SCV: Submitted on 06-17-2019 17:42:21 EDT for filing on 06-17-2019

IN THE

Supreme Court of Virginia

RECORD No. 181569

TIMOTHY JOSAAHN WATSON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF PROCEEDINGS

Timothy Josaahn Watson, hereafter referred to as "Appellant", was brought before the Virginia Beach Circuit Court on the following indictments: one (1) count of 1st Degree Murder of Paul Abbey, in violation of Va. Code § 18.2-32, one (1) count of Conspiracy to Commit a Felony, in violation of Va. Code § 18.2-22, two (2) counts of Robbery with Firearm of Paul Abbey and Joseph Jackson, in violation of Va. Code § 18.2-58, and two (2) counts of Use of a Firearm in the Commission of a Felony, in violation of Va. Code § 18.2-53.1. The offenses were alleged to have occurred in the City of Virginia Beach on May 30, 2015.

On June 10th, 2016 the Hon. H. Thomas Padrick granted Appellant's motion for expert funding to retain the services of Dr. Brian Cutler, Ph.D. on the subject of memory and eyewitness identification evidence. Appendix at 46. On October 26th, 2016, the Hon. James C. Lewis granted Appellant's request for further funding for Dr. Cutler's appearance and testimony at trial. App. at 95.

On March 21, 2017, a jury trial commenced before the Honorable James C. Lewis. After presentation of the Commonwealth case, Appellant made a motion to strike, App. at 1619-22, and renewed it again at the conclusion of all evidence. Id. at 1741-1742. The court denied both

motions. Id. at 1622, 1742.

On March 27, 2017, the jury found Appellant guilty of all charges and, on March 28, 2017 recommended a sentence of: Life imprisonment on the charge of 1st Degree Murder, ten (10) years on the charge of Conspiracy to Commit a Felony, a combined term of thirty-five (35) years on the two (2) counts of Robbery with Firearm, and a combined term of eight (8) years on the two (2) counts of Use of Firearm in the Commission of a Felony. The Court ordered the preparation of a long form pre-sentence report and continued further proceedings.

On August 2, 2017, Judge Lewis sentenced Appellant in accordance with the jury's recommendation to life plus fifty-three (53) years in the Virginia Department of Corrections. The Court suspended none of that sentence. App. at 157. Appellant timely filed his notice of appeal.

By per curiam order, Appellant's petition was denied on September 4th, 2018. App. at 167-88. A request for consideration by three judge panel was filed on September 17th, 2018 and denied on November 1st, 2018. Id. at 189. Appellant timely filed Notice of Appeal to this Court.

By order dated May 9th, 2019, this Court granted Appellant's petition for appeal with respect to Assignments of Error II and III and denied it with respect to Assignments of Error I and IV.

ASSIGNMENTS OF ERROR[1]

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S EXCLUSION OF APPELLANT'S PROFFERED EXPERT TESTIMONY BECAUSE THAT EVIDENCE WAS ADMISSIBLE EXPERT TESTIMONY AND CRUCIAL TO APPELLANT'S DEFENSE.
(Preserved at App. at 1289, 1295-1311, 167-88)

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF APPELLANT'S PROFFERED JURY INSTRUCTION REGARDING EYEWITNESS IDENTIFICATION TESTIMONY BECAUSE THE INSTRUCTION WAS AN ACCURATE STATEMENT OF LAW AND SUPPORTED BY AMPLE EVIDENCE.
(Preserved at App. at 1734-1739, 129-30, 167-88)

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[1] This Court granted review of Appellant's Assignments of Error II and III, and denied review of Assignments of Error I and IV. Accordingly, Appellant retains the original numbering in this brief to maintain consistency.

STATEMENT OF FACTS

Joseph Jackson testified that, on the evening of May 29th, 2017, he and decedent Paul Abbey went out to celebrate Jackson's birthday at Cheetah's Gentlemen's Club. App. at 655. When they arrived at the bar, Jackson and Abbey were approached by four unfamiliar individuals, later identified as Appellant, Raiquan Turner, Keith Mitchell, and Ericka Phillips, who arrived in a gray Ford Fusion. Abbey briefly spoke with Turner and Appellant, and then the four individuals went into the bar. Jackson and Abbey entered shortly afterwards. Id. at 655-65.

Jackson testified that, once inside the bar, he clearly saw the four individuals several times, but didn't have any further verbal contact with them. App. at 667. Appellant and Phillips left together, followed by Mitchell, and finally Turner. Jackson and Abbey left Cheetah's about fifteen minutes later. Id. at 667-672.

Jackson testified that, while walking to his vehicle, he was robbed by Turner at gunpoint. App. at 673. Turner fired a shot that grazed Jackson's head and Jackson went down to the ground. Turner then went through Jackson's pockets. Id. at 675-677.

When he was on the ground, Jackson heard a second shot, and looked over and saw Abbey on the ground. App. at 677. He saw two

individuals going through Abbey's pockets. Jackson couldn't see the faces of the two individuals because they were backlit, but he said he could identify them based on their clothing and stature. Id. at 677-78.

After the individuals went through Abbey's pockets, they ran off through a field and got into the same car he had seen the four individuals get out of earlier. App. at 680-81. Abbey died of a gunshot wound to the neck. Id. at 1392.

Jackson spoke with VBPD Detectives Roys and Kellogg the night of the incident. He gave a description of events to Roys and viewed surveillance video with Kellogg. App. at 686-90. He told Kellogg that Appellant was the shooter. Id. at 803-04. On June 8th or 9th, 2016, Jackson was shown a photo lineup by Detective Allen and failed to identify Appellant. Id. at 741, 750-51.

On cross-examination, Jackson testified that the incident was the most stressful situation he had ever experienced, that he was "kind of in shock" and dazed when he observed the second assailant. App. at 769. Further, he also admitted that he didn't see either Turner or Watson wearing the same clothing earlier in the evening as the assailants. Id. at 789-90.

Regarding his interview with Roys, Jackson conceded that he

incorrectly identified Appellant as the shooter, said there were three shots instead of two, only described a single assailant, and never mentioned being grazed in the head. App. at 803-04, 807-09.

On March 23, 2017, Keith Mitchell testified as a Commonwealth witness. He stated that he was with Appellant, Turner, and Phillips at Cheetah's, and that Appellant and Erica Phillips left the bar before Turner and him. App at 986-90. Appellant and Turner discussed needing money and Appellant handed a gun to Turner and told Mitchell to move the car. Mitchell got in the car and drove it to a lot adjacent to Cheetah's. He heard two gunshots and saw Turner, with the gun, and Appellant approaching the car. Appellant sat in the back seat and Mitchell drove off. Id. at 994-1000.

In the defense case, Appellant sought to introduce expert testimony from Dr. Brian Cutler, PhD., on the subject of eyewitness identification testimony. The Commonwealth objected to this testimony, and the trial court conducted a hearing outside the presence of the jury, during which it heard Cutler's proposed testimony. App. at 1255-1287. At the conclusion of this hearing, the trial court permitted testimony on exposure time, stress, weapon focus, and multiple perpetrators only; and specifically excluded testimony on unconscious transference, photo lineups, exposure time, and eyewitness confidence. Id. at 1305.

The defense also called Curtis Williams as a witness. Williams testified that, on the night of the incident, he was living in an apartment attached to Cheetah's and heard two gunshots outside his apartment. App. at 1675-77. After hearing the gunshots, Williams looked out the apartment window and saw one male standing and two people on the ground. The male he saw standing had darker skin and was taller than Appellant, with curly shoulder-length hair. Williams saw the male go through the pockets of both people on the ground, and then run across a field toward a vehicle. Id. at 1678-1687.

After the close of evidence, Appellant proffered a jury instruction on the subject of eyewitness identification testimony. App. at 1734. Defense counsel argued that the instruction was a proper statement of the law, in that it was taken from the Model Jury Instructions, and was also supported by the evidence. Id. at 1734-38. Without explanation, the trial court refused the instruction, marking it as Defense B - Refused. Id. at 1738. Appellant noted his objection. Id. at 1739

After the close of evidence, defense counsel renewed the motion to strike, which the trial court denied. App. at 1741. After closing arguments, the jury found Appellant guilty of all charges and recommended a combined active sentence of Life plus fifty three years. The matter was continued for

sentencing and the preparation of a presentence report. Id. at 154-55.

On August 2, 2017, Judge Lewis sentenced Appellant in accordance with the jury's recommendation to incarceration for Life plus fifty-three (53) years in the Virginia Department of Corrections. The Court suspended none of that sentence. App. at 157.

ARGUMENT

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S EXCLUSION OF APPELLANT'S PROFFERED EXPERT TESTIMONY BECAUSE THAT EVIDENCE WAS ADMISSIBLE EXPERT TESTIMONY AND CRUCIAL TO APPELLANT'S DEFENSE.
(Preserved at App. at 1289, 1295-1311, 167-88)

A. Standard of Review

The admissibility of expert testimony is within the sound discretion of the trial court, and that court's decision will not be disturbed absent an abuse of discretion. Pelletier v. Commonwealth, 42 Va. App. 406, 418, 592 S.E.2d 382, 388 (2004).

B. Argument

Unconscious Transference

The trial court erred in excluding testimony on unconscious transference because that evidence was proper expert testimony and crucial to Appellant's ability to confront his accusers. "It is well settled in Virginia that the opinion of an expert witness is admissible where the jury . . . is confronted with issues that cannot be determined intelligently merely from the deductions made and inferences drawn on the basis of ordinary knowledge, common sense, and practical experience." Pelletier, 42 Va. App. at 418, S.E.2d at 388 (citations omitted). As an initial matter, Virginia

courts have consistently commented that transference is an area where expert testimony may be particularly helpful, and thus admissible. See, e.g., Currie v. Commonwealth, 30 Va. App. 58, 65, 515 S.E.2d 335, 338 (1999); Payne v. Commonwealth, 65 Va. App. 194, 222, 776 S.E.2d 442, 455 n.22 (2015); Rodriguez v. Commonwealth, 20 Va. App. 122, 455 S.E.2d 724, 727 (1995).

Dr. Cutler testified during the admissibility hearing that transference means a witness "mistaking the familiar person for the perpetrator." App. at 1263. Dr. Cutler stated that there are several factors that make transference more likely to occur, especially where the witness has a "good look at the familiar person to begin with" but then doesn't "get a good look at the perpetrator" for some reason. Id. at 1263-64. Crucially, transference can occur at "any opportunity . . . or any time a witness mistakenly identifies a familiar person for a perpetrator or for another person" and not merely during a lineup process. Id. at 1283. Cutler further testified that transference could occur even before a lineup takes place. Id.

As argued during the hearing, this case presents the exact circumstances in which transference was most likely to occur, and the court therefore erred in prohibiting the jury from hearing evidence on that subject. First, Jackson had a considerable opportunity to view Appellant prior to the

incident. He testified that he first saw Appellant, with the gunman Turner, before going into the club. App. at 662-64. Jackson also saw Appellant clearly once he was inside of the club. He testified that Appellant walked "right in front of me" within "one to two feet" and then sat away from him "about ten feet at the most". Id. at 668. Jackson could clearly see the faces of the group at that point and was able to describe the clothes everyone was wearing. Id. at 668-69. Jackson could also specifically recall Appellant leaving with the female some time before Turner and Mitchell. Id. at 670.

On the other hand, Jackson had a poor opportunity to view the perpetrators during the incident. While walking out of the club, Jackson looked up and suddenly saw Turner standing in front of him pointing a gun at his face. App. at 766-67. Jackson conceded that the incident was the most stressful situation in which he'd ever been, that he had suffered a head injury, was "kind of in shock", and was dazed when he observed the second perpetrator while lying on the ground. Id. at 769. Further, the perpetrators were backlit by a light source some "fifteen, twenty feet" away. Id. at 788-89. Crucially, Jackson specifically testified that he "wasn't able to see their faces" and only was identifying them based on clothing and stature. Id. at 789. However, Jackson conceded on cross examination that Turner was wearing different clothing from earlier in the night and that the

second assailant was not wearing a hat, even though Appellant had been wearing a hat the entire time Jackson had previously seen him. Id. at 790.

Thus, the very circumstances likely giving rise to unconscious transference were amply present in this case. Jackson had a considerable opportunity to view Appellant prior to the incident and a poor opportunity to view the perpetrators during the incident. Further, he also previously saw Appellant with Turner, the conceded gunman, which may have increased the likelihood that he would identify Appellant as guilty by association. Finally, he admittedly viewed the perpetrators under conditions so poor that he could not even see their faces.[2]

Simply put, the evidence gave rise to a strong possibility that transference had occurred, and the jury was entitled to be informed regarding that phenomenon. Further, the possibility of transference was a critical issue in the case, and exclusion of testimony on that subject prevented Appellant from fully presenting his defense.

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[2] Finally, it is of no moment that Dr. Cutler did not seek to testify that transference occurred in this case. Appellant did not intend to introduce such a line of questioning, as that testimony would have likely been an impermissible comment upon the evidence and therefore beyond the scope of expert testimony. See Va. S.Ct. R. of Evid. 2:702(b) ("Testimony that is speculative, or which opines on the credibility of another witness, is not admissible."). Cutler's purpose was merely to inform the jury on particular factors affecting eyewitness identification.

Without Cutler's testimony on this point, defense counsel was unable to adequately protect Appellant from mistaken identification evidence. Specifically, the jury was not presented with any evidence on the phenomenon of transference, a subject Virginia courts have recognized is beyond the knowledge of ordinary persons and, therefore, permissible expert testimony. See, e.g., Currie, Payne, Rodriguez, supra. As a result, Appellant was unable to present a full defense and to truly confront Jackson's testimony. Therefore, the court committed reversible error by precluding the defense from presenting testimony on that subject.

Confidence Statements

The trial court also erred by preventing Cutler from testifying on the subject of eyewitness confidence because that was also a proper subject for expert testimony and was crucial to Appellant's case. Although the trial court opined that the proffered testimony regarding witness confidence was "common sense", App. at 1304, numerous scientific studies and court opinions reveal that understanding the "complex relation" between confidence and accuracy is anything but common knowledge. Scientific studies have consistently shown that, even under optimal circumstances, there is at best only a moderate association between expressed confidence

in an identification and the accuracy of that identification.[3] However, it is commonly believed that people who are highly confident in an identification are likely to be correct. See e.g., State v. Lawson, 352 Ore. 724, 745 (2012) ("Witness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors."). Indeed, confidence in an identification is one of the factors courts specifically consider under the Braithwaite framework. See Manson v. Braithwaite, 432 U.S. 98, 115 (1977).

In spite of that existing legal framework, courts nationwide, at both the state and federal level, have consistently recognized that "witness confidence or certainty is not a good indicator of identification accuracy." Lawson, 352 Ore. at 745; see also State v. Guilbert, 306 Conn. 218, 238-39 (2012); People v. Sanchez, 63 Cal. 4th 411 (2012); Commonwealth v. Johnson, 473 Mass. 594 (2016); United States v. Bartlett, 567 F.3d 901, 906 (7th Cir.2009) (confidence-accuracy relationship and memory decay); United States v. Brownlee, 454 F.3d 131, 142-44 (3d Cir.2006) ("inherent unreliability" of eyewitness identifications and accuracy-confidence relationship); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208, 1220-22

[3] Sporer, et al., Choosing, *Confidence And Accuracy: A Meta-Analysis Of The Confidence-Accuracy Relation In Eyewitness Identification Studies*, 118 Psychological Bulletin 315-27 (1995).

(1983) (memory decay, stress, feedback, and confidence-accuracy); People v. LeGrand, 8 N.Y.3d 449, 867 N.E.2d 374, 380, 835 N.Y.S.2d 523 (2007)) (confidence-accuracy relationship, feedback, and confidence malleability).

In light of the vast scientific evidence of the low probative value of confidence statements and, particularly, their misunderstood relation to accuracy, the trial court erred by excluding such evidence as "common sense". Again, without that testimony, defense counsel was unable to adequately confront Jackson's expressions of confidence and to explain the true nature of that evidence.

Post-Identification Misleading Information and Confidence Inflation

Within the ambit of confidence statements, the trial court specifically erred when it precluded testimony on the effect of post-identification misleading information and confidence inflation because those were particularly salient factors influencing Jackson's confidence in this case. "Post-identification confirming feedback tends to falsely inflate witnesses' confidence in the accuracy of their identifications, as well as their recollections concerning the quality of their opportunity to view a perpetrator and an event." Lawson, 352 Ore. at 743; see also Guilbert, 306

Conn. at 238-39; Young v. State, 374 P.3d 395 (Alas. 2016); Sanchez, 63 Cal. 4th 411; State v. Almaraz, 154 Idaho 584 (2013); Commonwealth v. Johnson, 473 Mass. 594 (2016); United States v. Greene, 704 F.3d 298 (2013). "[T]he danger of confirming feedback lies in its potential to increase the appearance of reliability without increasing reliability itself." Lawson, 352 Ore. at 743. For example, a witness viewing a suspect in court, in a jumpsuit and shackles, or learning that the suspect he identified has been charged would be information that could inflate confidence. App. at 1267-70. This type of validating information can lead to confidence inflation. Id.

Confidence inflation occurred in this case. Jackson stated at trial and at the preliminary hearing that he was 100% confident in his identification and estimated that he had been 85% certain during the lineup. App. at 797. However, Jackson was exposed to a large amount of post-identification confirming information between those events. He viewed Appellant in court on numerous occasions prior to trial, usually in prison garb and in shackles. He was aware the prosecution believed Appellant was the perpetrator, as he viewed Appellant during his preliminary hearings, pretrial motions, and by picture during the trial of Appellant's co-defendant, Turner. Id. at 1302-04. All of these subsequent viewings were highly likely to inflate Jackson's confidence in his earlier identification of Appellant. However, without

expert testimony on the subject, the defense was left with no meaningful way to adequately confront that evidence, and the jury was therefore ill-informed about the potential effects these circumstances could have had on Jackson's subjective expressions of confidence. The trial court's exclusion of admissible testimony on crucial aspects affecting eyewitness testimony significantly hampered Appellant's ability to confront the Commonwealth's evidence and to present a full defense to the charges and was therefore an abuse of discretion.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF APPELLANT'S PROFFERED JURY INSTRUCTION REGARDING EYEWITNESS IDENTIFICATION TESTIMONY BECAUSE THE INSTRUCTION WAS AN ACCURATE STATEMENT OF LAW AND SUPPORTED BY AMPLE EVIDENCE. (Preserved at App at 1734-1739, 129-30, 167-88)

A. Standard of Review

"As a general rule, the matter of granting and denying instructions . . . rest[s] in the sound discretion of the trial court." Cooper v. Commonwealth, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009). When reviewing a trial court's refusal to give a proffered jury instruction, an appellate court should view the evidence in the light most favorable to the proponent of the instruction. Commonwealth v. Vaughn, 263 Va. 31, 33, 557 S.E.2d 220, 221 (2002). "If a proffered instruction finds any support in credible

evidence, its refusal is reversible error." McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975).

B. Argument

In general, where the evidence warrants, an accused is entitled to an instruction presenting his theory of defense. See Martin v. Commonwealth, 218 Va. 4, 6, 235 S.E.2d 304, 306 (1977). Indeed, "if a proffered instruction finds any support in credible evidence, its refusal is reversible error." McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290, 293 (1975).

In essence,

> where the conflicting evidence tends to sustain either party's theory of the case, the trial judge *must* instruct the jury as to both theories. Phrased differently, if there is evidence in the record to support the defendant's theory of defense, the trial judge *may not refuse to grant a proper, proffered instruction*.

King v. Commonwealth, 64 Va. App. 580, 590-91, 770 S.E.2d 214, 219-20 (2015) (citations omitted) (emphasis in original). See also Martin v. Commonwealth, 218 Va. 4, 6, 235 S.E.2d 304, 306 (error to refuse instruction on accidental killing); McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290, 293 (error to refuse instruction on voluntary manslaughter).

At trial, Appellant proffered an instruction specifically dealing with eyewitness identifications, a crucial aspect of the defense. The instruction was an accurate statement of law in that it was drafted by the Model Jury Instruction Committee, with the most recent appellate case, Payne v. Commonwealth, 292 Va. 855, 794 S.E.2d 577 (2016), specifically in mind. Tr. at 1337-40. See Virginia Model Jury Instruction No. 2.800 – Note on Eyewitness Identifications. Indeed, the Payne Court specifically contemplated an instruction such as the one proffered here, one that merely mentioned factors to consider, and did not elevate any particular factors above all others. The instruction here expressly noted three times that the jury could consider "any other circumstances [the jury] believe[s] are important", and that the instruction was not intended to direct the jury to give more or less weight to the eyewitness identification evidence. As such, the instruction correctly stated the law in Virginia.

The instruction was also amply supported by the evidence in the case. The eyewitness testimony of Jackson was a crucial issue, and the instruction specifically addressed numerous aspects of that testimony, namely: suboptimal viewing conditions, poor lighting, extreme stress and fear, injury, intoxication, prior misidentifications and failed lineups, transference, subsequently viewing Appellant under suggestive conditions,

and confidence inflation. App. at 798-800. Because the instruction correctly stated the law and addressed issues raised by the evidence, and moreover was crucial to the defense theory of the case, the trial court erred in not giving the instruction, and the Court of Appeals erred in affirming that ruling.

CONCLUSION

For the reasons argued herein, Appellant respectfully requests that this Honorable Court find that the previous courts erred in the rulings described above, reverse his convictions for First Degree Murder, two counts of Robbery, and two counts of Use of a Firearm in Commission of a Felony, and order a new trial.

Respectfully Submitted,

Roger A. Whitus /s/_____
By Counsel
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CERTIFICATE

I hereby certify that Appellant's name is Timothy Josaahn Watson, and counsel for Appellant is Roger A. Whitus, VSB # 88096, Assistant Public Defenders, 2425 George Mason Drive, Post Office Box 6160, Virginia Beach, Virginia 23456, (757) 427-6050, email: rwhitus@vir.idc.virginia.gov; that the Appellee is the Commonwealth of Virginia and that counsel for the Appellee is Virginia Theisen, Senior Assistant Attorney General, Office of the Attorney General, 202 N. Ninth Street, Richmond, VA 23219, (804) 786-4775.

Counsel for the Appellant certifies that the word count for this Opening Brief exclusive of cover page, tables, and certificate is 3,756 words and 20 pages.

In compliance with Rule 5:26, I hereby certify that on June 17th, 2019, the correct number of true and accurate copies of this Opening Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the appellee: Virginia B. Theisen, Senior Assistant Attorney General, Office of the Attorney General, email: oagcriminallitigation@oag.state.va.us.

Counsel was appointed to represent the Appellant by the Circuit Court of the City of Virginia Beach.

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