State v. Copley: Addressing Race During Closing Argument

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Last month, the North Carolina Court of Appeals decided *State v. Copley*, __ N.C. App. __, 2019 WL 1996441 (May 7, 2019), in which a divided panel held that the trial court abused its discretion by overruling the defendant's objections to the prosecutor's remarks about race during closing argument. For that reason, the Court vacated the defendant's first degree murder conviction. This post discusses the law governing when parties in a criminal trial may discuss issues of race, as well as emerging strategies for mitigating the effects of implicit racial bias on decision-makers.

The Facts of the Case, the Prosecutor's Argument, and the Court's Ruling

Briefly, Defendant Chad Copley was tried in Wake County Superior Court for shooting and killing 20-year old Kourey Thomas with a shotgun through the window of Copley's garage. Thomas was crossing Copley's yard after leaving a party at Copley's neighbor's house when Copley shot him. Copley relied on self-defense and defense of habitation. The jury found Copley guilty of first degree murder by premeditation and deliberation and by lying in wait. Copley is White and Thomas was Black; another approximately 20 partygoers standing outside of Copley's house before the shooting were also Black.

In the rebuttal portion of his closing argument, the prosecutor stated as follows:

[THE STATE]: [] I have at every turn attempted to not make this what this case is about. And at every turn, jury selection, arguments, evidence, closing argument, there's been this undercurrent, right? What's the undercurrent? The undercurrent that the defendant brought up to you in his closing argument is what did he mean by hoodlums? I never told you what he meant by hoodlums. I told you he meant the people outside. They presented the evidence that he's scared of these black males. And let's call it what it is. Let's talk about the elephant in the room. []

If they want to go there, consider it. And why is it relevant for you? Because we talked about that self-defense issue, right, and reasonable fear. What is a reasonable fear? You get to determine what's reasonable. Ask yourself if Kourey Thomas and these people outside were a bunch of young, white males walking around wearing N.C. State hats, is he laying [sic] dead bleeding in that yard?

Think about it. I'm not saying that's why he shot him, but it might've been a factor he was considering. You can decide that for yourself. You've heard all the evidence. Is it reasonable that he's afraid of them because they're a black male outside wearing a baseball cap that happens to be red? They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang. That's the evidence. They can paint it however they want to paint it, but you all swore and raised your hand when I asked you in jury selection if you would decide this case based on the evidence that you hear in the case, and that's the evidence. Now, reasonableness and that fear, a fear based out of hatred or a fear based out of race is not a reasonable fear, I would submit to you. That's just hatred. And I'm not saying that's what it is here, but you can consider that. And if that's what you think it was, then maybe it's not a reasonable fear. [Overruled objections omitted.]

The Court held that this argument was improper and rejected the State's argument that the remarks were justifiable inferences in light of the defendant's statements describing the victim and the other partygoers as hoodlums and

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possible gang members. It concluded that the evidence presented did not raise an inference that race or racial bias may have been a factor motivating the defendant's response to the victim. Instead, the court held that the prosecutor's remarks about race constituted a gratuitous and unconstitutional appeal to juror prejudice. Slip op. at 21. The dissent would have held that the prosecutor's comments did not constitute an appeal to racial animosity and that, given the facts of the case, it was not an abuse of discretion for the court to allow the prosecutor to recognize the possibility that racial bias may have been a factor in this case. (Arrowood, J., dissenting, slip op. at 4).

Because there was a dissent, the North Carolina Supreme Court will determine whether the Court of Appeals reached the correct result in this case. The remainder of this post will focus on the legal standards applicable to discussions of race in closing arguments and research into the potential value of making race salient in criminal cases.

Relevant Legal Standards

Parties are given wide latitude in their closing arguments, which must be based upon "the law, the facts in evidence and all reasonable inferences drawn therefrom." *State v. Fletcher*, 370 N.C. 313, 319 (2017) (internal quotations omitted); *State v. Diehl*, 353 N.C. 433, 436, (2001). However, closing arguments may not be used to incite the passion or prejudice of the jury against the defendant. *State v. Williams*, 339 N.C.1, 24 (1994). In deciding a challenge to an allegedly improper closing argument, courts must determine whether the argument was an appropriate inference from the facts in evidence, or a gratuitous, improper, and unconstitutional effort to prejudice jurors against the defendant. *Diehl*, 353 N.C. at 436.

Courts have applied this standard to references to race in closing argument. At one extreme, "overt appeals to racial prejudice, such as the use of racial slurs, are clearly impermissible." *State v.* Williams, 339 N.C. 1, 24 (1994). For example, in *State v. Sims*, 161 N.C. App. 183, 193 (2003), a prosecutor argued that the defendant and his coconspirators, all of whom were Black, were "[j]ust like the predators of the African plane [sic]," like a "pack of wild dogs or hyenas in a group attack[ing] a herd of wildebeests" on "Discovery Channel [or] Animal Planet." The North Carolina Court of Appeals held that this argument was improper, although it found that the argument did not deny defendant due process entitling him to a new trial. *See also Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978) (argument that a White woman would never have consensual sex with a Black man constituted an overt appeal to racial prejudice in violation of the guarantee of equal protection); Elizabeth L. Earle, *Note, Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 Colum. L. Rev. 1212, 1222 (when the prosecutor's argument "appeals to passion and prejudice rather than facts and law, it compromises the fundamental guarantees of equal protection and an impartial trial"); Raising Issues of Race in North Carolina Criminal Cases Section 8.4 (References to Race at Trial) (UNC School of Government, 2014) (discussing overlapping constitutional protections applicable to references to race at trial and collecting cases).

However, North Carolina courts have recognized that not all references to race in the presentation of evidence and argument at trial are improper. It is "entirely appropriate" to raise the subject of race in closing argument where it is relevant to the case. *State v. Diehl*, 353 N.C. 433, 436 (2001). For example, where a White defendant used a racial slur to refer to a Black victim, it was appropriate for the prosecutor to argue that the murder was, at least in part, racially motivated. *State v. Moose*, 310 N.C. 482, 492, (1984); *see also* Elizabeth L. Earle, *Note, Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 Colum. L. Rev. 1212, 1222 (when a "prosecutorial reference to race has its basis in other evidence, it may serve a valuable role in the criminal justice system").

Self Defense, Implicit Bias Research, and the Value of Making Race Salient

As our Supreme Court has recognized, "[t]he mere mention of race [when relevant] is not evidence of racial animus." *State v. Williams*, 339 N.C. 1, 18 (1994). Appellate courts have acknowledged the importance of addressing race at trial for the purpose of ensuring that racial bias does not taint the criminal process. For example, the North Carolina Court of Appeals recently "caution[ed] trial courts to consider the importance of acknowledging issues of race and bias in voir dire." *State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415, 421 (2018) (internal quotations omitted)

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(PDR granted); *see also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 881 (2017) (Alito, J., dissenting) ("… voir dire on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it.").

One possible reason for addressing race at trial is to guard against the influence of implicit racial bias on juror decision-making. *See, e.g.*, Jerry Kang, et al., *Implicit Bias in the Courtroom*, Jerry Kang et al., 9 UCLA L. Rev. 1124 (2012). Implicit biases, briefly, are attitudes and stereotypes that we are not aware of, but that can influence our perceptions, decisions, and behavior. Many courts have taken notice of the "growing body of social science recogniz[ing] the pervasiveness of unconscious racial and ethnic stereotyping and group bias." *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004).

The phenomenon of implicit bias carries significant implications for cases involving claims of self-defense against a Black victim, as research demonstrates that automatic fear responses can be deeply racialized. "The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years." Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J.Personality & Soc. Psychol. 876, 876 (2004). Several recent studies document the "phenomenon of shooter bias in which individuals are quicker to identify weapons and slower to recognize harmless objects, like tools, in the hands of Black persons than in the hands of White persons." Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1582 (2013) (citing studies). Shooter bias researchers have concluded that the stereotype of Black criminality may influence not only perceptions of weapons, but decisions to shoot. *Id.* at 1584, *citing* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individu*als, 83 J. Personality & Soc. Psychol. 1314, 1315 (2002). These findings highlight two distinct risks: (1) that unconscious racial bias could influence a defendant's fear of harm; and (2) that unconscious racial bias could influence jurors' perception of whether the defendant's fear of a Black victim was reasonable. To avoid miscarriages of justice caused by implicit racial bias, it is incumbent upon the justice system to take steps to address both risks.

One strategy for addressing these risks derives from the discovery that, when race issues are brought to the forefront of a discussion or "made salient," the influence of stereotypes and implicit biases on decision-making recedes. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L.Rev. 997, 1011 (2003). Making race salient involves educating jurors about the risk that implicit racial bias and stereotypes can influence decision-making, in an effort to encourage jurors to consciously guard against such unconscious processes. Perhaps counterintuitively, Sommers and Ellsworth have found that raising the subject of race helps to promote equal treatment of all defendants, regardless of race. *Id.* This strategy was recently acknowledged by the North Carolina Court of Appeals, when it quoted Professor Cynthia Lee's observation that "[c]alling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make." *State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415, 423 n.2 (PDR granted) (*quoting* Cynthia Lee*, A New Approach to Voir Dire on Racial Bias*, 5 U.C.Irvine L. Rev.843, 846 (2015)); *see also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 881 n.9 (2017) (Alito, J., dissenting) (observing that "[t]o the extent race does become salient during *voir dire,* there is social science research suggesting that this may actually combat rather than reinforce the jurors' biases."). Older cases decided before the advent of cognitive bias research observed that discussing race increases the risk of activating juror bias. *See, e.g., McFarland v. Smith*, 611 F.2d 414, 416-17 (2d Cir.1979) ("To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore"), *quoted in State v. Copley*, slip op. at 16. However, the assumptions embedded in those discussions run counter to modern research into the operation of bias and best practices for guarding against its influence.

The implications of this strategy in cases involving self defense are exhaustively explored by Professor Cynthia Lee in a recent article, in which she argues for "mechanisms . . . to make the operation of racial stereotypes in the creation of fear salient" whenever decision-makers review a claim that a defendant shot a Black man in self defense. Cynthia Lee, *Making Race Salient* at 1555; *see also* James E. Coleman, Jr*., Ignoring Race a Mistake in Zimmerman Trial*, News And Observer (Raleigh), July 20, 2013 (arguing that the State of Florida created conditions for verdict of acquittal by

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failing to address the role of race in Zimmerman's perception of Trayvon Martin as a threat). Professor Lee suggests several ways in which court actors can make race salient and guard against the unconscious activation of implicit racial bias in assessing claims of self defense involving Black victims. In the context of closing arguments, Professor Lee suggests that attorneys could use the sort of race-switching exercise that the prosecutor used in *State v. Copley* when he asked jurors to imagine that the group of partygoers were instead white fraternity brothers. These exercises invite jurors to test their impressions against a counternarrative in which the race of the parties are different, and drive home the importance of avoiding reliance on racial stereotypes.

The *Copley* majority addressed the risk that the prosecutor's remarks could have fanned the flames of juror prejudice against the defendant. The court rightly recognized that appeals to juror prejudice and invitations to rely on ugly stereotypes are unconstitutional. *See, e.g.*, *Miller v. North Carolina*, 583 F.2d 701, 707 (1978). The court did not discuss the risk that stereotypes of Black criminality could have affected both the defendant's response to the victim and the jurors' assessment of the reasonableness of his response. The prosecutor's argument here, that the defendant's perception of the victim as a hoodlum or gang member may have been influenced by the victim's race, and his suggestion that jurors consider this possibility by participating in a race switching exercise, could be viewed as an effort to guard against the influence of implicit racial bias.

In other contexts, the U.S. Supreme Court has recognized the importance of taking affirmative steps to guard against the influence of bias on juror decision-making. *See, e.g., Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (announcing an exception to the no impeachment rule for jury verdicts in cases involving evidence that racial bias influenced the jury's deliberations). *State v. Copley* presents an opportunity for our Supreme Court not only to review one prosecutor's closing argument, but also to offer guidance to judges, prosecutors, and defense attorneys considering the strategy of "making race salient" to combat the effect of implicit racial bias on the administration of justice.

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