

64466-1

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NO. 64466-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN ALLEN,

Appellant.

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

The Honorable Theresa Doyle

CORRECTED BRIEF OF APPELLANT

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2010 JUN 7 PM 4:10
CORRECTION

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A. SUMMARY OF ARGUMENT

Faulty eyewitness identifications are the leading cause of wrongful convictions. The factors contributing to the unreliability of eyewitness identifications are magnified in the circumstance of a cross-racial identification, particularly where a weapon is used. Recognizing the potential effect of unreliable eyewitness identification testimony on the fairness of criminal proceedings, many jurisdictions now require, and the American Bar Association recommends, that when a cross-racial identification is involved and the evidence is otherwise weak or uncertain, the jury be instructed on the difficulties inherent in such an identification.

Bryan Allen was prosecuted for brandishing a gun after he was positively identified in a show-up identification procedure. Save for Allen's clothing and race, he bore little resemblance to the suspect description. Police never recovered a gun or other evidence corroborative of the victim's testimony, and there were no other witnesses to the crime.

Allen proposed a cross-racial identification instruction to ensure the jury fairly evaluated the eyewitness's testimony, which the court refused to give. Allen requests this Court reverse his conviction and hold that where eyewitness identification is a central

issue in the case, there is little corroborating evidence, and other factors call into question the reliability of the identification, an instruction about identification should be issued to ensure the defendant receives a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court denied Allen his Sixth Amendment right to present a defense and his Fourteenth Amendment right to due process of law in declining to issue the defense proposed jury instruction on cross-racial identification.

2. The prosecutor committed misconduct in closing argument, in violation of the Fourteenth Amendment guarantee of due process.

3. Whether the threat made was a “true threat” was an essential element of the crime of felony harassment that had to be included in the information and in the “to convict” instruction.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where identification is a central issue in the case and the evidence calls into question the identification’s reliability, cross-racial eyewitness identifications create an impermissible risk of wrongful conviction. There is a growing consensus that to counteract this effect, the jury should be instructed regarding the

factors that may influence the reliability of a cross-racial identification. Identification was the key issue in this case, where there was little independent evidence to corroborate the identification and other factors undermined the identification's reliability. Was Allen denied a fair trial when the court refused to issue his proposed jury instruction on cross-racial identification?
(Assignment of Error 1)

2. A prosecutor commits misconduct when he vouches for a witness either by stating his personal belief in the witness's credibility or implying that evidence not presented to the jury supports the conclusion that the witness is credible. Where the case hinged on the complainant's credibility, did the prosecutor commit reversible misconduct when he argued the jury should believe the complainant's testimony because the complainant was not a "flake" or a "derelict" and worked as a special education teacher?
(Assignment of Error 2)

3. Principles of due process require the essential elements of a criminal charge be pled in the information and included in the "to convict" instruction. Should this Court conclude that whether a threat was a "true threat" is an essential element of a crime of

harassment that must be included in the information and submitted to the jury in the “to convict” instruction? (Assignment of Error 3)

D. STATEMENT OF THE CASE

While walking in the University District at dusk, Gerald Kovacs was confronted by two young African American men who asked him if he wanted “fire.” 10/21/09 RP 6.¹ Kovacs asked them what they were talking about and the smaller of the two men said “bud, weed.” 10/21/09 RP 8. Annoyed, Kovacs told them to “fuck off” and the men became agitated and confrontational. 10/21/09 RP 9-10. The smaller of the two men, who was wearing a red hooded sweatshirt and had a large afro, started cursing and swearing at Kovacs. 10/21/09 RP 10. Kovacs told the men to leave him alone, and eventually they walked away. Id.

Several minutes later, Kovacs turned around and the young men were following him. The person in the red hooded sweatshirt told Kovacs, “My friend’s going to shoot you.” 10/21/09 RP 11. The other young man then said, “I’m going to kill you, you bitch,” and lifted the front of his own hooded sweatshirt to reveal a handgun at his waist. Id. Terrified, Kovacs fled to a nearby Chevron station, where he called the police. 10/21/09 RP 12.

¹ References to the verbatim report of proceedings are by date, followed by page number.

Kovacs described the confrontation to the 9-1-1 operator and said, "The guy pulled a gun on me." 10/22/09 RP 2. He said, "[H]e took a gun out of his pants. He went boom, I'm going to shoot you. And the other kid goes yeah bitch, yeah bitch, you know, whatever." 10/22/09 RP 3. Kovacs described the man with the gun as African American, in his mid-20s, 5'9" tall, wearing a black hooded sweatshirt, dark jeans, a baseball cap and large gold-rimmed sunglasses. 10/22/09 RP 3-5.

Some distance away, a University of Washington patrol officer attempted to stop two young African American men. One of the young men was wearing a white t-shirt, and the other, later identified as appellant Bryan Allen, was wearing clothes similar to those described by Kovacs. 10/21/09 RP 40. The young man in the t-shirt ran away when the officer tried to contact them, but Allen did not. 10/21/09 RP 43.

Allen was soon detained by Seattle police officers. Except for his clothes and his race, Allen did not match the description provided by Kovacs. 10/21/09 RP 66. Kovacs described the man who had threatened him as being his own height – 5'9" tall – and weighing about 220 pounds. 10/21/09 RP 32-33. Allen is 6'1" tall and weighed about 280 pounds. 10/21/09 RP 66. Nevertheless,

upon seeing Allen handcuffed and surrounded by uniformed officers, Kovacs positively identified Allen as the person who had threatened him. 10/21/09 RP 25-26.

Allen was searched incident to his arrest and no gun was found. 10/21/09 RP 44, 73. Allen also had no marijuana or cash on his person. 10/21/09 RP 73.

Based on these events, the King County Prosecuting Attorney charged Allen with felony harassment. CP 1. The matter was tried to a jury in one day. At trial, Allen requested the jury be given an instruction on cross-racial identification. CP 61-62. The court denied his request. 10/21/09 RP 75-76. After two days of deliberation, the jury convicted Allen as charged. CP 25. Allen appeals.

E. ARGUMENT

1. IDENTIFICATION WAS A KEY ISSUE AT TRIAL, THUS DENIAL OF THE DEFENSE-PROPOSED INSTRUCTION ON CROSS-RACIAL IDENTIFICATION VIOLATED ALLEN'S RIGHT TO A DEFENSE AND DUE PROCESS RIGHT TO A FAIR TRIAL.

a. An accused person has the due process right to have the jury instructed on his theory of defense. An accused person has a due process right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. V, VI, XIV; Const. art. I, § 3; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

b. The inherent unreliability of cross-racial identifications supports the issuance of a jury instruction where identification is a key issue in the case. A pretrial identification is “peculiarly riddled with innumerable dangers and variable factors which seriously, even crucially, derogate from a fair trial.” United

States v. Wade, 388 U.S. 218, 230, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The limitations and weaknesses of eyewitness identification testimony are firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as peer review literature. Henry F. Fradella, Why Judges Should Admit Testimony on the Unreliability of Eyewitness Testimony, 2006 Fed. Cts. L. Rev 1, 3 (June, 2006).

Where cross-racial identification is implicated, these problems are amplified, as the reliability of the identification is diminished by several empirically demonstrated factors. Chief among these is the “own-race” effect or “own-race” bias, in which witnesses experience “cross-racial impairment” when asked to identify suspects of another race. John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207, 211 (2001). This bias is strongest “when white witnesses attempt to identify black subjects.” Id. (quoting People v. McDonald, 690 P.2d 709, 720 (Cal. 1984)).

In addition to the problematic effects of cross-racial impairment, the conclusions to be drawn from a confident eyewitness identification are counter-intuitive. As one commentator observed, the research findings show:

witnesses often make mistakes, that they tend to make more mistakes in cross-racial identifications as well as when the events involve violence, that errors are easily introduced by misleading questions asked shortly after the witness has viewed the simulated happening, and that the professed confidence of the subjects in their identifications bears no consistent relation to the accuracy of these recognitions.

1 McCormick, Evidence, § 206 (6th Ed. 2006).

Recognizing the strong correlation between mistaken identifications and wrongful conviction, many states require a special jury instruction on cross-racial identification to reduce the risk that a conviction will be based on a flawed identification. In Utah, for example, unless expert testimony on the subject of cross-racial identification is introduced at trial, the trial judge must provide a cautionary instruction “if one is requested by the defense and eyewitness identification is a ‘central issue.’” State v. Clopten, 222 P.3d 1103, 1114 (Ut. 2009).

Similarly, in New Jersey, a cross-racial instruction must be given if “identification is a critical issue in the case, and an eyewitness’s cross-racial identification is not corroborated by other evidence giving it independent reliability.” State v. Cromedy, 727 A.2d 457, 464 (N.J. 1999); accord Janey v. State, 891 A.2d 355, 366, cert. denied, 898 A.2d 1005 (Md. 2006); cf., also, People v.

LeGrand, 867 N.E.2d 364 (N.Y. 2007) (holding the exclusion of expert testimony on eyewitness identification an abuse of discretion where there was not “sufficient corroborating evidence” that the defendant was the perpetrator).

After conducting a thorough survey of pertinent cases and sociological studies, the American Bar Association concluded a jury instruction on cross-racial identification should be given where the evidence corroborating the identification is uncertain:

A specific jury instruction on cross-racial identification sensitizes jurors to consider whether the fact that the defendant is of a different race than the identifying witness has affected the accuracy of the identification. Jurors are more apt to comfortably discuss racial differences with such an instruction. A cross-racial jury instruction is needed most in the following circumstances: (1) identification is the critical issue in the case; (2) little or no evidence corroborating eyewitness identification is presented; and (3) the circumstances raise doubts about the reliability of the identification.

American Bar Association Criminal Justice Section, Report to the House of Delegates on Cross-Racial Identification (2008)² (“ABA Report”).

² Available at <http://www.abanet.org/crimjust/policy/eyewitness.pdf>

c. The trial court's ruling denying Allen's requested instruction was based on an unsound grasp of decisional law.

Because identification was a key issue in the case and the circumstances called into question the identification's reliability, Allen requested the court instruct the jury on the concerns with cross-racial identifications. Allen's submitted two alternative proposed instructions. The first read:

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness's testimony, but you must also consider whether there are other factors present in this case that overcome any such difficulty of identification.

CP 61.

The second proposed instruction provided:

In this case, the defendant, Bryan [Allen], is of a different race than Gerald Kovacs, the witness who has identified him. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human

experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcome any such difficulty of identification.

Id.

The trial court declined to give either proposed instruction,

ruling:

The Washington Pattern Instruction's [sic] Committee does not recommend the giving of an eyewitness identification instruction. Of course the cross racial identification instruction is sort of a sub part of that.

The case law that was cited to me, the New Jersey case, and I think the other was a federal district court case. New Jersey, apparently the judiciary had something to do with a task force that issued a report. And, I think the court relied on that in deciding to give the instruction. And then held that like the Supreme Court did in the Brown [v. Board of Education of Topeka], 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)] case the court can rely on sociological studies. I don't have that in this case, I don't have a report that has been offered to me to review. I think the other case that was relied on, that was submitted, relied on expert testimony with respect to the risks of cross-racial identification. And I don't have expert testimony here either.

So, for those two reasons plus the fact that the Washington Pattern Instruction Committee has declined to draft a pattern instruction on this point, certainly could have, the Court declines to give the instruction.

I think the point has already been made really through the State's witnesses on cross-examination

with respect to the difficulties in cross-racial identification.

10/21/09 RP 75-76.

Although the trial court believed issuance of the instruction was inappropriate because no instruction on eyewitness identification has been approved by the Washington Pattern Instructions Committee, the Supreme Court has not endorsed this view. It is true that the Washington Pattern Instructions have met with the Supreme Court's general approval, but the Court has expressly repudiated the notion that the instructions accurately state the law, or that the issuance of non-pattern instructions is improper. State v. Studd, 137 Wn.2d 533, 547-49, 973 P.2d 1049 (1999).

As for the court's conclusion that it could not rule on the propriety of the instruction because it did not have "a report that has been offered to me to review", this utterly mistakes the significance of the authority that the court was provided and the New Jersey Supreme Court's analysis in Cromedy. In Cromedy, the trial court denied a request for a cross-racial identification instruction for nearly exactly the same reasons as the trial court here. Even though Cromedy had cited in support of his request for the

instruction the New Jersey Supreme Court Task Force on Minority Concerns Final Report, 131 N.J.L.J. 1145 (1992) (“Task Force Report”),³ the trial court concluded the instruction was not warranted because the Supreme Court had not yet adopted the findings in that report and there had been no expert testimony on cross-racial identifications. 727 A.J.2d at 460.

On review, the New Jersey Supreme Court commented that in addition to the Task Force Report, Cromedy “relied on common knowledge . . . and judicial notice to support his request.” Id. at 461. The Court conducted a detailed analysis of “empirical studies” that, for “more than forty years,” have demonstrated that cross-racial bias infects the reliability of cross-racial eyewitness identifications. Id. at 461-63. While observing that researchers disagree about the extent to which cross-racial identification should influence judicial decision-making, the Court analogized the circumstance to that presented in Brown, supra. Id. at 462 (noting “The debate among researchers did not prevent the Supreme Court of the United States in the famous school desegregation case of [Brown] from using behavioral and social sciences to support legal

³ Curiously, the trial court in this case apparently did not avail itself of any online legal research tools, as the Task Force Report cited to the trial court in Cromedy is available on Westlaw and presumably Lexis as well.

conclusions without requiring that the methodology employed by those scientists have general acceptance in the scientific community”).

Cromedy was decided in 1999. Since that decision, the consensus that instructions should be given to educate juries regarding the special challenges posed by cross-racial identifications has become near-unanimous. See ABA Report, supra (citing cases and studies). Thus, even if the trial court concluded it had insufficient “evidence” on which to base a decision, this Court should not.

The trial court’s alternative basis for refusing the instruction – that it should not be given because Allen had not offered expert testimony to “support” the instruction – was also unsound. Indeed, the court should have reached precisely the opposite conclusion. As the Utah Supreme Court reasoned, where an expert is permitted to testify on the fallibility of cross-racial identification, a trial judge acts within her discretion if she concludes a separate instruction on the subject will be cumulative. Clopten, 223 P.3d at 1113. But where such testimony is not introduced, and eyewitness identification is a “central issue” in the case, the instruction must be given to protect the defendant’s right to a fair trial. Id.

The trial court's final comment was that the instruction was unnecessary because "the point has already been made really through the State's witnesses on cross-examination with respect to the difficulties in cross-racial identification." 10/21/09 RP 76. This too was incorrect.

The sole witness to testify about cross-racial identification was arresting officer Anthony Bennett. Although Bennett grudgingly admitted to knowing of studies "suggesting that cross racial identifications can be more difficult for people," 10/21/09 RP 57, Bennett was a uniquely recalcitrant witness in other respects. Bennett resisted the fairly uncontroversial proposition that eyewitness testimony coupled with independent evidence is stronger than eyewitness testimony on its own, and claimed that the "most reliable" identification "is shortly after a crime has been committed and there's a show up." 10/21/09 RP 54, 56. Both of these assertions are flatly contradicted by prevailing authority. See U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999)⁴ (discussing shortcomings of eyewitness identification testimony and "inherent suggestiveness" of show-up identifications in particular).

⁴ Available at: <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>

d. Identification was a critical issue in this case, and Kovacs' identification was not corroborated by other evidence giving it independent reliability, thus the court's failure to give the requested instruction was prejudicial error. The evidence in this case bore all the hallmarks of an unreliable identification, making it critical that the court educate the jury regarding how to evaluate Kovacs' identification testimony. With respect to the factors enumerated in the ABA Report, first, identification was the sole issue in this case. The State's prospects for conviction rose or fell entirely on whether the jury credited Kovacs' testimony that Allen was the person who brandished a gun at him.

Second, there was little or no evidence corroborating the reliability of Kovacs' identification. There were no independent eyewitnesses to the altercation. Police officers were unable to arrest the second young man who was involved in the confrontation, and detained Allen based solely on (1) his race, and (2) his attire. Of Allen's clothing, the only arguably distinctive item was the gold-rimmed sunglasses, which police required Allen to put

on before conducting the show-up, so that Allen more closely resembled the suspect.⁵ 10/21/09 RP 70.

Third, multiple factors called into question the reliability of the identification:

- The case involved a cross-racial identification of a black subject. 10/21/09 RP 64.
- The incident occurred at dusk, thus it is not clear that Kovacs had a good opportunity to observe the suspect. 10/21/09 RP 31.
- The young man in the red hooded sweatshirt was doing most of the talking during the altercation, potentially detracting from Kovacs' attention to the young man in the black sweatshirt. 10/21/09 RP 27.
- A weapon was involved. Due to the factor of "weapon focus," when a weapon is present the victim will attend more closely to the weapon than the suspect's face, undermining the victim's ability to correctly identify the suspect later. Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum. Behav. 1, 11 (2009).
- The suspect wore a cap. The use of a disguise such as a hat or cap further compromises the accuracy of an identification. Richard A. Wise, Clifford S. Fishman, et. al., How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case, 42 Conn. L. Rev. 435, 456 (2009).
- The individual who was with Allen when they were stopped by University of Washington police did not match the

⁵ The police also instructed Allen to pull his baseball cap down low over his face. 10/21/09 RP 70.

description of the armed suspect's companion. 10/21/09 RP 42.

- Allen did not match the description of the armed suspect; he was easily four or five inches taller and 60 pounds heavier than the individual described by Kovacs. 10/21/09 RP 34, 66.
- No gun, weapon, or other item that could reasonably have been mistaken for a gun was recovered from Allen following his arrest. 10/21/09 RP 44, 59.
- No evidence was recovered from Allen's person corroborative of Kovacs' allegation that the two individuals who accosted him were selling drugs. 10/21/09 RP 44, 59.

In short, save for Allen's clothes, race, and the fact that he had the misfortune of being in the University District when police were searching for a suspect, no evidence corroborated Kovacs' identification, and the great weight of the evidence undermined its reliability. The State was thus wholly dependent on the jury crediting Kovacs' testimony regarding the certainty of the identification to obtain a conviction. As noted, although jurors may find an eyewitness's "100% positive" identification very convincing, certainty does not equate to accuracy. McCormick, supra.

In many jurisdictions, "[o]mission of . . . a cautionary instruction has been held to be prejudicial error where identification is the critical or central issue in the case, there is no corroborating evidence, and the circumstances of the case raise doubts

concerning the reliability of the identification.” Cromedy, 727 A.2d at 464 (citing cases). This Court should likewise hold that under the circumstances of this case, the failure to give Allen’s proposed instruction on cross-racial identification was a prejudicial error that denied Allen a fair trial. The conviction should be reversed, and the matter remanded with direction that on retrial, the proposed instruction should be given.

2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY VOUCHING FOR THE COMPLAINANT’S CREDIBILITY AND ARGUING FACTS NOT IN EVIDENCE.

a. The prosecutor vouched for Kovacs’ credibility and argued facts not in evidence. In rebuttal closing argument, presumably aware that his case hung on the thin thread of Kovacs’ identification, the prosecutor attempted to bolster Kovacs credibility by vouching for his character:

So what’s most important here is whether or not you accept Mr. Kovacs. I would point out to you from the evidence Mr. Kovacs is not a flake. He’s not some derelict. The evidence would show he’s a teacher, very passionate about his work. Not only is he a teacher he’s a special ed teacher.

10/21/09 RP 105-06. Allen objected to this argument on the basis that the State was vouching for Kovacs' credibility, but the court overruled the objection. 10/21/09 RP 106.

b. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V; XIV; Const. art. I, §§ 3, 22.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

Unless the misconduct infringes on a constitutional right, the defense bears the burden of proving a “substantial likelihood” that prosecutorial misconduct affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The allegedly improper arguments must be reviewed in the context of (1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. State v. Perez-Mejia, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006) (citing State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)).

c. As the case wholly depended on Kovacs’ testimony, the prosecutor’s vouching argument denied Allen a fair trial. A prosecutor is prohibited from directly or indirectly stating a belief that a witness was telling the truth. Reed, 102 Wn.2d at 105. A prosecutor who vouches for the credibility of a witness violates his duty to act impartially in the interest of justice, and commits misconduct. Id.

Vouching may occur in two ways: the prosecutor may place the prestige of the government behind the witness or may indicate

that information not presented to the jury supports the witness's testimony. United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). This second type of vouching "may occur more subtly than personal vouching, and is also more susceptible to abuse." Id.

The prosecutor here vouched for Kovacs by urging the jury to consider matters outside the record – i.e., that because Kovacs was "not a flake . . . not some derelict" and was a "special ed teacher" his identification testimony should be viewed as more reliable than the testimony of an ordinary witness. The prosecutor made this argument after expressly reiterating that "the most important thing" was whether or not the jury credited Kovacs' testimony. 10/21/09 RP 106.

This vouching argument was especially egregious because it was not true. First, there was no evidence to support the insinuation that a schoolteacher – and particularly a special education teacher – is a more reliable witness than an ordinary lay witness. Second, and more importantly, Kovacs had been convicted of the felony offense of attempted vehicular assault, which the prosecutor fought vigorously to keep out of the trial. 10/19/21 RP 8-10. Had the jury heard about this prior conviction, they may well have concluded Kovacs was a "flake" or "derelict"

and discounted his testimony accordingly. But because the prosecutor prevailed on the trial court to exclude the conviction, the prosecutor could falsely paint Kovacs as a model citizen.

Allen made a timely and specific objection to the improper argument, thus the issue is preserved for review. Upon consideration of the four factors enumerated in Russell, this Court should conclude there is a substantial likelihood that the improper argument affected the verdict.

First, the total argument and issues in the case focused on Kovacs' credibility. As noted in argument 1d, supra, there were substantial reasons to doubt Kovacs. Kovacs used fairly offensive language to characterize his assailants, stating "they stuck out like a sore thumb" in the University District and "looked like gang bangers." 10/21/09 RP 26-27. Kovacs was "100% positive" he saw a gun but Allen, the person arrested for the crime, was unarmed. 10/21/09 RP 29. If the State's theory were to be believed, Kovacs also made significant errors in estimating his assailant's height and weight.

Second, the trial court overruled the defense objection, thus placing a judicial imprimatur on the improper argument. Perez-Mejia, 134 Wn. App. at 916-17. Finally, the evidence addressed in

the argument was not merely collateral but was the central question in the case: whether the State had proven Allen's identity beyond a reasonable doubt. As the prosecutor himself stated, whether the jury "accept[ed] Mr. Kovacs" was "the most important thing." This Court should conclude that the prosecutor's improper vouching argument was substantially likely to have affected the verdict, requiring reversal of the conviction.

3. WHETHER THE THREAT WAS A "TRUE THREAT" WAS AN ESSENTIAL ELEMENT THAT HAD TO BE PLEADED IN THE INFORMATION AND INCLUDED IN THE "TO CONVICT" INSTRUCTION.

Although the trial court defined "threat" for the jury, the requirement that the threat made be a "true threat" was not included in the information or the "to convict" instruction. CP 20-21.

a. An accused person has the due process right to have the State prove the essential elements of the crime charged.

An accused person has the due process right to require the State to prove the essential elements of a charged offense to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Winship, 397 U.S. at 364; U.S. Const. amend. XIV.

Also required by principles of due process, the essential elements of a crime must be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amend. VI; Const. art. I, § 22; State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). In Goodman, the Court relied on Apprendi to hold that all facts essential to punishment must be pleaded in the information and proved beyond a reasonable doubt. Goodman, 150 Wn.2d at 785-86.

The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Id. at 784; State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information omitting essential elements charges no crime at all. State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343, rev. denied, 149 P.3d 378 (2006).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial or a guilty verdict. Kjorsvik, 117 Wn.2d at 102. The reviewing court determines whether the necessary facts appear in the information in any form, and if not, whether the

defendant was actually prejudiced by the lack of notice. Goodman, 150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06.

The first prong looks to the face of the charging document and requires at least some language giving notice of the allegedly missing elements. The second prong may look beyond the face of the information to determine if the accused actually received notice of the charges he or she must have been prepared to defend; it is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.

Courneya, 132 Wn. App. at 351 (citations omitted).

“If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” Id. In Courneya, the Court found the State’s omission of the implied element of knowledge from an information charging hit and run was fatal to the ensuing conviction, even though two jury instructions explained knowledge was an essential element of the crime charged. 132 Wn. App. at 353-54. Rejecting the State’s invitation to disregard the strict interpretation of the rule, the Court relied on Vangerpen, in which the Court held proper jury instructions cannot cure a defective information. Courneya, 132 Wn. App. at 354 (citing Vangerpen, 125 Wn.2d at 788).

Accordingly the Court reversed the conviction with instructions to dismiss the information. Courneya, 132 Wn.2d at 354.

b. That the threat made was a “true threat” was an essential element of felony harassment that had to be included in the information. In Washington, whether a threat was a “true threat” is an essential element of felony harassment that must be included in the charging document and the jury instructions.

In State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), the Supreme Court considered a First Amendment challenge to RCW 9A.46.020,⁶ the felony harassment statute. The Court noted that because the statute “criminalizes pure speech,” it “must be interpreted with the commands of the First Amendment clearly in mind.” Id. at 41 (quoting State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) and Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)). The Court held that in order to “avoid unconstitutional infringement of protected speech,

⁶ In pertinent part, RCW 9A.46.020 provides:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person[.]

Under subsection (b) of the statute, a person is guilty of a class C felony if “the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.”

RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only “true threats.” Kilburn, 151 Wn.2d at 43.

A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or take the life of another person.

Id. The communication “must be a serious threat, and not just idle talk, joking or puffery.” Id. at 46 (citing State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001)). Whether a true threat was made “is determined under an objective standard that focuses on the speaker.” Id. at 44.

The Court considered the issue again in State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). In that case the Court reiterated that a statute proscribing threats must be limited to “true threats” to avoid constitutional overbreadth prohibitions, and further found the failure to instruct the jury on the definition of a “true threat” was fatal to the conviction. Id. at 363-65.

In State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), this Court considered whether, in the context of a prosecution for telephone harassment, the requirement that the threat was a “true threat” had to be included in the information or the “to convict”

instruction. 141 Wn. App. at 482-85. Johnston notwithstanding, the court in Tellez concluded that the “true threat” requirement was a mere definitional component of the harassment statute, and not an essential element, reasoning that the court in Johnston did not expressly rule that “a true threat is an essential element of any threatening-language crime.” Id. at 483.

The decision in Tellez was incorrect. In fact, in Johnston the Court held “the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of a true threat.” Johnston, 156 Wn.2d at 366 (emphases added). The language of the Court’s holding intimates that the Court considered the “true threat” requirement to be an element of any harassment charge.

The conclusion that the Court considered the “true threat” requirement to be an element is consistent, as well, with the Court’s treatment of mere definitional terms. See e.g., State v. Lorenz, 152 Wn.2d 22, 33-35, 93 P.3d 133 (2004) (observing that the failure to instruct on definitional terms is not an error that requires a conviction be reversed) (citations omitted). By requiring an instruction on the “true threat” requirement, the Court implicitly distinguished “true threats” from definitional terms and signaled its

view that whether a threat was a “true threat” is an essential element of a harassment charge.

c. Courts in other jurisdictions have concluded the “true threat” requirement is an element. Both the federal courts and at least one other state supreme court have expressly held that whether a threat is a “true threat” is an element of a harassment crime. In State v. Robert T., 7146 N.W.2d 564 (Wis. 2008), the Wisconsin Supreme Court construed its own “bomb scares” statute. That statute provided,

Whoever intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by the means of explosives is guilty of a Class I felony.

Wis. Stat. § 947.015 (2003-04)

Discussing its own cases interpreting the “true threat” requirement, the Court concluded, “we are satisfied that upon reading into the elements of the crime a requirement that it must be a “true threat” renders Wis. Stat. § 947.015 constitutional.” Robert T., 746 N.W.2d at 568. The Court further observed, “Indeed, this is exactly what the supreme court of the state of Washington did with a similar statute prohibiting threats.” Id. (citing Johnston).

The Ninth Circuit has also held that a “true threat” requirement is an element of a harassment offense. United States v. Cassel, 408 F.3d 622 (9th Cir. 2005) (construing 18 U.S.C. § 1860, which proscribes interfering with a federal land sale). The Court conducted a lengthy analysis of the Supreme Court’s decision in Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), and concluded, based on this assessment, that “intent to threaten is a constitutionally necessary element of a statute punishing threats.” Cassel, 408 F.3d at 630-34. Applying this rule, in an appeal following a conviction for making interstate threats to injure in violation of 18 U.S.C. § 875(c), the Court noted, “specific intent to threaten is an essential element of a §875(c) conviction[.]” United States v. Sutcliffe, 505 F.3d 944, 962 (9th Cir. 2007).

The Seventh Circuit reached a like result in United States v. Fuller, 387 F.3d 643 (2004). While noting a circuit split on the question whether a “true threat” must include a subjective component, the Court held, “the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully.” 387 U.S. at 647; accord United States v. Lockhart, 382

F.3d 447, 450 (4th Cir. 2004) (“The statute governing threats against the President . . . has been interpreted to include two major elements: (1) the proof of a “true threat” and (2) that the threat is made “knowingly and willfully.”)

d. Tellez should be overruled. Under principles of stare decisis, established case doctrine is binding unless it is shown to be both incorrect and harmful. State v. Robbins, 138 Wn.2d 486, 494, 980 P.2d 725 (1999). Because the Supreme Court did not explicitly state that the “true threat” requirement is an element, this Court concluded that a “true threat” is a mere definitional term that need not be in the “to convict” instruction. Tellez, 141 Wn. App. at 482-84.

But the federal and state decisions cited in argument 2c establish that this Court’s conclusion is incorrect. Further, the holding is harmful to the extent that if this constitutional predicate is treated as a “definition,” the State’s burden of proof is diluted, and this Court cannot be confident that the jury’s verdict in a given case did not reach protected speech. Tellez should be overruled.

F. CONCLUSION

This Court should hold that where identification is a central issue in the case, little independent evidence exists to corroborate the identification, and other factors call into question its reliability, trial courts should instruct the jury on cross-racial identification. This Court should reverse Allen's conviction because the failure to so instruct was prejudicial error.

On remand, the prosecutor should be directed to refrain from engaging in misconduct, and the court must include the "true threat" requirement in the "to convict" instruction.

DATED this 7TH day of June, 2010.

Respectfully submitted:



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64466-1-I
v.)	
)	
BRYAN ALLEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JUNE, 2010.

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[Handwritten Signature]

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DIVISION ONE

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