

IN THE COURT OF APPEALS OF MARYLAND

No. 132

September Term, 1995

MARK D. GUNNING

v.

STATE OF MARYLAND

No. 19

September Term, 1996

GARY L. HARRIS

v.

STATE OF MARYLAND

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Wilner,

JJ.

Concurring and Dissenting Opinion
by Raker and Wilner, JJ.

Filed: October 14, 1997

We concur in the judgment of the Court reversing the conviction of Gunning but dissent from the judgment reversing the conviction of Harris.

We agree that, in concluding that the eyewitness identification instruction requested by the defendants was legally inappropriate and ought never to be given, the trial court committed an error of law. As the majority opinion makes clear, such an instruction is not generally inappropriate. When criminal agency is in dispute and the State seeks to establish that agency, in whole or in part, with eyewitness identification evidence that is challenged by the defendant, a specific instruction calling the jury's attention to the factors it ought to consider in determining whether the identification is reliable may not only be appropriate but, depending on the circumstances, may be required.

Not just psychologists but courts, including the United States Supreme Court, have recognized that eyewitness identifications are often inaccurate and unreliable and need to be viewed with some caution. *See United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Branch v. State*, 305 Md. 177, 186-90, 502 A.2d 496, 500-02 (1986) (Eldridge, J., dissenting); Vitauts M. Gulbis, *Necessity Of, And Prejudicial Effect Of Omitting, Cautionary Instruction To Jury As To Reliability Of, Or Factors To Be Considered In Evaluating, Eyewitness Identification Testimony — State Cases*, 23 A.L.R. 4th 1089 (1983).¹ The principal function of an instruction like those requested in these cases is to

¹ Perhaps the most famous articulation of that principle was by Felix Frankfurter, commenting in 1927 on the Sacco-Vanzetti case: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." That statement, quoted by the Court in *Wade* was embellished with the Court's own observation: "The vagaries of eyewitness identification are well-known; the annals of criminal law

focus the jury's attention on the factors it ought to consider in determining whether a critical eyewitness identification, which, by itself, is adequate *in law* to support a verdict of guilty, is sufficiently reliable *in fact* to justify such a verdict in the particular case. Because eyewitness identification evidence is a very special and powerful kind of evidence, being almost unique in its ability, alone and uncorroborated, to support a conviction, and because there is a demonstrated aura of unreliability associated with eyewitness identifications, it would be a rare case indeed when the giving of a carefully balanced and neutral instruction listing appropriate factors for the jury to consider could be regarded as legally inappropriate.² As the majority points out, most appellate courts throughout the country — Federal and State — have regarded such instructions as at least permissible. The trial court in the cases now before us was wrong in concluding otherwise.

are rife with instances of mistaken identification. *United States v. Wade, supra*, 388 U.S. at 228, 87 S. Ct at 1933, 18 L. Ed. 2d at 1158.

² In most instances, as in these cases, competent identification evidence suffices on its own to establish both the *corpus delicti* and criminal agency. The witness ordinarily (1) testifies to the conduct or activity he or she observed, and (2) identifies the defendant as being the person who engaged in that conduct or activity. If the testimony as to the occurrence includes all of the elements of the crime, as it most often does, the coupling of that testimony with the identification is usually enough, by itself, to satisfy the test of legal sufficiency and withstand a motion for judgment of acquittal. The only other kind of evidence having that breadth is accomplice testimony and the defendant's confession, both of which (unless the confession is made in court) require some corroboration. An uncorroborated extra-judicial confession is insufficient to establish the *corpus delicti* and thus to warrant a conviction. *Bradbury v. State*, 233 Md. 421, 424, 197 A.2d 126, 127 (1964); *Woods v. State*, 315 Md. 591, 615, 556 A.2d 236, 248 (1989). Accomplice evidence also must be corroborated; standing alone, it is insufficient to sustain a conviction. *Brown v. State*, 281 Md. 241, 378 A.2d 1104 (1977). Other kinds and items of evidence may, individually, be adequate to establish some or all of the elements of the crime or criminal agency, but they usually need to be linked; standing alone, they ordinarily do not suffice to establish *both* the *corpus delicti* and criminal agency.

The majority opinion essentially stops at that point; having found that the trial judge was in error in determining that the requested instruction was universally inappropriate, the Court reverses both convictions. We think that more needs to be examined. Under Maryland Rule 4-325, which governs jury instructions in criminal cases, a court need not grant a requested instruction if the matter is fairly covered by instructions actually given. Whether that is the case depends, obviously, on the issues raised and what the other instructions say. The majority mentions the other instructions given in these cases in a footnote but gives no consideration to them; nor does it take account of the very different factual circumstances presented in the cases. Even if the substance of a requested instruction is *not* fairly covered by other instructions actually given, reversal is mandated only if the refusal to give the requested instruction is prejudicial. *Rubin v. State*, 325 Md. 552, 585-86, 602 A.2d 677, 693-94 (1992); *Allen v. State*, 91 Md. App. 705, 744, 605 A.2d 960, 979 (1992), *cert. denied*, 327 Md. 625, 612 A.2d 256; and *cf. Hunt v. State*, 321 Md. 387, 441, 583 A.2d 218, 244-45 (1991).

We believe it appropriate — indeed necessary — to examine what was actually before the jury in these cases, and, when that is done, we believe that the correct result is to affirm the judgment in *Harris* and to reverse the judgment in *Gunning*. The Court notes that both cases involved purse snatchings and that both involved uncorroborated eyewitness identifications, and that is true. But there is more involved.

In *Harris*, the victim, Ms. Dennis, was an elderly woman walking north on Cathedral Street carrying bags of groceries when a man grabbed her purse and ran. She was unable to

identify the robber. The eyewitness, Ms. Carponetto, was looking out on to Cathedral Street from her place of business and observed the entire episode. Ms. Dennis was walking slowly, and Ms. Carponetto for a moment considered going outside to help her with the groceries. She then saw Harris walking about three feet behind the victim and watched him because she thought he was about to offer to help the victim with the groceries: “So I was watching and thinking, you know, that it was really nice that he was going to do that.” Suddenly, she said, “he started moving a little bit more quickly, fiddling with a cigarette behind his ear and looking at her. And he ran up to her and pushed her and grabbed her purse and then ran on down the street.”

Ms. Carponetto selected Harris’s picture from a photo array several days later and positively identified him in court as the person who robbed Ms. Dennis. She said that she had a clear and unobstructed view through the window, and she described in some detail what Ms. Dennis was wearing, what her complexion was, and even what her purse looked like. She described what Harris was wearing as well, noticing the cigarette behind his ear and the fact that his hat was “a little big for his head.” Ms. Carponetto, who did skin care work in a beauty salon, was also drawn to what she described as keloid scars on Harris’s cheek and to the shape of his nose.

Other than the brief testimony of Ms. Dennis as to what occurred, the only other evidence in the case was the testimony of the police officer who showed Ms. Carponetto the photo array; she confirmed the positive identification made by Ms. Carponetto of Harris’s picture. Harris did not testify and presented no witnesses or other evidence on his behalf.

All that the jury had before it, therefore, was a positive identification by a neutral eyewitness in a nearly perfect daylight setting, with no hint of suggestiveness and no evidence casting any doubt on Ms. Carponetto's ability to observe what occurred and to report that observation accurately.

Although defense counsel suggested to the jury that Ms. Carponetto may have been mistaken in her identification, there was no *evidence* to support the prospect of a misidentification. In its instructions, the court told the jurors that they were the sole judges of whether a witness should be believed and that in making that determination, they were to use their common sense and everyday experiences. The court suggested that they consider the witness's behavior on the stand and way of testifying, whether the witness appeared to be telling the truth, *the opportunity of the witness to hear or see things about which testimony was given*, the witness's intelligence, *the accuracy of the witness's memory*, whether the witness had any reason for not telling the truth, whether the witness had any interest in the outcome of the case, *and whether the witness's testimony was supported or contradicted by other evidence*.

On these facts and with that instruction, we would conclude, beyond any reasonable doubt, that the court's error in determining that the requested eyewitness identification instruction should never be given was in no way prejudicial to the defendant. Under the circumstances, we would hold that the essence of the instruction was, indeed, fairly covered by the other instructions given and that, to the extent it was not, no prejudice ensued. The only significant witness was Ms. Carponetto; her only significant testimony was her

identification of Harris. The instructions given by the court necessarily focused the jury's attention on that identification — on her ability to observe what she claimed she saw and on the accuracy of her memory.

The *Gunning* case is different. At about 2:25 on the afternoon of February 4, 1994, Mr. and Mrs. Hoopes, an elderly couple, were about to go on an errand. Mr. Hoopes had already seated himself in the driver's seat of his car and had buckled his seat belt. Mrs. Hoopes was preparing to enter the front passenger seat when an assailant came up behind her, put his arm around her neck and a knife to her throat, pushed her into the car, and ran off with her purse. She did not see the assailant — was not certain even of his race — and could not identify him. She said that the incident took “very little time” and that the man was next to her about a “couple of seconds.” Mr. Hoopes did identify Gunning, from both a photo array and in court. He said that he was facing the assailant and looked straight into his face, although he later said that he was focusing on the knife. He also was quite certain that the incident took two-and-a-half to three minutes, which was inconsistent with his wife's testimony that it took but a couple of seconds. He said that he described the assailant as being between five feet eight inches and six feet tall, although the investigating officer recorded the height description as being between six feet and six feet two inches.

In contrast to *Harris*, Gunning presented an alibi defense. His father testified that, shortly after 1:00 on the afternoon of February 4, he drove Gunning to a friend's house to get a movie and that they then returned home and watched the movie, together. The movie lasted, he said, nearly three hours, and, during that period, Gunning did not leave the house.

Gunning's friend, Kenny, from whom they had borrowed the movie, came over and joined them for a while. Gunning's sister, Karen, was also in the home at the time and confirmed that Gunning and her father went to get a movie, returned just before 2:00, and that they then watched the movie. She also said that it was a long movie and that Gunning was present the entire time. The friend from whom they got the movie, Kenny Kleinsmith, also testified. He said that he had many tapes, that he lent them to his friends, but that he recorded in a book each time he lent a movie. He produced the book, which showed that, on February 4, he lent the movie *Scarface* to Gunning's father. Kleinsmith testified that the Gunnings left his home around 2:00 and that he later walked over to their house and remained there until about 3:30.

This evidence presented a very clear conflict, which necessarily put into issue the accuracy of Mr. Hoopes's identification. That conflict appears to have been of some concern to the jury, notwithstanding its ultimate verdict. The case was closed and the jury began its deliberations on June 6, 1994. The jury was excused for the day at 5:00 that afternoon and resumed its deliberations the next day. The record reveals that, at some point on June 7, the jury presented five questions which, so far as we can tell, were never answered by the court. The questions were: (1) Where was Mrs. Hoopes's purse, on which arm; (2) When did the defendant get his hair cut; (3) When was the picture taken of the defendant; (4) Why wasn't the book (presumably Mr. Kleinsmith's book) admitted as evidence; and (5) When the defendant was in custody, what was his appearance (what did he look like?) Were the mug shots presented taken when the defendant was in custody? Are they available and can we

see them?

The record does not reveal whether these questions were asked prior to or after the jury returned its verdicts. The transcript makes no mention of them; they are simply filed in the record with the date of June 7, 1994. In either event, they indicate that the jury did entertain some question about the evidence; this was not at all the kind of open and shut case presented in *Harris*.

In this setting, and unlike the situation in *Harris*, we are unable to conclude that the court's erroneous view as to the propriety of an eyewitness identification instruction was not prejudicial. Had the court understood that such an instruction was permissible, it may well have given one in this case, and, had it done so, the jury would have had before it specific and objective factors to focus its attention on the reliability of Mr. Hoopes's testimony. Given the fact that several witnesses testified, giving a conflicting account of Gunning's whereabouts, the general credibility instruction would not, as in *Harris*, have given that special focus to the jury. That is why we concur with the Court's reversal of Gunning's conviction.

As the *Telfaire* court pointed out, a distinction needs to be drawn between the desirability of an eyewitness identification instruction when criminal agency is in dispute, as to which that court took a liberal and expansive view, and whether the failure to give such an instruction constitutes reversible error, as to which it took a decidedly less liberal and expansive view. *United States v. Telfaire*, 469 F.2d 552, 556, 152 U.S. App. D.C. 146, 150 (D.C. Cir. 1972). We believe that trial courts, upon proper request, ought to give a neutral

and balanced instruction calling the jury's attention to the factors it should consider in determining the reliability of an eyewitness identification whenever (1) criminal agency is in dispute, (2) the State's case as to criminal agency rests, to any significant degree, on eyewitness identification evidence, and (3) whether through cross-examination or other evidence, the reliability of the identification is significantly challenged by the defendant. In such a case, there really is no reason not to give the instruction; it takes but a few seconds and properly focuses the jury on what is likely to be the most critical issue in the case. It gives sufficient, but not undue, credence to the documented concern over the reliability of eyewitness identifications and gives the jury a more rational basis for determining whether the particular identification evidence before it is, in fact, reliable.

In espousing that view, we do recognize that there may be cases where such an instruction may truly be unnecessary — where the identification witness is a close friend or relative of the defendant, for example, knows the defendant well, and had an unimpeded opportunity to observe the defendant at the relevant time. In those kinds of situations, it is not likely that the defendant will seek a specific instruction or would have much of a basis for complaining if one was not given. We agree that the court has some discretion in the matter, but, like the *Telfaire* court, would admonish trial judges to be careful and circumspect when rejecting requests.