IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVONTAE AMARRI WHEELER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81374-COA

FILED

AUG 18 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Davontae Amarri Wheeler appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery and second-degree murder. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

The State charged Wheeler with conspiracy to commit robbery, attempted robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. The State alleged he committed these crimes with Demario Lofton-Robinson, DeShawn Robinson, and Raekwon Robertson. A jury found Wheeler guilty of conspiracy to commit robbery and second-degree murder, and it found him not guilty of attempted robbery with use of a deadly weapon. The district court sentenced Wheeler to 24 to 72 months for conspiracy to commit robbery and 10 years to life for second-degree murder, to run consecutively. The convictions are based on the following facts established at trial.

One late August evening, a jogger was running around his neighborhood when he noticed four African American males wearing dark hoodies and sweatpants standing in his path.[1] Based on a suspicious

[1]We do not recount the facts except as necessary to our disposition.

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feeling, because the men were wearing hoodies on a hot summer night, he memorized and wrote down the license plate number of a nearby white Grand Marquis that he believed to belong to them. He later described the car and its license plate to a police officer.

Shortly after, John Relato was in his house when he heard his cousin, Gabriel Valenzuela, pulling into the driveway. Around the same time, Relato heard several gunshots, so he ran outside and discovered Valenzuela lying on the ground with multiple gunshot wounds. An autopsy later revealed that Valenzuela sustained four gunshot wounds—one to the head, one to the abdomen, one to his right ankle, and one to his left ankle. Valenzuela ultimately passed away from these injuries.

Surveillance footage from a gas station near the crime scene showed the four defendants together shortly before the crime occurred. It also showed the defendants enter a white Grand Marquis, with a license plate that matched the license plate the jogger described. A homicide detective eventually discovered that the car belonged to Lofton-Robinson.

Forensic scientists and crime scene analysts investigated several pieces of evidence recovered at the scene and compared the DNA from the scene to the defendants' DNA. None of the DNA samples revealed Wheeler's DNA, but the DNA samples matched the DNA of two of his codefendants, who were with him that night.

Robinson, one of Wheeler's codefendants, testified at trial.[2] According to Robinson, the day before the incident, he received a text message from Robertson, which read, "[A]sk dj [Lofton-Robinson] if he

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[2]Robertson and Wheeler were tried in the same trial. Robinson testified against them pursuant to a guilty plea agreement. *See* NRS 174.061.

trying to hit ahouse tonight. me u sace and him. [S]ace already said yeah." Robinson testified without objection that Sace was Wheeler and Wheeler was in the surveillance video. He also testified that they all drove together to Valenzuela's house, stepped out of the car, and stood near the wall where the jogger saw them. Further, he testified that they got out of the car with the intent to rob a house. He identified Wheeler in court and said that Wheeler was present during the shooting.

Wheeler objected to admitting the text message into evidence both before and during trial. Before trial, Wheeler objected to the State referencing the text message during its opening statement, claiming it was hearsay within hearsay and that the text message violated the Confrontation Clause. Wheeler did not challenge the authenticity of the text message prior to trial. The district court ruled that the State could reference the text message during its opening statement. At trial, Wheeler objected, arguing that the text message was inadmissible hearsay, violated the Confrontation Clause, and lacked authentication. The district court overruled Wheeler's objection.

Wheeler also objected to the jury venire for underrepresenting African Americans. The district court held an evidentiary hearing, and the jury commissioner testified. The jury commissioner testified that she uses a system called the jury management system, which randomly selects jurors from a master list that is based on four sources required by the NRS. The system issues summonses randomly to zip codes, and it does not target zip codes or account for race when sending out summonses. The jury commissioner then randomly generates each jury pool, and she creates a Race Report based on the randomly generated jury pool. The Race Report is based on the potential juror's self-reported identity, and the jury

commissioner does not determine what the potential juror's race is. The district court denied Wheeler's challenge to the venire, finding that he failed to set forth specific allegations demonstrating systematic exclusion.

Wheeler appeals, advancing two arguments.[3] First, Wheeler argues the district court abused its discretion when it admitted Robertson's text message to Robinson because it was double hearsay and it violated the Confrontation Clause. Second, Wheeler argues that the venire violated his Sixth Amendment right to a jury trial because it was not comprised of a cross-section of the community.

The text message

Hearsay

Wheeler claims the district court abused its discretion when it admitted the text message because the text was an out-of-court statement involving double hearsay, as it purported to relate what Wheeler said to Robertson and not just what Robertson said to Robinson. Wheeler further contends that the coconspirator exception under NRS 51.035(3)(e) does not apply because there was no foundation that established that Wheeler made the statement in furtherance of a conspiracy.

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Hearsay is an out-of-court statement offered to

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[3]Wheeler also claims that the district court erred when it allowed Robinson to testify because NRS 175.291(1) prevents a conviction based on an accomplice's testimony without corroborative evidence. NRS 175.291(1), however, does not prevent an accomplice from being a witness. *See* NRS 50.105 and NRS 174.061. Furthermore, the Nevada Supreme Court evaluated an identical argument in Robertson's appeal and concluded it had no merit. *See Robertson v. State*, Docket No. 81400 (Order of Affirmance, May 14, 2021).

prove the truth of the matter asserted. NRS 51.035. However, a statement offered against a party that is made by a coconspirator "during the course and in furtherance of the conspiracy" is not hearsay. NRS 51.035(3)(e). A declarant's statement is in furtherance of a conspiracy when the declarant designed the statement to induce another party to join the conspiracy or act in a way that assists the conspiracy's objective. *Burnside v. State*, 131 Nev. 371, 392, 352 P.3d 627, 642 (2015); *Wood v. State*, 115 Nev. 344, 349, 990 P.2d 786, 789 (1999). Even when a statement is susceptible to alternative interpretations, it may be in furtherance of a conspiracy "so long as there is 'some reasonable basis' for concluding that it was designed to further the conspiracy." *Burnside*, 131 Nev. at 392, 352 P.3d at 642 (quoting *United States v. Shoffner*, 826 F.2d 619, 628 (7th Cir. 1987)).

Here, the district court did not abuse its discretion by determining that both statements in the text messages were nonhearsay under NRS 51.035(3)(e) because the statements were made during the course and in furtherance of the conspiracy. Robertson made his statement during the course and in furtherance of the conspiracy because he designed the statement to induce others to join the conspiracy—i.e., he asked if Lofton-Robinson would join the robbery now that he had others who were participating. Moreover, Wheeler's statement (as attributed by Robertson) was during the course and in furtherance of the conspiracy, as it was the agreement that constituted the conspiracy. Although Wheeler contends there is no way to ascertain the context for his statement and he offers alternative interpretations of it, there are reasonable bases to conclude the statement was in furtherance of the conspiracy based on evidence presented at trial, including Robinson's testimony authenticating the statements. *See Burnside*, 131 Nev. at 392, 352 P.3d at 642. For example, eyewitness

testimony and surveillance video footage place him with the coconspirators near the time the crime occurred, which is sufficient to establish context for his statement that he would participate in robbing a house. Thus, the district court did not abuse its discretion when it admitted the text message as nonhearsay.

Confrontation Clause

Wheeler claims that the text message violated his Sixth Amendment right to confront witnesses because he could not cross-examine his codefendant, Robertson, about the meaning of the text message.

We review Confrontation Clause issues de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Under *Bruton v. United States*, a nontestifying codefendant's incriminating statement violates the Confrontation Clause. *See Burnside*, 131 Nev. at 393, 352 P.3d at 643 (citing *Bruton*, 391 U.S. 123 (1968)). However, the United States Supreme Court has since clarified that out-of-court statements that are nontestimonial do not implicate the Confrontation Clause. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36 (2004)). Thus, "if the challenged out-of-court statement by a nontestifying codefendant is not testimonial, then *Bruton* has no application because the Confrontation Clause has no application." *Id.* at 393, 352 P.2d at 643. Statements are testimonial when a declarant makes the statements "under circumstances that would lead a reasonable person to believe that they would be used prosecutorially." *Id.* at 394, 352 P.3d at 643.

Here, the text message does not implicate the Confrontation Clause because it was nontestimonial. Wheeler and Robertson did not make their respective statements in formalized testimonial materials, to law enforcement in the course of interrogation, or under any other circumstance that would lead a reasonable person to believe they would be used

prosecutorially. Thus, the text message was comprised of nontestimonial statements and does not violate the Confrontation Clause.

Cross-section representation

Wheeler contends that the jury venire violated his Sixth Amendment right to a jury trial because it was not a representative cross-section of the community. He argues that only two out of the sixty people of the venire were African American. He claims that a selection process that randomly sends out jury summonses cannot take into consideration representative demographics, which makes jury trials unrepresentative. He then argues that sending an equal number of jury summonses to randomly selected zip codes without determining the percentage of the population that constitutes a distinctive group within each zip code is prima facie evidence of systematic exclusion of that group.

Although Nevada has never explicitly stated a standard of review, we review Sixth Amendment challenges to a jury's composition de novo. *See generally United States v. Torres-Hernandez*, 447 F.3d 699, 703 (9th Cir. 2006). "Both the Fourteenth and the Sixth Amendments to the United States Constitution guarantee a defendant the right to a trial before a jury selected from a representative cross-section of the community." *Evans v. State*, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996). A defendant bears the burden to demonstrate a prima facie violation of the cross-section requirement. *Id.* at 1186, 926 P.2d at 275. To demonstrate a prima facie showing, a defendant must show three things:

> (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.

Id. (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). We conclude the first prong is satisfied—the Nevada Supreme Court has repeatedly held that African Americans are a distinctive group. *Morgan v. State*, 134 Nev. 200, 208, 416 P.3d 212, 221 (2018).

Under the second prong, "[w]hether a certain percentage is a fair representation of a group is measured by the absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community." *Williams v. State*, 121 Nev. 934, 940 n.9, 125 P.3d 627, 631 n.9 (2005). The absolute disparity is the difference between the percentage of the group in the community and the percentage of the group in the venire. *Id.* The comparative disparity is the percentage between the absolute disparity percentage and the percentage of African Americans in Clark County. *Id.* Comparative disparities over 50% prima facie satisfy the second prong. *Id.*

Under the third prong, a defendant shows systematic exclusion of a distinctive group when the underrepresentation is "inherent in the particular jury-selection process utilized." *Evans*, 112 Nev. at 1186-87, 926 P.2d at 275 (internal quotation marks omitted). However, this does not mean that a defendant is entitled to a perfect cross-section of the community; random variations that do not produce any African Americans are permissible so long as they do not systematically exclude African Americans from the jury selection process. *Williams*, 121 Nev. at 940-41, 125 P.3d at 631-32.

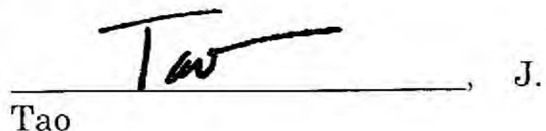
Even assuming Wheeler met the second prong, Wheeler failed to satisfy the third prong. Wheeler argues that randomized jury summonses are exclusionary because such a system does not account for the

number of African Americans in each zip code. However, randomized jury summons systems are legally permissible under Nevada law. *See Valentine v. State*, 135 Nev. 463, 465, 454 P.3d 709, 713 (2019). Even if a randomized process produces a venire with zero African Americans, the Nevada Supreme Court has held that this is a legally permissible byproduct of the randomized process, so long as the process does not systematically exclude African Americans. *Williams*, 121 Nev. at 940-41, 125 P.3d at 631-32. Wheeler has not demonstrated a practice of systematic exclusion, such as only sending jury summonses to zip codes with a very low percentage of African Americans, and thus, he has failed to satisfy the third prong.

Therefore, we

ORDER the judgment of conviction AFFIRMED.

_______________, C.J.
Gibbons



_______________, J.
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Bulla

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