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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001404-MR

OTHELLO WASHINGTON — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 04-CR-00143

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: The appellant, Othello Washington ("Washington"), appeals to this Court as a matter of right from his conviction for one count of robbery in the second degree and being a persistent felony offender in the first degree. On

appeal, he argues that the trial court erred by failing to sustain his objection to the hearsay testimony of an officer regarding an identification; by failing to grant a directed verdict; and by allowing the Commonwealth to advance improper racial arguments at trial. We agree that a reversal is in order based upon the improper injection of race into the case by the Commonwealth. As we are reversing on Washington's last assignment of error, we decline to address the sufficiency of the evidence argument. However, as the assignment of error concerning investigative hearsay is capable of repetition on retrial, we will briefly address it.

Background

According to the defense's witnesses, on October 7, 2004, Washington was picked up from a park in Georgetown, Kentucky by two acquaintances. The acquaintances, Steven Sturgill ("Sturgill") and Robin Glass ("Glass"), accompanied Washington to Glass's residence in Georgetown. Sturgill testified at trial that the three stayed up late that night drinking. He further testified that Washington was with him at the house when he awoke that morning around 6:30 or 6:45 a.m. Sturgill also testified that Washington was with him when they went to pick up his truck around 7:00 to 7:20 a.m. However, Sturgill testified at trial that he couldn't be sure that the night he described was October 7, 2004; that it *actually* could have been the night before or the night after.

Holly Soto ("Soto"), a cashier at a Shell gas station in Georgetown was finishing up her shift at around 7:00 in morning on October 7, 2004. As she was counting the money in the cash register, a man came in from the street and

threatened to shoot if she did not give him money. Soto gave the man the money from the drawer and an additional money bag from beneath the counter. The total amount of money given to the assailant was $272.00.

After the man left, Soto telephoned the police. Soto was unable to provide the police with a detailed description of the man, stating that she did not get a good look at the man's face. At trial, she could only say, generally, that he was a "tall, thin black man." When asked to identify Washington at trial, Soto could not positively identify Washington as the robber.

The police obtained video surveillance from the Shell station after the robbery. Officers were able to discern that the robber was wearing a low-riding cap or mask. Although the robber's face was partially obscured, police officer Michael Morris ("Officer Morris") identified the suspect as Washington. During trial, Officer Morris was asked if he identified the robber "solely from the nose down," to which he responded affirmatively, saying "[f]rom the rest of the face, down. From the top of the mask down." When viewing the same video footage, police Chief Reeves could not identify the suspect.

Based upon Officer Morris' assertion that the man in the video was Washington, police began a search for him. Police went to the residence of Washington's girlfriend, Vernette Harris ("Harris"), and showed her a photo printed out from the surveillance footage. It is disputed whether she made a positive identification of Washington at this time or not. She admitted at trial that the initials on the photo, "V.H.," were her initials; however, she claimed she could

not recall whether she made an identification. It is undisputed that she identified the sweatshirt worn by the robber as belonging to Washington. The trial court allowed the Commonwealth to examine Harris as a hostile witness at trial, and Harris testified that she did not think the initials on the photo were hers and that she did not know who the man in the photo was. Sergeant Mather offered impeachment testimony that he had shown the photo to Harris and that she made a positive identification of Washington. Officer Palmer also testified at trial. He stated that he would not describe Harris's statements as a "positive identification" of Washington.

About an hour after police visited with Harris, Washington voluntarily walked into the police station and asked to speak to the police sergeant. He claimed that he had heard the police were looking for him but did not know why. Sergeant Mather interviewed Washington, wherein Washington denied any involvement in the robbery.

Thereafter, Washington was indicted by a Scott County grand jury for one count of robbery in the second degree and persistent felony offender in the first degree. After a jury trial, Washington was convicted of robbery in the second degree and found to be a persistent felony offender in the first degree. He was sentenced to seventeen-years' imprisonment. This appeal followed.

Analysis

Improper Racial Argument

Washington argues that the Commonwealth made an improper racial "odds-making" argument during trial. Despite the appellant's assertion to the contrary, we believe this issue was preserved for review by objection of defense counsel at trial.[1] Although defense counsel did not specifically mention race, it was clear that the prosecutor was "going in that direction." Moreover, defense counsel did object to the use of statistics for which no foundation had been laid.

We review the trial court's ruling for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). On review for abuse of discretion, we ask "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. An error is reversible if there is a reasonable possibility that it contributed to the conviction. *Id*. at 122. Although an abuse of discretion standard is applied to evidentiary rulings, a heightened form of scrutiny is applied in cases where it is alleged that race has been wrongfully injected into the trial. *McFarland v. Smith*, 611 F.2d 414, 416-17 (2d Cir. 1979); *see also State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163, 187 (1995), *citing Miller v. N.C.*, 583 F.2d 701 (4th Cir. 1978), *and Weddington v. State*, 545 A.2d 607 (Del. Sup. 1988). On review, we ask whether there was a compelling state interest for the injection of race into the case. *Id.*

[1] As a side-note, even if we had proceeded under the assumption that the issue was not preserved, we would not have conducted a typical RCr 10.26 palpable error analysis. Instead (as we have done herein), we would have applied a heightened form of scrutiny requiring a compelling state interest as there was an improper injection of race into a case where race was not an issue.

Washington argues that during both the Commonwealth's case-in-chief and closing arguments, "the Commonwealth attempted to tell the jury, in essence, that 'the person in the video is African American, there are not many African Americans in Georgetown, and Mr. Washington is an African American . . . [so] odds are it is him.'" (Appellant's brief at 18.) Specifically, the following exchange occurred during the Commonwealth's examination of Sergeant Mather as part of its case-in-chief:

Prosecutor: How long have you lived here?

Mather: About ten years, now.

Prosecutor: About ten years? About how large is Georgetown? Do you know how many people live here?

Mather: I think the last thing I heard was about 15,000 or 14,000, in that range.

Prosecutor: And in your experience as a police officer, your dealings in Scott County, is there a large black community, small, large, in proportion to the white community, do you know? Are you familiar with that?

Mather: Well, I don't believe it's very large, no, sir.

During closing arguments, the Commonwealth expanded on this groundwork by suggesting that the statistical odds were that Washington probably committed the crime. Defense counsel objected. The interchange was as follows:

Prosecutor: About 15,000 people live in Georgetown. Of that population, it's mainly a white population but there is a black minority in Georgetown, I might estimate 10 percent. Now, let's think about this. 15,000

people in Georgetown and 10 percent black. That leaves us with about 1,500 black men.

Defense: Your Honor, I'm going to object. May we approach?

(BENCH DISCUSSION)

Defense: I don't think he can statistically define the population of Georgetown unless he's got some basis for that.

Prosecutor: Well, I think that Sergeant Mather testified, you know, that it's a small, you know, it's a small black minority in the population and I think I made that clear. And I'm not. . .

Defense: He's throwing out numbers.

Prosecutor: I'm not saying this is evidence, I'm just saying, say it's 10 percent, I'm not saying it is 10 percent.

Judge: Okay, you can use the word "small" so it will conform to the testimony.

Defense: Okay.

(BACK IN THE HEARING OF THE JURY)

Prosecutor: What inferences or what deductions can you draw[?]. . . The Shell station, in Georgetown, a guy on foot. He probably lives in Georgetown, whoever it is. Why do I say this? Did this happen out on the interstate? No. It happened in town. The guy who did it was on foot, so he lives in Georgetown. . .15,000 people live in Georgetown, and of that number a small percentage is black. Now, think about that. That's really, really important. If you were to, say, be in Louisville and Lexington, you know, with a large population, with a sizeable black population and you were just looking at photo identifications, you know, there's probably a lot of guys who fit this description. But in Georgetown there's only a very limited number of black men, and black men over 6'3." Keep that in mind. We're not talking about a

> huge population or a huge group of people that this could be, but we're talking about a small group. . .

On appeal, Washington correctly notes that it is an underlying premise of the Commonwealth's argument that the robber must have been from Georgetown. The logic of this reasoning is dubious. However, the employment of faulty reasoning is not something which ordinarily rises to the level of reversible error. What we do find far more troubling, however, is the use of guesswork to arrive at racial statistics concerning Georgetown's population in order to make the question of guilt or innocence one of "odds." For obvious reasons, an "odds-are" type of argument as applied to the defendant's race is problematic.

The injection of race into a case where race is not relevant is prohibited. *See e.g., United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992); *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005); *State v. Guthrie*, *supra.* Indeed, "the Supreme Court [has] stated flatly, [and] at least two circuits [have] already held, that '[t]he Constitution prohibits racially-biased prosecutorial arguments.'" *United States v. Doe*, 903 F.2d 16, 24-25, 284 U.S. App. D.C. 199, 207-208 (1990), *citing McFarland v. Smith, supra,* and *quoting McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 107 S.Ct. 1756, 1776 n.30, 95 L.Ed.2d 262 (1987). The "Constitution prohibits a prosecutor from making race-conscious arguments since it draws the jury's attention to a characteristic that the Constitution generally demands that the jury ignore." *U.S. v. Hernandez*, 865 F.2d 925, 928 (7th Cir. 1989). However, where race or ethnicity is a relevant factor in a case, its

admission is not prohibited unless the probative value of such evidence is substantially outweighed by the danger of unfair prejudice. *See State v. Guthrie, supra; Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).

In order to be probative, evidence must first be "relevant" under Kentucky Rules of Evidence ("KRE") 401. Under KRE 401, evidence is relevant when it tends to make an issue of fact in the case more or less likely. If the danger of unfair prejudice exists, a balancing test is performed to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. KRE 403. In the present case, the evidence was not sufficiently probative to warrant the injection of race into the trial because the "statistical information" only narrowed the pool of suspects (allegedly) down to about 10% of the population.[2] This is not the sort of case where "odds" are permissibly used, such as in cases where DNA evidence can narrow someone's identity down to "one-in-a-million", for example. Here, the argument was truly that African Americans are a minority in the small community of Georgetown and that because there are fewer African Americans than whites, Washington is likely to be the perpetrator because he is African American.

The United States Court of Appeals for the Second Circuit has noted that "[e]ven a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." *McFarland v. Smith*, 611 F.2d at 417.

[2] There is no reason to believe that these statistics have any basis in fact as they were supplied based on speculation through the prosecutor and the prosecution's witness.

Indeed, "given the general requirement that the race of a criminal defendant must not be the basis of any adverse inference, any reference to it by a prosecutor must be justified by a compelling state interest." *Id*.

Here, we cannot say that the state interest was compelling. The prosecutor could have easily relied on other evidence, such as Officer Morris' identification of Washington, the alleged identification of Washington by Vernette Harris, Vernette Harris' identification of the perpetrator's sweatshirt, and the infirm testimony of Washington's alibi witness. Further, the jurors were free to look at the pictures introduced to determine whether they thought the suspect was Washington. It was unnecessary and improper for the prosecutor to inject race into the equation where race was not an issue in the case. Moreover, the standard for conviction in criminal cases is "beyond a reasonable doubt," and the concern in this case is that the jury may have been swayed to convict Washington based upon "odds" rather than the reasonable-doubt standard.

As we review the injection of race into a case where race is not an issue with heightened scrutiny, and as we find no compelling state interest for the injection of race into the case, Washington's conviction must be set aside. Therefore, we reverse the judgment of the Scott Circuit Court and remand this matter for a new trial.

Investigative Hearsay

We will now briefly address Washington's assignment of error concerning investigative hearsay as it is an issue which may recur on retrial.

Washington argues that the hearsay testimony of Sergeant Mather was improperly admitted over his objection. This issue is preserved for review. As previously stated, we review evidentiary rulings for abuse of discretion. *Anderson, supra.*

At trial, the prosecutor asked Sergeant Mather whether Officer Morris made an identification of Washington, and Sergeant Mather responded in the affirmative. This was not a hearsay statement as the prosecutor did not ask Sergeant Mather *who* Officer Morris identified (but merely whether an identification was made) and because the statement was not used to prove the truth of the matter asserted, but to explain actions taken by police. Indeed, "[t]he rule is that a police officer may testify about information furnished to him . . . where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case." *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988), *overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006). In the present case, defense counsel's opening arguments suggested that local police did not undertake a legitimate investigation. Further, the fact that an identification was made served to explain why officers went to Harris' house to question her thereafter. As such, the actions of police were at issue in the case, and the testimony was not hearsay. Indeed, the testimony was not admitted for the truth of the matter asserted but to explain actions taken by police. *Young v. Commonwealth*, 50 S.W.3d 148, 167 (Ky. 2001).

Conclusion

Based upon the injection of improper racial arguments into the trial, the judgment of the Scott Circuit Court is reversed and remanded for a new trial on this matter.

ALL CONCUR.

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