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23-P-807

Appeals Court

COMMONWEALTH vs. DEJAN BELNAVIS.

No. 23-P-807.

Worcester. May 13, 2024. - October 10, 2024.

Present: Ditkoff, Englander, & Smyth, JJ.

Assault and Battery by Means of a Dangerous Weapon. Assault by Means of a Dangerous Weapon. Constitutional Law, Identification. Due Process of Law, Identification. Identification. Evidence, Identification, Videotape, Photograph. Witness, Police officer. Practice, Criminal, Motion in limine.

Complaint received and sworn to in the Worcester Division of the District Court Department on July 1, 2021.

The case was tried before Andrew J. Abdella, J.

Mitchell Kosht for the defendant.
Jesse-Paul J. Crane, Assistant District Attorney, for the Commonwealth.

DITKOFF, J. The defendant, Dejan Belnavis, appeals from his convictions, after a jury trial in the District Court, of assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b), and assault by means of a dangerous weapon,

G. L. c. 265, § 15B (b). We conclude that two nonpercipient police officers should not have been allowed to identify the defendant in court from Walmart surveillance video recordings, where one officer had encountered the defendant twice and the other four times, over a four or five-year period, and where there was no evidence that the encounters were prolonged or memorable. Further concluding that this evidence, which the prosecutor relied upon in his closing argument to establish the defendant's identity, created a substantial risk of a miscarriage of justice, we reverse.

1. Background. On June 21, 2021, surveillance cameras at the Walmart store in Worcester recorded an altercation between a man wearing a white T-shirt, black pants, a black bag, white sneakers, and sunglasses (who the Commonwealth contends is the defendant) and a man wearing a blue T-shirt (victim).¹ In the moments leading up to the altercation, the man in the white shirt and another man walked down an aisle in the store. The victim and two other men stood ahead of them in the aisle.

As the man in white approached, he pointed at one of the men with the victim. The man with the victim walked into the

¹ A "fisheye" camera mounted overhead recorded the entire altercation; another nearby camera recorded only the initial confrontation. The parties were provided the shorter video recording during discovery and first became aware of the longer video recording at trial.

right-hand side of the aisle, and the victim came up next to him, blocking the aisle to the right of the boxes. The man in white remained in front of the boxes. The victim advanced to within a few feet of the man in white, who pointed at him. The victim rapidly spread out his arms and then clasped his hands together, and then the man in white advanced and shoved him in the chest with a firearm. The victim backed up, and the man in white passed the victim on the left. The victim and his two companions turned to face the man in white and took several steps toward him. The man in white turned and pointed his firearm at them. All five men came together in a circle, and, after a brief interaction, the man in white lunged at the victim. The victim backed up, then lunged at the man in white, who retreated down the aisle with his companion.

Another camera at one of the store exits captured footage of a man with the same appearance and clothing as the man in white leaving the store. The next day, a police officer working a detail at the store took stills from several of the video recordings depicting the man in white.

The defendant was subsequently identified by police as the man in white and charged accordingly. No one who was present at the altercation testified at trial. Instead, after the Walmart video recording was admitted, two officers from the Worcester police gang unit testified.

Each officer started by describing the duties of a gang unit officer. The first officer described his duties as to "respond to any calls that include firearms and gunshots" and to "interact with the community," including with "programs to help reintegrate those who have been arrested for firearms and things like that back into society." The second officer described his duties as "[t]o identify gang members, identify the active feuds within the city, follow-up on gang violent incidents; things along those lines." Once redirected by the prosecutor, he agreed that he "interact[s] with citizens on the street often," including "anybody who's just out and about in the city."

Each officer testified concerning his encounters with the defendant. Specifically, the first officer had encountered the defendant four times over a five-year period and had viewed his identification at least once, and the second officer had encountered the defendant two times over a four-year period and had been present when someone else asked for his identification. Both officers identified the defendant as the man in white seen in the surveillance videos.

During closing arguments, the Commonwealth played a portion of the surveillance footage depicting the man in white and argued that

"it's this individual who [the first officer] and [the second officer] identified as Dejan Belnavis, somebody that they're familiar with, somebody that they know, somebody

that even [the first officer] has had an opportunity to ask him for his license or identification and has been able to positively identify him, Dejan Belnavis, through identification as Dejan Belnavis."

The jury convicted the defendant on both counts. This appeal followed.

2. Standard of review. The defendant did not object to the police identification testimony at issue. Nonetheless, the defendant urges that the issue was preserved by the defendant's motion in limine. There seems to be a common misconception that the filing of a motion of limine in a criminal case will always be adequate by itself to preserve review of an error. That is not the case.

In Commonwealth v. Grady, 474 Mass. 715, 719 (2016), the Supreme Judicial Court held that a defendant need not "object to the admission of evidence at trial where he or she has already sought to preclude the very same evidence at the motion in limine stage, and the motion was heard and denied." Furthermore, in addition to the motion in limine needing to (1) involve the "very same evidence" and to be (2) "heard and denied," id., (3) it must be on the same ground as raised on appeal. See Commonwealth v. Santana, 477 Mass. 610, 620 n.7 (2017); Commonwealth v. Almele, 474 Mass. 1017, 1018 (2016). Absent satisfaction of those requirements, the filing of a motion in limine does not preserve an issue for appeal.

Here, the defendant's invocation of Grady falters at the second requirement. Although the defendant moved to preclude the police officer identification in a pretrial motion in limine, the trial judge did not deny the motion. Instead, the judge ruled that he would "allow the Commonwealth to elicit testimony to see if they can establish a foundation to meet the factors necessary." The judge directed the defendant to object at that time if unsatisfied. Under that circumstance, it was incumbent on the defendant to object to alert the judge that he believed the foundation had not been established, and the issue is accordingly unpreserved. See Commonwealth v. Smith, 92 Mass. App. Ct. 417, 419 n.5, 422 n.12 (2017).

"Because the defendant did not object at trial to the challenged testimony . . . , 'we review his claims to determine whether there was error, and, if so, whether the errors created a substantial risk of a miscarriage of justice.'" Commonwealth v. Cintron, 103 Mass. App. Ct. 799, 804 (2024), quoting Commonwealth v. Diaz, 100 Mass. App. Ct. 588, 596 (2022). "In reviewing for a substantial risk of a miscarriage of justice, we determine 'if we have a serious doubt whether the result . . . might have been different had the error not been made.'" Commonwealth v. Barros, 494 Mass. 100, 113 (2024), quoting Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005).

3. Lay identification testimony. A percipient witness, including a police officer, may generally identify a defendant if the witness either made an unequivocal, out-of-court, positive identification of the defendant or there is "good reason" for foregoing that process. Commonwealth v. Santiago, 100 Mass. App. Ct. 700, 709 (2022), quoting Commonwealth v. Collins, 470 Mass. 255, 265 (2014). See Commonwealth v. Crayton, 470 Mass. 228, 234-235 (2014). Where there is no testifying percipient witness and the defendant is to be identified from a video recording or photograph, that is usually a task for the jury, which is qualified to compare the video recording or photograph to the defendant sitting in court. See, e.g., Commonwealth v. Quinones, 95 Mass. App. Ct. 156, 157 (2019).

Nonetheless, "[a] lay witness is permitted to identify an individual depicted in a video recording or photograph if that testimony would assist the jurors in making their own independent identification." Commonwealth v. Pina, 481 Mass. 413, 429 (2019). Accord Mass. G. Evid. § 701(b) (2024). "[S]uch testimony is admissible . . . when the witness possesses sufficient[ly] relevant familiarity with the defendant that the jury cannot also possess." Pina, supra at 430, quoting Commonwealth v. Vacher, 469 Mass. 425, 441 (2014). Accord Mass. G. Evid. § 701(b) note. "Relevant factors to consider include

whether '[the images] are neither so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification' and 'whether the defendant is disguised in the photograph or has changed his appearance since the time of the crime.'" Commonwealth v. Matos, 95 Mass. App. Ct. 343, 349 (2019), quoting Commonwealth v. Pleas, 49 Mass. App. Ct. 321, 325, 326 (2000). "The level of familiarity between a witness and the suspect is measured by factors such as the number of times the witness viewed the suspect previously; the duration, nature, and setting of those encounters; and the period of time over which the encounters occurred." Commonwealth v. Thomas, 476 Mass. 451, 460 (2017). The identification testimony of a police officer, which carries a "possibly greater imprint of authority . . . is not permissible absent some compelling reason that the police officer is in a better position than the jury to identify the defendant." Pina, supra.

Here, despite being alerted to the need to do so, the Commonwealth failed to establish that the officers had "sufficient relevant familiarity" with the defendant to admit their lay identification testimony. See Pina, 481 Mass. at 430. The officers' encounters were infrequent and sporadic. The first officer had encountered the defendant only four times over a five-year period. The second officer had encountered the

defendant only two times in the four years before the trial and not in the previous two or three years.

Of course, even infrequent or sporadic encounters might be adequate if those encounters were particularly memorable. No such evidence was presented here. From the testimony of each officer, the jury could have inferred that they knew the defendant only through policing; each officer testified that he had never socialized with the defendant, had never had dealings with him outside of work, and was unaware of his personal life. Nor is there anything in the evidence to suggest that, when the officers did encounter the defendant, these encounters were particularly prolonged or involved, such that these sporadic contacts would have been enough to give the officers special familiarity with the defendant. To the contrary, the only evidence of the extent of the encounters was the first officer's testimony that, on one occasion, he viewed the defendant's identification, and the second officer's testimony that he was present when "somebody on scene asked him for an identification." Contrast United States v. Kornegay, 410 F.3d 89, 95 (1st Cir. 2005) (affirming identification testimony of officer who met with defendant six times in one summer for purpose of distinguishing him from his twin brother).

This degree of familiarity was inadequate to place the officers "in a better position than the jury to identify the

defendant." Pina, 481 Mass. at 430. See Commonwealth v. Fisher, 492 Mass. 823, 851 (2023) (inadequate familiarity where officer interacted with defendant at drive-through and watched video recordings of defendant numerous times). Contrast Commonwealth v. Brum, 492 Mass. 581, 593 (2023) (witness who "knew the defendant since middle school and . . . the defendant recently had been her boyfriend's roommate"); Pleas, 49 Mass. App. Ct. at 328 (officer "had known the defendant socially for nine to ten years, . . . had met the defendant's mother and had been to a barbecue at his house"); United States v. Beck, 393 F.3d 1088, 1091 (9th Cir.) (probation officer had met with defendant four times over two months), vacated on other grounds, 544 U.S. 1016 (2005); United States v. Allen, 787 F.2d 933, 935 (4th Cir. 1986), vacated on other grounds, 479 U.S. 1077 (1987) (parole officer had met with defendant monthly for six or seven months leading up to robbery and creation of surveillance photographs).

Furthermore, beyond wearing a pair of sunglasses, the man in the videos was not "disguised," and there is no contention that he otherwise "changed his appearance" after the incident, such that even the officers' scant familiarity might be superior to the jurors'. Matos, 95 Mass. App. Ct. at 349. In light of the officers' slight familiarity with the defendant and the clarity of the video recordings, the officers' testimony

provided nothing that the jury could not also acquire by observing the defendant as he sat in the court room in front of them for two days, much longer than either of the officers had viewed the defendant.

In the circumstances of this case, the officers' testimony created a substantial risk of a miscarriage of justice. See Barros, 494 Mass. at 113. The defense argued, among other things, that the defendant had been misidentified. In closing argument, the prosecutor relied primarily on the officers' identification testimony, asserting that the defendant was "somebody that they're familiar with, somebody that they know," and that one officer "has been able to positively identify him." Although the prosecutor stated that the "video and photo evidence . . . speak for themselves," the prosecutor did not suggest that the jurors identify the defendant themselves or that any other evidence established the defendant's identity. Cf. Fisher, 492 Mass. at 856 (no prejudice where "the prosecutor never relied on [the officer's] identification of the defendant" and "implored the jury to compare the photographs in evidence of the defendant with the individual seen in the video recordings to make their own identification"); Vacher, 469 Mass. at 442 (no prejudice where defendant admitted to being present). Similarly, the jury instructions did not require the jurors to determine for themselves whether the defendant was the person in

the video recordings and photographs. See Fisher, supra at 853-854 (no prejudice where judge twice instructed jurors that they were "not bound to accept that [identification] testimony and, indeed, . . . must make [their] own determinations as to what [they] see in those security videos" [emphasis omitted]).

The prejudice to the defendant was further increased by the evidence that the officers were gang unit officers and had encountered the defendant in that capacity. See Commonwealth v. Wardsworth, 482 Mass. 454, 476 (2019), quoting Vacher, 469 Mass. at 442 ("We have recognized the 'increase[d] potential for inappropriate prejudice to the defendant stemming from identification testimony from a police officer who is so designated'"); Cintron, 103 Mass. App. Ct. at 804, quoting Commonwealth v. Gonzalez, 47 Mass. App. Ct. 255, 259 (1999) ("Evidence that a police officer knew persons 'from "dealing with them in the past"' is suspect, and should be avoided").² In this regard, both officers testified that they were assigned to the Worcester police gang unit, and the second officer described their duties as being "[t]o identify gang members, identify the

² In light of our disposition, we need not decide whether the testimony about the gang unit assignments was independently error. It does not appear that the prosecutor intended to elicit the particular testimony concerning the duties of the gang unit, and the evidence is likely to come in very differently at any retrial. See Commonwealth v. Conkey, 443 Mass. 60, 74 (2004), S.C., 452 Mass. 1022 (2008).

active feuds in the city, follow-up on gang violent incidents; things along those lines." The identification testimony, therefore, encouraged the jurors to defer to the officers' inadmissible identifications and to think of the defendant as a violent gang member. We have a serious doubt whether the verdict would have been different without this inadmissible testimony. See Wardsworth, supra at 476-477.³

Judgments reversed.

Verdicts set aside.

³ We need not reach the defendant's arguments concerning the late disclosure of some of the video recordings, as the defendant has now received all of the video recordings well in advance of any possible retrial. See Commonwealth v. Harris, 101 Mass. App. Ct. 308, 325 (2022) (need not address claims that do not "concern matters likely to arise at any retrial").