Washington and Lee Journal of Civil Rights and Social Justice

Volume 12 | Issue 2 Article 14

Spring 3-1-2006

SMITH V. STATE

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Recommended Citation

SMITH V. STATE, 12 Wash. & Lee J. Civ. Rts. & Soc. Just. 359 (2006).
Available at: https://scholarlycommons.law.wlu.edu/crsj/vol12/iss2/14

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SMITH V. STATE, 880 A.2d 288 (Md. 2005)

FACTS

On the evening of May 8, 2002, Christine Crandall, a white female, was approached and threatened at gunpoint by two black men requesting that she relinquish her car keys.[1] Although the alleged perpetrators walked away after Crandall's neighbor called the police, Crandall was able to describe the men to the authorities.[2] The police were unable to locate the two men.[3] When Crandall was brought into the Baltimore City police station for questioning two days later, she did not recognize any of the men in the photo line-ups prepared by the police.[4] Two weeks after the incident, Crandall returned to the police station to examine newly prepared photo arrays, at which time she identified Jason Mack as the man who held the gun and James Smith as the man who tried to take her car keys from her.[5] Based on Crandall's identifications, both men were arrested and charged with attempted armed robbery,[6] first and second degree assault,[7] carrying a handgun and use of a handgun in commission of a crime,[8] and attempted theft.[9]

In pretrial proceedings, the trial judge denied Smith's motion *in limine* requesting that the jury be instructed on cross-racial eyewitness identification,[10] which would allow the parties to raise the issue in opening statements.[11] During direct examination at trial, Crandall stated that at the time of the assault, she was able to observe both men and was able to describe their clothing and other physical features.[12] In addition to her identification testimony, Crandall stated that she was sure these two men

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1 Smith v. State, 880 A.2d 288, 289 (Md. 2005).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*; *see* MD. CODE ANN., Criminal Law § 3-402 (2005) ("A person may not commit or attempt to commit robbery.").

7 *See* MD. CODE ANN., Criminal Law § 3-202 ("(1) A person may not intentionally cause or attempt to cause serious physical injury to another. (2) A person may not commit an assault with a firearm."); *see also id.* at § 3-203 ("A person may not commit an assault.").

8 *See id.* at § 4-203 ("A person may not wear, carry, or transport a handgun, whether concealed or open, on or about the person."); *see also id.* at § 4-204 ("A person may not use an antique firearm capable of being concealed on the person or any handgun in the commission of a crime of violence.").

9 *See id.* at § 7-104 ("A person may not willfully or knowingly obtain or exert unauthorized control over property.").

10 *Smith*, 880 A.2d at 289 n.1.

11 *Id.* at 291.

12 *Id.*

were the defendants because she was "extremely good with faces."[13] On cross-examination, defense counsel did not ask specific questions relating to cross-racial identification.[14] During a recess, the judge denied defense counsel's request to mention the difficulties of cross-racial identification during closing arguments because the defendant had not entered this information as facts in evidence.[15] The judge allowed defense counsel to state the fact that the defendant is black while the victim is white, but both parties declined to do so.[16]

The trial court found Smith guilty of attempted robbery, second degree assault, and attempted theft. A separate sentencing hearing merged the assault and attempted theft convictions.[17] Smith received a six-year prison sentence with all but two years suspended along with three years of probation for the attempted robbery conviction.[18] The Maryland Court of Special Appeals affirmed the judgment, finding that the trial court did not abuse its discretion in declining to give a jury instruction concerning cross-racial identification.[19] In its opinion, the court repeated the trial judge's reasoning that no evidence was presented at trial to show that race played a part in Crandall's identification or that cross-racial identification was an issue.[20] The intermediate appellate court noted that the trial court was correct in prohibiting discussion of cross-racial identification in closing arguments since that was not within the evidence adduced at trial.[21] It mentioned that statements concerning the defendant or victim's race were permissible since these were matters of "common knowledge," and the jury was allowed to draw reasonable inferences from these matters.[22]

HOLDING

In a 4-3 decision, the Maryland Court of Appeals, the highest state court, reversed the defendants' convictions and vacated their sentences,

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[13] *See id.* at 292 (stating that during direct examination, Crandall replied that she was "extremely good with faces" when asked how she was sure that the defendants were the two people that had tried to rob her). The trial transcript further quotes Crandall as saying, "I am a teacher and I watch lay mannerisms . . . I'm obsessed with people's postures and the way you'[re] looking [at] them and seeing what's going on . . . . And so, I think [of] myself [as] very, very good with people. [I] study faces and I have, I look for features on people that make them more distinct." *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 293.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

holding that under the circumstances of this case, the trial judge erred in precluding the defendants from discussing cross-racial identification in closing arguments.[23] Since the court found the trial court and the intermediate appellate court in error on the matter of closing arguments, it did not reach the question of whether the trial judge should have given a jury instruction on cross-racial identification.[24]

ANALYSIS

In evaluating whether the trial judge erred in precluding defense counsel from discussing the difficulties of cross-racial identification in his closing argument, the court mostly relied on scientific research.[25] "Own-race bias" is the tendency for some witnesses to be better able to identify members of their own race while having significant problems trying to identify members of another race.[26] Almost all of the studies concerning this phenomenon have been conducted in a laboratory setting, with results showing that white participants have the greatest identification difficulty with black faces.[27] Only three published field studies have examined the cross-racial effect, and although they seem to support the theory that some witnesses are more likely to misidentify members of other races than their own, the variations in the studies leave inconclusive results.[28]

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23 *Id.*

24 *Id.*

25 *Id.* at 294.

26 *Id.*; *see* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 230 (2001) (discussing that the difficulty of other-race facial recognition relative to own-race facial recognition in eyewitness identification is highly relevant to the criminal justice system).

27 *Smith*, 880 A.2d at 295; *see* P. Barkowitz & John Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12 J. APPLIED SOC. PSYCHOL. 255, 261 (1982) (stating that the own-race effect is strongest when white participants attempt to recognize black faces); *see also* Roy S. Malpass & Jerome Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 330–34 (1969) (reporting that in a laboratory setting, white subjects misidentified black faces two-to-three times more often than they misidentified white faces).

28 *Smith*, 880 A.2d at 296; *see* John C. Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673, 681 (1982) (reporting that when convenience store clerks were later asked to identify customers, black participants had an overall higher accuracy percentage and white participants misidentified black customers 36.3% more than white customers); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972, 977–78 (1988) (reporting that white convenience store clerks correctly identified white customers at a higher rate than both black and Hispanic customers and Hispanic clerks were better able to identify Hispanic customers than white or black customers); Daniel B. Wright, Catherine E. Boyd & Colin G. Tredoux, *Eyewitness Identification: A Field Study of Own-Race Bias in South Africa and England*, 7 PSYCHOL. PUB. POL'Y & L. 119, 119 (2001) (reporting that in South Africa and England, both black and white participants displayed a cross-race effect when attempting to identify photos of individuals whom they had seen in a lineup earlier).

Since the majority of these studies have been conducted in a laboratory setting and the field studies have been rather sterile, researchers disagree on the extent to which own-race bias affects eyewitness identification at an actual crime scene.[29] This disagreement has caused scientists to question whether courts should recognize the difficulties with cross-racial identification in cases where the defendant and witness are of different races.[30] The Maryland Court of Appeals lists six cases from other jurisdictions where courts have allowed jury instructions or closing arguments based on cross-racial identification as evidence that some courts find the evidence of this trend persuasive enough to allow discussion of this phenomenon in the courtroom.[31]

In examining the permissible scope of closing arguments guaranteed through the Sixth Amendment's right to counsel, the court notes that closing arguments can contain any comment on the evidence, inferences that may be drawn from such evidence, attacks on the character or credibility of the witnesses, and reminders of matters of common knowledge.[32] The court relied on the third element in deciding that the trial judge should have allowed comments on cross-racial identification in closing arguments. Crandall's identification of the defendants is the only significant piece of evidence linking the defendants to the crime, and due to Crandall's remarks

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[29] *Smith*, 880 A.2d at 296-97; *see* Siegfried Ludwig Sporer, *The Cross-Race Effect: Beyond Recognition of Faces in the Laboratory*, 7 PSYCHOL. PUB. POL'Y & L. 170, 173 (2001) (discussing how variations in statistical data lead different researchers to different conclusions about the extent to which own-race bias affects identification); Wells & Olson, *supra* note 18, at 230 (stating that the legitimacy of the results of laboratory and field studies as applied to "real-world" situations is a point of contention among researchers).

[30] *Smith*, 880 A.2d at 298; *see, e.g.*, John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207, 215 (2001) (discussing that the denial of a defense request for a special jury instruction regarding the difficulties with cross-racial identification is usually upheld on appeal as within the trial court's discretion unless the identification is the critical issue in the case and the circumstances of the case raise doubts about the reliability of the identification).

[31] *Smith*, 880 A.2d at 298; *see* People v. Carrieri, 777 N.Y.S.2d 627, 629 (N.Y. App. Div. 2004) (permitting a defendant's closing argument on cross-racial identification and stating that the quality of cross-racial witness identification fell within the ambit of jurors' general knowledge and life experience); *see also* State v. Wiggins, 813 A.2d 1056, 1059 (Conn. App. Ct. 2003) (stating that "closing argument may be employed to demonstrate the problems that might arise as a result of cross-racial identification"); State v. Cromedy, 727 A.2d 457, 467–68 (N.J. 1999) (allowing jury instruction on cross-racial identification and stating that there is a "widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race"); People v. Sanders, 905 P.2d 420, 435 (Cal. 1995) (holding that the defendant had not been prejudiced by the trial court's refusal of expert testimony on eyewitness identification because defense counsel had been allowed to argue the problems of cross-racial identification in closing argument); State v. Cunningham, 863 S.W.2d 914, 923 (Mo. Ct. App. 1993) (noting that counsel may discuss the problems with cross-racial identification in closing argument); State v. Patterson, 405 S.E.2d 200, 207 (N.C. Ct. App. 1991) (upholding defendant's conviction based upon eyewitness identification and noting that defense counsel had been allowed to argue the difficulties of cross-racial identification in closing argument).

[32] *Smith*, 880 A.2d at 299; *see* Wilhelm v. State, 326 A.2d 707, 728 (Md. 1974) (discussing the scope of permissible closing argument).

about her enhanced ability to identify faces, the jury might have put more weight on her identification than if she had not qualified her experience.[33] The court states that it "cannot state with certainty that difficulty in cross-racial identification is an established matter of common knowledge," but comments upon the difficulties of such should be allowed here to counter Crandall's self-described enhanced abilities.[34] The trial court erred in not allowing comments on cross-racial identification during closing arguments.[35]

DISSENTING OPINION

Judge Harrell, joined by Judges Wilner and Greene, dissents from the majority because he believes it was within the trial judge's discretion to disallow discussion of cross-racial identification in closing arguments.[36] Judge Harrell agrees that the difficulties associated with cross-racial identification are not common knowledge.[37] However, he does not think that Crandall's supposed enhanced ability to identify faces is related to cross-racial identification to the extent that it could be used to attack her credibility.[38] He also notes that, while inferences can be drawn from the evidence during closing arguments, the defense never admitted evidence about cross-racial identification difficulties during trial.[39]

Furthermore, Judge Harrell examines the cases cited by the majority in a different light.[40] He points out that on the issue of cross-racial identification, some of the cited cases were from other jurisdictions, were unpersuasive, or dealt with the issue peripherally in dicta.[41] Some of the cases go so far as to say that cross-racial eyewitness identification alone is insufficient for cautionary jury instructions.[42]

According to Judge Harrell, arguments concerning cross-racial identification are not necessarily appropriate in every case where the

33 *Smith*, 880 A.2d at 300.
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* at 302.
38 *Id.*
39 *Id.* at 301.
40 *Id.* at 302.
41 *Id.* at 302–03.
42 *Id.*; *see Cunningham*, 863 S.W.2d at 923 (discussing that arguments concerning cross-racial identification difficulties might only be allowed when the evidence has shown the specific impact that such identification has on that case); *Wiggins*, 813 A.2d at 1059 (stating that jury instructions or closing arguments regarding cross-racial identification difficulties are not appropriate in every case to which they could potentially relate); *Cromedy*, 727 A.2d at 467 ("The simple fact pattern of a white victim of a violent crime at the hands of a black assailant would not automatically give rise to the need for a cross-racial identification charge.").

defendant and victim are of different races.[43] He points out that the court seems to grant automatic permission to argue these difficulties, as well as the fact that such a position has not been supported in prior case law.[44] If the court were to keep this rule of inherent suspicion in any cross-racial identification, Judge Harrell believes there would be "severe and limitless implications" that the majority did not contemplate.[45] Judge Harrell's primary concerns are that there is no description of which factors would be relevant, no definition of "races," and no legal analysis of whether the findings of this scientific research is credible enough to be admissible in court.[46]

The court has not properly considered the implications of this decision, and thus the rule set out by the majority is more prejudicial than probative in regards to cross-racial identification evidence.[47] The trial judge did not abuse her discretion by not allowing counsel to discuss cross-racial identification difficulties in closing arguments.[48]

CONCLUSION

The 4-3 decision in *Smith v. State* shows the contentious nature of the use of cross-racial identification in legal proceedings. Because the trend in studies on this issue confirms the difficulties associated with cross-racial identification,[49] the majority's decision to allow discussion of these difficulties is understandable as a policy matter. However, the majority mostly relied on psychological studies and the case law it mentioned does not bear directly on the issue of whether cross-racial identification difficulties are a valid counter-argument to attack a witness's enhanced ability to identify faces.[50] The dissent points out that in a number of the

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43 *Smith*, 880 A.2d at 304.

44 *Id.*

45 *Id.*

46 *Id.* at 304–05. The court suggests a *Frye-Reed* or *Daubert* analysis before the results of this psychological research is allowed in court. *Id.* In *Frye v. United States*, the court announced that in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court decided that in regards to expert testimony, a trial judge must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592–93 (1993).

47 *Smith*, 880 A.2d at 305.

48 *Id.* at 306.

49 *See supra* text accompanying note 27; *see also supra* text accompanying note 28.

50 *See generally Smith*, 880 A.2d at 298; *see also* FED. R. EVID. 608 (stating that a witness's credibility can be attacked during direct examination by opinion and reputation testimony and during cross examination by testimony concerning specific instances of conduct).

cases cited by the majority, the various courts state that the trial judge has discretion to decide whether cross-racial identification difficulties can be mentioned at trial because the veracity of these difficulties has not been sufficiently proven.[51] If the dissent's application of these cases is correct, the trial judge's belief that these difficulties should not be argued was within her discretion given the jury confusion that could result from trying to weigh this information with the totality of the evidence.[52]

The court justifies the discussion of difficulties with cross-racial identification in closing arguments by limiting its approval to the certain circumstance when the witness qualifies her identification abilities.[53] It is this qualification that gives the defense the opportunity to counter her abilities via discussion of cross-racial identification difficulties.[54] In *People v. McDonald*,[55] the prosecution relied heavily on eyewitness identification in its case against the defendant, just as the prosecution had in *Smith*.[56] However, the California Supreme Court did not even go so far as *Smith*'s qualification threshold in holding that cross-racial identification testimony is allowed when eyewitness identification is so crucial to the prosecution's case that it will weigh heavily in the jury's deliberations.[57] In this situation, it is an abuse of the trial judge's discretion not to allow the defendant's expert to comment on this identification.[58] The exclusion of testimony attacking the accuracy of the eyewitness identifications "undercut[s] the evidentiary basis of defendant's main line of defense" and "deprive[s] the jurors of information that could have assisted them in resolving that crucial issue."[59] Crandall's identification of the defendants was similarly vital to the prosecution's case in *Smith v. State*, and precluding the defense from commenting on such, especially given her qualification of her identification abilities, constituted an abuse of discretion.

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[51] *See Smith*, 880 A.2d at 303 (discussing how dialogue concerning cross-racial identification difficulties is not always appropriate and the trial judge is the final decision-maker about whether any topic or piece of evidence will be proper for the jury consideration).

[52] *Id.* at 304.

[53] *Id.* at 300.

[54] *Id.*

[55] People v. McDonald, 37 Cal. 3d 351 (1984). In *McDonald*, the California Supreme Court considered if the trial judge abused his discretion in excluding expert witness testimony concerning various psychological factors affecting the accuracy of eyewitness testimony. *Id.* at 355. In *McDonald*, a capital case, the prosecution's only evidence was the identifications of seven eyewitnesses, all of different races than the defendant. *Id.* The trial judge excluded a psychologist's expert testimony on problems with cross-racial eyewitness identification because it would confuse the jury and would be a personal attack on the individual witnesses. *Id.* at 362–63. The *McDonald* Court found this exclusion to be an abuse of discretion, as the testimony presented essential information which may have been necessary for the triers of fact to determine the reliability of the seven eyewitnesses. *Id.* at 366–70.

[56] *Id.* at 355.

[57] *Id.* at 375–76.

[58] *Id.*

[59] *Id.* at 376.

Due to the developing evidentiary difficulties with eyewitness identification, not all courts agree on the pervasive acceptance of cross-racial identification evidence as set out in *People v. McDonald*.[60] Some courts claim that *McDonald*'s rule has not been widely followed, while others insist that the trial judge's discretion will rarely be found an abuse as long as she considers the totality of the circumstances.[61] As recently as 2002, the Supreme Court of New York County held that expert psychological testimony regarding different aspects of eyewitness identification was inadmissible because the relevant information was not generally accepted in the relevant psychological community.[62] Conversely, the Utah Supreme Court has gone so far as to declare eyewitness identification suspect in all circumstances, making it a subject always appropriate for cautionary jury instructions.[63]

Nation-wide disagreement on how to treat cross-racial eyewitness identification evidence supports the dissent's conclusion that the trial judge could not have abused her discretion no matter how she ruled. However, the specific circumstances of this case demand that the majority's rule be exercised. Crandall's allegedly enhanced identification is the prosecution's critical piece of evidence, and the defendant must have the best opportunity to rebut that identification.[64] The ruling of the Maryland Court of Appeals

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[60] *See* State v. Lawhorn, 762 S.W.2d 820, 822–23 (Mo. 1988) (holding that expert testimony regarding difficulties associated with cross-racial identification is inadmissible because it is within the common experience of the jurors and would only divert the jury's attention from relevant issues). The *Lawhorn* Court disregards *McDonald* but states its rule that "where (1) identification is a key element of the prosecution's evidence, (2) the guilt of the accused is not substantially corroborated by other evidence, and (3) the evidence by a qualified expert would supply information not likely to be known to the jury," it is an abuse of the trial court's discretion not to admit such evidence. *Id.*; *see also* People v. Beaver, 725 P.2d 96, 99–100 (Colo. Ct. App. 1986) (holding that the trial court properly excluded expert testimony and jury instructions concerning reliability of cross-racial eyewitness identification because the testimony would not have aided the jury in resolution of the ultimate issue and the jury instructions did not affect a substantial right).

[61] *See* Lawhorn, 762 S.W.2d at 822 ("*McDonald* [has not] been widely followed"); State v. Stilling, 770 P.2d 137, 143 (Utah 1989) (discussing that in the past, trial judges had complete discretion to give cautionary jury instructions under the totality of the circumstances, and the judge's decision was seldom declared an abuse of discretion on appeal).

[62] *See* People v. LeGrand, 747 N.Y.S.2d 733, 744–51 (N.Y. Sup. Ct. 2002) (discussing how a *Frye* analysis led the court to conclude that none of the phenomena to which the expert would testify had received general acceptance in the psychological community).

[63] *See* State v. Long, 721 P.2d 483, 492 (Utah 1986) (holding that trial courts must give cautionary jury instructions whenever eyewitness identification is a central issue in the case and such an instruction is requested by the defense because of the great weight jurors give to eyewitness testimony and the unknown flaws of such).

[64] *See McDonald*, 37 Cal. 3d at 377 (holding that when an eyewitness identification is a key element of the prosecution's case and the defendant offers testimony on psychological factors outside jurors' common experience affecting the accuracy of the identification, "it will ordinarily be error to exclude that testimony"); *Long*, 721 P.2d at 492 ("A proper instruction should sensitize the jury to the factors that empirical research have shown to be of importance in determining the accuracy of eyewitness identifications, especially those that laypersons most likely would not appreciate.").

will be upheld because the excluded cross-racial identification information is vital for the defendant to present his best defense and successfully refute the prosecution's strongest evidence.

Summary and Analysis Prepared By:
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