16-P-1441 Appeals Court

COMMONWEALTH vs. MOSES COLLINS.

No. 16-P-1441.

Suffolk. September 5, 2017. - October 18, 2017.

Present: Milkey, Hanlon, & Shin, JJ.

Assault and Battery. Threatening. Identification. Constitutional Law, Identification. Due Process of Law, Identification. Evidence, Identification. Practice, Criminal, Identification of defendant in courtroom, Argument by prosecutor.

Complaint received and sworn to in the Dorchester Division of the Boston Municipal Court Department on March 23, 2015.

The case was tried before Thomas S. Kaplanes, J.

Christie L. Nader (Dana Alan Curhan also present) for the defendant.

Cailin M. Campbell, Assistant District Attorney (Dana M. Goheen, Assistant District Attorney, also present) for the Commonwealth.

SHIN, J. A jury convicted the defendant of assault and battery and threatening to commit a crime against the person or property of another. On appeal the defendant argues that the

trial judge abused his discretion in admitting the victim's in-court identification of the defendant, that the prosecutor elicited inadmissible testimony identifying the defendant as one of the people seen on video surveillance footage, and that the prosecutor made improper statements in his closing argument. We affirm.

Background. The jury could have found the following facts. On the day of the crime, the victim, Alejandro Gonzalez, and his supervisor, Susan Wall, both letter carriers for the United States Postal Service, were working in the Roxbury section of Boston. After delivering mail to a pizzeria and exiting onto the sidewalk, Gonzalez encountered a man who looked at him as though he recognized him. The man then grabbed Gonzalez by the shoulder, hit him on the head, and pointed at him with his hand in the shape of a gun and stated, "I know your face. Boom, boom, boom."

Gonzalez immediately went to Wall and told her what had happened. They returned to the pizzeria, where Gonzalez pointed out a man inside as the person who attacked him. Wall confronted the man and told him not to put his hands on a postal worker.

About a month later, a Boston police detective showed Gonzalez a photographic array consisting of eight photographs.[1] Gonzalez initially believed that two of the photographs looked similar to his assailant but, after reviewing those two, made a positive identification of the defendant, writing underneath his photograph, "He looks like the person." At that point the detective placed the defendant's photograph facedown and showed Gonzalez the rest of the photographs in the array; Gonzalez did not identify anyone else as the person who assaulted him.

The detective separately showed Wall a photographic array consisting of eight photographs. Wall also made a positive identification of the defendant, writing underneath his photograph, "'[E]yes' seem familiar." The detective proceeded to show Wall the rest of the photographs, but she did not identify any of them as the man she confronted in the pizzeria.

Discussion. 1. In-court identification. Before trial the prosecutor moved in limine to permit Gonzalez to make an in-court identification of the defendant. The defendant filed a motion of his own to exclude the anticipated in-court identification. The judge reserved ruling on the motions, stating that he would "see how the testimony comes in" and then

[1] Before starting the procedure, the detective read Gonzalez a set of instructions that complied with the protocol for photographic arrays set out in Commonwealth v. Silva-Santiago, 453 Mass. 782, 797–798 (2009).

address the issue at sidebar. As the transcript reflects, a sidebar conference occurred towards the end of Gonzalez's direct testimony, but it was not transcribed. Immediately afterwards, the prosecutor asked Gonzalez, "[D]o you see the person in court today [who] assaulted you on February 3, 2015?" Gonzalez identified the defendant.

Relying on Commonwealth v. Collins, 470 Mass. 255 (2014), the defendant argues to us that the judge should have excluded the in-court identification because Gonzalez did not make an unequivocal pretrial identification of the defendant from the photographic array. In considering this argument, we must confine ourselves to determining whether the judge abused his discretion, see Commonwealth v. Bly, 448 Mass. 473, 495 (2007); Commonwealth v. Crayton, 470 Mass. 228, 245 (2014), meaning that he must have "made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (quotations omitted). We discern no such error.[2]

[2] We need not decide whether the defendant preserved his objection, a point on which the parties disagree, as we would reach the same result whether we review for prejudicial error or for a substantial risk of a miscarriage of justice.

In Collins, 470 Mass. at 266, the Supreme Judicial Court announced a prospective rule[3] requiring "good reason" to admit an in-court identification by an eyewitness who participated in a nonsuggestive pretrial identification procedure but did not make "an unequivocal positive identification of the defendant." See Mass. G. Evid. § 1112(c)(1)(A) and (c)(2)(A) (2017). But unlike here, the eyewitness in Collins plainly failed to make an "unequivocal" pretrial identification: After initially saying "no" to each of the eight photographs in the array, 470 Mass. at 259–260, the eyewitness could in the end only "identify [the defendant's] photograph as one of two that looked like the person she saw" on the day of the crime. Id. at 261. The court did not further explore the contours of what would constitute an unequivocal identification.[4]

In this case, based on its factual differences with Collins, the judge could reasonably have found that Gonzalez's pretrial identification qualified as unequivocal. Gonzalez identified the defendant's photograph, and his alone, from the array. As he testified, any uncertainty he had between the two similar photographs was only "in the beginning." And although the defendant asserts that Gonzalez took an inordinately long

[3] The defendant's trial occurred after the issuance of Collins.

[4] The parties have not cited, and we have not uncovered, any case law discussing this aspect of Collins.

time to view the photographs, suggesting that he was equivocating, Gonzalez testified that the entire process (not just the actual viewing) took "[n]o more than one hour," was "not too long," and was over "quickly."

The defendant also ascribes a great deal of significance to Gonzalez's statement that the defendant's photograph "look[ed] like" the assailant, claiming that, under Collins, this falls short of an unequivocal positive identification. What made the identification equivocal in Collins, however, was not the words used by the eyewitness but her inability to choose between "one of two [photographs] that looked like" the perpetrator. Id. at 260. Gonzalez, in contrast, was able to positively identify the defendant's photograph after studying the two he thought looked similar. Moreover, we think it plausible, as the Commonwealth argues, that Gonzalez was simply responding to the detective's instructions to state "which photograph [he] recognize[d] and how [he] recognize[d] the individual," rather than evincing a lack of confidence in his identification.[5]

On these facts we cannot say that it would be beyond the range of reasonable alternatives for the judge to characterize Gonzalez's pretrial identification as unequivocal, thereby

[5] Although Gonzalez's testimony was less than clear on this point, defense counsel was unable to get him to admit on cross-examination that he used the words "looks like" because he was unsure about the identification.

taking this case outside the scope of Collins. Unlike the eyewitness in Collins, Gonzalez selected only one photograph to the exclusion of others. To the extent Collins were taken to require more -- that the eyewitness reach a certain degree of confidence about his selection of that one photograph -- the judge permissibly could have found that Gonzalez did not equivocate and was sufficiently certain about his pretrial identification of the defendant. Thus, as the defendant makes no contention that the pretrial procedure was suggestive, the judge did not abuse his discretion in admitting Gonzalez's in-court identification. See Crayton, 470 Mass. at 245 ("[W]e cannot conclude that the judge abused her discretion in allowing the in-court identifications in evidence where their admission was in accord with the case law existing at the time of her decision . . . ."); Collins, 470 Mass. at 261, quoting from Crayton, 470 Mass. at 238 (judge's admission of in-court identification conformed to then-prevailing case law, which required exclusion only where in-court identification was "tainted by" impermissibly suggestive out-of-court identification).

2. Testimony regarding surveillance footage. The prosecutor also moved in limine to admit a surveillance video recording taken from inside the pizzeria, for the purpose of showing the jury how close the two postal employees were to the

man they confronted. The prosecutor represented that he would not ask the authenticating witness, United States Postal Service inspector Ryan Noonan, to identify any of the people in the video. The judge ruled the video relevant and admissible.

On appeal the defendant does not challenge the admission of the video itself but claims that the prosecutor, contrary to his representation, elicited inadmissible testimony from Noonan identifying the defendant as the man in the video. Specifically, the defendant points to the following portions of Noonan's testimony: (1) when asked what was written on the label of the compact disc containing the video, Noonan replied, "Forensic Laboratory Services, Boston. Digital evidence, disc 1 of 1, Moses Collins"; (2) when asked whether he knew the name of the person who was charged, he replied, "Detective Francis told me it was Moses Collins"; and (3) he identified Gonzalez as one of the "two letter carriers" in the video.[6] According to the defendant, these statements were inadmissible hearsay and improper lay opinion because they implied that the defendant was the third person depicted in the video. We review the defendant's arguments, which are unpreserved, to determine whether any error resulted in a substantial risk of a

[6] Noonan's identification of Gonzalez was nonresponsive to the question asked, and he was immediately cut off by the prosecutor. The defendant acknowledges that the identification was inadvertent.

miscarriage of justice. See Commonwealth v. Dyer, 460 Mass. 728, 741 (2011).

To the extent Noonan's testimony implied that the defendant was depicted in the video, any such implication was far too slight to create a substantial risk of a miscarriage of justice. A rational jury would not have considered the compact disc label, or Noonan's knowledge that charges were brought against the defendant, as evidence that Noonan or anyone else identified the defendant from the video. And Noonan's testimony that Gonzalez was one of the two letter carriers -- a point that was not genuinely in dispute -- did not bear on the identity of the third person in the video. In addition, the challenged testimony was fleeting and made in the course of authenticating the video, which the jury had the opportunity to view. We are confident in these circumstances that, even assuming Noonan's testimony could be construed as identification testimony, it had no material impact on the verdict. See Commonwealth v. Vacher, 469 Mass. 425, 442 (2014) (improper identification testimony not prejudicial where it "did not overwhelm" other evidence and jury viewed surveillance footage and were able to draw their own conclusions); Commonwealth v. DePina, 476 Mass. 614, 623–624 (2017) (erroneous admission of hearsay did not create substantial risk of miscarriage of justice where jury could have inferred same facts from properly admitted evidence).

3. Closing argument. Finally, the defendant contends that the prosecutor improperly equated a guilty verdict with justice by stating during his closing argument, "I ask you to now do your job just as [Gonzalez] was doing his job that day, to consider the evidence, and I ask you to find Moses Collins guilty on all counts." The impact of this statement was exacerbated, the defendant says, by other comments the prosecutor made about Gonzalez's and Wall's good character. Because the defendant did not object to the prosecutor's argument, we review only to determine whether the error, if any, resulted in a substantial risk of a miscarriage of justice. See Commonwealth v. Silanskas, 433 Mass. 678, 702 (2001).

It "cross[es] the permissible line of advocacy" for a prosecutor to "suggest[] it is the jury's 'job' or 'duty' to return verdicts of guilty." Commonwealth v. Adams, 434 Mass. 805, 822 (2001), quoting from Commonwealth v. Degro, 432 Mass. 319, 328 (2000). In this case the prosecutor hewed close to, but did not cross, that line. Viewed in context, the complained-of statement, which was immediately preceded by a discussion of the evidence, asked the jury to do their job by "consider[ing] the evidence" and did not suggest that they had a duty to convict. Cf. Adams, 434 Mass. at 822 ("[R]eference to the jury's 'job' did not contain suggestion of a duty to convict that we have found unacceptable in other instances"). Moreover,

while some of the prosecutor's remarks about the witnesses' character -- for example, that it was a "big deal" for Gonzalez to be hired as a postal worker -- were better left unsaid, they did not create a substantial risk of a miscarriage of justice. The comments were brief and were mitigated by the judge's instructions that closing arguments are not evidence and that the jury were "not to be swayed by prejudice or by sympathy, by personal likes or dislikes toward either side." We presume that the jury followed these instructions. See Commonwealth v. Mitchell, 428 Mass. 852, 857-858 (1999).

Judgments affirmed.