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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.

2010 SEP 13 PM 2:13

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE DIFFICULTY OF CROSS-RACIAL IDENTIFICATION VIOLATED MR. ALLEN'S RIGHT TO PRESENT A DEFENSE AND RIGHT TO A FAIR TRIAL.

In his opening brief, Mr. Allen argued that the trial court erred in denying the defense-proposed instruction on cross-racial identification. The inherent unreliability of cross-racial identifications supports the issuance of a jury instruction where, as here, identification is a key issue in the case. The refusal to give the instruction was prejudicial error because identification was the central issue in the case, there was little evidence corroborating the reliability of the identification, and multiple circumstances – including the facts that Mr. Allen was unarmed and nowhere near the height or weight of the described suspect – raise doubts concerning the reliability of the identification.

The State argues that “Washington courts have previously rejected this claim,” but cites only decades-old caselaw. Br. of Resp’t at 10-11 (citing State v. Laureano, 101 Wn.2d 745, 767, 682 P.3d 889 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988); State v. Jordan, 17 Wn. App. 542, 564 P.2d 340 (1977); State v. Edwards, 23 Wn. App. 893, 600

P.2d 566 (1979); State v. Hall, 40 Wn. App. 162, 166-67, 697 P.2d 597 (1985)). Subsequent studies show that cross-racial identifications are unreliable. “Thirty years of social science research ... provide very strong evidence” that “mistaken eyewitness identification and the increased risk of cross-racial eyewitness identification is a serious problem.” American Bar Association Criminal Justice Section, Report to the House of delegates on Cross-Racial Identification (2008)¹ (“ABA Report”) at 2. “The last half-century’s empirical study of cross-racial IDs has shown that eyewitnesses have difficulty identifying members of another race.” John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am.J. Crim. L. 207, 211 (2001).

The law will always lag behind the sciences to some degree because of the need for solid scientific consensus before the law incorporates its teachings. Appellate courts have a responsibility to look forward, and a legal concept’s longevity should not be extended when it is established that it is no longer appropriate.”

Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (internal citation omitted) (holding jurors should no longer be instructed to consider an eyewitness’s “level of certainty” with respect to identification,

¹ Available at <http://www.abanet.org/crimjust/policy/eyewitness.pdf> (last visited 9/2/2010).

because social science research had debunked the myth that certainty and accuracy are correlated).

The State then argues that a cautionary instruction on cross-racial identification would be inappropriate because the “credibility of identification witnesses can be adequately addressed through cross-examination.” Br. of Resp’t at 11. The State misses the point. The issue is not credibility.² Witnesses who misidentify alleged perpetrators are not being untruthful; they honestly believe the named individual committed the crime. See Brodes, supra. The problem is that their identification is inaccurate for reasons unknown to them, including the inability of members of one race to distinguish members of another. Cross-examination is a useless tool for exposing such unconscious inaccuracies. Jules Epstein, The Great Engine that Couldn’t: Science, Mistaken Identifications, and the Limits of Cross-Examination, 36 Stetson L. Rev. 727 (2008). “Absent the remarkable occurrence of a very insightful witness aware of and willing to disclose his or her ‘own-race bias,’ there can be no effective cross-examination on the phenomenon of cross-racial bias.” Id. at 776.

² Even if it were, courts do give cautionary instructions on witness credibility in appropriate circumstances. E.g. WPIC 6.05 (Testimony of Accomplice).

The State is also wrong in suggesting that only New Jersey and Utah have caught up with the scientific research and addressed the cross-racial identification problem. Br. of Resp't at 12. In California, jurors are instructed to consider several factors in evaluating the reliability of eyewitness identifications, including "the cross racial [or ethnic] nature of the identification." CALJIC 2.92. As in New Jersey, California courts provide the instruction when identification is a crucial issue and there is no substantial corroborative evidence. People v. Wright, 755 P.2d 1049, 1059 (Cal. 1988).

In Massachusetts, trial judges may instruct jurors that "in determining the weight to be given eyewitness identification testimony, they may consider the fact of any cross-racial identification and whether the identification by a person of different race from the defendant may be less reliable than identification by a person of the same race." Commonwealth v. Engram, 686 N.E.2d 1080, 1082 (Mass. App. 1997).

Military courts also give a cautionary instruction on cross-racial identification and other factors affecting the reliability of eyewitness testimony. United States v. McLaurin, 22 M.J. 310, 312 (1986). In one case, the Air Force Court of Military Review held

that the refusal of the trial court to give the requested instruction on cross-racial identification by eyewitnesses was reversible error because identification was a primary issue and defense counsel requested a cross-racial jury instruction. United States v. Cannon, 26 M.J. 674 (1988).

Washington should join these jurisdictions and acknowledge the scientific consensus that cross-racial identifications are inherently unreliable and that the problems attendant in such identifications cannot be revealed through cross-examination. Where identification is the primary issue and little or no evidence corroborates the identification, courts must either admit expert testimony on the issue or instruct the jury on the factors that may influence the reliability of cross-racial identification. Because Mr. Allen requested such an instruction and identification was the key issue in the case, the trial court erred in refusing to provide the instruction.

The State's contention that the facts of this case do not warrant an instruction is unconvincing. Br. of Resp't at 13-14. The case involved the identification of a black suspect by a white eyewitness, and defense counsel made a timely request for the instruction. As explained in Mr. Allen's opening brief, identification

was the sole issue in the case, there was little or no evidence corroborating the identification, and multiple factors called into question the reliability of the identification. Corrected Brief of Appellant at 17-19. Although Mr. Allen was wearing clothing and accessories similar to those described in the 911 call, he was significantly taller and heavier than the suspect. Furthermore, he did not have a gun or drugs, contrary to the description made by the 911 caller. The individual who was with Mr. Allen when he was stopped did not match the description of the second suspect. Finally, the incident occurred at dusk and involved a weapon, both of which reduce a witness's ability to perceive a perpetrator accurately. If the cross-racial identification instruction should have been given in Cannon, supra – where two different witnesses saw the suspect in a well-lit area and identified the defendant – it certainly should have been given here.

Finally, contrary to the State's assertion, the error was not harmless. "Omission 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." State v. Cromedy, 727 A.2d 457, 464 (N.J.

1999). As explained above, this is such a case. Our supreme court recently reversed for instructional error because it could not “say with any confidence what might have occurred had the jury been properly instructed.” State v. Bashaw, 169 Wn.2d 133, 148, 234 P.3d 195 (2010). The same is true here. This Court cannot say with any confidence what might have occurred had the jury been instructed on the difficulties of cross-racial identification. Accordingly, this Court should reverse Mr. Allen’s conviction and remand for a new trial.

2. 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.

As explained in Mr. Allen’s opening brief, the First Amendment requires that the anti-harassment statute be interpreted to prohibit only “true threats,” which are statements “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.” State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Mr. Allen submits that whether a statement is a true threat is an element of the crime that must be

pleaded in the information and included in the “to convict” instruction.

After Mr. Allen filed his opening brief, our supreme court decided State v. Schaler, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 2948579 (filed July 29, 2010). The State claims that under Schaler, “true threat” is not an element that must be included in the to-convict instruction. The State is wrong. The Schaler Court expressly declined to reach the issue, id. at n.6, but its reasoning supports the conclusion that the to-convict instruction must include the “true threat” element.

In Schaler, the Court reversed the defendant’s conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. Id. at *1. The full definition of “true threat” was neither in the to-convict instruction nor in a standalone instruction. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker’s conduct, it was not instructed on the necessary means rea as to the result. Id. at *5 -*6. “True threat” includes the latter – that a reasonable speaker would foresee that the statement would be interpreted as a serious expression of intention to inflict harm. Id. at *6.

The Court went on to explain that “the omission of the constitutionally required mens rea from the jury instructions ... is analogous to [a situation] in which the jury instructions omit an element of the crime.” Id. And although it declined to reach the issue Mr. Allen raises, it noted, “[i]t suffices to say that, to convict, the State must prove that a reasonable person in the defendant’s position would foresee that a listener would interpret the threat as serious.” Id. at n.6 (emphasis added).

The above reasoning supports Mr. Allen’s argument that a “true threat,” i.e. the mens rea as to the result, is an element that must be included in the to-convict instruction. “[A] crime defined by a particular result must include the intent to accomplish that criminal result as an element.” State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). For example, “[t]he crime of murder is defined by the result of death, RCW 9A.32.030, and the rule is well established that the crime of attempted murder requires the specific intent to cause the death of another person.” Id. Thus, for attempted murder, the mens rea as to the result must be pleaded in the information and included in the to-convict instruction. See id. The same is true for murder. See, e.g., WPIC 27.02 (to-convict instruction for second-degree intentional murder). As the Supreme

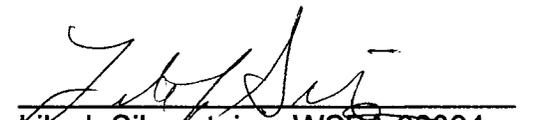
Court explained in another case, the elements that must be included in the to-convict instruction are “the actus reus, mens rea, and causation.” State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (emphasis added). Because the definition of “true threat” is the mens rea for felony harassment, it must be included in the to-convict instruction.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Allen asks this Court to reverse his conviction and remand for a new trial.

DATED this 3rd day of September, 2010.

Respectfully submitted,


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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
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BRYAN ALLEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **REPLY 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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<input checked="" type="checkbox"/> BRYAN ALLEN 322839 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF SEPTEMBER, 2010.

X _____ 

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