SJC-12284

JAHMAL BRANGAN vs. COMMONWEALTH.

Suffolk. September 7, 2017. - November 14, 2017.

Present: Gants, C.J., Gaziano, Budd, Cypher, & Kafker, JJ.

Practice, Criminal, Double jeopardy, Indictment, Conduct of prosecutor, Argument by prosecutor. Robbery.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on December 19, 2016.

The case was considered by Lowy, J.

Merritt Schnipper for the defendant.
Amal Bala, Assistant District Attorney, for the Commonwealth.

CYPHER, J. The petitioner, Jahmal Brangan, appeals from the denial, by a single justice of the county court, of his petition for relief from the denial of his motion to dismiss the indictment against him for armed robbery while masked by the trial judge, after the Commonwealth's closing argument led to a mistrial. Brangan argues that principles of double jeopardy

forbid his retrial because the Commonwealth did not present sufficient evidence to sustain a guilty finding or, alternatively, the prosecutor's misconduct was so egregious that it warranted a dismissal of the indictment. We affirm the decision of the single justice.

Background. The following facts are taken from Commonwealth v. Brangan, 475 Mass. 143 (2016), and from the trial record.[1]

In January, 2014, a bank in Springfield was robbed. The robber entered the bank with his face obscured by a hat and sunglasses. He was wearing gloves. His nose and his cheeks were nonetheless visible. He approached a teller's window, but that window was closed so the teller asked him to move to another teller window. He then approached a second teller window and handed a note to that teller. The note stated that the robber had a weapon and demanded all of the teller's cash. The teller complied and gave the robber an envelope with less than $1,000 in cash. The robber fled, and the police arrived shortly thereafter. The police processed the note for

[1] The Commonwealth appealed from the trial judge's order granting Jahmal Brangan's motion for a mistrial in Commonwealth v. Brangan, 475 Mass. 143 (2016). We held that the Commonwealth had no right to appeal because an order granting a mistrial is generally not appealable. Id. at 144. Brangan also obtained our review of the trial judge's order setting his bail in Brangan v. Commonwealth, 477 Mass. 691, 693 (2017), but that case is not relevant to this appeal.

fingerprints within hours of the crime. On the note, the police found Brangan's thumbprint. They also found a right palm print that was unusable for determining a match. Brangan was arrested.

At trial, both bank tellers testified about the robber's appearance. The tellers each described her recollection of the robber's race, skin tone, and nose shape and size. One teller described the robber as having acne scars on his cheeks. The Commonwealth also played a surveillance video recording of the robbery.

A police officer testified about the fingerprint testing on the note. The officer explained that the powder used to discover the thumbprint can only uncover recent fingerprints, allowing the inference that Brangan touched the note recently, but the officer could not provide a more specific timeline. The officer also opined that, because of the position of the right palm print, the author of the note was likely left-handed. The prosecutor, during the Commonwealth's closing argument, stated: "[I]t would be impossible to write the note right-handed and put that mark on the note. Left-handed, someone holding the paper [sic]. You've got to watch . . . Brangan the whole trial take his notes left-handed." Brangan objected because no evidence about his alleged left-handedness was introduced during trial, and he moved for a mistrial. The trial judge issued a curative

instruction and took Brangan's motion for a mistrial under advisement. After the jury returned a guilty verdict, the judge granted Brangan's motion for a mistrial but did not dismiss the indictment, allowing the Commonwealth to move to retry him.

Discussion. Common-law double jeopardy prohibits the Commonwealth from prosecuting a defendant again for the same crime. Marshall v. Commonwealth, 463 Mass. 529, 534 (2012). However, "[d]ouble jeopardy concepts do not bar second trials in all instances." Thames v. Commonwealth, 365 Mass. 477, 479 (1974). After a mistrial, the Commonwealth may retry a defendant if it has presented evidence at the first trial that, if viewed in the light most favorable to the Commonwealth, would be sufficient for a rational trier of fact to find the defendant guilty of the crime charged beyond a reasonable doubt. Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). If the evidence was sufficient to support a finding of guilt, the defendant still may not be retried if the prosecutor's misconduct in the first trial was so egregious that a dismissal with prejudice is warranted to discourage further misconduct of the same kind. Commonwealth v. Durand, 475 Mass. 657, 672-673 (2016), cert. denied, S. Ct. (2017), quoting Commonwealth v. Merry, 453 Mass. 653, 666 (2009).

We conclude that the evidence the Commonwealth presented in the first trial was legally sufficient to support a guilty

finding and the alleged prosecutor's misconduct in closing argument was not sufficiently problematic to warrant a dismissal of the indictment.

1. Sufficiency of the evidence in Brangan's first trial. Where a first trial ends in a mistrial, "the defendant is entitled to a review of the legal sufficiency of the evidence before another trial takes place." Berry v. Commonwealth, 393 Mass. 793, 798 (1985). Accordingly, "[w]e must review the evidence, together with permissible inferences therefrom, in the light most favorable to the Commonwealth, and then decide whether a rational trier of fact could have found each essential element of the crimes charged beyond a reasonable doubt" (citation and quotations omitted). Corson v. Commonwealth, 428 Mass. 193, 196–197 (1998). "Questions of credibility are to be resolved in the Commonwealth's favor, and circumstantial evidence is sufficient to establish guilt beyond a reasonable doubt." Commonwealth v. Miranda, 458 Mass. 100, 113 (2010), cert. denied, 565 U.S. 1013 (2011). Brangan contends that the eyewitness testimony adds no evidentiary weight and, therefore, the testimony about his thumbprint on the robbery note is insufficient alone to support a finding of guilt. He relies heavily on our decision in Commonwealth v. Morris, 422 Mass. 254, 257 (1996), in which we stated that where "the only identification evidence is the defendant's fingerprint at the

crime scene, the prosecution must prove beyond a reasonable doubt that the fingerprint was placed there during the crime." The facts of Morris are distinguishable.

In Morris, the defendant's fingerprint was found on a mask worn by one of five participants in a homicide and left at the scene of the crime. Id. at 256. The Commonwealth sought to prove that the defendant was connected to his alleged coconspirators and the homicide by introducing evidence that the suspects telephoned the defendant's home, including one suspect who did so while being booked for the homicide, and that one of the suspect's vehicles was stopped after the homicide a few blocks from the defendant's home. Id. at 258-259. However, this association also provided a clear alternative explanation for the defendant's fingerprint being on the mask found at the crime scene: the defendant had touched the mask at some point in his dealings with the other suspects, other than during the homicide. Id. at 259. The Commonwealth thus had to prove that the defendant's fingerprint was left on the mask because he was wearing it during the crime. Id. at 257-258. The Commonwealth offered two witnesses to try to place the defendant at the scene of the crime. Id. at 255-256. However, each witness introduced more doubt and no affirmative evidence that linked the defendant

to the crime scene.[2] We concluded that there was insufficient evidence for a jury to conclude beyond a reasonable doubt that the defendant was at the scene. Id. at 259-260.

Moreover, we do not agree with Brangan that Commonwealth v. Joyner, 467 Mass. 176 (2014), demonstrates the weakness of the Commonwealth's evidence in this case. In Joyner, a masked intruder robbed a gasoline station. Id. at 177-178. Although the witness could not identify the robber, evidence that the defendant's fingerprint was found on the station's cash drawer was introduced at trial. Id. at 179. The Commonwealth proved that the defendant could not have touched the cash drawer at any time other than during the robbery. Id. Surveillance videotape of the crime showed the robber touching the cash drawer with his bare hand. Id. at 178. The defendant's fingerprints were found in the area depicted in the surveillance videotape. Id. Further, the store owner testified that the defendant had never

[2] The only witness to the homicide itself said that the masked killer may have been the defendant or may have been another man, whom the witness also knew. Commonwealth v. Morris, 422 Mass. 254, 258 (1996). A witness to the flight of the alleged killers from the crime scene described two vehicles fleeing the scene. Id. at 255. The description of one of the vehicles could have been found to be similar to a vehicle owned by the defendant's mother. Id. at 256. However, the witness testified that he had "no doubt" that the vehicle in question was a different make from the defendant's mother's vehicle. Id. The Commonwealth presented no evidence linking that vehicle to the defendant. Id. at 258. The other vehicle was found soon after the homicide with two of the alleged conspirators and a gun used in the shooting. Id. at 255. The defendant was not in that vehicle. Id.

worked at the gasoline station and that no customer had ever touched the cash drawer before. Id. at 179. See Commonwealth v. Wei H. Ye, 52 Mass. App. Ct. 390, 392-393 (2001), S.C., 441 Mass. 1010 (2004) (defendant's fingerprint found inside cabinet left open by the robbers in home was admissible where no other reasonable opportunity to place fingerprint and other circumstantial evidence connected defendant to crime).

Similar to the Joyner case, here, as Brangan's thumbprint had been left on the note within a short time of the bank robbery, the jury could have found that he was responsible for writing it. Also, other evidence placed Brangan at the scene of the crime, including a physical description of the robbers provided by the bank tellers, a videotape recording of the robbery, and a photograph of Brangan on the day of his arrest. The jury also had an opportunity to view Brangan throughout the trial.[3] This evidence offered the jury an opportunity to compare him to the witnesses' descriptions and determine whether his physical characteristics were consistent with the witnesses' descriptions and what the jury could see of the robber from the videotape.

[3] The extent to which the jury saw Brangan while he was seated at his table during the trial is disputed and related to Brangan's claim of prosecutorial misconduct, discussed infra. However, at the prosecutor's request, Brangan stood in front of counsel's table for the jury to view him. He does not challenge this procedure.

On retrial, the jury are free to assess the credibility of all of the witnesses, including the police officer who testified that Brangan's thumbprint was on the note. Moreover, Brangan's challenges to the descriptions of the robber provided by the bank tellers go to the weight of the evidence and credibility of the witnesses, but not to the sufficiency of the evidence. Commonwealth v. Sullivan, 436 Mass. 799, 806-807 (2002), citing Commonwealth v. Paszko, 391 Mass. 164, 172 (1984). "[I]t is for the jury to determine -- after listening to cross-examination and the closing arguments of counsel —- what significance, if any, they will attach" to that evidence (citation omitted). Commonwealth v. Voisine, 414 Mass. 772, 782 (1993). We may, in some cases, evaluate eyewitness testimony when determining sufficiency of the evidence even where, as here, there was no identification attempted of the robber. In this case, although we give this evidence the modest weight it deserves, when combined with the strength of the inference from Brangan's thumbprint on the note, we conclude that there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the Commonwealth proved each element of the crime.

2. Prosecutorial misconduct.[4] In rare circumstances, prosecutorial misconduct will prohibit retrial where the prosecutor engaged in misconduct in order to "goad the defendant into moving for a mistrial;" the misconduct caused such "irremediable harm" that a fair retrial is impossible; or the misconduct is "so egregious" that dismissal of the indictment is necessary to deter the Commonwealth from similar misconduct in the future. Durand, 475 Mass. at 672-673, quoting Merry, 453 Mass. at 666. "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice." Commonwealth v. Cronk, 396 Mass. 194, 199 (1985), quoting Commonwealth v. Light, 394 Mass. 112, 116 (1985) (Liacos, J., dissenting). Prosecutorial misconduct during a trial might be sufficiently "egregious" to warrant dismissal of an indictment when the prosecutor makes a statement to the jury that he or she knows to be false in an effort to gain a "tactical advantage" over the defendant. See Merry, supra at 664; Glawson v. Commonwealth, 445 Mass. 1019, 1021 (2005), cert. denied, 547 U.S. 1118 (2006). "In such instances prophylactic

[4] The Commonwealth moved to strike the portion of Brangan's brief addressing this issue, arguing that the issue was waived. However, both sides thoroughly briefed and addressed the issue at oral argument. Therefore, in the interests of an efficient administration of justice and in light of the results we reach, we address the merits of Brangan's claim. See Commonwealth v. Chatfield-Taylor, 399 Mass. 1, 3 (1987).

considerations may assume paramount importance and the drastic remedy of dismissal of charges may become an appropriate remedy" (quotations omitted). Cronk, supra at 199, quoting Light, supra at 114.

The standard for prosecutorial misconduct mandating the dismissal of an indictment is high. See Merry, supra at 664-668 (prosecutor's misconduct was not egregious when prosecutor's closing statement "exceeded the bounds of permissible argument," but "expert's material exculpatory opinion" not timely disclosed required new trial). It is not enough for the prosecutor to make a false statement to the jury; rather, the prosecutor must knowingly make a false statement. See id. at 664-665 (if prosecutor "intentionally misled the jury by making statements in his closing argument that he knew were false, his conduct might have been grounds for dismissal" [emphasis added]).

Here, Brangan urges us to view the prosecutor's statements during her closing argument about his left-handed writing during the trial as such a false statement. He does not dispute that the prosecution may refer to his generally observable characteristics during its closing argument. See Commonwealth v. Cohen, 412 Mass. 375, 385-386 (1992) (no error where prosecutor linked defendant's right-handedness to crime during closing argument by stating, "I would suggest to you the gunshot is consistent with a right-handed man. I think you've probably

seen [the defendant] writing during this case . . ."). See also Mass. G. Evid. § 1113 note, at 277 (2017) ("The appearance and demeanor of a person in a courtroom is evidence even if the person does not take the stand"). Rather, Brangan contends that the prosecutor knew the jury could not see him writing with his left hand and therefore intentionally made a false statement when she told the jury they indeed had seen him writing during the trial. Neither the evidence in the record nor the trial judge's ruling is consistent with these allegations.

During the trial, the prosecutor requested that Brangan stand and display himself to the jury. When making this request, the prosecutor referred to "all the times" that she or the defense attorney had blocked the view of Brangan. We are not able to discern from the record how often the prosecutor believed the jury could see Brangan. The judge's memorandum of decision granting a mistrial also leaves open the possibility that some of the jurors could have seen Brangan writing during the trial. Taken together, this evidence does not establish that the prosecutor thought that none of the jurors could see Brangan throughout the trial and sought to falsely inform them of what they had witnessed. None of this rises to the level of proving that the prosecutor engaged in "intentional" misconduct by knowingly making a false statement to the jury. Dismissal of

the indictment to discourage further prosecutorial misconduct is inappropriate.

Conclusion. The judgment of the single justice is affirmed.

So ordered.