

Circuit Court for Baltimore City  
Case Nos. 119178016  
119178017

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

Nos. 2595 and 2596

September Term, 2019

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ROBERT MCBRIDE

v.

STATE OF MARYLAND

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Kehoe,  
Nazarian,  
Eyler, James R.,  
(Senior Judge, Specially Assigned)  
JJ.

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Opinion by Kehoe, J.

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Filed: May 28, 2021

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

A jury in the Circuit Court for Baltimore City convicted Robert McBride of two counts of robbery with a dangerous weapon. The Court sentenced him to a term of ten years' imprisonment for one of the robbery convictions and a concurrent term of ten years' imprisonment for the other robbery conviction. In this appeal, McBride presents a single question for our review:

Did the trial court fail to exercise its discretion or abuse its discretion when it declined to give an instruction on cross-racial identification as requested by the defense?

For the reasons that follow, we hold that the trial court did not err in refusing to give the requested instruction. Accordingly, we affirm the judgments of the circuit court.

### **Background**

McBride was arrested and charged after he was implicated in two separate robberies that occurred in the early morning hours of June 3, 2019, at a bus stop on East Fayette Street in Baltimore. At the trial, Noael Pineda-Moreno testified that, at approximately 6:30 a.m. on June 3, 2019, he was standing at the bus stop when someone approached him, pulled out a “weapon,” and demanded money. After Mr. Pineda-Moreno handed over his money, he went across the street and called the police. While he was waiting for the police to arrive, Mr. Pineda-Moreno saw the same perpetrator rob another person who was standing at the same bus stop. By the time the police arrived, the perpetrator had fled the scene. Mr. Pineda-Moreno described the perpetrator to the police as having “dark skin,” wearing white tennis shoes and a black shirt, and carrying a black backpack. The following

day, the police showed Mr. Pineda-Moreno a photographic array that included McBride's picture. Mr. Pineda-Moreno identified McBride as the person who robbed him.

Darmin Abrego-Deras testified that, at approximately 6:30 a.m. on June 3, 2019, he was standing at the same bus stop when a man approached, brandished a handgun, and demanded money. After handing over his money, Mr. Abrego-Deras fled the scene. Sometime later, he reported the robbery to the police, describing the robber as a black man who was carrying a black backpack. Six days after the robbery, the police showed Mr. Abrego-Deras a photographic array that included McBride's picture. Mr. Abrego-Deras identified McBride as the person who robbed him.

In addition to the above testimony, the State introduced surveillance footage that depicted the area near the bus stop around the time of the two robberies. In that video, McBride can be seen standing in front of a convenience store located a short distance away from the bus stop where the robberies occurred. At approximately 6:37 a.m., McBride walks off camera, heading in the direction of the bus stop. Six minutes later, McBride walks back to the area in front of the convenience store, having come from the same direction. In the video, McBride, an African-American male, is wearing dark-colored clothes and white shoes and is carrying a dark-colored backpack.

At the conclusion of the evidence, defense counsel asked the trial court to instruct the jury on "cross-racial identification." The proposed instruction read:

In this case, the identifying witness is of a different race than the defendant.  
In the experience of many, it is more difficult to identify the members of a

different race than members of one's own. If this is also your own experience, you may consider it in evaluating the witness testimony. You must also consider, of course, whether [there] are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have great difficulty in making a reliable identification.

Defense counsel argued that the instruction was appropriate "since in this case both of the victims were of a different race than the defendant." The trial court declined the request, stating: "In the absence of any supporting testimony that would help them with that, I'm not going to give the cross-racial identification. But certainly, you're free in your argument to challenge the validity of their identification." Although the court did not ultimately give the requested instruction, the court did give a more general "eyewitness" instruction that was substantially similar to Maryland Criminal Pattern Jury Instruction 3:30 "Identification of Defendant." The court's instruction was as follows:

You have heard evidence that prior to this trial a witness identified the defendant by photo array. The identification of the defendant by a single eyewitness, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification with great care. It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

The jury later convicted McBride of two counts of robbery. This timely appeal followed.

### **Analysis**

McBride asserts that the trial court’s ruling was wrong for two reasons: First, he argues that the court erred because it failed to give due consideration to his request and then denied the request for a reason, i.e., the lack of supporting expert testimony, that is not consistent with existing Maryland caselaw. Second, he contends that the facts of his case necessitated a cross-racial identification instruction because the victims’ testimony “was critical to his conviction of both robberies” and was not corroborated by any other evidence. Citing *State v. Cromedy*, 158 N.J. 112, 727 A.2d 457 (N.J. 1999), McBride asserts that a cross-racial identification instruction is particularly relevant when the eyewitness identification is critical to the case and is not corroborated by other evidence.<sup>1</sup>

The State contends that the trial court properly exercised its discretion in refusing to give the instruction. The State asserts that the trial court’s reference to “supporting” testimony is best understood as a reference to the absence of any testimony that could have assisted the jury in applying McBride’s specific instruction to the evidence presented. In

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<sup>1</sup> The relevant holding in *Cromedy* was that a trial court was required to give an instruction on cross-racial identification “only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.” *Cromedy*, 727 A.2d at 467. This holding was modified in *State v. Henderson*, 208 N.J. 208, 27 A.3d 872, 826 (2011), in which the Court held that: “additional research on own-race bias . . . and the more complete record about eyewitness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial.”

that context, the State continues, the court was within its discretion in considering the lack of supporting testimony when declining McBride's request for the instruction. The State also asserts that, although the victims' testimony was critical to the State's case, the impact of possible cross-racial bias, and thus the need for an instruction cross-racial identification, was attenuated by the introduction of evidence that tended to corroborate both identifications.

A

McBride argues that the trial court erred as a matter of law when it declined to give a cross-racial identification instruction. He states:

In making this ruling, the trial court imposed an unwarranted precondition of expert [testimony] before weighing whether the circumstances to determine whether a cross-racial identification instruction was warranted. No such expert testimony is required before determining whether a cross-racial identification instruction is warranted.

He asserts that there is no Maryland decision that states that a cross-racial identification instruction is appropriate only when there has been expert testimony on the subject.

For its part, the State does not contend that it is the law of Maryland that a cross-racial identification instruction is inappropriate in the absence of expert testimony. However, the State asserts, and we think correctly, that McBride's appellate contention does not account for the actual language in the proposed instruction, which we repeat (emphasis added):

In this case, the identifying witness is of a different race than the defendant. In the experience of many, it is more difficult to identify the members of a different race than members of one's own. If this is also your own experience,

you may consider it in evaluating the witness testimony. *You must also consider, of course, whether [there] are other factors present in this case which overcome any such difficulty of identification.* For example, you may conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have great difficulty in making a reliable identification.

The State asserts:

Thus, “the absence of supporting testimony that would help [the jury] with that,” referred to by the court, is better understood as a reference to the absence of testimony to help the jury “conclude [whether] the witness has had sufficient contacts with members of the defendant’s race that (he) would not have great difficulty in making a reliable identification,” or “whether [there] are other factors present in this case which overcome any such difficulty of identification,” be that factual or expert testimony.

We agree with the State. The instruction requested by defense counsel referred to factual matters, specifically, whether the witnesses had had “sufficient contacts with members” of McBride’s race, and, more generally, unspecified “other factors” that might overcome difficulties otherwise inherent in cross-racial identifications.<sup>2</sup> Because there was no such evidence before the jury in McBride’s trial, the instruction was an invitation for the jury to speculate about matters not in evidence. The trial court did not abuse its discretion in declining to give the requested instruction.

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<sup>2</sup> For example, in *Tucker v. State*, 407 Md. 368, 374 n.3 (2009), defense counsel elicited testimony from the witness regarding the racial composition of the neighborhood in which she lived; in *Smith v. State*, 388 Md. 468, 475 (2009), the witness testified that “she was extremely good with faces” because of her professional training.

B

Maryland Rule 4-325(c) states, in relevant part, that a “court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding.” “Rule 4-325(c) has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.” *Dickey v. State*, 404 Md. 187, 197-98 (2008). “We review a trial court’s decision on whether to provide a cross-racial identification instruction for an abuse of discretion.” *Harriston v. State*, 246 Md. App. 367, 382, *cert. denied* 471 Md. 77 (2020). “In so doing, we are mindful that ‘jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate.’” *Kazadi v. State*, 240 Md. App. 156, 190 (2019) (citing *Fleming v. State*, 373 Md. 426, 433 (2003)), *rev’d on other grounds*, 467 Md. 1 (2020).

We first discussed the issue of cross-racial identification instructions in *Smith v. State*, 158 Md. App. 673 (2004), *rev’d on other grounds*, 388 Md. 468 (2005), in which the trial court gave an eyewitness identification instruction pursuant to MPJI-Cr 3:30<sup>3</sup> but refused

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<sup>3</sup> This was the instruction given by the trial court in the present case.



to give a more specific cross-racial identification instruction. *Id.* at 679-80. We noted that, under the Court of Appeals’ holding in *Gunning v. State*, 347 Md. 332 (1997), the decision whether to give an instruction on eyewitness identification pursuant to MPJI-Cr 3:30 is within the discretion of the trial court. *Id.* at 694-96. We concluded that, based on the Court’s holding in that case, “it necessarily follows that the giving of [an instruction on cross-racial identification] lies within the trial court’s discretion.” *Id.* at 696.

We then addressed an argument regarding the applicability of *State v. Cromedy*, a case in which the New Jersey Supreme Court held that a cross-racial identification instruction must be given when the identification is crucial to the case and is not corroborated by other evidence. *Id.* We concluded that *Cromedy* was inapposite because it was based on New Jersey law, which was inconsistent with Maryland law:

Under New Jersey law, an eyewitness identification instruction is required when eyewitness identification is a critical issue in the case. As we have seen, that is not Maryland law. Under *Gunning*, even when identification is a critical issue in a case and there is no corroborating evidence, an identification instruction is not necessarily required, and the test is abuse of discretion.

*Id.* at 696-97 (internal citations omitted).

Although we continued to discuss, in greater detail, the rationale of the *Cromedy* court, noting with particularity that court’s discussion of certain empirical studies regarding cross-racial identification, *see id.* at 697-702 (describing the court’s rationale as “instructive”), we ultimately concluded that the “question of identifying specific factors in

an eyewitness identification instruction [was] too complex to simply mandate that race should be identified as a factor.”<sup>4</sup> *Id.* at 702. We noted that “the Court of Appeals has already ruled [in *Gunning*] that the giving of a general eyewitness instruction is discretionary, and by necessary implication, the same is true with respect to an instruction that identifies specific factors, such as race.” *Id.*

Applying those principles to the facts of that case, we held that the trial court did not abuse its discretion. *Id.* at 703-04. We explained that the eyewitness, a robbery victim, had identified the defendant as her attacker within two weeks of the crime, that she had articulated “specific features” in describing her attacker, and that she had been consistent in her identification. *Id.* at 704. We also noted that there was no evidence that the victim lacked familiarity with persons of the defendant’s race or that race played a part in the identification. *Id.* We concluded that “[b]ecause there was no evidence of any problem associated with cross-racial identification, the pattern instruction given, which advised the jury to, ‘examine the identification of the defendant with great care,’ was sufficient.” *Id.*

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<sup>4</sup> McBride notes that, in reversing our judgment on other grounds, the Court of Appeals “took the time to acknowledge the growing body of scientific laboratory and field research . . . that some witnesses are better able to identify members of their own race but are significantly impaired when attempting to identify individuals of another race or ethnicity.” *Smith v. State*, 388 Md. 468, 478-79. But the Court’s comments on the matter were confined to the issue of whether the trial court had erred in precluding defense counsel from mentioning cross-racial identification in closing argument. *Id.* at 477-489. The Court of Appeals held that the trial court erred because the witness had testified that “she had a heightened ability to identify faces.” *Id.* at 380.

A few years later, in *Janey v. State*, 166 Md. App. 645 (2006), we again held that a trial court had not erred in refusing to give an instruction on cross-racial identification. *Id.* at 647. Citing both *Gunning* and *Smith*, we once more concluded that the giving of such an instruction lies within the trial court’s sole discretion. *Id.* at 654-61. We also addressed *Cromedy*, stating that, “even if Janey[, the defendant,] had been tried in New Jersey, where the *Cromedy* standard requires that an instruction on cross-racial identification be given under certain circumstances, it would not have been reversible error for the trial judge to refuse to grant the instruction in Janey’s case[.]” *Id.* at 664. We noted that, in that case, the witness’s identification was not a critical issue, there was other evidence corroborating the identification, and the witness, who was Hispanic, admitted that he was not good at identifying African-Americans. *Id.*

In reaching those conclusions, however, we cautioned that our holding “should not be interpreted as holding that it is never appropriate to give such an instruction.” *Id.* at 666; *see also Tucker v. State*, 407 Md. 368, 381-82 (2009) (holding that the trial court erred when it instructed the jury that “There is no particular reason to think that cross-racial identification applies to eyewitnesses in actual criminal cases[.]”). Instead, we explained, a court “must, upon request, consider whether an instruction is appropriate in the case.” *Id.* We further stated that a court should not be deterred from giving a cross-racial instruction simply because no such instruction appears in the Maryland Criminal Pattern Jury Instructions. *Id.* We explained that “it would be an abuse of discretion for a trial judge to

apply a uniform policy of rejecting all requested instructions that are not covered by some pattern instruction.” *Id.*

In *Kazadi v. State, supra*, we revisited the issue and concluded that the trial court in that case had not abused its discretion in refusing to give a six-page instruction on cross-racial identification where the accused had been identified by two witnesses who were of a different race. *Kazadi*, 240 Md. App. at 194. We noted that the requested instruction in that case, which had been derived from a ten-page pattern instruction approved for New Jersey courts, concerned “an uncorroborated identification of the accused by a stranger with a different racial background.” *Id.* at 188, 194. We reasoned that such an instruction was inappropriate under the circumstances presented there because the two witnesses had known the accused for several years and because each witness had separately identified the accused in a photo array. *Id.* at 194.

Finally, in *Harriston v. State*, this Court upheld the trial court’s refusal to give an instruction on cross-racial identification where a witness made a photographic identification of the accused. *Harriston*, 246 Md. App. at 387. In so doing, we rejected any notion that our courts had adopted “the *Cromedy* test,” wherein an instruction on cross-racial identification is required in cases where identification is a critical issue and is not corroborated by other evidence. *Id.* at 385-86. We explained that our holdings in *Janey* and *Kazadi* “make clear that Maryland courts are yet to require cross-racial identification instructions in certain scenarios.” *Id.* at 386. Instead, we remarked, “*Janey* made clear that

a trial judge may not arbitrarily refuse to provide a cross-racial identification instruction[.]”

*Id.*

After noting that the trial judge, in that case, had not arbitrarily refused to provide the instruction, we held that the trial judge had not abused her discretion. *Id.* We noted further that “even if our courts were bound by the *Cromedy* test, we still would likely not find the cross-racial instruction was required.” *Id.* at 387. In support, we pointed out that the witness had known the accused for some time prior to the identification. *Id.* We also noted that the witness’s testimony was corroborated by other testimony. *Id.*

From those cases, several conclusions can be made. First, a trial court’s decision to give an instruction on cross-racial identification is not dictated by any one factor or set of factors, including those set forth by the New Jersey Supreme Court in *Cromedy*. Rather, the decision to provide such an instruction is committed to the court’s sole discretion, which the court must exercise in a non-arbitrary manner. Moreover, at no point have we suggested that a court is barred from considering any “supporting” testimony (or lack thereof) when deciding whether to grant a request for a cross-racial identification instruction. On the contrary, we expressly recognized the lack of supporting evidence when we concluded, in *Smith*, that the trial court did not abuse its discretion in refusing to give a cross-racial identification instruction. *Smith*, 158 Md. App. at 704. Finally, at no point have we held that a trial court has actually abused its discretion in refusing to give such an

instruction, even when we considered the court’s actions under the more stringent *Cromedy* test.

Against this backdrop, we hold that the trial court in the present case did not abuse its discretion in refusing McBride’s requested instruction on cross-racial identification. McBride’s requested instruction touched on some rather complex issues, including the unsubstantiated claim that “in the experience of many, it is more difficult to identify the members of a different race than members of one’s own.” The instruction also suggested that the jurors should evaluate certain amorphous and potentially misleading factors that might impact a cross-racial identification, including whether there were “other factors” present in the case and whether the witnesses “had sufficient contacts with members of the defendant’s race.” When McBride requested the instruction at trial, the court considered the request and denied it, finding that there was a lack of supporting testimony to aid the jury in understanding the specific issues raised in McBride’s requested instruction. Later, in lieu of a cross-racial identification instruction, the court gave a general “eyewitness” instruction that was substantially similar to Maryland Criminal Pattern Jury Instruction 3:30 “Identification of Defendant.”

From this, we see no evidence that the court failed to exercise its discretion or that the court denied McBride’s request by applying some predetermined position. On the contrary, the court properly considered the request in light of the specific facts of the case and then denied the request for a non-arbitrary reason. Moreover, because there was no concrete

evidence that race played a part in the witnesses' identifications, the court's general eyewitness instruction adequately covered the issues raised by the evidence. We can find no support in the record or the relevant case law to suggest that the court's handling of the matter was anything but a reasonable exercise of its discretion.

Assuming, *arguendo*, that the trial court was bound by the stricter *Cromedy* test, we would still conclude that the court did not abuse its discretion. Although there is little doubt that each of the victims' testimony was critical to the State's case, that testimony was nevertheless corroborated by other evidence. For starters, the identification by each victim corroborated the other's, particularly when we consider that the individual robberies occurred within minutes of one another at the same location. In fact, the first victim, Mr. Pinedo-Morena, testified that he actually witnessed the second robbery and recognized the robber as the same person who had robbed him. In addition, the video from the surveillance cameras depict McBride walking toward the area of the robberies and then, just minutes later, walking away from the direction of the robberies. In the surveillance video, McBride is wearing clothing that matched the description given by the victims immediately after the robberies.

In short, McBride's claim that the victims' testimony was uncorroborated is belied by the record. For that additional reason, the trial court was well within its discretion in refusing to give McBride's requested instruction on cross-racial identification.

We are of course aware that the reliability of eyewitness identification is a matter of widespread concern and controversy. We are also aware that, on February 17, 2021, the Standing Committee on Rules of Practice and Procedure submitted a report to the Court of Appeals recommending changes to several Maryland Rules including one to require a jury instruction in appropriate cases “to give appropriate guidance in determining the ultimate reliability/credibility of the identification.” *Two Hundred and Sixth Report of the Standing Committee on Rules of Practice and Procedure* at 11 (2020).

The Rules Committee’s report is pending before the Court of Appeals and it is not our role to comment upon it. However, regardless of what rules may be adopted in the future, the task before the trial court and this panel is to apply the law as it currently exists. We conclude that the trial court did not err in denying McBride’s requested jury instruction in light of the evidence presented at trial.

**THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANT TO PAY COSTS.**