

*State v. Jaime (James Frank)*

No. 82008-2

SANDERS, J. (concurring)—I concur in the majority’s decision to reverse the conviction and remand this case for a new trial based upon the use of the jailhouse courtroom. However, I would also reverse and remand because the trial court erred when it excluded relevant expert testimony on eyewitness identification.

This court in *State v. Cheatam*, 150 Wn.2d 626, 649, 81 P.3d 830 (2003), set forth the standard by which a trial court must determine whether expert testimony concerning witness reliability should be admitted:

[W]here eyewitness identification of the defendant is a key element of the State’s case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc.

Here, eyewitness identification was a key element of the State’s case. The defense expert witness would have testified on the effects of lighting, weapon focus, stress, and cross-racial identification on the accuracy of a witness’ identification.

Those effects were more than “marginal[ly] relevan[t]” here and would have assisted a

jury to assess the accuracy of three of the four witnesses' identifications—that of Linda Gange, Deanne Moore, and Rachel McClaskey. *Cheatam*, 150 Wn.2d at 650.

First, lighting was at issue because it was “pretty dim” in the house and dark outside. Trial Tr. vol. IV, 141, Oct. 5, 2006. In contrast, this court in *Cheatam* determined lighting was not materially relevant in the rape because the assailant was extremely close to the victim and the victim, working with a sketch artist, was able to produce a “nearly photo perfect” sketch of the assailant. 150 Wn.2d at 649. But here descriptions of the shooter were vague. Gange’s testimony was limited to his clothing and that he was of Hispanic descent; she was unable to recall his hair color, how his hair was trimmed, or whether he was wearing a hat or that he had a tattoo on his face. Trial Tr. vol. IV, 128-29, Oct. 5, 2006; Trial Tr. vol. V, 230-31, Oct. 6, 2006. Moore could only testify Jaime had the same “shape of [the shooter’s] face,” and she felt she was only about 50 percent sure the shooter was Jaime. Trial Tr. vol. VI, 441-42, Oct. 9, 2006. McClaskey only specifically remembered the shooter was “about [her] height and stocky build, squinty eyes,” *id.* at 484, and did not identify Jaime until two to three days after the incident in a photographic lineup, *id.* at 471. The eyewitness accounts here lacked any indicators of objective reliability like those present in *Cheatam*, 150 Wn.2d at 649-50.

Second, weapon focus was apparent from the testimony. Gange extensively detailed the appearance of the gun. Trial Tr. vol. IV, 146-48, Oct. 5, 2005. Moore

observed something fall from the gun to the floor when the shooter drew the gun.

Trial Tr. vol. VI, 436, 438, Oct. 9, 2006. McClaskey observed the shooter loading a clip. *Id.* at 459-60.<sup>1</sup> In contrast, the victim in *Cheatam* saw the knife for only a very brief instant, after which the weapon was hidden from her sight. 150 Wn.2d at 650.

Third, stress was a factor for the witnesses. The shooter threatened to kill everyone in the room and was waving his gun around when he did so. Trial Tr. vol. IV, 138-39, Oct. 5, 2006. As discussed above, the resulting eyewitnesses' descriptions were vague. In contrast, the victim in *Cheatam* testified that she realized at the time of the attack the importance of later recognizing the attacker, carefully examined his face, and memorized his features. 150 Wn.2d at 649. The resulting sketch of her assailant was "nearly photo perfect." *Id.*

Fourth, cross-racial identification is relevant here. The record indicates Gange, Moore, and McClaskey were not Hispanic and thus did not share the same race as the shooter and Jaime. *See* Trial Tr. vol. IV, 128, Oct. 5, 2006; Trial Tr. vol. VI, 443, Oct.

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<sup>1</sup> These eyewitnesses saw the shooter before the shooter drew a gun, but this fact does not render weapon focus irrelevant because those pregun observations themselves were of questionable reliability. Gange saw him when he entered the house where the shooting took place. Trial Tr. vol. IV, 127-28, Oct. 5, 2006. Moore saw him prior to driving over to that house. Trial Tr. vol. VI, 424-25, Oct. 9, 2006. McClaskey saw him outside the house, while talking to the person accompanying him. *Id.* at 455-56. Gange's and McClaskey's pregun observations were in the dimly lit house or outside after nightfall. Moore was ultimately only 50 percent sure the shooter was Jaime. *Id.* at 441-42. All three of their pregun observations were in casual settings where they would have had no reason to make a detailed memory of his appearance. *Cf. Cheatam*, 150 Wn. at 649 (where the victim knew she needed to memorize the assailant's features to identify him after the attack).

9, 2006. In *Cheatam*, the “nearly photo perfect” sketch demonstrated that cross-racial identification did not hinder the victim in identifying the assailant. 150 Wn.2d at 650. Here, again, descriptions of the shooter were vague. Gange did identify Jaime once as the shooter out of a lineup of other Hispanic men, but later in the same day was unable to do so again. Trial Tr. vol. IV, 245, Oct. 5, 2006. Cross-racial identification issues may account for such difficulty and would have been helpful to the jury in its deliberations.

The expert testimony would not have been relevant to the identification by the fourth witness, Shawn Stahlman. He had known Jaime for 10 years prior to the incident. Trial Tr. vol. V, 325, Oct. 6, 2006. However, his testimony does not provide an objective confirmation of the identifications of the other witnesses. *Cf. Cheatam*, 150 Wn.2d at 649-50 (where the “nearly photo perfect” sketch the victim was able to produce with a sketch artist was an objective confirmation that lighting, weapon focus, stress, and cross-racial issues did not render her identification less reliable). There are numerous reasons why a jury would doubt the veracity of Stahlman’s testimony. Stahlman admitted he agreed to testify only because, in exchange, the State dismissed the charges against him arising from this incident. Trial Tr. vol. V, 309-10, 340, Oct. 6, 2006. Stahlman had originally blamed a “Javier” for the shooting and then later Stahlman himself confessed to the shooting. *Id.* at 335-37, 358-60. Stahlman also testified he was regularly using methamphetamine throughout the month of the

shooting and had used cocaine and drank beer the day of the shooting. *Id.* at 343-46.

Stahlman ultimately testified he did not actually see the shooting. *Id.* at 337, 358.

Stahlman's testimony did not provide an objective confirmation of the reliability of the identifications by the other witnesses in any way similar to how the "nearly photo perfect" sketch objectively confirmed the witness identification in *Cheatam*, 150 Wn.2d at 649-50.

The trial court abused its discretion by not permitting Jaime to present expert testimony concerning the effects of lighting, weapon focus, stress, and cross-racial issues on the accuracy of the witnesses' identifications. *See Cheatam*, 150 Wn.2d at 645 ("Admissibility of expert testimony under ER 702 is within the trial court's discretion."). The appropriate standard is whether the testimony "would assist the jury in assessing the reliability of eyewitness testimony." *Id.* at 649. The standard is not whether the trial court believes that the jury will ultimately find the identifications unreliable as a result. The expert testimony would have been helpful to a jury to consider the reliability of, and vagueness and inaccuracies in, the eyewitness accounts of Gange, Moore, and McClaskey. That should have been the end of the trial court's inquiry, and the testimony should have been admitted.

Weighing the evidence is squarely within the province of the jury. Convictions and acquittals are still determined by a jury of peers, and the power to find a defendant guilty still rests in their hands.

I concur.

AUTHOR:

Justice Richard B. Sanders

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WE CONCUR:

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Justice Tom Chambers

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