NEW YORK COURT OF APPEALS ROUNDUP

CROSS-RACIAL WITNESS IDENTIFICATION: A REVIEW OF *'PEOPLE V. BOONE'*

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The issue of cross-racial witness identification has emerged as a potentially significant source of error in criminal proceedings. One report by the National Academy of Sciences concluded that "at least one mistaken eyewitness identification was present in almost three-quarters" of cases in which the convicted defendant was later exonerated by DNA testing. Experts in the field have concluded that the risk of misidentification is substantially higher when the identifying-witness is of a different race than the identified-defendant. In *People v. Boone*, the Court of Appeals took up this issue in the context of jury instructions and held that, in a case in which a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, a jury charge on the cross-race effect during final instructions.

In an opinion authored by Judge Eugene M. Fahey and joined by Chief Judge Janet DiFiore and Judges Paul Feinman, Jenny Rivera, and Peter Tom,[1] the court observed that there is a "near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race." The court referred to several studies and cases describing the prevalence of eyewitness misidentifications in wrongful convictions, citing in particular to a meta-analysis showing that participants were 1.56 times more likely to falsely identify a "novel other-race face when compared with performance on own-race faces." Although one survey showed that 90 percent of psychologists believed that "the cross-race effect" is generally accepted and empirically reliable enough to present as expert evidence in court, another study showed that 48 percent of surveyed jurors thought cross-race and same-race identifications are of equal reliability.

Based on the body of scientific and empirical data presented, the court held that a special jury instruction on potential problems with cross-race identification should be given where a party requests the instruction, there is an issue about a witness's identification of the defendant, and the witness and defendant appear to be of different races. The court stated that the instruction should state:

> (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant; and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness's identification.

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The court specifically held that in order for the instruction to be given, the defendant does not need to proffer expert testimony or cross-examine witnesses on the topic.

In the underlying case, the trial judge rejected the request for a charge on the cross-race effect because there had been no expert testimony or cross-examination regarding the lack of reliability of cross-racial identification. The case involved an African-American man charged with, inter alia, two counts of robbery in the first degree involving two separate incidents with white male victims. In the first, the alleged perpetrator approached a man in his 20s and asked for the time. When the man pulled out his cellphone, the perpetrator grabbed the phone and ran. The man gave chase but stopped when the perpetrator turned around with a knife and told him to stay where he was. The second incident happened ten days later in the same neighborhood in Brooklyn when the perpetrator approached a teenager and asked the time. The teenager looked at his cellphone and answered, at which point the perpetrator grabbed for the phone, a struggle ensued, and the perpetrator stabbed the teenager in the back and fled. The victims separately identified the defendant from a six-person line-up, although the teenager was initially unsure until each line-up participant said “what time is it?” The police did not recover the stolen cellphones, and there was no physical evidence linking the defendant to the offenses.

The trial judge gave an expanded charge on eyewitness identification but refused the defendant’s request for a charge on cross-racial identification. The jury convicted, and the trial judge gave a sentence of 25 years. The Appellate Division modified the sentence to 15 years, affirmed the decision not to charge on the unreliability of cross-racial identification “as the defendant never place the issue in evidence during the trial,” and otherwise affirmed. The Court of Appeals granted leave to appeal.

In reversing, the court observed that three other states (New Jersey, Massachusetts and Hawaii) now require trial courts to give an instruction on cross-racial witness identifications in appropriate circumstances. The court rejected the prosecution’s argument that decisions on jury instructions should always remain in the trial judge’s discretion. While the court noted that prior precedent, *People v. Knight*, 87 N.Y.2d 873 (1995), and *People v. Whalen*, 59 N.Y.2d 273 (1983), provides that a trial judge has discretion on whether to provide an expanded charge on witness identification, neither case involved cross-racial identification issues. The court concluded that a new approach is required for cross-racial identification cases given the evolving developments in cognitive and social psychology and the risk of wrongful convictions. In such cases, the trial judge’s otherwise broad discretion is limited by a requirement that the judge give the cross-racial identification charge in the specified circumstances.

In a spirited separate opinion, Judge Michael Garcia, joined by Judge Leslie Stein, concurred in the result but disagreed with the majority’s reasoning. While Judge Garcia agreed that the trial judge in this case should have given the cross-racial identification charge, he argued that trial judges should have discretion about whether to provide the charge and he took issue with what he characterized as the majority’s “mandatory-on-request” charge. Judge Garcia pointed to the majority’s holding that the jury charge would be required where (1) a witness’s identification of the defendant is at issue, and (2) the witness and defendant appear to be of different races, and argued that those two caveats are amorphous and that trial judges will therefore be reluctant to invoke them, lest they be subject to reversible error. Judge Garcia noted that this could ultimately lead to a scenario in which the charge is required even where a complainant is victimized by a close friend or family member, including in domestic violence and child abuse cases. This hypothetical, however, seems at odds with the caveat that the instruction would not be required where identification of the defendant is not at issue. Judge Garcia favors the application of the discretionary rule of *Knight* and *Whalen* to the cross-racial identification charge and noted that while three jurisdictions have mandated the cross-racial charge when such identifications are at issue, “many more have opted to preserve the discretion of trial courts to assess

whether—and how—to communicate to jurors the factors that may support a more sensitive evaluation of eyewitness testimony."

An interesting question that emerges from the *Boone* holding is whether it will lead to new appeals in old cases where the trial judge refused to provide a cross-racial identification charge in the circumstances outlined by the majority opinion. Judge Garcia commented that "[a] mandatory rule also spawns retroactivity issues, which carry serious and sweeping implications." In determining whether a new precedent should be applied retroactively, New York courts weigh multiple factors but focus on whether the new rule "go[es] to the heart of a reliable determination of guilt or innocence." *People v. Pepper*, 53 N.Y.2d 213, 221 (1981). Interestingly, in the opinions announcing their new rules on cross-racial witness identifications, the supreme courts of Hawaii, Massachusetts, and New Jersey each stated that the rule would not have retroactive effect. The majority in *Boone* did not opine on retroactivity, and it remains to be seen how defense counsel will employ the *Boone* holding to mount new challenges going forward on the issue of unreliable cross-race identifications.

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[1] Appellate Division, First Department Justice Peter Tom was sitting by designation as a result of Judge Wilson's decision to recuse himself from the case.