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## STATE V. CROMEDY 727 A.2D 457 (N.J. 1999)

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**STATE V. CROMEDY**  
**727 A.2D 457 (N.J. 1999)**

**FACTS**

On August 28, 1992, an African-American male broke into the basement apartment of D.S., a white female university student.<sup>1</sup> The intruder told D.S. that he was “wanted for murder” and needed money “to get to New York.”<sup>2</sup> After stealing money and credit cards from D.S.’s purse, he forced D.S. into her “brightly-lit kitchen.”<sup>3</sup> The intruder pushed D.S. against the kitchen door and sexually assaulted her “from behind.”<sup>4</sup> D.S. could not see her attacker during the sexual assault, as she kept her eyes closed and had her back to her assailant the entire time.<sup>5</sup> However, when the assault was over, she was able to observe her attacker from only a few feet away.<sup>6</sup> Throughout the encounter, the intruder made no attempt to hide his face.<sup>7</sup>

When the police took D.S.’s initial statement at her apartment, she described her attacker as an “African-American male in his late 20’s to early 30’s, full-faced, about five feet five inches tall, with a medium build, mustache and unkempt hair.”<sup>8</sup> The next day, D.S. again described her assailant to the police and made a formal statement.<sup>9</sup> She also described the intruder to a police artist who drew a composite sketch.<sup>10</sup> Five days after the attack, the police showed D.S. slides and photographs in an attempt to identify her attacker.<sup>11</sup> Although one of the photographs was of defendant McKinley Cromedy (“Cromedy”), D.S. did not identify him as her attacker.<sup>12</sup>

Almost eight months after the attack D.S. saw an African-American man, later identified as Cromedy, walking down the street.<sup>13</sup> Believing that he might be her attacker, D.S. studied his “face and gait” when she walked past him.<sup>14</sup> D.S. immediately went home and called the police.<sup>15</sup> Acting on only the information received from D.S., the police picked up Cromedy and took him to police headquarters where D.S. identified him as her attacker.<sup>16</sup> The

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1. *State v. Cromedy*, 727 A.2d 457, 459 (N.J. 1999).
  2. *Cromedy*, 727 A.2d at 459.
  3. 727 A.2d at 459.
  4. *Id.*
  5. *Id.*
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Id.*
  10. *Id.*
  11. *Id.*
  12. *Id.*
  13. *Id.*
  14. *Id.*
  15. *Id.*
  16. *Id.*

police arrested Cromedy and took saliva and blood samples for scientific analysis.<sup>17</sup>

At trial, the prosecution presented no forensic evidence, such as fingerprints, hair, or semen matches that linked Cromedy to the crime.<sup>18</sup> Neither the results from the blood test or semen analysis were introduced, as both were inconclusive.<sup>19</sup> Additionally, there was testimony from the police that fingerprints, hair samples and other body fluids found at the scene were not a match for the defendant.<sup>20</sup> The only evidence against Cromedy was the eyewitness testimony of D.S.<sup>21</sup>

D.S.'s identification of Cromedy is termed a "cross-racial identification" because the eyewitness and the defendant are of different races.<sup>22</sup> Defense counsel requested a cross-racial identification jury instruction,<sup>23</sup> noting D.S. had not been able to identify the defendant from his photograph, almost eight months had passed between the attack and D.S.'s positive identification of the defendant, and the victim and the defendant were of different races.<sup>24</sup> In support of his request, defense counsel cited the *New Jersey Supreme Court Task Force on Minority Concerns Final Report*<sup>25</sup> ("Task Force Report"), which recommended that the Supreme Court of New Jersey adopt a cross-racial identification instruction.<sup>26</sup>

The trial court rejected the proposed jury instruction because the Supreme Court of New Jersey had not yet adopted the Task Force Report and also because the defendant failed to provide expert testimony on the issue of cross-racial identification.<sup>27</sup> Subsequently, the jury convicted Cromedy of first-degree aggravated sexual assault, second-degree robbery, second-degree burglary, and third-degree terroristic threats.<sup>28</sup> On appeal, the Appellate

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17. *Id.*

18. *Id.*

19. *Id.* Because both D.S. and Cromedy had the same blood type, and Cromedy was a non-secretor, Cromedy's samples could not be compared with the specimens collected in the rape kit. *Id.*

20. See Ronald Smothers, *DNA Tests Free Man After 6 Years; Had Been Convicted in Rape of Student*, N.Y. TIMES, Dec. 15, 1999, at B6.

21. 727 A.2d at 460.

22. *Id.*

23. Defense counsel proposed the following jury instruction: "You know that the identifying witness is of a different race than the defendant. When a witness who is a member of one race identifies a member who is of another race we say there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness's original perception and/or accuracy of a subsequent identification." *Id.* at 460.

24. *Id.*

25. *New Jersey Supreme Court Task Force on Minority Concerns Final Report*, 131 N.J.L.J. 1145 (1992).

26. 727 A.2d at 460. Defense counsel's request for the cross-racial identification jury instruction was not based on precedent or New Jersey practice, but rather on the findings of the Task Force which had investigated the need for such an instruction and had concluded that such an instruction should be given.

27. 727 A.2d at 460.

28. *Id.*

Division upheld the convictions, finding that the trial court had committed no error in refusing to provide the jury with a cross-racial identification instruction.<sup>29</sup>

The Supreme Court of New Jersey granted certiorari to decide whether a cross-racial identification jury instruction should be provided despite the lack of agreement in the scientific community over the reliability of cross-racial identifications.<sup>30</sup> Cromedy argued that the trial court erred in refusing to include a cross-racial identification instruction.<sup>31</sup> Specifically, Cromedy argued that cross-racial impairment of witnesses is "a scientific fact" and that the court should adopt the Task Force Report recommendations.<sup>32</sup> Additionally, Cromedy argued that expert testimony is not needed before a judge can give a cross-racial identification charge to the jury.<sup>33</sup> The State argued that because of the lack of consensus in the scientific community regarding the existence and effects of cross-racial impairment on witnesses, the trial court properly rejected the cross-racial identification instruction.<sup>34</sup>

### HOLDING

The Supreme Court of New Jersey unanimously held that "a cross-racial identification, as a subset of eyewitness identification, requires a special jury instruction in an appropriate case."<sup>35</sup> The court limited the use of cross-racial identification instructions to those cases in which "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."<sup>36</sup>

### ANALYSIS

Although many other jurisdictions have examined the need for cross-racial identification jury instructions, this case presented the Supreme Court of New Jersey with its first opportunity to address this issue.<sup>37</sup> The court began its analysis by reviewing the behavioral and social science literature addressing

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29. *Id.*

30. *Id.* at 460-61.

31. *Id.* at 460.

32. *Id.* at 460-61.

33. *Id.* at 461. Cromedy also maintained that if expert testimony was deemed necessary, the court should remand the case to the trial court to afford Cromedy an opportunity to present such testimony. *Id.*

34. *Id.*

35. *Id.* at 467.

36. *Id.*

37. *Id.* at 461.

the reliability of cross-racial eyewitness identifications.<sup>38</sup> The court then reviewed cases from other jurisdictions that addressed the appropriateness of providing a cross-racial identification instruction to the jury.<sup>39</sup> Finally, the court considered the Task Force Report recommendations and concluded that a cross-racial identification charge should be required in certain cases.<sup>40</sup>

A review of the behavioral and social science literature revealed that while many researchers agree that witnesses are better at identifying suspects of their own race ("own-race" bias),<sup>41</sup> there is disagreement about the extent to which "cross-racial impairment" affects identification.<sup>42</sup> The research cited by the court also indicated disagreement about whether cross-racial impairment affects all racial groups equally.<sup>43</sup>

Recognizing the ongoing debate over the effect of cross-racial impairment, the court relied on historical precedent to support the use of behavioral and social science studies in reaching a determination.<sup>44</sup> The court cited *Brown v. Board of Education*<sup>45</sup> as the "prototypical example" of a court using modern social science and behavioral sciences as evidence to support its legal conclusion.<sup>46</sup> In *Brown*, the U.S. Supreme Court used social science studies to support its conclusions despite debate among researchers concerning the validity of the studies.<sup>47</sup>

The court also cited several court of appeals and U.S. Supreme Court cases that have acknowledged existing problems with eyewitness identifications in general and cross-racial identifications in particular.<sup>48</sup> One of the primary concerns with eyewitness identifications is the "great potential for misidentification."<sup>49</sup> The risk of misidentification is particularly problematic in instances where a witness bases his identification of a stranger solely upon one brief observation.<sup>50</sup> Additionally, the risk increases when an

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38. *Id.* at 461-62.

39. *Id.* at 463-65.

40. *Id.* at 465-67.

41. *Id.* at 461.

42. *Id.* at 462.

43. *Id.* See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 at 939 (1984) (citing four studies finding African-American eyewitnesses identified both white and black subjects with same degree of accuracy; citing five studies concluding black subjects experience some degree of cross-racial impairment).

44. 727 A.2d at 462-63.

45. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

46. 727 A.2d at 463.

47. *Id.* at 462-63.

48. *Id.* at 463-64. See *United States v. Telfaire*, 469 F.2d 552, 555, 559-560 (D.C. Cir. 1972); *United States v. Russell*, 532 F.2d 1063, 1066 (6th Cir. 1976); *United States v. Smith*, 563 F.2d 1361, 1363 (9th Cir. 1977); *Jackson v. Fogg*, 589 F.2d 108, 111-12 (2d Cir. 1978); *United States v. Wade*, 388 U.S. 218, 228-229 (1967); *Manson v. Brathwaite*, 432 U.S. 98, 110-15 (1977).

49. *United States v. Russell*, 532 F.2d 1063, 1066 (6th Cir. 1976).

50. *Russell*, 532 F.2d at 1066.

observation is made in a situation rife with stress or excitement.<sup>51</sup> "Own-race" bias may further impair the witness's ability to identify another individual.<sup>52</sup>

In support of the proposition that cross-racial identifications present a greater risk for misidentification than same-race identifications, the Supreme Court of New Jersey cited D.C. Circuit Chief Judge Bazelon.<sup>53</sup> In his concurring opinion in *United States v. Telfaire*, Chief Judge Bazelon argued that "the cross-racial nature of an identification" could affect the accuracy of a witness's identification.<sup>54</sup> Therefore, he urged that jurors be apprised of "the pitfalls of cross-racial identification."<sup>55</sup>

In *Jackson v. Fogg*, the Second Circuit questioned the reliability of a single eyewitness identification.<sup>56</sup> The *Jackson* court observed that, of all types of evidence, eyewitness identification "is the least reliable, especially where unsupported by corroborating evidence."<sup>57</sup> In *Manson v. Brathwaite*, the U.S. Supreme Court suggested that an identification is more reliable if the eyewitness and the suspect are of the same race.<sup>58</sup> The Supreme Court of New Jersey used *Jackson* and *Manson* to show that the reliability of eyewitness identifications is suspect, particularly when the eyewitness and the accused are of different races.<sup>59</sup>

The court noted that when identification is a critical issue in a case, New Jersey trial courts are obligated to provide a jury instruction "to focus the jury's attention on how to analyze and consider the trustworthiness of the eyewitness identification."<sup>60</sup> Under *State v. Green*,<sup>61</sup> trial courts must ask the jury weighing the reliability of an eyewitness's identification to consider "the capacity or the ability of the witness to make observations or perceptions" taking into consideration all of the surrounding circumstances.<sup>62</sup> In this case, Cromedy urged the trial court to instruct the jury to consider the cross-racial nature of the identification in evaluating the ability of D.S. to make a reliable identification.<sup>63</sup>

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51. 532 F.2d at 1066.

52. *Cromedy*, 727 A.2d at 461.

53. *Id.* at 463.

54. *Telfaire*, 469 F.2d at 559 (Bazelon, C.J., concurring).

55. 469 F.2d at 559 (Bazelon, C.J., concurring).

56. *Jackson*, 589 F.2d at 108.

57. 589 F.2d at 112.

58. *Manson*, 432 U.S. at 115.

59. 727 A.2d at 463-64.

60. *Id.* at 465. See *State v. Green*, 86 N.J. 281, 292 (1981); *State v. Melvin*, 65 N.J. 1, 18 (1974); *State v. Middleton*, 299 N.J. Super. 22, 32 (App. Div. 1997); *State v. Frey*, 194 N.J. Super. 326, 329-330 (App. Div. 1984).

61. *State v. Green*, 86 N.J. 281 (1981).

62. *Green*, 86 N.J. at 293-94.

63. 727 A.2d at 465.

The supreme court's review of other jurisdictions indicated that the majority of courts that allow cross-racial identification jury instructions have left the decision to provide the instruction to the trial judge's discretion.<sup>64</sup> However, other jurisdictions have also recognized that the discretion of the trial judge may result in prejudicial error if the cautionary instruction is not provided in cases "where identification is the critical or central issue in the case, there is no corroborating evidence, and the circumstances of the case raise doubts about the reliability of the identification."<sup>65</sup> In contrast, courts have refused to permit a cross-racial identification instruction when the eyewitness had adequate opportunity to view the defendant, there was corroborating evidence to support the identification, "and/or there was no evidence that race affected the identification."<sup>66</sup> The Supreme Court of New Jersey embraced the findings of these courts in its holding in this case.

In addition to empirical studies and decisions from other jurisdictions, the court considered the recommendations in the Task Force Report. After studying the problem of cross-racial identification for five years, the Task Force concluded that a problem exists with the reliability of cross-racial identifications.<sup>67</sup> The Task Force Report recommended that the court develop a special jury charge addressing the unreliability of cross-racial identifications.<sup>68</sup>

After considering the professional literature, case law and the Task Force Report, the court held that "a cross-racial identification, as a subset of eyewitness identification, requires a special jury instruction" in cases where

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64. *Id.* at 464.

65. *Id.* See *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990) (calling for cross-racial identification instruction when requested by counsel and when cross-racial identification is "primary issue"); *People v. Palmer*, 154 Cal. App. 3d 79 (Ct. App. 1984) (holding that defendant was entitled to specific instruction on inaccuracies of cross-racial identification because only evidence against defendant was victims' identifications); *People v. Harris*, 47 Cal. 3d 1047 (1989) (finding harmless error in excluding special instruction on cross-racial identification where there was substantial evidence to corroborate identifications).

66. 727 A.2d at 464. See *Commonwealth v. Hyatt*, 647 N.E.2d 1168, 1171 (Mass. 1995) (declining instruction in rape and robbery case where victim was terrorized for fifteen to twenty minutes in broad daylight and could see attacker's face).

67. 727 A.2d at 465-66.

68. *Id.* at 466. After reviewing the Task Force Report, the Supreme Court of New Jersey referred the recommendations to the Criminal Practice Committee. The Criminal Practice Committee concluded that the current identification charge should be revised to include a statement on cross-racial identification, and it proposed the following charge: "You know that the identifying witness is of a different race than the defendant. When a witness, who is a member of one race, identifies a defendant, who is a member of a different race, we say that there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness' [sic] original perception and/or accuracy of the subsequent identification(s)." *Id.* The proposed charge was submitted to the Model Jury Charge Committee, but the Committee decided to withhold further consideration of the proposed charge until the Supreme Court of New Jersey issued its decision in this case. *Id.*

"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."<sup>69</sup> The instruction provided should "alert the jury . . . that it should pay close attention to a possible influence of race."<sup>70</sup> Concluding that the trial court committed reversible error by not including an instruction on cross-racial identification, the court reversed Cromedy's conviction and remanded the case for a new trial.<sup>71</sup>

## CONCLUSION

The Supreme Court of New Jersey limited the use of cross-racial identification jury instructions to cases that rely on eyewitness identifications unsupported by corroborating evidence.<sup>72</sup> In fact, the court specifically emphasized that "[t]he simple fact pattern of a white victim of a violent crime at the hands of a black assailant would not automatically give rise to the need for a cross-racial identification charge."<sup>73</sup> By imposing the requirement that there be no corroborating evidence of the defendant's guilt, the court severely limited the utility of the cross-racial identification instruction.

Cross-racial identification instructions may provide some benefit to minority defendants, but that potential benefit is only available in a limited number of cases.<sup>74</sup> Although the cross-racial identification instruction is, in theory, a step toward counterbalancing the effects of "own-race" bias; in practice, the court sets forth a standard that is extremely difficult to meet. In most cases, there is usually some corroborating evidence to support an eyewitness's testimony. For example, if two white people, instead of just one, identify the same black person, they would be corroborating each other; and, thus, no cross-racial identification instruction would be permitted. However, in cases that rely exclusively on a single witness's identification, an additional jury instruction addressing the issue of cross-racial identification could help to establish reasonable doubt in the minds of the jury.

Judge Shebell's dissent from the decision of the appellate court addressed the societal factors that necessitate a cross-racial identification instruction. He observed:

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69. *Id.* at 467.

70. *Id.*

71. *Id.* at 467-68.

72. *Id.* at 467.

73. *Id.*

74. *See* State v. Gaskin, 325 N.J. Super. 563 (App. Div. 1999) (finding no plain error in trial court's failure to give cross-racial identification instruction because trial preceded the *Cromedy* decision, defense counsel failed to request instruction, and identification of defendant was corroborated by other evidence).



A jury instruction that contains no direct reference to the hidden fires of prejudice and bias which may be stoked by an incident such as the sexual assault in question and fails to call the jury's attention to the problems of cross-racial identification, so well documented by the [New Jersey Supreme Court Task Force on Minority Concerns], denies minority defendants, such as McKinley Cromedy, their constitutional right to a fair trial.<sup>75</sup>

Although the court indicated its desire to prevent minority defendants from being convicted based on racial prejudices, the court only permits the charge in a limited but overinclusive number of cases. The jury charge could conceivably be used by a white defendant who is identified by a black eyewitness, even though many of the studies found that black people tend to have less "own-race" bias when making cross-racial identifications.<sup>76</sup> Although white defendants are not subject to the racial prejudices that the court sought to remedy, the court did not limit the application of the cross-racial identification charge to minority defendants.

The impact of *Cromedy* will not be felt unless the Supreme Court of New Jersey broadens its holding to require a cross-racial identification charge in every case in which cross-racial identification is at issue. Despite recognizing that cross-racial identifications are frequently inaccurate, the court restricted the use of cross-racial identification jury instructions to a very limited type of case.<sup>77</sup> Although the court cautioned that "care must be taken to insulate criminal trials from base appeals to racial prejudice," it then stated that the purpose of the cross-racial instruction is "to alert the jury . . . that it should pay close attention to a possible influence of race."<sup>78</sup>

The court, in its attempt to provide a bright-line rule, diluted the impact of the instruction. If race impairs one's ability to accurately identify members of another race, as the court recognized, the mere existence of corroborating evidence does not make it less likely that the witness was affected by "own race" bias. Although a broadening of the rule would make it even more overinclusive with respect to white defendants, the resulting benefit to minority defendants would outweigh the unintended overinclusiveness. For example, in a case in which the corroborating evidence is weak, a cautionary instruction would alert the jury to the reliability problems inherent in cross-racial identifications; and, it would prompt the jury to analyze the reliability

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75. *Cromedy*, 727 A.2d at 460 (quoting unpublished appellate decision (Shebell, J., dissenting)).

76. See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 at 939 (1984) (citing four studies finding African-American eyewitnesses identified both white and black subjects with same degree of accuracy).

77. 727 A.2d at 467.

78. *Id.*

of the witness's identification more critically. Consequently, minority defendants would have a greater chance of acquittal because the jury would be aware that the eyewitness's identification of the defendant could be faulty.

In criminal cases, the standard of proof is "beyond a reasonable doubt."<sup>79</sup> The jury, as the fact-finding body, should be presented with all relevant information so that it can decide for itself whether race should be considered in its deliberations. The inclusion of the cross-racial identification instruction is necessary if the jury is to make a fully informed decision. By denying many defendants this instruction, the court not only deprives them of their right to a fair trial, as Justice Shebell noted in his dissent, the court also denies jury members of their right to decide cases based on the totality of the circumstances.

The *Cromedy* case has a bittersweet ending. On December 14, 1999, McKinley Cromedy was released from jail and all charges against him were dropped.<sup>80</sup> However, this was not the result of a new trial with the cross-racial identification instruction. The utility of the cross-racial identification instruction was not tested because prosecutors conducting DNA tests in preparation for the new trial discovered that the semen taken from the victim just after the incident did not match the samples taken from Cromedy.<sup>81</sup> As the DNA tests proved, the victim had identified the wrong man and, consequently, an innocent man had spent six years in jail.

We will never know what effect the cross-racial identification jury instruction would have had on the outcome of Cromedy's new trial. However, the lesson to be taken from this case is clear. The *Cromedy* case provides clear evidence that cross-racial identifications are fallible. More importantly, the result in this case emphasizes the need for a cross-racial identification jury instruction to prevent the wrongful conviction of future defendants. McKinley Cromedy can testify to that.

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79. See *In re Winship*, 397 U.S. 358 (1970).

80. See Ronald Smothers, *DNA Tests Free Man After 6 Years; Had Been Convicted in Rape of Student*, N.Y. TIMES, Dec. 15, 1999, at B6.

81. *Id.* Defense counsel requested that DNA tests be performed following Cromedy's conviction but the judge denied the request. At that time, DNA tests were not routinely performed in Middlesex County. However, in preparation for the new trial, both the prosecution and the defense agreed that the DNA tests should be performed. See also Caren Chesler, *DNA Tests Imply Inmate's Innocence*, ASBURY PARK PRESS, Dec. 14, 1999, at A3.

