



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELDER SAAVEDRA-HERNANDEZ,)
)
Defendant Below - Appellant,) Supreme Court No. 165, 2019
)
v.) On appeal from Superior Court
) ID No. N1705014681
THE STATE OF DELAWARE,)
)
Plaintiff Below - Appellee.)

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. DETECTIVE MAUCHIN'S VIDEO SURVEILLANCE NARRATION AMOUNTED TO MISCONDUCT THAT VIOLATED SAAVEDRA'S DUE PROCESS RIGHTS.

Merits of the Argument

A. The prosecution committed misconduct based upon Mauchin's identification testimony.¹

1. Detective Mauchin's lay opinions identifying the Defendant were not admissible under DRE 701.²

Detective Mauchin's testimony was not admissible under DRE 701 because (1) it violated the trial court's instructions, (2) he relied upon or conveyed hearsay evidence when testifying as a lay witness, and (3) he based his lay testimony on matters not within his personal knowledge,

a. The State elicited identification testimony in disregard of Court instructions.

The State's claim that the prosecutor elicited identification evidence in good faith is erroneous. The State's argument completely disregards the fact that the Court sustained the initial objection to the improper identification testimony

¹ The Defendant preserved this argument for appeal as noted in his Opening brief. Any initial failure to object when Mauchin first began discussing specifics contained in Exhibit 18 did not amount to a waiver of the objections that were later made by defense counsel. Any initial failure to object was the result of oversight as opposed to a strategic decision.

² The detective's identification testimony includes both his express and implicit identifications of Saavedra during his surveillance videotape narration.

elicited by the prosecutor, and then subsequently disregarded the Court's order to "refrain from making any type of identification of the defendant" on multiple occasions. Repeated disregard of court instructions is textbook misconduct.

- b. Detective Mauchin's identification testimony was not rationally based on his firsthand perception;

Mauchin's identifications were not admissible under DRE 701. He did not know the Defendant. He was not testifying from firsthand knowledge and his opinions were based primarily on hearsay from unidentified witnesses.

The requirement that a witness's opinion must be "rationally based on the witness's perception" comprises two elements. First, it echoes the personal knowledge requirement of Rule 602.³

In *United States v. Fulton*,⁴ the Third Circuit summarized the meaning and limitations of Rule 701 as follows:

³ Fed.R. Evid. 602 ("a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). See, *United States v. Garcia*, 413 F. 3d 201, 211 (2nd Cir. 2005). The first condition (testimony rationally based upon perception) essentially restates the personal knowledge requirement set by FRE 602 for all lay testimony, no matter how particular or how general. The idea is that the witness must know enough from first-hand observation about the underlying events being addressed to support the inference or the opinion that is to be given. See also, Annotated Committee Note to FRE 701 (describing first condition as "the familiar requirement of first-hand knowledge or observation"). *United States v. Rea*, 958 F.2d 1206, 1215. (2nd Cir. 1992). (Under FRE 701, there are two expressed preconditions to its admissibility. First, the opinion evidence may be allowed only if the court finds that the opinion is "rationally based upon "the witnesses own perceptions; and second, it is to be allowed only if the court concludes that it will be "helpful" to a clear understanding of the witness's testimony or the determination of fact in issue. The rationally based requirement "is the familiar requirement of first-hand knowledge or observation.") (citing, FRE 701 Advisory Committee Note on 1972 proposed rules). See also, *United States v. Kaplan*, 490 F.3d 110, 118-19 (2nd Cir. 2007) (lay opinion inadmissible in absence of evidence that was based on firsthand knowledge).

In layman's terms, Rule 701 means that a witness is only permitted to give her opinion or interpretation of an event when she has some personal knowledge of that incident. The objective of such testimony is to put "the trier of fact in possession of an accurate reproduction of the event.' (Citation omitted). In other words, " 'lay opinion testimony is permitted under Rule 701 because it has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event.' (Citation omitted). This rule recognizes the reality that "eyewitnesses sometimes find it difficult to describe the appearance or relationship of persons, the atmosphere of a place, or the value of an object by reference only to objective facts.' (Citation omitted). Accordingly, it permits witnesses "to testify to their personal perceptions in the form of inferences or conclusory opinions." (Citation omitted).

Importantly, the rule is carefully designed to exclude lay opinion testimony that "amounts to little more than choosing up sides, or that merely tells the jury what result to reach." (Citation omitted).

In *Thomas v. State*,⁵ this Court recently addressed the application of DRE 701 in the context of witness identification. The Court enunciated that DRE 701 "permits a lay witness to testify about his own observations when they are based on personal observation."⁶ "The ultimate question of the identity.... remains one for the jury to decide, and lay opinion testimony will not be helpful to the jury 'when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion.'"⁷

⁴ *United States v. Fulton*, 837 F.3d 281, 291 (3rd Cir. 2016)

⁵ *Thomas v. State*, 2019 WL 1380051 (Del. March 26, 2019)

⁶ Citing, *Cooke v. State*, 97 A.3d 513, 547 (Del. 2014).

⁷ *Id.*, at p.3.

In *Thomas*, the Court found that it was not error for a detective to provide his opinion about the identity of individuals depicted in different videos retrieved from the scene of a robbery, but only because defense counsel opened the door to the testimony. However, the Court expressed its concern about identification of a defendant that is not based upon the witness's own perceptions but rather on his review of the same videos and evidence available to the jury:

“We have serious reservations about the admission of this type of identification testimony. It is unclear to us how the testimony of a police officer -- or any other witness without a particular expertise in comparing a video graphic representation of a person with a suspect or defendant -- would be helpful to the factfinder in resolving an identification issue. And here, neither the Superior Court in its evidentiary ruling nor the State in its briefing offered a satisfactory answer to that question.⁸

The State's reliance upon *Thomas* is misplaced. It downplays the Court's serious concerns about the admission of this type of testimony and ignores the fact that the Court's decision was limited to the particular facts of this case where the defense opened the door to the testimony.

In this case, the State is promoting the exact same type of testimony discouraged by the Court in *Thomas*. The argument supporting Detective Mauchin's identification opinions is an aggressive application of DRE 701 that is contrary to this Court's decision in *Thomas*.

⁸ *Thomas*, at p. 3.

In *United States v. LaPierre*,⁹ the Ninth Circuit determined that it was error for the trial court to allow a police officer to identify the defendant from a bank surveillance photo because the officer did not know the defendant and “had never... seen him in person,” and his knowledge of the defendant’s appearance “was based entirely on his review of photographs of the defendant and witnesses descriptions of him.”¹⁰ It held that the district court abused its discretion in allowing the testimony, stating:

“lay opinion testimony of the type given. . . is of dubious value. The jury, after all, was able to view the surveillance photos of [the defendant] and make an independent determination whether it believed that the individual pictured in the photos was in fact [the defendant]. [The officer’s] testimony therefore ran the risk of invading the province of the jury and unfairly prejudicing [the defendant]. For these reasons we have held that while lay testimony of this sort is sometimes permissible, “the use of lay opinion identification by policeman or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution.”

The second element of the requirement that a witnesses’ opinion must be “rationally based on the witness’s perception” is the requirement eliminating opinions based upon hearsay.¹¹

⁹ *United States v. LaPierre*, 998 F2d 1460 (9th Cir. 1993)

¹⁰ *LaPierre*, at 1465.

¹¹ *United States v. Freeman*, 498 F3d 893, 903 (9th Cir. 2007). (If [the detective] relied upon or conveyed hearsay evidence when testifying as a lay witness or if [he] based his lay testimony on matters not within his personal knowledge, he exceeded the bounds of properly admissible testimony.

- c. Detective Mauchin's identification testimony was not helpful to the jury in determining a fact in issue.

Lay opinion testimony is also restricted to those instances in which hearing the opinion would help the jury to understand the witness's testimony or determine a fact in issue. One of the factors that affects whether a lay witness's opinion meets this test is the extent to which the jury is equally well positioned to make the identification determination.¹²

The New Jersey Supreme Court's decision in *State v. Lazo*¹³ is instructive. There, the Court held that the trial judge erred by allowing a police officer to testify that he believed defendant closely resembled a composite sketch of the suspect, and for this reason, included defendant's photo in an array. The Court determined that the officer's testimony improperly bolstered the victim's account and usurped the jury's responsibility to weigh the victim's credibility. The *Lazo*

¹² LaPierre, *supra*, at 1465. (The jury, after all, was able to view the surveillance photos of [the defendant] and make an independent determination whether it believed that the individual pictured in the photos was in fact [the defendant]. See also, *United States v. Fulton*, 837 F3d 281, 299 – 300 (3rd Cir. 2016) cert. denied 139 S.Ct. 214 (2018). (officer's testimony comparing defendants to person in surveillance video held inadmissible where officers were not sufficiently familiar with the defendants to assist the jury and "were no better equipped than the jurors to compare the suspects appearance with that of [defendant's]"; "the jury was able to view the surveillance photos and compare them to [defendants] appearances...., [and] could rely on their own assessments of the photos"); *State v. Lazo*, 34 A.3d 1233 (N.J. 2012) (detective's opinion that defendant's arrest photograph closely resemble plea sketch of perpetrator inadmissible; detective had not witnessed the crime and did not know defendant, and there was no change in the defendant's appearance, therefore jurors "could have compared a photo and sketch on their own"); *State v. Jamison*, 613 P.2nd 776, 799 (1980)(officers testimony identifying defendant as a robber depicted in surveillance photographs inadmissible; defendant was "in the jury's presence" and "the jury was able to compare [defendants] appearance with the photographs and decide whether the robber pictured therein was the defendant")

¹³ *State v. Lazo*, 34 A.3d 1233 (N.J. 2012)

court pointed out that whether such evidence is helpful depends upon various factors, including whether the witness knew the defendant over time and in a variety of circumstances.

Detective Mauchin's identification testimony was not helpful to the jury since he was not familiar with the defendant prior to this investigation. There was no basis for concluding that Mauchin was more likely to correctly identify the defendant from the video than the jury.¹⁴ Therefore, the State's reliance upon cases admitting this type of identification testimony is misplaced because the witnesses in many of those cases had previous familiarity with the defendant.¹⁵

B. The prosecution committed misconduct based upon Mauchin's narration.

Eliciting Detective Mauchin's speculation that Defendant was signaling to others in Exhibit 18 was misconduct because it was clearly inadmissible under any evidence rule, including DRE 701. Mauchin's testimony was not rationally based upon his firsthand perception and was not helpful to the jury as it could draw its own conclusions about the conduct depicted in the video.

¹⁴ It is telling that none of the witnesses familiar with the Defendant who testified at trial were asked to identify the individual entering the Escalade in the subject videos.

¹⁵ *Weber v. State*, 971 A.2d 135 (Del. 2009) this Court held that the officer's identification of the defendant in a video was admissible because he was familiar with the defendant's appearance based upon knowing him for years prior to the incident as well as actually seeing him on the day of the subject crimes. Other cases cited by the State involved identification testimony from witnesses who previously knew the defendant. *Robinson v. People*, 927 P.2d 381, 383 (Colo. 1996)(citing *United States v. Jackman*, 48 F.3d 1, 4-7 (1st Cir. 1995) ; *United States v. Henderson*, 68 F.3d 323, 324-27 (9th Cir. 1995); *United States v. Stormer*, 938 F.2d 759, 761-62 (7th Cir. 1991); *United States v. Allen*, 787 F.2d 933, 935-37 (4th Cir. 1986); *United States v. Farnsworth*, 729 F.2d 1158, 1160-61 (8th Cir. 1984);

C. The video enhancements that “tracked Saavedra” constitute misconduct.

The video enhancements which “tracked Saavedra” are based upon the erroneous assumption that Detective Mauchin’s multiple identifications of the Defendant were admissible. Again, no civilian witness who was present at the Rodeo and/or familiar with the Defendant testified that the individual circled in the video was Saavedra. The circling of the individual identified as Saavedra by Detective Mauchin was based exclusively upon his conclusions. His conclusions were not based upon firsthand perception, but primarily upon hearsay from unidentified individuals. Therefore, the enhancement was improper for the same reasons that Detective Mauchin’s testimony was inadmissible. The enhancement skewed the evidence in favor of the State on the identification issue.

D. The errors regarding Saavedra’s identification and the video enhancements deprived him of a fair trial.

The errors at issue here are egregious. Since it is apparent that no civilian witness was able to identify Saavedra as the individual in Exhibits 18 and 153, the State resorted to a strategy in which the identification was made by Detective Mauchin primarily based upon hearsay by unidentified individuals.¹⁶ Detective Mauchin’s testimony was not admissible under DRE 701. The State repeatedly violated the Court’s order to “*refrain from making any type of identification of the*

¹⁶ Madelyn Aramiz identified Saavedra as the individual who got out of the Escalade after the collision, but did not identify him in the exhibits at issue.

defendant.” The video enhancement compounded the errors. The errors directly affected the core issue in the case, the identity of the individual who struck the victim with the Escalade.

This error requires reversal.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BY ADMITTING TROOPER DIAZ'S TESTIMONY.

Merits of the Argument

Defendant has explained in detail why Trooper Diaz's testimony does not constitute admissible lay testimony under DRE 701, and rejects the State's application of that rule to his testimony. The State's claim that the testimony was relevant is also rejected.

The relevance of the words "La Migra," if any, relate to the listener's understanding of the words and innuendo in order to help the jury determine what the speaker meant to convey. Here, the only witness who heard the words "La Migra" was Madelyn Aramiz. She stated that the words meant "immigration." She was not asked what the words may have meant to her, and she did not state that she interpreted the words to mean that the feds are coming so that people should leave. Since the listener's understanding of the meaning of the words was not consistent with Trooper Diaz's interpretation, why was his testimony relevant?

At trial, the State expressly stated the basis for admission of Diaz's testimony was under DRE 701. The State expressly rejected that Diaz's testimony was sought as expert testimony under DRE 702.¹⁷

¹⁷ A79 "Prosecutor: Your Honor, this is not expert testimony."

The State now argues that Diaz's testimony was admissible as expert testimony contrary to the representations made to the trial court. The State's argument should be rejected. It waived any claim that this was expert testimony. The State prevented defense counsel from articulating any objection to its admission as expert testimony, and prevented the judge from applying DRE 702 to determine its admission under that rule. The State's attempt to support its admission as expert testimony, and reversal of its prior position, seems a bit duplicitous.

This error requires reversal.

III. THE PROSECUTOR'S DIRECT EXAMINATION OF BRIAN SAAVEDRA, AND CLOSING ARGUMENT, CONSTITUTE MISCONDUCT VIOLATING DEFENDANT'S DUE PROCESS RIGHTS.

Merits of the Argument

The State's argument denying misconduct is rejected. Implicit in the prosecutor's question was the assertion that the witness previously gave "troopers the name of the individual who was seen walking with the sombrero." The misconduct was compounded when the prosecutor misled the jury in closing by claiming Brian Saavedra "*somehow identified him by not identifying him.*"

The prosecutor's remedy to address witness recantation was to provide the jury with his prior statement pursuant to 11 Del. Code §3507. There is a question about whether his prior statement(s) were memorialized and/or support the assertion that he previously identified the Defendant to the police.¹⁸ While the prosecutor initially indicated that he was subject to impeachment pursuant to a §3507 statement, she ultimately declined to present the alleged prior inconsistent statement. Consequently, the jury was left with the unsubstantiated assertion made by the prosecutor.

The assertion that any error was harmless is rejected. The jury was left with the improper assertion implicit in the prosecutor's question to the witness. That assertion unfairly undermined his credibility and likely misled the jury to believe

¹⁸ A60, 61.

that he previously identified the Defendant in the video. Since identification was the core issue in this case, the error affected the ability of the jury to fairly and accurately determine whether Defendant operated the vehicle striking the victim beyond a reasonable doubt. This error requires reversal.

CONCLUSION

WHEREFORE, Defendant asks that the Court grant him all relief to which he may be entitled in this proceeding. Defendant seeks an Order reversing his convictions and ordering a new trial.

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