BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CM-20

KEVIN MICHAEL BROWN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2020-CMD-7728

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II. Whether there was sufficient evidence that Brown was the person who assaulted the victim to support his bias-related assault conviction, where a police officer identified Brown in court as the person he arrested approximately five minutes after the assault and other evidence in the case connected him to the assault.

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COUNTERSTATEMENT OF THE CASE

On June 22, 2021, an amended information was filed charging appellant Kevin Michael Brown with one count of bias-related assault against Christopher Reyes based on Reyes's sexual orientation, in violation of D.C. Code §§ 22-404, -3701, and -3703; assault on a police officer (APO), in violation of D.C. Code § 22-405; resisting arrest, in violation of D.C. Code § 22-405.01; and destroying property (DP), in violation of § 22-303 (Record on Appeal (R.) 44-47 (Amended Info. p. 1);

R. 60 (Order Granting Gov't Mot. to Amend Info. p. 1)).[1] Before the start of trial, the government moved to dismiss the APO, resisting arrest, and DP counts, which the trial court granted (R. 21-22 (Docket Entries pp. 21-22); 12/6/23 Tr. 18-21, 27-28, 47-48). On December 6 and 11, 2023, Brown was tried before a jury and the Honorable Jason Park on the remaining charge of bias-related assault (R. 22-23 (Docket Entries pp. 22-23)). On December 12, 2023, the jury found Brown guilty of bias-related assault (R. 24 (Docket Entries p. 24); 12/12/23 Transcript (Tr.) 67-69). On December 13, 2023, Judge Park sentenced Brown to 270 days of incarceration (12/13/23 Tr. 18). Brown filed a timely notice of appeal on January 7, 2024 (R. 142 (Notice p. 1)).

The Trial

The Government's Evidence

Christopher Reyes and Manuel Cosme had been married for about five years and lived together in Washington, D.C. (12/6/23 Tr. 96-97, 126). Reyes had a sister and a nephew, 12-year old F., who lived in Texas, and in October 2020, during the COVID-19 pandemic, F. visited Reyes and

[1] All page references to the record on appeal are to the PDF page numbers.

Cosme at their home in the District (12/6/23 Tr. 97-98). F. had told his uncle that he wanted to ride the Metro underground when he visited D.C. (12/6/23 Tr. 99-100). On October 6, 2020, after F. had finished remote school for the day, Reyes and Cosme decided to take him on the Metro and visit the U.S. Capitol (12/6/23 Tr. 99-100, 127). Cosme, Reyes, and F. rode the Green/Yellow Line train to Fort Totten to catch the Red Line (12/6/23 Tr. 101, 127-28). Upon arriving at the Fort Totten station, they got off at the lower platform and took the escalators to the upper platform to transfer to the Red Line in the direction of Shady Grove (12/6/23 Tr. 101, 128).

On the platform, Reyes was about to take a "selfie" with his nephew to send to his sister, when a man whom he had never met before – but subsequently identified as appellant Brown, see infra – approached him and asked if he was gay (12/6/23 Tr. 102, 123). When Reyes responded that he was gay, Brown asked Reyes if F. was his child (12/6/23 Tr. 102-03). Reyes "just said yes" because he did not want to engage in any further conversation with Brown and turned away from him (12/6/23 Tr. 103). Brown asked F. several times whether he liked girls and whether "these guys," referring to Reyes and Cosme, were touching him (12/6/23

Tr. 104-05). Reyes put his arm around F. and tried to walk away, but Brown followed them down the platform and continued to badger them (12/6/23 Tr. 104-05). Brown asked F., "Do you want to come with me? I'll get you away from these f****ts." (12/5/23 Tr. 105.) Reyes, Cosme, and F. tried to go down the escalator, but Brown blocked their path (12/6/23 Tr. 105-06).

Brown then punched Reyes on the right side of his jawline, close to his ear (12/6/23 Tr. 106). Reyes was "stunned" by the blow (12/6/23 Tr. 106). Reyes did not strike back or try to defend himself because his focus was on making sure that his nephew, who was standing right next to him, did not get hurt (12/6/23 Tr. 106). A crowd began to gather around them, and when an older lady asked what was going on, Brown told her, "These guys are fucking this little boy" (12/6/23 Tr. l07). Reyes responded, "We don't know what you're talking about" (12/6/23 Tr. 107). Brown said, "Yes you do. You do know what's happening," and punched Reyes on the right side of his face a second time (12/6/23 Tr. 107). As a result, Reyes's phone fell out of his hand and onto the train tracks (12/6/23 Tr. 107). Reyes tried several more times to go down the escalator, but Brown once again prevented him from leaving the platform and punched him a third

time on the right side of his face (12/6/23 Tr. 107). After the third punch, enough bystanders had gathered around to create some distance between Reyes and Brown to end the confrontation (12/6/23 Tr. 107-08). Brown then stepped onto a train and left the station (12/6/23 Tr. 108).[2]

According to Cosme, the stranger who approached them on the upper platform at Fort Totten Metro Station (i.e., Brown) asked whether he and Reyes were "f****ts" and accused them of molesting F. and trying to turn him gay (12/6/23 Tr. 128-30, 133). They ignored Brown and tried to walk away from him, but he continued to follow them and harass them (12/6/23 Tr. 129-31). After Brown punched Reyes, Cosme went to the lower platform to get the station manager and called 911 (12/6/23 Tr. 108, 131).

At about 6:15 p.m., Officer Jason Dixon of the Metro Transit Police was with his partner, Officer Pree,[3] when they received a radio run for an assault in progress at the Fort Totten Metro Station (12/11/23 Tr. 13, 19-20). The lookout description of the assailant provided was a Black

[2] Reyes was unable to make an in-court identification of Brown as the man who had assaulted him on October 6, 2020 (12/6/23 Tr. 115).

[3] Officer Pree's first name was not stated during the trial testimony.

male with dreadlocks wearing dark clothes and blue jeans (12/11/23 Tr. 23). Officer Dixon was further advised by the dispatcher that the assailant had gotten on a Red Line train in the direction of Shady Grove and that the train would be held at the next stop, Brookland Metro Station (12/11/23 Tr. 18-20). Officers Dixon and Pree drove to Brookland Metro Station, parked in front of the entrance/exit, and got out of their vehicle (12/11/23 Tr. 21-22). As they were approaching the escalators, the dispatcher advised them that "he was coming up [the] escalator now" (12/11/23 Tr. 22). Officer Dixon explained that the dispatcher was providing them with information "as it was happening" – i.e., the assailant was being followed "via camera," and when the train was held at Brookland Metro Station, the assailant was followed on camera as he exited out of the station (12/11/23 Tr. 23-24).

Officer Dixon looked down the escalator and saw only one person, subsequently identified as Brown, who matched the lookout description coming up the escalator (12/11/23 Tr. 22-23, 48, 53).[4] The officers

[4] According to Officer Dixon, approximately five minutes passed between the time he first received the radio run and he saw Brown coming up the escalator (12/11/23 Tr. 24).

approached Brown, asked to speak with him, and advised him to walk toward the bicycle rack (12/11/23 Tr. 26). Brown took two steps toward the bicycle rack and then started to run toward the grassy area and the wall separating the train tracks from the bus bay (12/11/23 Tr. 26). Officers Dixon and Pree chased after him and instructed him to stop (12/11/23 Tr. 26-27, 39). Officer Dixon injured his knee while running, and ultimately Officer Pree apprehended Brown and placed him under arrest (12/11/23 Tr. 26-27, 39). During this encounter, Officer Dixon had come within two feet of Brown and had ample opportunity to observe his facial characteristics (12/11/23 Tr. 52). Officer Dixon identified Brown in court as the man who was arrested that day (12/11/23 Tr. 13-14).

The government introduced surveillance footage from the Fort Totten Metro Station capturing the assault (12/6/23 Tr. 108-09; Government Exhibit (GX) 1). At trial, Reyes identified himself in the footage as the person closest to the train tracks wearing blue jeans and a blue and tan vest looking down at his phone; the child in front of him as F.; and the man to his right as Cosme (12/6/23 Tr. 111; GX 1 at 1:00). Reyes also indicated on the footage when: (1) the assailant (i.e., Brown) followed Reyes and F. down the platform and badgered F. with questions

(12/6/23 Tr. 112; GX 1 at 1:28); (2) Brown blocked Reyes and F. from going down the escalator and leaving the platform (12/6/23 Tr. 112-13, 117; GX 1 at 2:40); and (3) the first time Brown punched Reyes in the face (GX 1 at 2:54 to 3:05).[5]

The government also introduced surveillance footage of a Black man wearing a black jacket and blue jeans and carrying a plastic bag (i.e., Brown) going up the escalators toward the exit of the Brookland Metro Station (12/11/23 Tr. 27-28; GX 5), and the officers attempting to stop Brown once he exited the station (12/11/23 Tr. 30-32; GX 6).[6] GX 6, a compilation video, showed four video "boxes" depicting different camera

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[5] Two still photographs from GX 1 were also introduced into evidence (12/6/23 Tr. 117-19; GX 2; GX 3). These photographs showed Brown on the platform at Fort Totten Metro Station wearing a red bandana, a black jacket, and blue jeans and carrying a plastic bag (12/6/23 Tr. 119; 12/11/23 Tr. 104-05; GX 2; GX 3). The government will move to supplement the record on appeal with GX 1, GX 2, and GX 3.

[6] One still photograph from GX 5 was introduced into evidence, which showed Brown from the back going up the escalator at Brookland Metro Station, wearing a black jacket and blue jeans and carrying a plastic bag (12/11/23 Tr. 27-28, 104-05; GX 5A). Two still photographs from GX 6 were also introduced into evidence (12/11/23 Tr. 31-32; GX 6A; GX 6B). These photographs showed the officers chasing Brown outside the entrance/exit to the Brookland Metro Station (GX 6A; GX 6B). The government will move to supplement the record on appeal with GX 5, GX 5A, GX 6, GX 6A, and GX 6B.

angles of the Brookland Metro Station bus bay area, including the grassy area and wall separating the train tracks from the bus bay and the entrance/exit to the station where the escalators and bicycle rack were located (12/11/13 Tr. 32-33). On this footage, Officer Dixon identified himself and Officer Pree (wearing a hat) stepping out of their vehicle and approaching Brown at the top of the escalator (12/11/23 Tr. 34-37; GX 6 at 0:00 to 0:19). Officer Dixon further indicated on the footage when Brown started to run toward the grassy area and he and Officer Pree began their pursuit of him (12/11/13 Tr. 37-38; GX 6 at 0:19 to 0:42). The actual location of the arrest was beyond the coverage area of the cameras and was not captured on the footage (12/11/13 Tr. 38-39).[7]

The Defense Evidence

The defense entered a stipulation into evidence stating that a witness on the Fort Totten Metro platform called 911; this 911 call was recorded by Office of Unified Communications; the recording of this 911

[7] At the close of the government's case-in-chief, the defense moved for a judgment of acquittal, which was denied by the trial court (12/11/13 Tr. 54-55). The trial court also denied the renewed defense motion for a judgment of acquittal at the close of the defense case-in-chief (12/11/13 Tr. 62).

call was not preserved by the Office of Unified Communications; and the government was under an obligation to preserve this 911 call (12/11/23 Tr. 61-62). The defense did not call any witnesses (12/11/13 Tr. 62).

SUMMARY OF ARGUMENT

The trial court did not err in denying Brown's request for disclosure of jury selection records under the District of Columbia Jury System Act to substantiate his claim that the venire panel did not represent a fair cross-section of the community. Brown did not comply with any of the procedural or timeliness requirements set forth in the statute. He did not file a written motion, which was supported by an affidavit, before any individual juror was examined, and only sought disclosure of court records after the jury selection process had started. The trial court therefore properly denied his discovery request as untimely.

There was sufficient evidence that Brown was the person who assaulted the victim to support his bias-related assault conviction. A reasonable juror could conclude that the man on surveillance video footage assaulting the victim at one Metro station was the same man exiting another Metro station approximately five minutes later and fleeing from police officers when they approached him. A police officer

identified Brown in court as the man whom he and his partner had apprehended that day.

ARGUMENT

I. The Trial Court Did Not Err in Denying Brown's Discovery Request to Support His Fair Cross-Section Claim.

Brown contends that the trial court erred in denying his request for jury data to support his claim that the venire panel did not represent a fair cross-section of the community and asks this Court to remand his case to permit discovery under the District of Columbia Jury System Act to "give [hi]s counsel access to the records he needs to prepare a possible motion" (Brief for Brown (Br.) at 16-24). His contentions are without merit.

A. Additional Background

During voir dire, defense counsel raised an objection to the racial composition of the venire panel, arguing that it did not represent a fair cross section of the African American community (12/5/23 PM Tr. 24-25, 74). Defense counsel specifically noted that there were only three African American jurors out of a panel of 54 venire members (12/5/23 PM Tr. 24-

25, 74). He further noted that he had "no documentation" of how the jury was selected from the community and orally moved to strike the jury panel (12/5/23 PM Tr. 74).

The trial court denied the defense motion (12/5/23 PM Tr. 75). The court rejected Brown's fair cross-section claim because, even assuming arguendo defense counsel's numbers were "roughly accurate," the defense had "made no showing that this underrepresentation [wa]s due to any systematic exclusion of the group from the jury selection process" (12/5/23 PM Tr. 75).

Defense counsel responded that he could not make the requisite showing of systematic exclusion because he did not have access to information on how the jury selection process was conducted (12/5/23 PM Tr. 76). He thus requested the appropriate court records so that he could review them overnight (12/5/23 PM Tr. 76). The trial court denied Brown's belated request for discovery, noting that there was ongoing "cross-section litigation" initiated by the Public Defender Service and Brown had not joined in that litigation, nor had he made any effort to litigate this issue before trial (12/5/23 PM Tr. 76). Because nothing in the record indicated that "there was any policy or procedure that was

employed by [the Superior] Court that resulted in a systematic exclusion or underrepresentation of any particular group," the court denied Brown's fair cross-section motion (12/5/23 PM Tr. 76-77, 81-82).[8]

B. Standard of Review and Applicable Legal Principles

The Sixth Amendment guarantees a defendant the "'right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community.'" *Israel v. United States*, 109 A.3d 594, 602-03 (D.C. 2014) (quoting *Berghuis v. Smith*, 559 U.S. 314, 319 (2010); *accord Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). A defendant who alleges a violation of the Sixth Amendment's fair cross-section requirement bears the burden of showing:

> (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.

[8] After the petit jury sent a note stating that it had reached a unanimous verdict, defense counsel reiterated his fair cross-section objection, noting that only one of the petit jurors was African American, two were Asian, and the remaining jurors were white (12/12/23 Tr. 65-66).

Duren v. Missouri, 439 U.S. 357, 364 (1979). "A showing of systematic exclusion must be based on more than statistical evidence relating to the jury pool in one case." *Diggs v. United States*, 906 A.2d 290, 298 (D.C. 2006).

The District of Columbia Jury System Act (DCJSA), D.C. Code §§ 11-1901 et seq., governs the selection of jurors in the Superior Court and codifies the Sixth Amendment right to have a jury selected from a fair cross section of the community. *See generally Epps v. United States*, 683 A.2d 749, 753-54 (D.C. 1996); *Gause v. United States*, 6 A.3d 1247, 1251-52 (D.C. 2010) (en banc). The DCJSA provides that "[a]ll litigants entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the residents of the District of Columbia." D.C. Code § 11-1901.

Under the DCJSA, "[a] party may challenge the composition of a jury by a motion for appropriate relief." D.C. Code § 11-1910(a). "The procedures prescribed by [§ 11-1910] are the exclusive means by which a person accused of a crime . . . may challenge a jury on the ground that the jury was not selected in conformity with this chapter." D.C. Code § 11-1910(c). The prescribed procedures include that: (1) "[a] challenge

shall be brought and decided before any individual juror is examined, unless the [c]ourt orders otherwise"; and (2) "[t]he motion shall be in writing, supported by affidavit, and shall specify the facts constituting the grounds for the challenge." D.C. Code § 11-1910(a). Although the DCJSA generally prohibits the disclosure of "[t]he contents of any records or lists used in connection with the selection process," it provides an exception for any such records or lists used "in connection with the preparation or presentation of a motion under § 11-1910." D.C. Code § 11-1914(b).

In *Gause*, the defendant filed a pretrial motion pursuant to D.C. Code § 11-1910, alleging that the jury was not selected from a fair cross section of the community and requesting discovery of jury selection records. *See Gause*, 6 A.3d at 1249. The trial court denied the defendant's discovery request on the ground that he had failed to establish a prima facie case that the Superior Court's jury selection system violated the Sixth Amendment and the DCJSA. *Id.* On appeal, the en banc Court found that the trial court erred, holding that the DCJSA did not require a threshold showing that the requested discovery material would substantiate a statutory or constitutional violation. *Id*. at 1249, 1257-58.

The "only qualification" imposed by the DCSJA was that the discovery sought must be made "in connection with the preparation or presentation" of a motion challenging the composition of a jury. *Id.* at 1257 (quoting D.C.Code § 11-1914(b)). The Court made clear, however, that the trial court retained "important discretion" in "entertaining a motion for discovery under D.C. Code § 11-1914(b)" and "manag[ing] DCJSA discovery in a reasonable manner." *Id*. at 1256-57.

C. Discussion

Relying on *Gause*, Brown claims that the trial court erred in requiring a prima facie showing of systematic discrimination before allowing him to inspect Superior Court records to support his claim that his right to a jury drawn from a fair cross-section of the community had been violated (Br. at 16-24).[9] He is mistaken. The trial court here imposed

[9] It is not clear from the record if Brown's fair cross-section claim was grounded in the Sixth Amendment or the DCJSA. He did not file a written motion, and he did not specify in his oral motion before the trial court whether he was alleging a statutory or constitutional violation or both. In any event, it appears that Brown's sole contention on appeal is that the trial court erred in denying his discovery request under the DCJSA and asks this Court to remand his case to permit discovery under that statute (Br. 16).

no such threshold requirement; rather, the court reasonably exercised its discretion in denying Brown's untimely request for such records.

The DCJSA sets forth the procedures with which a defendant challenging the composition of a jury panel must comply. *See* D.C. Code § 11-1910. Under the DCJSA, Brown was required to file a motion "in writing" and "supported by an affidavit," and this written motion had to be "brought and decided before any individual juror [wa]s examined." D.C. Code § 11-1910(a), (c). The government does not dispute that the DCJSA allows for the disclosure of relevant court records "in connection with the preparation or presentation of a motion under § 11-1910." D.C. Code § 11-1914(b). But because a written motion must be both filed and decided "before any individual juror is examined," it follows that any request for discovery made "in connection with the preparation or presentation of [this] motion" also must be made before the start of jury selection.

Brown, however, did not comply with any of the procedural requirements in D.C. Code § 11-1910. He filed no written motion challenging the jury selection process, let alone a timely one supported by an affidavit. He raised his fair cross-section claim orally, and made his

very first request for discovery of jury selection records, *after* the venire panel had already been sworn and the jury selection process had started (see 12/5/23 Tr. 8-24). As the trial court pointed out in response to Brown's request "to get the appropriate records" and "review them overnight," "there [we]re certain requirements under the law that the defendant . . . must make," and Brown should have undertaken those efforts well before the start of trial, as other defendants who were litigating fair cross-section claims had done (12/5/23 PM Tr. 76). Given Brown's utter failure to follow the prescribed procedures and time limits in D.C. Code § 11-1910, the trial court properly denied his discovery request and oral fair cross-section motion. Indeed, federal courts of appeal have strictly construed similar requirements in the DCJSA's predecessor statute and federal analogue, the federal Jury Selection and Service Act of 1968 (FJSSA), 28 U.S.C. §§ 1861 et seq.,[10] and have denied

[10] Like the DCJSA, its federal counterpart provides that litigants "have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. The federal statute also sets forth procedures for challenging the jury selection process, allowing a defendant to "move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of [the FJSSA] in selecting the grand or petit jury." *Id.* § (continued . . .)

motions challenging the composition of juries and requests for discovery in connection with such motions as untimely or procedurally defective. *See United States v. Jones*, 533 F. App'x 291, 299-300 (4th Cir. 2013) (affirming denial of defendants' motion for discovery regarding jury selection process under federal statute as untimely where defendants filed such motion two weeks after trial); *United States v. Young*, 822 F.2d 1234, 1239 (2d Cir. 1987) (denying challenge to jury venire under federal statute where "it [wa]s undisputed that no objection was made to the composition of the jury panel until after the selection process had

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1867(a). The defendant must file the motion "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered . . . the grounds [for the motion], *whichever is earlier*." *Id.* § 1867(a) (emphasis added). In addition, the motion must "contain[ ] a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of" the FJSSA. *Id.* § 1867(d). The "procedures prescribed by [§ 1867]" are "the exclusive means by which a person accused of a [f]ederal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions of" the FJSSA. *Id.* § 1867(e). The federal statute also allows the defendant "to inspect, reproduce, and copy" records or papers relating to the jury selection process "at all reasonable times during the preparation and pendency" of a motion to stay the proceedings or dismiss the indictment. *Id.* § 1867(f). *See generally Gause,* 6.A3d at 1250-53 ("comparing DCJSA with its predecessor, the [FJSSA]" and noting that "[w]hile there are some obvious differences in the statutes, there are also some key similarities").

commenced" and "no sworn statement was submitted"); *United States v. Jones*, 480 F.2d 1135, 1139 (2d Cir. 1973) (concluding that defendants could not challenge jury panel when they did not file motion with sworn statement of facts as required by 28 U.S.C. § 1867(d), and noting that "[c]ompliance with these express statutory requirements is necessary" to challenge jury selection process under federal statute); *United States v. Bearden*, 659 F.2d 590, 595 (5th Cir. 1981) (timeliness requirement in federal statute "is to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act").

Brown contends that his trial counsel "requested access [to jury selection records] so that he could potentially prepare a motion under [D.C. Code] § 11-1910," and the trial court conflated the standard for prevailing on a fair cross-section claim with the minimal standard for disclosure of jury selection records under the DCJSA (Br. 23). But what Brown fails to grasp is that by the time his counsel made this discovery request a written motion and supporting affidavit already should have been filed pursuant to D.C. Code § 11-1910(a). In short, as the trial court indicated, Brown's discovery request and fair cross-section motion should have been made well before the start of trial (12/5/23 PM Tr. 76). The

record reflects that the trial court denied Brown's eleventh-hour discovery request because it was untimely, and not because the court was requiring him to make a prima facie showing of systematic discrimination before it would permit him to inspect such records, as he claims (Br. 23).[11] Having denied Brown's belated discovery request, the trial court correctly found (and Brown's counsel essentially conceded) that he could not make a showing that any underrepresentation of African Americans on the particular jury venire provided in this case was due to systematic exclusion of the group in the jury selection process (12/5/23 PM Tr. 75-76 ("I have no documentation of how the . . . jury selection process was conducted.")).

[11] Brown's reliance on *Gause* and *Israel* is misplaced (see Br. 19-23). In both of those cases, the defendants made pretrial requests for the disclosure of jury selection records in connection with the preparation or presentation of motions challenging the jury selection process. *See Gause*, 959 A.2d at 673 n.1 (defendant made a "pretrial request . . . for discovery, pursuant to the DCJSA, relating to jury selection records"); *Israel*, 109 A.3d at 599 (defendant "filed a pre-trial motion in which he sought an opportunity for discovery on jury selection procedures"). Accordingly, the issue of whether the defendants had complied with the timeliness and procedural requirements prescribed in D.C. Code § 11-1910 was not before this Court in either case.

Brown's complaints that the trial court's enforcement of the timeliness requirements put "the cart before the horse" and was somehow unfair miss the mark (Br. at 24). As the Fifth Circuit has explained in connection with the FJSSA, the "timeliness requirement was provided to prevent dilatoriness and to ensure the rapid disposition of claims, particularly those that are spurious." *Bearden*, 659 F.2d at 595. Indeed, the FJSSA's requirement that a written motion challenging the venire selection process state the facts and grounds on which the motion rests, *see* 28 U.S.C. § 1867(a), (d) – mirrored in the District's statute – is intended "to allow the court to quickly assess the merits of the motion and to determine whether an evidentiary hearing is warranted." *Bearden*, 659 F.2d at 597. The purpose of the hearing, in turn, "is to substantiate claims asserted in the motion and not to serve as a 'fishing expedition' by defendants to uncover possible grounds for additional claims." *Id.* Given that "[t]he mere observation that a particular group is underrepresented on a particular panel does not support a constitutional challenge," *United States v. Grose*, 525 F.2d 1115, 1119 (7th Cir. 1975), it is hardly unfair to require defendants, at a minimum, to explain to a trial

judge how the court's jury-selection process is defective before obtaining an indefinite delay of the trial.

Brown's preferred approach – in which a defendant may flout the statute's requirements and make an oral, entirely unsupported motion and request discovery after the jury-selection process has already begun – would, by contrast, encourage gamesmanship and delay. A defendant could simply wait, as Brown did, until seeing the composition of the particular venire when it arrives in the courtroom before deciding whether to complain about the selection process. And the defendant, like Brown, would not even need to proffer a specific reason why the selection process systematically excluded any members of a group; he could request discovery and begin his investigation *after* making the motion. That process would, as a practical matter, force the trial court either to halt the trial indefinitely while the defendant investigated his claim, or (more likely) agree to bring in another venire panel whose racial, gender, or other composition was more acceptable to the defense. Given that "the requirement of a fair cross-section . . . does not guarantee that juries be of any particular composition," *United States v. Royal*, 174 F.3d 1, 6 (1st Cir. 1999), *quoted in Diggs*, 906 A.2d at 296 (cleaned up), this Court

should reject Brown's approach and uphold the statute's procedural requirements.

II. There Was Sufficient Evidence of Identification to Support Brown's Bias-Related Assault Conviction.

Brown contends that there was insufficient evidence that he was the person who assaulted Reyes to support his conviction for bias-related assault (Br. 25-30). His contention is meritless.

A. Standard of Review and Applicable Legal Principles

"When considering the sufficiency of evidence, [this Court] 'view[s] the evidence in the light most favorable to the government, giving full play to the right of the factfinder to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence.'" *White v. United States*, 207 A.3d 580, 587 (D.C. 2019) (quoting *Cherry v. District of Columbia*, 164 A.3d 922, 929 (D.C. 2017)). "Although the government bears the burden of presenting sufficient evidence, the government is not required to 'negate every possible inference of innocence.'" *Cherry*, 164 A.3d at 929 (quoting *Brooks v. United States*, 130 A.3d 952, 959 (D.C.

2016)). "The evidence is sufficient if 'any rational fact-finder could have found the elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Hernandez v. United States*, 129 A.3d 914, 918 (D.C. 2016)).

"This [C]ourt has repeatedly held that the identification testimony of a single eyewitness is sufficient to sustain a conviction." *In re R.H.M.*, 630 A.2d 705, 708 (D.C. 1993) (listing cases); *see also Lewis v. United States*, 567 A.2d 1326, 1331 n.11 (D.C. 1989) ("We routinely sustain single-witness convictions."). "So long as 'a reasonable person could find the identification convincing beyond a reasonable doubt, given the surrounding circumstances,' [this Court] will not find an identification insufficient to convict." *In re R.H.M.*, 630 A.2d at 708 (quoting *Beatty v. United States*, 544 A.2d 699, 701 (D.C. 1988)).

B. Discussion

Brown contends that the identification evidence was insufficient to support his conviction because Reyes and Cosme were unable to identify him in court and Officer Dixon only identified him as the man whom he arrested outside the Brookland Metro Station (Br. at 25). Viewing the evidence in the light most favorable to the government, there was ample evidence from which a reasonable factfinder could conclude beyond a

reasonable doubt that Brown was the person who assaulted Reyes on the Fort Totten Metro Station platform.

Surveillance footage from the Fort Totten Metro Station, which captured the entirety of the assault, was admitted into evidence (12/6/23 Tr. 108-09; GX 1). The footage clearly shows a Black man wearing a black jacket and blue jeans and carrying a plastic bag: (1) approach Cosme, Reyes, and F. on the platform; (2) follow them up and down the platform; (3) prevent them from going down the escalator and leaving the platform; and (4) punch Reyes in the face several times before he gets on a train and departs the station (GX 1).

Surveillance footage from the Brookland Metro Station was also admitted into evidence, which showed (from the back) a Black man wearing a black jacket and blue jeans and carrying a plastic bag going up the escalators toward the exit of the Brookland Metro Station (12/11/23 Tr. 27-28; GX 5). The surveillance footage also showed two officers approaching this man as he exited the station; the man running away from the officers; and the officers pursuing him (12/11/23 Tr. 30-32; GX 6).

Officer Dixon testified that he received a radio run for an assault in progress at Fort Totten Metro Station (12/11/23 Tr. 13, 19-20). The dispatcher provided a lookout description of the assailant as a Black male with dreadlocks wearing dark clothes and blue jeans and advised that the assailant had boarded a Red Line train in the direction of Shady Grove and that the train would be held at the next stop, Brookland Metro Station (12/11/23 Tr. 18-20, 23). The assailant was being followed "via camera" by the Metro Transit Authority, and when Officer Dixon and his partner arrived at the Brookland Metro Station, the dispatcher further advised them that the assailant "was coming up [the] escalator now" (12/11/23 Tr. 21-22). Officer Dixon saw only one person coming up the escalator who matched the lookout description, a mere five minutes after receiving the radio run (12/11/23 Tr. 22-24, 48, 53). When the officers asked to speak to this man, he fled from them (12/11/23 Tr. 26). Officers Dixon and Pree chased after him, and Officer Pree apprehended him and placed him under arrest (12/11/23 Tr. 26-27, 39). Officer Dixon identified Brown in court as the man who was arrested that day (12/11/23 Tr. 13-14). Officer Dixon testified that he had come within two feet of Brown

and had ample opportunity to observe his facial characteristics (12/11/23 Tr. 52).

Based on the surveillance footage, the contemporaneous information provided by the dispatcher,[12] and Officer Dixon's testimony, a reasonable juror could conclude that the man seen in the footage on GX 1 assaulting Reyes on the Fort Totten Metro Station platform was the same man seen in the footage on GX 5 and GX 6 who exited the Brookland Metro Station and fled from the officers when they approached him. Officer Dixon, in turn, identified Brown in court as the man whom he and his partner had apprehended that day (12/11/23 Tr. 13-14). During this encounter, Officer Dixon came within two feet of Brown and had ample opportunity to observe his face (12/11/23 Tr. 52). Because "a reasonable

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[12] Brown complains that "the dispatcher could have testified at trial about his live observations," but he did not (Br. 29). Brown did not object below to the admission of the dispatcher's out-of-court statements, and he does not raise any stand-alone claims based on the admission of these statements in his appellate brief. He has therefore abandoned them. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993). Where hearsay statements are admitted without objection, they may be accorded the same weight as other testimony. *See Derrington v. United States*, 488 A.2d 1314, 1337 & n.35 (D.C. 1985); *see also United States v. White*, 116 F.3d 903, 923 (D.C. Cir. 1997) ("[A] hearsay statement, unobjected-to at trial [is] properly admitted and given its full probative value.") (internal quotation marks and citation omitted).

person could find [Officer Dixon's] identification convincing beyond a reasonable doubt, given the surrounding circumstances," the identification evidence was sufficient to convict Brown of assaulting Reyes. *Beatty*, 544 A.2d at 701; *see Hill v. United States*, 541 A.2d 1285, 1287-88 (D.C. 1988) (upholding drug conviction based on the testimony of a single undercover police officer, even though there was some dispute about whether the drug seller was or was not wearing glasses, where the officer had ample opportunity to observe the two men who sold him drugs and testified that he stood within a couple of feet from Hill when the transaction took place).

Brown contends that "there [wa]s no in-court identification made at all" in his case, but he is wrong (Br. 27). Officer Dixon identified Brown in court as the person whom he and his partner arrested and other evidence in this case (the surveillance video footage and the contemporaneous information provided by the dispatcher) connected Brown to the assault against Reyes. The cases relied on by Brown (see Br. 27-28) – *Tornero v. United States*, 161 A.3d 675 (D.C. 2017); *In re R.H.M.*, *Beatty*, and *Crawley v. United States*, 320 A.2d 309 (D.C. 1974) – are therefore inapposite because in those cases there were either no

witness identifications at all or only highly questionable ones, and no other evidence was presented linking the defendant to the charged crime. Because the jury had a more than sufficient basis to conclude that Brown assaulted Reyes, his conviction should be affirmed.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Russell A. Bikoff, Esq., on this 20th day of December, 2024.

/s/
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