THE “EYES” MAY NOT ALWAYS HAVE IT

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 Royal Clark Jr. age 41, was recently released from a Louisiana State Prison after serving 17 years of a 49 and ½ year sentence for an armed robbery that, it turned out (based on a re-analysis of fingerprint evidence found on a cup the robber drank from before holding up a Burger King restaurant), he did not commit.

A restaurant worker who misidentified the defendant from photographs viewed two months after the robbery, reportedly said that her attention was focused more on the gun than on the robber’s face. A memory specialist from Stony Brook University commented on national television that the eyewitness was a victim of mug shot exposure (i.e. re-identifying the person selected in the mug shot rather than the actual perpetrator, who turned out to be another individual convicted a similar robbery). Both Clark and the witness who identified him are of the same race.

Same race or not, the Clark case underscores the hazards of eyewitness identification testimony, especially where there is only one identifying witness or there is little or no corroborating evidence. Eyewitnesses (whether victim or bystander), may come across as sincere in their belief in the accuracy of their in-court identification and they may be upright, law-abiding citizens whose apparent credibility is not readily susceptible to challenge. That is why counsel may have to focus instead on factors affecting the reliability of the identification (e.g. duration of observation, lighting conditions, vantage point, stress, suggestive police conduct) and, in cases of cross-race identification, consider calling an expert witness to testify about the various factors that can adversely affect the accuracy of eyewitness identification.

In People v LeGrand 8 NY3d 449 (2007), the Court of Appeals held that when a case turns on the accuracy of eyewitness identification and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion to exclude expert testimony on the reliability of eyewitness identifications.

In LeGrand’s second trial on a seven-year-old murder charge (in which one witness identified the defendant’s photo five years after the crime, another said, “he’s a close match” and two witnesses couldn’t say one way or the other), the defense sought to call an expert (pursuant to People v Lee 96 NY2d 157 [2001]), to educate the jury on the weaknesses and dangers of eyewitness identifications with research studies on the effects of “weapon focus,” post-event information, confidence malleability and the correlation between the claimed level of certainty and inaccuracy of identification. After a Frye hearing, the court precluded the testimony based on insufficient proof of general acceptance of the underlying theories in the scientific community (Frye v US 293 F 1013 [DC Cir 1923]). The Appellate Division in LeGrand affirmed. (28 AD3d 218 [2006]).

The Court of Appeals reversed, noting that while there may be some risk in applying research findings from experiments to real-life identifications, conclusions with respect to the factors affecting eyewitness identifications generated by sound, generally accepted experimentation techniques and theories, published in scholarly journals and subjected to peer review, have gradually gained increasing acceptance in the scientific community. Noting what was then an “emerging trend” in both scientific and legal circles toward acceptance of such principles, the Court said that in a case which turned entirely on eyewitness identification testimony (there was no corroborating evidence), excluding expert testimony that could have helped the jury evaluate the accuracy of the identification testimony was an abuse of discretion.

Any remaining doubts as to law’s recognition of risks and hazards of eyewitness identification testimony (especially in cross-race identification cases), were clearly laid to rest in People v Boone 2017 NY Slip Op 08713 (12/14/17). In that case, the Court of Appeals held that when identification is in issue in a criminal case and the identifying witness and the defendant appear to be of different races, UPON REQUEST, a party is entitled to a jury instruction on cross racial identification. THIS IS SO EVEN IF THE DEFENDANT DOES NOT CALL AN EXPERT WITNESS ON IDENTIFICATION AND DOES NOT CROSS EXAMINE THE IDENTIFYING WITNESS(ES) ABOUT THE IDENTIFICATION. The charge reads as follows:

“You should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, you should consider that some people have greater difficulty in accurately identifying members of a different race than…members of their own race, and therefore you should consider whether the difference in race affected the accuracy of the witness’ identification.”

The Court prefaced its decision by citing other cases (e.g. State v DelGato 188 NJ 48,60 [2006]), noting that, “mistaken eyewitness identifications are the single greatest cause of unlawful convictions in this country.” The Court also recognized that social and behavioral scientists generally agree that identification testimony is by no means infallible, and that the likelihood of misidentification increases (over one-and-a-half times) when the identification is cross racial.

In Boone, the defendant was charged with and ultimately convicted of multiple counts of robbery in connection with the forcible theft of cell phones from two young white males in the same neighborhood ten days apart. Their descriptions of the robber were similar and each one identified the defendant in separate line ups (the second victim only after the defendant spoke).

Defense counsel requested a jury instruction on cross race identification which the trial court denied because he did not call an expert witness on identification. The Appellate Division affirmed the conviction but modified the sentence. (129 AD3d 1099 [2d dep’t 2015]).

The Court of Appeals reversed, holding that it was error to deny the request to charge notwithstanding the defendant’s failure to call an expert witness. In the Court’s view, while expert testimony could be helpful to the jury’s understanding of the factors affecting the reliability of identification, (e.g. by educating them on research relevant to cross-racial identification), it is not a prerequisite to a charge instructing that racial cross over is a factor that a jury may consider (not unlike the distance between victim and perpetrator) in assessing the accuracy of the identification. Nor would the failure to test the identification on cross examination preclude the charge because identifying witnesses, as noted above, are often subjectively certain (and seemingly sincere), and counsel may have tactical reasons for not wanting to alienate the jury by pressing the witness on his/her inability to distinguish one minority person from another.

While trial courts retain the discretion to allow expert testimony in a given case, chances are that in identification cases, especially those involving witnesses and defendants of different races, expert testimony on the factors affecting the reliability of identifications will be allowed. A jury instruction on cross racial identification in the appropriate case, after Boone, by contrast, appears to be a given thing BUT counsel has to ask for it.

In any identification case, whether cross racial or not, counsel should prepare his/her cross examination and tailor it to the instructions that counsel knows the jury will be given at the end of the case. For example, the court will invite the jury, first, to consider the credibility factors that apply to any witness. (See Jury Charge on Credibility of Witnesses).

Regarding the ACCURACY of the identification, the court will instruct the jurors to “evaluate the witness’ intelligence, and capacity for observation, reasoning and memory, and determine whether…the witness is a reliable witness who had the ability to observe and remember the person in question.”

The court will then have the jury focus on the witness’ opportunity to observe and remember the person whom he/she has identified as the perpetrator. Some of the relevant factors to consider include: the lighting conditions under which the observation was made, the distance between witness and the perpetrator, whether the view of the perpetrator was obstructed, whether the witness could make out the perpetrator’s facial features, body size, hair, skin, color and clothing; the length of time of observation of the perpetrator, where the witness was looking and what direction the perpetrator was facing, whether the perpetrator had any distinctive features, what description did the witness provide and how closely did it match the perpetrator, what was the witness’ physical, mental and emotional state, whether the witness had any prior or subsequent contact with the perpetrator, under what circumstances did the witness identify the perpetrator and was it free of any suggestion.

In closing argument, counsel should stress that it is the PEOPLE’S BURDEN TO PROVE THE DEFENDANT’S IDENTITY AS THE PERPETRATOR (as well every element of the crime), and that, as the final instructions state, “our system of justice is DEEPLY CONCERNED that no person who is innocent of a crime be convicted of it…(Therefore), identification testimony must be considered “WITH GREAT CARE…And if after careful consideration of the evidence, the jury is “not satisfied that the identity of the defendant as the person who committed a charged crime has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of that charged crime.”

Royal Clark Jr is undoubtedly cherishing his long overdue freedom from wrongful imprisonment based on an erroneous identification with his family which includes his daughter who was an infant when he was arrested for armed robbery back in 2002. If he goes out for a celebratory meal, one has to think that it will be at someplace other than Burger King.