DISTRICT OF COLUMBIA COURT OF APPEALS

DANIELS

FILED
JUN 22 2012
DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 09-CF-1572, 09-CF-1584, 09-CF-1585

JOSEPH D. THOMAS, APPELLANT,

v. CF1-25845-07
CF2-7689-09
CF2-10002-09

UNITED STATES, APPELLEE.

Appeals from the Superior Court
of the District of Columbia
Criminal Division

(Hon. Herbert B. Dixon, Jr., Trial Judge)

(Argued March 20, 2012 Decided June 22, 2012)

Before WASHINGTON, *Chief Judge*, OBERLY, *Associate Judge*, and KING, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Joseph D. Thomas challenges his convictions for second-degree murder while armed,[1] possession of a firearm during a crime of violence,[2] and carrying a pistol without a license.[3] We affirm.[4]

Eyewitness Carolyn Clark testified that on June 15, 2007, she was sitting on her porch, and saw Thomas and his brother, both of whom she knew because they had lived

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[1] D.C. Code § 22-2103 (2001), -4502 (2009 Supp.).

[2] D.C. Code § 22-4504 (b) (2009 Supp.).

[3] D.C. Code § 22-4504 (a) (2009 Supp.).

[4] Appellant was also convicted of obstructing justice and suborning perjury, but does not challenge those convictions in this appeal.

in the neighborhood for several years, with decedent Andrew Brown and a man on a moped in a nearby parking lot. The group had a heated conversation, and then Thomas and his brother left. They returned a few minutes later with a third person, and Thomas approached Brown with his gun drawn, pointed the weapon at Brown, and then shot him when he ran.[5]

When the shooting began, Clark went inside her home to call the police. She testified that she could see what was going on from inside her home, and saw Brown fall to the ground while she was still on the phone.[6] While Clark initially gave the 911 operator the wrong address and did not speak to police on the scene out of fear, she eventually came forward with her eyewitness testimony.

Ellen Woods, a neighbor, told investigators that she was in her apartment about fifty feet from the scene of the shooting, when she heard an argument outside. She looked and saw a group of juveniles she recognized as people who hung out around the apartment complex. Then she heard gunshots, and saw the group of juveniles, one of whom appeared to have a gun, running away.[7]

Cartridge casings were recovered from the area in which Brown was killed. In a search of Thomas' apartment several months later, police recovered a Glock semiautomatic pistol, to which Thomas was a major DNA contributor. A firearms examiner, qualified as an expert, testified that he was sure to a reasonable degree of scientific certainty that the casings recovered at the scene of Brown's murder had all been fired from the pistol provided to him, which was recovered from Thomas' home.

Thomas was arrested for Brown's murder in November 2007. In jail, he rekindled a romance with an old flame, who he then asked to lie for him and say "Bug" committed the murder. The letters written from Thomas to the woman were admitted into evidence. He also recruited others to lie on his behalf. One of these people was Jimmy Hunter, who was in jail with him. In notes sent between the men while in jail, which were admitted into evidence, Thomas asked Hunter to say that "Bug" killed Brown.

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[5] The third man fired his weapon in the air, before Thomas shot Brown.

[6] Clark's testimony was contradicted in part by her boyfriend, Alfred Belton, who said they were not on the porch at the time.

[7] Ms. Woods' statements to the investigating officers were contradicted by her statements to the grand jury, where she claimed she had not seen anything and never spoke to the officers. Woods was not called to testify by the government; however, the defense effort to present her as a witness is discussed *infra*.

Before trial, Thomas filed a motion to exclude testimony by the government's firearms expert under *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), arguing that the expert could not testify "to a reasonable degree of scientific certainty" that the shell casings found at the scene came from the gun recovered from Thomas' apartment. The trial judge held a *Frye* hearing on the firearms expert issue, and denied the motion to exclude.

Thomas contends that the trial court erroneously admitted testimony of the firearms expert, because ballistics pattern matching is no longer accorded general scientific acceptance as required by *Frye*, 54 App. D.C. 46, 293 F. 1013. "*Frye* only applies to 'a novel scientific test or a unique controversial methodology or technique.'" *(Ricardo) Jones v. United States*, 27 A.3d 1130, 1137 (D.C. 2011) (quoting *Drevenak v. Abendschein*, 773 A.2d 396, 418 (D.C. 2001)). "Once a 'technique has gained . . . general acceptance, we will accept it as presumptively reliable and thus generally admissible into evidence.'" *Id.* at 1136 (quoting *(Nathaniel) Jones v. United States*, 548 A.2d 35, 39 (D.C. 1988)). While undoubtedly "a technique that has previously been recognized in court as generally accepted may lose that wide acceptance," *id.*, due to advancement in research and technology, Thomas has not shown that firearms identification is no longer "generally accepted."

Here, Thomas was granted a *Frye* hearing to challenge the admissibility of the expert testimony. Thomas bore the burden of "preliminarily demonstrat[ing] that the method is no longer accorded general scientific acceptance." *Id.* at 1136-37 n.4 (citation and internal quotation marks omitted). The trial court rejected Thomas' claims, ruling that Thomas had not met his heavy burden of demonstrating that firearms and toolmark identification was no longer a valid methodology. Our review of Thomas' challenge to the admissibility of the expert testimony, because the trial court granted a *Frye* hearing, is *de novo*, as we are reviewing as a legal matter whether firearms and toolmark identification is still accorded general acceptance.[8] *Porter*, 618 A.2d at 635. We conclude that there has been no sufficient showing that firearms and toolmark identification is no longer accorded general acceptance and, thus, Thomas has failed to meet his burden in challenging the admissibility of expert testimony on these matters.

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[8] Normally issues of the admission of expert testimony are reviewed for an abuse of discretion. *United States v. Porter*, 618 A.2d 629, 635 (D.C. 1992). However, because the trial court held a *Frye* hearing, we review this matter *de novo*, even though firearms and toolmark identification is not a new technique, *per se*. *Id.* We note, however, that under either a *de novo* review, or an abuse of discretion standard, we reach the same result.

In challenging the general acceptance of firearms and toolmark identification, Thomas relies primarily on a report by the National Research Council of the National Academies of Sciences ("NRC" or "NRC Report") — a broad-based report, commissioned by Congress, examining a variety of forensic disciplines, not just firearms and toolmark identification. Thomas relies on language in the report, which challenges the lack of statistics, "lack of sufficient studies," and "lack of a precisely defined process," as evidence that firearms and toolmark identification are no longer generally accepted or, in fact, not a "science" at all. Thomas, however, confuses a single scientific report, which reaches no definitive conclusion and which includes no independent examination of the challenged methodology, with general discord in the scientific community. We therefore reject Thomas' reliance on the NRC Report.

Expert testimony of firearms and toolmark examiners has been admissible in this court for decades — in fact, only a decade shy of a century. *See Laney v. United States*, 54 App. D.C. 56, 60, 294 F. 412, 416 (1923). Beyond the criticisms and suggestions for more research raised in the NRC Report, Thomas has presented nothing showing that the expert testimony of firearms examiners is not "based on a scientifically sound methodology, as determined by members of the relevant scientific community." Indeed, "[n]ot every scientific opinion is either new or original — some are the kind that are offered all the time." *Commonwealth v. Whitacre*, 878 A.2d 96, 100 (Pa. Super. Ct. 2005) (citation and internal quotation marks omitted). As the Pennsylvania Superior Court ruled in *Whitacre* — a case where the admissibility of firearms and toolmark testimony was challenged as lacking general acceptance — "the technique has been in use since the 1930's, [and] it is neither new nor original, but rather is of the sort that is offered all the time." *Id.* at 101. In short, nothing presented to us — nor to the trial court — shows that firearms and toolmark examination is no longer generally accepted, such that there is discord in the scientific community which would prevent expert witnesses from testifying "to a reasonable degree of scientific certainty" as to the conclusions they have reached. Therefore, there was no basis for excluding the expert testimony on these grounds.

Thomas next argues that Ellen Woods' extrajudicial statement to police on the night of the shooting should have been admitted as substantive evidence as a prior identification exception to the hearsay rule, pursuant to D.C. Code § 14-102 (b)(3) (2001), or that the defense should have been allowed to impeach her with the statement if she testified contrary to it on the stand — a course the trial judge rejected. Decisions on whether to admit evidence are committed to the discretion of the trial court, and our review is only for an abuse thereof. *Brown v. United States,* 840 A.2d 82, 88 (D.C. 2004). "Determining whether a statement falls within an exception to the hearsay rule, on the other hand, presents a question of law which this court considers *de novo.*" *Id.*

We need not decide, however, whether Woods' vague description of "the group of juveniles who hung out on the corner" rose to the level of a prior identification in this instance, because we conclude, even assuming there was error in excluding Woods' statement, that the error was harmless.[9] We are satisfied that the forensic evidence, Thomas' jailhouse communications — where he attempted to suborn perjury and obstruct justice — in addition to the testimony of an eyewitness with no motive to lie and who had known Thomas for several years, taken together were very strong evidence of his guilt. In short, we are able to say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Similarly, assuming it was error for the trial judge to not allow Woods' prior statement to come in for impeachment purposes, such error was also harmless. Indeed, were Woods to have taken the stand and reiterated her grand jury testimony that she did not see anything, and then been impeached with her statement to police,[10] we cannot say — given the overwhelming evidence in this case — that the verdict would not have been the same. Based on that overwhelming evidence, we conclude again "that the judgment was not substantially swayed by the error." *Id.*

For the foregoing reasons, it is hereby ORDERED and ADJUDGED that appellant's convictions are

Affirmed.
ENTERED BY DIRECTION OF THE COURT:
Julio A. Castillo
JULIO A. CASTILLO
Clerk of the Court

[9] The defense sought to have this evidence introduced because, at the time of the offense, Thomas was twenty-one years old, not a juvenile.

[10] Our "harmlessness" analysis on this point is bolstered by the fact that, had the witness been so impeached, the government would have been entitled to a jury instruction that the prior statement could not be used as substantive evidence.

Copies to:

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