

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON BAKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68731

FILED

APR 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of robbery with the use of a deadly weapon and assault with a deadly weapon. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Inconsistent statement

Appellant Brandon Baker claims the district court abused its discretion and violated his confrontation rights by refusing to allow him to present evidence of the victim's inconsistent statement through another witness's testimony. Baker argues the victim's out-of-court statement to a police officer was inconsistent with the victim's testimony at trial and was admissible to impeach the victim's credibility. Baker further asserts the district court violated his constitutional right to discredit witnesses by restricting his cross-examination of the police officer.

"We generally review a district court's evidentiary rulings for an abuse of discretion. However, whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be

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reviewed de novo.” *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal citations and quotation marks omitted). “When a witness’s out-of-court statements are inconsistent with [his] testimony, those statements are not hearsay if the witness ‘testifies at the . . . hearing and is subject to cross-examination concerning the statement.’” *Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. ___, ___, 305 P.3d 887, 893 (2013) (quoting NRS 51.035(2)(a)) (emphasis added). “Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

The record reveals Baker was given the opportunity to cross-examine the victim. Baker asked the victim “did [he] ever break in and go inside [the bar]” and “did [he] ever tell anyone that the fight happened any place [other than in the alley].” The victim responded “no” to both questions. Later, while cross-examining the police officer, Baker asked whether the victim told the officer “that the black male ran into the bar.” The State objected to this question on hearsay grounds. And the district court sustained the objection because the victim was not asked about this statement during his trial testimony.

Based on this record, we conclude the district court did not abuse its discretion by sustaining the hearsay objection and Baker was not deprived of his constitutional right to cross-examine and discredit the State’s witnesses. *See generally California v. Green*, 399 U.S. 149, 149 (1970) (“[Holding] that statute providing that evidence of statement made by witness is not made inadmissible by hearsay rule if statement is

inconsistent with testimony at hearing and witness is given opportunity to explain or deny prior statement does not violate confrontation clause of Sixth Amendment.”).

Fair-cross-section challenge

Baker claims the district court erred by rejecting his challenges to the racial composition of the jury venire without permitting adequate discovery so he could assess whether he had a viable constitutional challenge.

A defendant enjoys a constitutional right to a trial before a jury selected from a representative cross-section of the community. *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). However, the Constitution “does not guarantee a jury or even a venire that is a perfect cross section of the community. Instead, [it] only requires that venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.” *Id.* at 939-40, 125 P.3d at 631 (internal quotation marks omitted). The burden of demonstrating a prima facie violation of the fair-cross-section requirement rests with the defendant who must show

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (emphases added)).

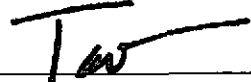
After Baker challenged the venire because it did not fairly and reasonably represent the number of African Americans in Clark County, the district court sua sponte called the jury commissioner to testify as to how a jury pool is selected. The jury commissioner testified that a master list of potential jurors is maintained using the names of people obtained from Nevada Energy and the Department of Motor Vehicles. The Eighth Judicial District Court's jury management system uses an algorithm to randomly select names from the master list to create a jury pool. The jury pool is sent to a third-party vendor, who then sends summonses to the potential jurors. The potential jurors are instructed to call an automated phone system which asks them to identify their race; however, not all of the potential jurors call this number or identify their race. The race information that is collected is not placed on the "bio form" provided to the attorneys because the jury selection is not supposed to be made on the basis of race. The jury commissioner further testified she does not use the race data for anything, she has the ability to pull race information from the system on a jury pool for any given day, and she is unaware of any studies providing the racial breakdown of Nevada Energy and DMV customers.

The record is devoid of any indication Baker requested and was denied discovery regarding his fair cross-section claim, and Baker failed to make a prima facie showing "that the jury selection process in Clark County systematically excludes African Americans from its jury selection process." *Williams*, 121 Nev. at 942, 125 P.3d at 632.

Accordingly, we conclude the district court did not err by rejecting his fair cross-section challenges.

Having concluded Baker is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Carolyn Ellsworth, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk