

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)	No. 79337-3-I
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
ANTHONY MICHAEL TURRIZIANI, JR.,)	
)	
Appellant.)	
)	

HAZELRIGG, J. — Anthony M. Turriziani, Jr., seeks reversal of his conviction for robbery, arguing that the trial court’s failure to instruct the jury regarding witness identification testimony violated his constitutional rights. Because Turriziani did not request that the court instruct the jury on cross-racial witness identification or show that the instruction was constitutionally mandated, the court did not err in failing to give that instruction. The court did not abuse its discretion in declining to provide a general witness identification instruction for voice identification testimony because the instructions as given allowed Turriziani to argue his theory of the case. Turriziani also fails to show that he received ineffective assistance of counsel when his attorney conceded that the cross-racial witness identification instruction was not warranted. We affirm.

FACTS

Son Kyong was born in South Korea and moved to Washington in 1992. She ran a number of different businesses before purchasing the Welcome Everett Inn in 2015. Kyong lived in one of the rooms while she operated the motel. The property was equipped with 13 security cameras. The camera feeds were visible from behind the front desk of the motel.

Kyong met Anthony Turriziani in 2016 when he stayed in a room at her motel. One day, Turriziani offered to help Kyong when she was cleaning up garbage in the parking lot, and she ended up hiring him to work for her. As part of his compensation, she offered Turriziani the management apartment on the property. In the course of his duties, Turriziani mostly did maintenance work and sometimes covered the front desk when Kyong was out. Although Kyong described Turriziani as a “nice guy” and “very smart,” she did not find him to be a particularly hard worker and thought he worked too slowly on projects around the motel. Kyong fired Turriziani after three or four months because she often found him in his room when he was supposed to be working.

Turriziani returned to the motel less than a month later to rent a room. Kyong had not been able to find a satisfactory replacement to do maintenance work, so she hired Turriziani again. The two fought regularly about Turriziani’s grooming and appearance because Kyong wanted him to look nice when he was working with customers at the front desk. After about seven months, she fired him again in April or May 2017.

On the evening of March 24, 2018, Kyong went to Angel of the Winds casino and played the slot machines. Before she left the casino, she printed a ticket for about \$1,200 but did not cash it. She put the ticket in a Bank of America money bag that she kept in her purse. Kyong returned to the motel and worked until around 3:00 a.m., which was the usual time that she closed the front office and turned off the lights and vacancy sign.

As Kyong walked upstairs to her room, she heard footsteps and saw a person wearing a hood and a brightly colored mask approaching her. The person grabbed her purse and tried to pull it away from her. Kyong fell to the ground and the person dragged her down the stairs, out of view of the security cameras. The person began beating her while trying to pull the purse away and yelling at her to give them the purse. Kyong started to scream for help. Eventually the purse strap broke, and the robber left with Kyong's wallet and money bag. One of the guests at the motel heard Kyong's screams and found her on the ground. Kyong told the police that she thought the robber might have been Turriziani because of his body type and apparent knowledge of her routine.

At 3:42 a.m., Andrew Sims pulled into the parking lot of Angel of the Winds Casino driving a yellow taxi cab. There appeared to be another person in the cab, but the passenger did not get out of the car and could not be identified from casino security footage. Sims used Kyong's ticket at a slot machine, played the slots for a few minutes, and then cashed out the new ticket for \$1,183 at 3:52 a.m. Sims appeared much larger in height and stature than the person that Kyong had described as the robber.

Turriziani was charged with robbery in the first degree. Kyong testified at trial that she identified the robber as Turriziani because he was only a little taller than she was. Kyong is five feet three inches tall. She also testified that she immediately recognized Turriziani's voice when the robber was telling her to give them the purse. She said that she was shaking for four hours after the robbery and she lost her voice for three days from the screaming. There was no testimony as to Turriziani's race.

Turriziani proposed a version of a Washington Pattern Jury Instruction concerning eyewitness testimony that had been modified to address voice identification:

Voice identification testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to voice identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:

1. The witness's capacity for hearing, recall and identification;
2. The opportunity of the witness to hear the alleged criminal act and the perpetrator of that act;
3. The emotional state of the witness at the time of the observation;
4. The witness's ability, following the observation, to provide a description of the perpetrator of the act;
5. The period of time between the alleged criminal act and the witness's identification;
6. The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and
7. Any other factor relevant to this question.

The pattern jury instruction also includes another optional factor: "The witness's familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY

INSTRUCTIONS: CRIMINAL 6.52, at 212 (4th ed. 2016) (WPIC) (alteration in original).

Turriziani's attorney stated that she had not included this cross-racial identification language in the proposed instruction because she "didn't think it applied in this case."

The court declined to give the proposed instruction, voicing reservations about whether it would be proper in this situation and ultimately concluding that the other instructions would be sufficient to inform the jury of its duties and allow the defense to argue its theory. The court provided a general instruction on witness credibility to the jury.

The jury found Turriziani guilty of first degree robbery. He was sentenced to 54 months incarceration and 36 months community custody. Turriziani appealed.

ANALYSIS

I. Cross-Racial Witness Identification Instruction

Turriziani argues that the trial court abused its discretion and violated his due process rights by failing to give a cautionary cross-racial witness identification instruction. The State responds that this issue has not been preserved for review because Turriziani did not request an instruction on cross-racial witness identification at trial.

"A defendant cannot claim that the trial court erred in refusing an instruction he did not offer unless the failure to so instruct is violative of a constitutional right." State v. Tamalini, 134 Wn.2d 725, 730–31, 953 P.2d 450 (1998). It is undisputed that Turriziani did not explicitly request an instruction concerning cross-racial

witness identification. Nonetheless, Turriziani argues that the court was required to give the instruction because he proposed a general witness identification credibility instruction, analogizing this situation to that discussed in State v. Gresham, 173 Wn.2d 405, 423–24, 269 P.3d 207 (2012).

In Gresham, the defendant requested a limiting instruction regarding the proper purpose for which the jury could consider evidence of his prior conduct admitted under ER 404(b).¹ Id. at 424. Gresham’s attorney proposed a limiting instruction that contained an incorrect statement of law. Id. The trial court refused to give the incorrect instruction. Id. Although the Supreme Court found that this refusal was proper, it held that the trial court erred when it did not give a correct limiting instruction to the jury. Id.

The rules of evidence provide that, “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” ER 105. Because this rule specifies that the court shall instruct the jury only “upon request,” the court is not required to give a limiting instruction for ER 404(b) evidence absent a request for such an instruction. State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). However, the Gresham court found that, “[a]t least in the context of ER 404(b) limiting instructions, once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense

¹ “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

counsel's failure to propose a correct instruction." 173 Wn.2d at 424. This is consistent with ER 105, which requires the court to instruct the jury as to the proper scope of the evidence when a request for an instruction is made, not to accept whatever instruction is proposed by the parties.

Turriziani argues that "counsel's proposed instruction and formal objections [to its exclusion] were sufficient to preserve the issue, and the trial court then had an affirmative duty to provide an accurate and complete instruction to the jury on the issue of cross-racial witness identification." However, Turriziani does not point to any evidentiary rule or case requiring instruction on credibility considerations analogous to ER 105's requirement that the court instruct the jury on the proper scope of evidence on request.

Because Turriziani did not request the cross-racial witness identification instruction at trial and his request for a general cautionary witness identification instruction did not obligate the court to provide an unrequested portion of the pattern instruction, we next consider whether the court's failure to caution the jury regarding cross-racial witness identification violated Turriziani's constitutional rights. See Tamalini, 134 Wn.2d at 730-31.

Turriziani contends that the trial court violated his right to due process when it failed to provide a cautionary instruction on cross-racial witness identification. "Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4)

give the jury discretion to decide questions of fact.” State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

Washington courts have not held that due process always requires a cross-racial identification instruction in cases in which the defendant and identifying witness are of different races. See State v. Allen, 176 Wn.2d 611, 621, 626, 294 P.3d 679 (2013) (plurality opinion) (“[B]oth prior to and following Laureano,² our cases have held that an instruction on eyewitness identification is not constitutionally required. . . . We decline to adopt a general rule requiring the giving of a cross-racial instruction in cases where cross-racial identification is at issue.”). In every case cited in support of Turriziani’s argument in which an eyewitness identification instruction was not given, the instruction was requested and refused by the trial court. See State v. Jordan, 17 Wn. App. 542, 544, 564 P.2d 340 (1977) (“Jordan claims that he was prejudiced by the trial judge’s rejection of his proposed instruction on the vagaries of eyewitness identifications.”); State v. Edwards, 23 Wn. App. 893, 897, 600 P.2d 566 (1979) (“The trial judge did not err in refusing the proposed instruction.”); Laureano, 101 Wn.2d at 767–68 (“Defendant’s proposed instruction regarding the reliability of cross-racial or ethnic eyewitness identification was based on an instruction in United States v. Telfaire, 469 F.2d 552 (D.C.Cir.1972). . . . [W]e conclude that the trial court did not err in refusing the Telfaire instruction in the present case.”); Allen, 176 Wn.2d at 614 (“Allen requested the court to instruct the jury regarding cross-racial identifications. The court refused Allen’s request.”). Even the dissent in Allen would hold that “courts

² State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984), abrogated by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

should be required to give [a cross-racial identification] instruction where eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically asks for an instruction.” 176 Wn.2d at 637 (Wiggins, J., dissenting).

Turriziani provides no authority for the proposition that due process requires a cross-racial identification instruction even when it is not requested. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Turriziani has not shown that his constitutional rights were violated by the court’s failure to give a cross-racial identification instruction when he did not request that instruction. Accordingly, he cannot challenge the court’s failure to give a cross-racial identification instruction.

II. Voice Identification Testimony Instruction

Turriziani also contends that the court erred in declining to give his proposed instruction regarding voice identification testimony. Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury, and do not misstate the law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). We review a trial court’s decision to reject a proposed jury instruction for an abuse of discretion. City of Seattle v. Pearson, 192 Wn. App. 802, 820, 369 P.3d 194 (2016). A court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. State v. Horn,

3 Wn. App. 2d 302, 312, 415 P.3d 1225 (2018). A court does not err in refusing a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case. State v. Hathaway, 161 Wn. App. 634, 647, 251 P.3d 253 (2011).

Although Turriziani argues that the court's refusal to give the proposed voice identification instruction was primarily based on its belief that such an instruction would constitute a comment on the evidence, the record does not support this contention. The court stated four reasons for refusing the instruction. First, the court believed that the arguments to be addressed by the voice identification instruction could be "argued under the general instruction about weighing the credibility of witnesses." Second, the court noted that it was "a little concerned" that the instruction was "beginning to cross over into a comment on the evidence." Third, the court remarked that:

[T]he point of instructions is to allow the parties to argue their theory of the case, and I think that the testimony as it came out and the existing instructions provide ample opportunity to raise issues about the accuracy of Ms. Kyong's identification based on voice and height, basically, which she relied on.

Finally, the court indicated that it did not know of any cases that supported the giving of an eyewitness identification instruction for a voice identification.

The court's statements that it was concerned that the instruction might comment on the evidence and that it did not know of any authority employing this instruction in the voice identification context were not definitive rulings of law on these issues. It is clear from the record that the court based its decision to deny

the request for the voice identification instruction on its belief that the instructions as given were sufficient to allow Turriziani to argue his theory of the case.

The court instructed the jury on its responsibility to consider the evidence:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

Defense counsel argued in closing that Kyong's identification of Turriziani as the robber was based on faulty reasoning rather than her actual perception at the time of the robbery. Counsel posited that Kyong had worked backward from her suspicions about the robber's knowledge of her routine and the placement of the cameras, the stature of her assailant, and a possible motive for the attack. Once she had the idea that Turriziani could have been the robber, she may have convinced herself that she had recognized his voice during the attack.

In support of this argument, defense counsel argued that Kyong's initial identification of Turriziani was tentative, noting that she initially told police that it was possible that the robber was a former employee and she had a feeling it was Turriziani, but did not mention recognizing the assailant's voice. Kyong justified this omission by saying that she was too shaken up to think clearly, but defense counsel pointed out that Kyong provided other detailed information to the police and the casino in the hours after the robbery.

Defense counsel attacked the credibility of Kyong's claim that she recognized the voice of her assailant. Counsel suggested that Kyong was fixated on the robber's mask during the robbery and that her lack of memory about other details, including the robber's clothes, showed that the intense fear prevented her from forming accurate memories about what happened. She noted that Kyong's ability to hear the assailant's voice would have been diminished because she was screaming during the robbery.

Counsel also challenged Kyong's other reasons for assuming the assailant was Turriziani. She suggested that any visitor to the motel could have seen the location of the cameras and noticed the time that the lights were turned off every night. Counsel argued that the robber's height was not "so uniquely small that there is only one person that it could have been." She also pointed out that Kyong's imposition of strict rules at the motel and tendency to kick out those who did not adhere to them had upset a lot of people.

The jury instructions as given informed the jury of the applicable law and allowed Turriziani to argue his theory of the case and challenge Kyong's voice identification. In fact, his closing argument discussed nearly all of the factors affecting the accuracy of a witness identification that were listed in the proposed instruction. The court did not abuse its discretion in rejecting Turriziani's proposed voice identification instruction.

III. Ineffective Assistance of Counsel

Turriziani argues briefly that his attorney's acknowledgement that the cross-racial identification portion of WPIC 6.52 did not apply in this case and failure to

include the cross-racial identification language in the proposed instruction constituted ineffective assistance of counsel.

The federal and state constitutions guarantee every criminal defendant the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST., art. I, § 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). “Courts engage in a strong presumption counsel’s representation was effective.” State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The failure to make either one of these showings defeats a defendant’s claim of ineffective assistance. State v. Emery, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

Deficient performance is that which falls “below an objective standard of reasonableness based on consideration of all the circumstances.” McFarland, 127 Wn.2d at 334–35. Reasonable conduct includes researching relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Legitimate trial strategy or tactics cannot form the basis of a claim of ineffective assistance. Id. at 863.

Defense counsel indicated that the cross-racial identification language in WPIC 6.52 was not included in the proposed voice identification instruction because she believed it was not applicable in this case. Turriziani argues that this concession was legally inaccurate and constituted deficient performance.

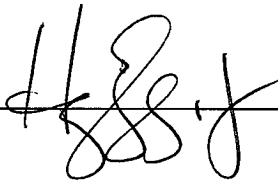
Turriziani has provided no authority approving the use of a cross-racial identification instruction for voice identification. He cites one Washington Supreme Court case that, he argues, “has recently recognized that a person’s use of voice, including diction and intonation, can convey the speech of a particular race.”³ In the cited case, the court found that the prosecutor committed misconduct by “injecting racial prejudice into the trial proceedings” in a number of ways, including “referring to the ‘police’ as ‘po-leese’” during the examination of a witness. State v. Monday, 171 Wn.2d 667, 678–79, 257 P.3d 551 (2011). The court found that “the only reason to use the word ‘po-leese’ was to subtly, and likely deliberately, call to the jury’s attention that the witness was African American.” Id. at 679.

Turriziani argues that this case shows that “there is support in jurisprudence for the proposition that voice identification can be similarly fraught by issues of imputed race or ethnicity, and thus, cross-racial identification bias.” Turriziani’s argument skims over a number of important intermediate pieces of this analysis. At best, Monday simply acknowledges that certain speech patterns may be racially coded. The fact that a specific pronunciation of a word was used to evoke a particular racial group does not compel the conclusion that a person of one race has a diminished ability to accurately distinguish between the voices of two people of another race. Defense counsel cannot reasonably have been expected to make this inferential leap.

³ Turriziani also cites to an unpublished opinion decided after he was sentenced. State v. O’Neal, No. 50796-0-II (Wash. Ct. App. Sept. 4, 2019) (unpublished), <http://www.courts.wa.gov/opinions/pdf/D2%2050796-0-II%20Unpublished%20Opinion.pdf>. Counsel cannot be faulted for failing to anticipate future developments in the law. In re Pers. Restraint of Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998).

Because of the dearth of authority supporting Turriziani's argument that the cross-racial identification instruction can apply to voice identifications, it was not unreasonable for his trial counsel to conclude that the instruction was not warranted under these circumstances. Counsel's failure to request a cross-racial identification instruction did not constitute deficient performance. Accordingly, Turriziani's claim of ineffective assistance fails.

Affirmed.



WE CONCUR:

