

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Trials & TRIBULATIONS

# Preclusion of eyewitness expert gaffe warrants new trial

The New York State Court of Appeals recently ordered a new trial for a man serving a 25-year prison sentence for assaulting a woman on a Manhattan subway platform, because expert testimony should have been permitted regarding the credibility of eyewitness identification.

In *People v. Santiago*, \_\_ NY2d \_\_, 2011 WL 4972074 (Oct. 20), the Court of Appeals considered whether two eyewitness identifications of a suspect with a partially concealed face sufficiently corroborated the victim's identification so as to render expert testimony on eyewitness recognition memory unnecessary. A unanimous court concluded that two eyewitnesses did not sufficiently corroborate the victim's identification and the trial court improperly excluded the expert witness.

### A. Facts

While she waited for a subway in Manhattan on Jan. 10, 2003, a University of Massachusetts student was slashed in the face and hand with a box cutter. Fifty stitches were required to close the wound, and she almost lost her thumb.

Witnesses stated that the assailant wore a hooded sweatshirt, a winter hat and a winter coat, all of which concealed the perpetrator's face. The victim identified the defendant, Edwin Santiago, a few days after the assault in both a photo array and lineup. Both times the victim identified Santiago, she felt as if her "heart stopped" and she "got really scared and [ ] said that that was him," *Id.* at \*2.

Two other eyewitnesses who were discovered shortly before the trial testified to seeing Santiago on the Chambers Street subway platform just after the attack. However, there was no physical evidence linking Santiago to the assault, and the people's case was built entirely on identification testimony, *Id.*

Not surprisingly, Santiago wished to call Steven Penrod, of the John Jay College of Criminal Justice, to testify regarding scientific findings on eyewitness identification, *Id.* Santiago attempted to introduce testimony from Penrod regarding studies that support various principles proposed by psychologists in the field of eyewitness recognition.

### B. Trial Court's Decision

Without conducting a *Frye* hearing — and prior to the discovery

of the two eyewitnesses — the trial court declined to admit the entire proffered testimony. Notably, this ruling was made prior to the Court of Appeals' decision in *People v. LeGrand*, 8 NY3d 449 (2007), which held that it was an abuse of discretion not to permit expert eyewitness proof when a case turns on the accuracy of eyewitness identification.

The trial court in *Santiago* found that even though there was "no corroboration of the victim's identification," the case was not "an appropriate one for an expert identification witness," *People v. Santiago*, 2 Misc.3d 652, 653 (NY Co Sup Ct 2003). The trial court ruled that testimony on how lineup instructions can influence identification would be inappropriate because the victim here "must have realized that the person whose photograph she selected would be in the lineup," *Id.*

The court further rejected expert testimony on post-event information (eyewitness testimony about an event often reflects not only what the witness actually saw, but also information the witness obtained later), the forgetting curve (the rate of memory loss for an event is greatest right after the event and then levels off over time), the wording of questions, and eyewitness confidence issues (including confidence malleability) on the ground that "by helping to create a sketch and approving its final version, the victim went on the record, for better or worse, about the facial features of her attacker long before any of those topics potentially could influence her lineup identification," *Id.* at 654.

The trial court additionally noted that, in other cases, post-event information and unconscious transference (eyewitnesses sometimes identify as the culperate an individual familiar to them from other context) had been found not to be generally accepted within the scientific community, an issue which the Court of Appeals later decided otherwise in *People v. LeGrand*, 8 NY3d at 458.

### C. Appeal

A fractured Appellate Division, First Department affirmed the trial court's decision to preclude the expert testimony, *People v. Santiago*, 75 AD3d 163 (1st Dept 2010). Two dissenting justices would have held that the trial court abused its discretion in deny-

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ing the expert testimony, and one of the dissenting justices granted Santiago leave to the Court of Appeals.

When it heard the case, the Court of Appeals found that the First Department should have applied the holdings of *LeGrand*, even though the decision in *LeGrand* came more than three years after Santiago's conviction for first-degree assault.

The Court of Appeals previously found in *LeGrand* that it was "an abuse of discretion" for a trial judge to deny a defendant the opportunity to present an eyewitness expert "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence to connect the defendant to the crime," *People v. LeGrand*, 8 NY3d at 458.

As *LeGrand* established, there is a two-stage inquiry needed for considering a motion to admit expert testimony. The first stage is deciding whether the case "turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime," *LeGrand*, 8 NY3d at 452.

If the court finds that such a case exists, it must proceed to the second stage, which involves the application of four factors. The expert evidence must be "relevant to the witness's identification of defendant;" "based on principles that are generally accepted within the relevant scientific community"; "proffered by a qualified expert," and "on a topic beyond the ken of the average juror," *Id.*

Justice Eugene F. Pigott Jr., writing for the court, noted that the facts in *Santiago* turned on the accuracy of a single eyewitness identification and there was no corroborating evidence connecting Santiago to the crime. Therefore, the issue became whether the four factors enumerated in the second stage of the *LeGrand* analysis applied to the proposed testimony, *Santiago*, \_\_ NY2d at \*6.

The Court of Appeals found that the trial court "abused its discretion" when it refused to allow testimony on studies showing that eyewitness confidence is a poor predictor of identification accuracy and studies regarding "confidence malleability" (eyewitness' confidence levels can be influenced by factors unrelated to identification accuracy). The court reasoned, "that the testimony is relevant because the primary evidence against Santiago — the only evidence at the time of the Supreme Court's ruling — was the victim's identification," *Id.*

The court also found that the trial court abused its discretion when it excluded expert testimony on the effects of post-event information on eyewitness memory and studies regarding the inaccuracy of identifications of Hispanic people by non-Hispanic Caucasians.

The trial court should have also given more adequate consideration — and at least held a *Frye* hearing — to determine whether the proposed testimony regarding exposure time, lineup fairness, the forgetting curve, and simultaneous versus sequential lineups

was generally accepted as reliable within the relevant scientific community, *Id.*

A separate question the court took up was whether the trial court abused its discretion when, after the people had rested, the court denied Santiago's renewed request to call an expert witness on eyewitness identification. By the time of this request, the people had introduced evidence of two eyewitness identifications of defendant in addition to the victim.

The people argued that because of this additional evidence it was not a case in which "there is little or no corroborating evidence connecting the defendant to the crime," *Id.* The Court of Appeals disagreed with this reasoning as it looked at the actual eyewitness testimony and "several factors" called the corroborating identifications into question.

The court found that one eyewitness "saw only part of the perpetrator's face" and only "identified defendant as the perpetrator with only 80 percent confidence" and it was also possible that the eyewitness identification using photographs may have been tainted by the witness's memory of the photograph of Santiago he had seen in a Spanish language newspaper, *Id.* at \*7.

Finally, the other eyewitness' identification may have been influenced by his memory of the police artist's sketch of the assailant, calling into question the independence of this evidence from the victim's own identification. The court concluded "taking into account all these circumstances, we do not consider the corroborating evidence sufficient to obviate the second stage of the *LeGrand* analysis."

The court additionally found that the errors were not harmless. "[T]rial error is only harmless when there is overwhelming proof of the defendant's guilt and no significant probability that the jury would have acquitted the defendant were it not for the error," *Id.* Judge Pigott further wrote, "the proof of defendant's guilt was not overwhelming; therefore, the errors cannot be regarded as harmless," *Id.*

Interestingly enough, approximately two years ago I wrote an article addressing eyewitness identification and the misidentification of eyewitness testimony. In that article I stressed the importance of retaining a scientific expert who could testify regarding the way memory and perception affect the reliability of eyewitness identification in appropriate cases, as well as other factors that contribute to misidentification, and should be explored by counsel.

The *Santiago* decision now gives guidance as to the detailed review that needs to be undertaken by the trial court in order to determine whether to permit expert eyewitness testimony and certain theories to be advanced based upon the facts of each case.

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