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RECENT DEVELOPMENT

SMITH v. STATE: DEFENSE COUNSEL IS ENTITLED TO COMMENT ON THE CHALLENGES OF CROSS-RACIAL IDENTIFICATION AT CLOSING ARGUMENT WHEN THE SOLE BASIS FOR CONVICTION IS EYEWITNESS TESTIMONY

By: Bryan Davis

The Court of Appeals of Maryland held that defense counsel is entitled to argue the fallibility of cross-racial identification in closing argument when the sole piece of evidence introduced against the defense is eyewitness testimony. *Smith v. State*, 388 Md. 468, 880 A.2d 288 (2005). The Court found the victim's testimony regarding her enhanced ability to recognize faces had raised the issue of cross-racial identification. As defense counsel is given the right to discuss all evidence raised during trial in closing argument, the trial court's denial of that right was an abuse of discretion and sufficient grounds to reverse the convictions of both defendants. *Id.*

Christine Crandall ("Crandall"), a white female, was held up at gunpoint by two black males in an attempt to steal her car. A struggle ensued for her car keys, and Crandall called out to a neighbor to summon the police. The two men then walked away, but allegedly turned to face the victim before leaving the area. Approximately two weeks after the incident, Crandall viewed a series of photo arrays at the police station and identified James Smith ("Smith") and John Mack ("Mack") as the two men who had accosted her. With regard to Mack's photo, Crandall noted that despite a difference in hairstyle, "He looks very much like the man who had the gun and attempted to rob me." After viewing Smith's photo, Crandall wrote, "This looks like the man wearing the hat that attempted to rob me." Based on Crandall's identification, Smith and Mack were arrested and charged with a series of offenses.

Prior to trial in the Circuit Court for Baltimore City, counsel for Smith and Mack jointly submitted a motion *in limine* requesting the jury be instructed on the challenges of cross-racial eyewitness identification. The judge denied the motion and precluded the parties

from raising the issue during opening statements. Defense counsel again attempted to raise the issue of cross-racial identification before closing arguments, but were denied permission to raise the issue in summation. The jury later found both defendants guilty of attempted robbery, assault, and attempted theft.

Smith and Mack jointly appealed to the Court of Special Appeals of Maryland for review of the lower court's treatment of the cross-racial identification issue. The Court of Special Appeals of Maryland upheld the lower court's ruling and held the trial court did not abuse its discretion in refusing to instruct the jury on cross-racial identification. Additionally, the Court held that the lower court correctly excluded any discussion of cross-racial identification from closing argument because no evidence had been produced at trial to suggest that cross-racial identification was an issue. The Court of Appeals of Maryland granted the defendant's petition for a writ of certiorari.

The Court of Appeals of Maryland was asked to address whether the trial court erred either when it refused to give a jury instruction regarding the challenges of cross-racial identification or when it precluded the defense from discussing cross-racial identification in closing argument. *Smith*, 388 Md. at 477, 880 A.2d at 293. The Court of Appeals of Maryland did not reach the jury instruction issue because it found sufficient grounds to reverse on the closing argument issue. *Id.* at 478, 880 A.2d at 293.

The Court's opinion rested on the foundation that a criminal defendant, under both Article 21 of the Maryland Declaration of Rights and the Sixth Amendment of the United States Constitution, will have the benefit of summation by defense counsel. *Id.* at 486, 880 A.2d at 298 (citing *Holmes v. State*, 333 Md. 652, 658-59, 637 A.2d 113, 116 (1994)). To determine whether this right was violated by the limits placed on defense counsel's closing argument during trial, the Court of Appeals of Maryland utilized the parameters announced in *Wilhelm v. State*, 272 Md. 404, 326 A.2d 707 (1974).

Wilhelm states, "As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range." *Id.* (quoting *Wilhelm*, 272 Md. at 412-13, 326 A.2d at 714). Additionally, the Court of Appeals of Maryland held that during closing argument, counsel may make mention of ideas and concepts that would be considered common knowledge even if such

ideas have not been entered into evidence. *Smith*, 388 Md. at 487, 880 A.2d 299 (citing *Wilhelm*, 272 Md. at 438, 326 A.2d at 728).

The Court first looked to determine whether comment on cross-racial identification would have been proper under the common-knowledge prong. *Smith*, 388 Md. at 488, 880 A.2d at 300. In making that determination, the Court reviewed leading social research on the ability of witnesses to identify individuals of another race. *Id.* at 479-85, 880 A.2d at 294-98. Experts note that while there seems to be agreement that certain races are impaired in their ability to identify members of another race, the evidence is far from conclusive. *Id.* at 479, 880 A.2d at 294 (citing John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (Spring 2001)). This lack of conclusive evidence about own-race bias led the Court to find that difficulty in cross-racial identification is not a matter of common knowledge and therefore not subject to comment in closing argument. *Smith* at 488, 880 A.2d at 300.

The Court then examined whether comment on cross-racial identification was appropriate because it was either a discussion of evidence or a legitimate inference from facts established at trial. *Id.* The Court of Appeals of Maryland argued that Crandall's testimony had indeed raised the issue of cross-racial identification. *Smith* at 488-89, 880 A.2d at 300. The witness testified that she was "extremely good with faces," and that she was "obsessed" with observing people and their postures as a result of her interest in art and painting people. *Id.* at 488, 880 A.2d at 300.

Noting that eye-witness identification was the only significant evidence linking the defendants to the crime, the Court held that Crandall's testimony did raise the issue of cross-racial identification and should have opened the door for defense counsel to discuss the issue during closing argument. *Id.* at 489, 880 A.2d at 300. The denial of defense counsel's ability to comment on the issue was a reversible error. *Id.*

Judge Harrell's dissenting opinion criticized the majority for creating a rule that gives judges and attorneys little guidance for implementation and enforcement. *Id.* at 497, 880 A.2d at 305. Additionally, the dissent voiced concern regarding the possibility that jurors may be misled by cross-racial identification arguments that are not based on conclusive research. *Id.* at 498, 880 A.2d at 305.

In conclusion, as it seems the Court is willing to review cases in which discussion of cross-racial identification has been excluded,

defense attorneys should seize the moment and preserve the record whenever possible as it pertains to this issue. Conversely, prosecutors should be mindful that their cases may be derailed by the cross-racial identification issue when eyewitness testimony is the only evidence offered and the victim and defendant are of different races. Finally, it seems that the Court's decision in this case endorses defense counsel's use of inconclusive research about cross-racial identification whenever eyewitness testimony is a crucial component of a case. Courts will need to be vigilant to ensure that counsel does not mislead future juries about the strength of the research in an effort to invalidate otherwise reliable eyewitness identifications.