. at 93 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)) (internal quotations omitted).

When analyzing a Batson objection, the district court must determine whether the challenger has established a prima facie case of discrimination, and if so whether the proponent has a neutral explanation for the peremptory challenge, which negates the challenger's claim of purposeful-racial discrimination. Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577-78 (2006).

"Under the first step, the trial court should consider the totality of the circumstances in determining whether the opponent of the peremptory challenge has made a prima facie showing of discrimination." Id. In determining whether a prima facie showing exists, a district court may specifically consider whether the State exercised its peremptory challenges in a discriminatory pattern or alluded to a discriminatory

purpose in its questions or comments during voir dire. Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 222-23 (1997).

We conclude that Moore did not satisfy his burden of establishing a prima facie case of racial discrimination because he did not cite to any evidence in the record indicating that the State engaged in a discriminatory pattern or purpose. Instead, Moore's entire analysis is as follows: "Mr. Moore established a prima facie case of racial discrimination: the prosecution used a peremptory challenge to exclude one of only three minority panelists." Solely exercising a peremptory challenge to strike a minority juror is insufficient to establish a prima facie case of race discrimination.

Further, the State responded to Moore's objection by asserting that it dismissed the one African-American juror because of her degrees in psychology and nursing and her pursuit of a PhD in psychology. The State claimed it was concerned that the juror would bring into the jury room information not presented at trial. Finally, the State consistently used its peremptory challenges to exclude jurors with similar backgrounds. Accordingly, we conclude that the district court did not abuse its discretion in denying Moore's Batson challenge.

The admission of Jackson's 911 call

Moore also contends that the district court violated his constitutional confrontation rights when, over his objection, it admitted the tape recording of Jackson's 911 call. We disagree. This court reviews a district court's ruling on whether to admit evidence for abuse of discretion. Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004).

The United States Supreme Court, in Davis v. Washington, held that a victim's statements in response to a 911 operator's questions were not testimonial in nature because the victim "was speaking about events as they were actually happening." 547 U.S. 813, 827 (2006). The Court concluded the statements made during a 911 emergency call are generally non-testimonial hearsay. Id. On the other hand, the Court explained that investigative statements are testimonial hearsay because the declarant makes the statements with prosecutorial intent. Id. at 826-27.

Similarly, the New York Criminal Court concluded that a 911 call was generally non-testimonial for purposes of the Confrontation Clause because the police do not initiate the call and the purpose of the call is for emergency assistance, as opposed to prosecutorial intent. People v. Moscat, 777 N.Y.S.2d 875, 879 (N.Y. Crim. Ct. 2004).

We conclude that the district court did not abuse its discretion when it admitted Jackson's 911 recording. Jackson initiated the phone call for emergency assistance: the record indicates that Jackson placed the call shortly after she was battered, suffocated, and sexually assaulted and she made the call from a payphone in an unfamiliar location. Jackson placed the call because she wanted the government to come to her aid and not because she wanted to prepare trial evidence. Further, she took the stand at trial, which allowed Moore to cross-examine her. Thus, we conclude that Jackson's 911 phone call was non-testimonial hearsay, and its admission did not violate Moore's confrontation rights.

Accordingly, we conclude that each of Moore's challenges fails, and therefore we

ORDER the judgment of conviction AFFIRMED.

Hardesty, C.J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

cc: Hon. Jackie Glass, 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