

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-866-2011
 :
 SHAKOOR TRAPP, :
 Defendant :

OPINION AND ORDER

Before the court is the Commonwealth's motion to preclude the defense from presenting expert testimony regarding eyewitness identification. The relevant facts follow.

On May 29, 2011, an individual entered a residence at 606 Maple Street in Williamsport Pennsylvania and assaulted a 23-year old African American female in an upstairs bedroom by stabbing, choking, and shooting her. Fortunately, she survived the attack and sought help at a neighbor's residence. After receiving medical treatment for her injuries, the victim identified the Defendant as her attacker through photographs shown to her by family members and a photo array conducted by the police. The police obtained a warrant for the Defendant's arrest as well as a warrant to search his residence. When the police executed the search warrant, they found a bloody sock near a couch in Defendant's living room.

Defendant was arrested and charged with attempted homicide, two counts of aggravated assault, burglary, criminal trespass, person not to possess a firearm, possessing instruments of crime, recklessly endangering another person and simple assault. Upon motion of the defense, the person not to possess charge was severed for trial purposes.

The parties stipulated that the severed firearm charge would proceed to a non-

jury trial and the other charges would proceed to a jury trial. The trial was held June 5-7, 2012. The jury trial ended in a mistrial, but the court convicted Defendant of the firearm charge. Defendant filed an appeal, claiming that re-trial of the remaining charges was barred by double jeopardy. This claim, however, was rejected by the appellate courts, and the case was placed back on the trial list.

Jury selection was scheduled for August 27, 2014. The day before jury selection defense counsel requested a continuance to seek leave to hire an expert witness regarding eyewitness identification. The court denied the continuance request and a jury was selected. The trial is scheduled for September 10-12, 2014.

On August 27, 2014, defense counsel contacted Dr. Jonathan Vallano about providing expert testimony on eyewitness identification in this case. On September 1, 2014, Dr. Vallano submitted a letter to defense counsel that described his prospective testimony regarding eyewitness memory issues. As September 1 was Labor Day and the courthouse was closed, defense counsel reviewed the letter and provided a copy to the prosecuting attorney via email on September 2, 2014. The Commonwealth immediately filed a motion to preclude the expert testimony, because its case is neither solely nor primarily dependent on eyewitness identification, a Frye hearing has not been held to determine the admissibility of the proposed expert testimony in this case, and the Commonwealth does not have sufficient time before trial commences to secure the services of its own expert.

The court held an argument on the motion on September 4, 2014. The argument focused on the reasons for defense counsel's delay in seeking and obtaining the

expert testimony and whether this case is one in which expert testimony regarding eyewitness identification is admissible.

Prior to May 28, 2014, expert testimony on the subject of eyewitness identification was per se inadmissible in Pennsylvania. On May 28, 2014, in the case of Commonwealth v. Walker, 92 A.3d 766 (Pa. 2014), however, the Pennsylvania Supreme Court held that the admission of expert testimony regarding eyewitness identification is no longer per se inadmissible; rather, the admissibility of such evidence is left to the discretion of the trial court. This does not mean that such testimony would be admissible in every case, though. The Court stated:

Initially, we envision that allowing such expert testimony would be limited to certain cases. As discussed below, such testimony would only be permitted where relevant. Pa.R.E. 401. While we need not precisely define such situations, generally speaking, it would be where the Commonwealth's case is solely or primarily dependent upon eyewitness testimony.

92 A.3d at 787.

Defense counsel argued that expert testimony is admissible in this case because the case is based primarily on eyewitness testimony. He asserted that the bloody sock found in Defendant's residence is not enough to render the proposed expert testimony inadmissible because, but for the eyewitness identification of Defendant, Defendant's residence would not have been searched and the sock would never have been found. Furthermore, the sock is "in question" because Defendant's door had been kicked in sometime before the police arrived, which supports the defense argument that the real perpetrator planted the sock in his residence.

The Commonwealth argued that Walker is distinguishable because the sole evidence was the eyewitness identification and the perpetrator was a stranger of a race different than the person who was assaulted. The Commonwealth also noted that its case is not based only on the eyewitness testimony of the victim. The Commonwealth pointed out that it also has two pieces of DNA evidence, the testimony of a neighbor that tended to corroborate the victim's identification, a videotaped statement in which the Defendant admits that the sock was probably his, and the fact that the police found the Defendant hiding in an attic for no good reason.

The court agrees with the Commonwealth that the facts of Walker are distinguishable. This case does not involve a complete stranger or a cross-racial identification. Although the victim did not know Defendant by name, she had seen him previously around the neighborhood. More importantly, this case is not solely or primarily dependent on eyewitness identification testimony.

At the previous trial, the victim testified that on May 29, 2011, she was awoken in the early morning hours believing that she was being "punched" in her chest. In fact, she was being stabbed by a person who she described during the trial as being African American, wearing a white or cream colored hoodie and who looked familiar. She testified that she had seen the individual previously around the neighborhood.

The perpetrator of the offense ended up not only stabbing Ms. Nixon but also choking her and eventually shooting her in her cheek, temple area and knee.

The victim testified that she had an ample opportunity to identify the

individual who shot her and during the trial positively identified the Defendant as her assailant.

When the victim first spoke with the police immediately following her attack, she testified that she was not thinking clearly. She was confused, scared and in pain. Furthermore, she was worried about her physical condition and most of all about her children. As a result, she was unable to provide any specifics regarding her assailant to the police.

The victim was transported by ambulance to the Williamsport Emergency Room where she was assessed and then lifeflighted by helicopter to Geisinger Medical Center. She underwent emergency treatment, was admitted to the Intensive Care Unit and was intubated.

The victim started writing notes as her recollection of what occurred became clearer and as she testified her “memory got better.” Among other things, she recalled that the attacker wore a white or cream colored hoodie and shot her with a small silver gun.

Her sister visited her in the hospital and based upon information her sister had received from others, showed Ms. Nixon three photographs obtained from Facebook of three different individuals. One of the photographs depicted Defendant. According to the victim, the photos jogged her memory and she recognized Defendant as her attacker.

Subsequently, the victim identified Defendant from a photo array that had been presented to her by the Williamsport Police. Without any suggestions being made to her, she quickly picked out Defendant and identified him as her attacker. The photo array

picture of Defendant was not the same Facebook photograph she had previously recognized.

According to the victim, there was no doubt in her mind that Defendant was the individual that attacked her. She had previously seen Defendant “quite often” outside of where she resided, among other things, smoking cigarettes. During her testimony, the victim positively identified Defendant as her attacker.

Officer Levan of the Williamsport Bureau of Police confirmed that when he first contacted the victim immediately following the attack, she was hysterical, crying obsessively, frantic, “absolutely” upset, unsteady and suffering from a “gross amount” of blood loss.

Agent Eric Delker of the Williamsport Bureau of Police confirmed the victim’s testimony with respect to the photo array. He indicated that when he presented the array to her, there was nothing suggestive about it and he asked that she look at it closely to determine if there was anyone who she recognized. She identified Defendant and indicated that she was absolutely sure that he was the individual who attacked her and shot her.

A neighbor, Shana Saunders, testified that a few nights before the attack she had an encounter with Defendant. She heard Defendant fire a handgun and saw him with a small silver gun. Defendant asked Ms. Saunders not to tell anyone what she observed. Ms. Saunders also saw Defendant in front of his apartment, a few doors from the victim’s apartment, only a few hours prior to the attack.

Agent Leonard Dincher of the Williamsport Bureau of Police indicated that following the victim’s identification of Defendant and further investigation, a warrant was

issued for Defendant's arrest. He obtained information that Defendant was at 523 High Street. He and other police officers searched the residence and eventually found Defendant lying between ceiling joists in the rafters below the roof hiding from the police. Defendant was attempting to evade apprehension by hiding in an area of the home that was very inaccessible and in an area that was extremely hot with no ventilation whatsoever.

A search warrant was obtained for Defendant's residence and a pair of bloody socks was found in the living room. The blood stain was tested and a DNA expert testified that the DNA in the blood was consistent with that of the victim. The expert opined that the chances of the blood being similar to the DNA of another person were extremely small.

There were hairs and other material on the sock which initially were not submitted for DNA analysis. This evidence subsequently was submitted for DNA analysis and Defendant's DNA was discovered on the sock.

It is clear from the Pennsylvania Supreme Court opinion in Walker that the Court did not envision that expert testimony regarding eyewitness identification would be admissible in every case or even in thousands of cases. The court finds that the notes from the victim referencing a white or cream colored hoodie and a small silver gun, the supporting testimony from the neighbor, the bloody sock with both the victim's and Defendant's DNA on it, Defendant's videotaped statement that the sock was probably his and the evidence of Defendant's consciousness of guilt, are sufficient to show that the Commonwealth's case is not primarily dependent upon eyewitness testimony.¹ Therefore, the court will grant the

¹ The court was surprised and somewhat dismayed by counsel's statement that he was unaware of the Walker

Commonwealth's motion.

ORDER

AND NOW, this ____ day of September 2014, the court GRANTS the Commonwealth's motion to preclude the defense from offering expert testimony regarding eyewitness identification in this case.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalas, Esquire (ADA)
Robert Cronin, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file

decision until sometime in July and the fact that he did not seek a continuance to consult with an expert until August 26, the eve of jury selection. The court, however, did not decide this issue based on counsel's delay, but solely on the fact that the Commonwealth's case is neither solely nor primarily based on eyewitness testimony.