

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EURAN J. WOODS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

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1. INTRODUCTION

In the 21st Century, the impact of implicit bias on the assessment of the fairness of tribunals is well known and has been analyzed in great detail in both academia and by the courts. The ability of a criminal defendant, particularly an African-American male, to obtain a constitutionally fair determination of his guilt or innocence is significantly influenced by how the Court, and the lawyers that appear before it, address evidence having the tendency to confirm racial stereotypes, biases and prejudices.

It is incumbent upon a properly educated prosecutor not seek convictions utilizing evidence that either explicitly or implicitly appeals to racial animus or stereotyping based on race. Similarly, it is the role of any properly educated defense counsel to be able to identify circumstances that might lead implicit bias to infiltrate a trial and, primarily through objections, or other means, make this issue apparent to the Court.

In the instant case, none of the functionaries (i.e. the Court or counsel) even contemplated the implicit bias impact the admissibility of pimp/prostitution evidence would have on the fairness of the trial. As such, each failed in their individual and combined responsibility to ensure

Mr. Woods had a fair trial. Nothing in the State’s Response Brief changes this immutable fact.

2. ARGUMENT

2.1. The Trial Court erred in not excluding evidence of Pimp/Prostitution as unduly prejudicial

A defendant should not have to wait until an appeals court determines that the trial court wrongfully admitted evidence that implicated racial bias in order to get a fair trial. Academics and the courts have long acknowledged that implicit bias exists and that it is a particular issue in the criminal trials. See State v. Saintcalle, 178 Wash.2d 34, 46 (2013){Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.}

Here, the Court ignored (or more likely was unaware) the probability that admission of the pimp/prostitution evidence would have a much more prejudicial impact on the defendant the regular run of the mill prior bad acts. The responsibilities of a judge compel her to exercise her discretion in a manner reflects an understanding and appreciation of how jurors make decisions, including the role racial bias plays. Here, the Court failed to factor in current research involving implicit bias in analyzing the

proffered evidence under ER 404 (b). In doing so, the Court committed a similar mistake as the Court in Monday in failing to intervene appropriately when a lawyer appearing before it made direct appeals to racial animus. See Monday, 171 Wash.2d at 673. {Stating that the trial judge, while ruling that the prosecutor should not make comments about the credibility of the witness, was nonetheless “sympathetic” to the difficulties the State was having in getting witnesses to testify.} Ultimately, the Court in Monday, primarily faulted the prosecution. However, the failure of the trial judge, as arbiter of evidence, to intervene and, more, to appear sympathetic to the State’s witness problem appeared to concern the Court as well.

2.2 The Pimp/Prostitute evidence was inadmissible under ER 404 (b)

It goes without saying that the King County Prosecutor’s office prosecuting this appeal is the same prosecuting authority that actively argued the State’s case in State v. Monday, 171 Wash.2d 667 (2011). Indeed, the King County Prosecutor defended its deputy’s actions until the bitter, iniquitous.

Given the Washington Supreme Court’s decision in Monday, one would expect a much more – shall we say- “post- Monday” argument in the instant case. Instead, the State’s argument, in support of the evidence

of implicit bias, largely mirrors its arguments against the low-hanging fruit of explicit bias denounced in Monday. It is akin to saying, “implicit bias, what implicit bias?” It demonstrates little, if any acknowledgment, that a phenomenon that is quite well documented takes place in the fanciful land of King County.

As in Monday, the State argues here that the overwhelming evidence of guilt justifies the admission of this highly prejudicial evidence. The State’s argument is that this evidence is not an implicit appeal to bias but simply admitted to explain why Ms. Englund failed to report the alleged assault until months later. Fatal to the State’s argument is the fact that in order for the jury to have actually taken this as explanatory, the Court would need to be convinced that the understanding of the pimp/prostitute dynamic on the part of the jurors was not impacted by racial stereotypes. Given what we know, the opposite is most likely true. Moreover, that the specific relationship between Mr. Woods and Ms. Englund fit into that dynamic in such a manner as to fit that explanation.

Moreover, the evidence would be more explanatory on issues where the jury can be assumed to have more collective experience (i.e. relationships, perhaps violent ones). It is doubtful that any of the potential jurors had any experience in pimp/prostitute relationships. Without that,

the jurors are left to their own imaginations filled as it were with cultural implicit biases that no doubt impacted their decisions.

The State's arguments here further mirror its argument in Monday in that it suggests that the strength of the evidence against the Defendant makes the impact of implicit bias irrelevant. See Monday, 171 Wash.2d at 679. Rebuking this argument, the Washington Supreme Court stated, in essence, that race is different. “ The constitutional promise of an impartial jury trial commands jury indifference to race.” Id. Further, the Court stated “that the very existence of appeal to racial bias by the State “demands that appellate courts set appropriate standard to deter such conduct.”

In the instant case, the State's insistence on admitting this evidence under the pretext of explaining Ms. Englund's behavior, was the functional equivalent of an explicit appeal to an impermissible racial narrative—that of the black pimp with his white prostitute. Of particularly note is the fact that Mr. Woods was never charged with promoting prostitution or any other charge, which might make evidence of this nature relevant. The State, in seeking its admission under ER 404 (b), with the rules significantly lower (effectively non—existent) standard of proof, guaranteed a conviction.

2.3 Counsel's failure to raise implicit bias as an objection to the admission of this evidence was neither objectively reasonable nor strategic

While it is true that trial counsel raised a general objection to all ER 404 (b) evidence in this case, including the pimp/prostitution evidence, trial counsel did not articulate, as an additional basis for exclusion, the potential that the evidence might be seen through implicit bias lenses by the jury.

The central question here is whether the failure to present the appropriate argument to the trial court regarding the implicit bias was objectively reasonable in light of trial strategy or some other tactical reason? This decision might be considered reasonable if the argument had taken place perhaps thirty (30) years ago or even twenty (20) years ago. Instead, in light of current research on implicit bias and the Court's decisions in State v. Monday and State v. Saintcalle, no reasonable defense attorney should fail to identify implicit bias evidence which no doubt will adversely impact their client, particularly a black defendant.

The fact that the Court, the State, or the Defense failed to recognize the significant elephant in the room with the admission of the evidence, far from being complimentary, is a damning indictment of the depth to which institutionalize racism is endemic to the criminal justice system in Washington State.

Unfortunately for the State of Washington, the research is clear that the impact of racial animus is both explicit and subtle in the criminal justice system. The fact that Defense counsel failed to recognize this fact in this case, does not save the State from having the grant Mr. Woods a truly fair trial by an impartial jury. In Monday, the defense counsel failed to timely object to the State's questioning and when the defense did object, the Court found that the objection was unpecific. Monday, 171 Wash.2d at 679. Still, the Court reversed the conviction because even in light of the failure of the Defense to object, race is different. Id.

The same result should occur in the instant case. Just because the evidence in the instant case did not involve explicit appeals to racial stereotypes, in no way explains, let alone justifies, the admission of implicit evidence of such animus. Nor does it lessen the scrutiny that should be applied by judges and the lawyers that appear before them to identify and nullify this evidence even if, in doing so, it results in fewer convictions.

3. CONCLUSION

For the reasons discussed above and oral argument, this Court should reverse Woods' conviction and remand for a new trial.

DATED this 17^h day of October 2016.

THE WOMACK LAW GROUP, PLLC

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ATTORNEY FOR APPELLANT.

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Court of Appeals No.: 72628-5-I
Superior Court No.: 13-1-13434-5 SEA

DECLARATION OF SERVICE

DECLARATION

I, SORAYA WOMACK, being over eighteen (18) years of age and not a party to the above-captioned matter, filed the following: Appellant's Reply Brief on October 17, 2016.

CERTIFICATE OF SERVICE

I certify that on the 17th day of October 2016, I caused a true and correct copy of this Notice to be served on the following in the manner indicated below:

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By: *Soraya T. Womack* Soraya T. Womack. Signed at Seattle, WA this 17th day of October 2016.

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