No. 166
The People &c.,
            Respondent,
        v.
Edwin Santiago,
            Appellant.

Jeffrey I. Dellheim, for appellant.
Patrick J. Hynes, for respondent.

PIGOTT, J.:

In this case, turning on the accuracy of eyewitnesses'
recognition of an assailant's partially concealed face, we
consider whether two additional eyewitness identifications
sufficiently corroborated the victim's identification of the
defendant, so as to render expert testimony on eyewitness

recognition memory unnecessary. We conclude that they did not,
and that it was error to exclude much of the proposed testimony.

I.

In the early morning of January 10, 2003, a woman
waiting for a train at a Manhattan subway station was attacked by
a stranger. She had noticed the man when, after they made eye
contact on the platform, he stepped behind a pillar before
approaching her. When he was an arm's length away from her, the
man asked whether she was "working." When she inquired what he
meant, he asked if she was an escort. After she looked away and
said "No," the man began assaulting her. She closed her eyes
while raising her hands to protect herself. She could not tell
whether her assailant had a weapon. After about ten seconds, the
attack stopped, and the assailant fled.

The victim was assisted by workers at the station, who,
along with the police, searched fruitlessly for the assailant.
An ambulance transported her to a hospital where she was treated.
At the hospital, the victim gave detectives a description of her
attacker, a Hispanic male, late 20s or early 30s, five feet,
eight inches to five feet, nine inches tall, with a mustache and
a goatee. To one detective, the victim described her assailant's
"brown/yellow mustache."

The man was wearing a winter jacket, a hooded
sweatshirt or "hoodie," jeans, and a "winter hat." The jacket,
hoodie and hat together covered the assailant's head in such a

way that his face was concealed "from the middle of his top lip,
down, and from the top of his eyebrows up." The victim could not
see her assailant's hair, except for his eyebrows and mustache.
On the day after the attack, the victim was interviewed by a
police artist who created a sketch of the perpetrator.

Police detectives visited the subway station in search
of eyewitnesses. Edwin Rios, who had seen the assault, described
the assailant as a Hispanic male in his mid- to late 20s, with a
goatee, wearing a hood. The assailant had passed Rios after the
attack, carrying a knife. Later, police located another witness,
Pablo Alarcon, who had noticed the assailant beforehand because
the man's facial expression made Alarcon nervous. After the
attack, Alarcon saw the assailant put a knife away as he fled.
Alarcon also described the perpetrator as a Hispanic male with a
goatee. Police officers showed Rios a copy of the artist's
sketch of the perpetrator; Rios thought it was "more or less"
accurate.

On January 19, 2003, a plain-clothes police officer
patrolling a subway station in Brooklyn noticed a man in a winter
jacket, jeans and winter cap selling Metrocard "swipes." Later,
the officer saw the same man engaged in the same activity at the
next stop. The officer arrested the man, defendant Edwin
Santiago, and his photograph made its way to the detective squad
investigating the January 10 attack.

An array comprising photographs of six men and

including defendant's arrest photograph was shown to Alarcon on
January 22. He claimed not to recognize defendant or any of the
other men in the array. The victim viewed the photographic array
on January 24. She testified that, when she saw the photograph
of Santiago, it felt as if her "heart stopped and [she] got
really scared and [] said that that was him."

Santiago, who had been released, was rearrested the
following day, at a shelter for the homeless. A photograph taken
after the second arrest shows Santiago with a dark mustache and
goatee. He was 30 years old and five feet, five inches in
height.

On January 26, the victim identified Santiago in a six-
person line-up. According to the victim, when she saw defendant,
she felt "really scared" – it was, once again, as if her "heart
stopped" and she "knew it was him." On the same day, Alarcon
viewed the line-up. As he later explained at defendant's
suppression hearing and trial, he recognized defendant as the
perpetrator of the attack with an "eighty percent" feeling of
confidence in his identification, but, because he was concerned
about his immigration status, he told the police that he did not
recognize anyone. The following day, Alarcon saw a photograph of
Santiago in handcuffs, accompanied by police officers, in a
Spanish-language newspaper; the article made it clear that
Santiago had been identified by the victim of the subway attack
and arrested.

Santiago was indicted by a grand jury on a first-degree assault charge on February 6, 2003.

II.

No physical evidence linked defendant to the assault. As it appeared at the time of the indictment, the People's case would be built entirely on the victim's identification. Attempting to secure expert testimony from Professor Steven Penrod on the psychological factors affecting the accuracy of eyewitness identification, Santiago filed a motion *in limine* on June 26. The People countered by arguing, among other things, that much of the proposed expert testimony was within the common understanding of jurors, or inapplicable to the facts of the case.

Supreme Court granted defendant's motion to the extent of ordering a Frye hearing (see Frye v United States, 293 F 1013 [DC Cir 1923]), to determine whether the principles Professor Penrod proposed to describe in his testimony had gained general acceptance in their scientific fields. During subsequent motion practice, defendant gave provisional summaries of Penrod's expected testimony. He would testify concerning studies that support various principles proposed by psychologists in the field of eyewitness recognition – exposure time (the amount of time available for viewing a perpetrator affects the witness's ability to identify the perpetrator); cross-racial and cross-ethnic inaccuracy (non-Hispanic Caucasian eyewitnesses are generally

less accurate in identifying Hispanic people than in identifying
other non-Hispanic Caucasians); weapon focus (a victim's focus on
the weapon used in an assault can affect ability to observe and
remember the attacker); lineup fairness (similarity of fillers to
the suspect increases identification accuracy); lineup
instructions (police instructions indicating that the police
believe the perpetrator to be in the lineup increase the
likelihood of false identification); forgetting curve (the rate
of memory loss for an event is greatest right after the event and
then levels off over time); postevent information (eyewitness
testimony about an event often reflects not only what the witness
actually saw but also information the witness obtained later);
wording of questions (eyewitness testimony about an event can be
affected by how questions put to the witness during investigation
are worded); unconscious transference (eyewitnesses sometimes
identify as the culprit an individual familiar to them from other
situations or contexts); simultaneous versus sequential lineups
(witnesses are more likely to make mistakes when they view
simultaneous lineups than when they view sequential lineups);
eyewitness confidence issues (an eyewitness's confidence level is
not a good predictor of eyewitness accuracy, but eyewitness
confidence is the major determinant in whether an identification
is believed by jurors), and confidence malleability
(eyewitnesses' confidence levels can be influenced by factors
unrelated to identification accuracy).

After defendant's case was transferred to a different
Supreme Court Justice, defendant renewed his motion to admit
expert testimony. On December 19, 2003, Supreme Court denied
defendant's motion, without holding a <u>Frye</u> hearing. While noting
that there was "no corroboration of the victim's identification,"
Supreme Court nonetheless ruled that the case was not "an
appropriate one for an expert identification witness" (2 Misc 3d
652, 653 [Sup Ct 2003]). Supreme Court found that the case did
not involve a cross-racial identification as contemplated by the
psychological literature, and that weapon focus was not relevant
because the victim was not aware of any weapon. Supreme Court
further reasoned that testimony about how lineup instructions can
influence an identification would be inappropriate, because the
victim here "must have realized that the person whose photograph
she selected would be in the lineup" (<u>id.</u> at 654). The court
rejected expert testimony on postevent information, the
forgetting curve, the wording of questions, and eyewitness
confidence issues (including confidence malleability), on the
ground that "by helping to create the 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" (<u>id.</u> at 654). The court found evidence about
simultaneous versus sequential lineups inappropriate on the basis
that "[j]urors are not experts on constitutional law and

procedure, and cannot be educated about those topics during a
trial" (id. at 655). In addition, Supreme Court noted that, in
Frye hearings in other cases, postevent information and
unconscious transference had been found to be not generally
accepted within the relevant scientific community.[1] Supreme
Court concluded by inviting the parties to "suggest ways to
address, during jury selection and in the final instructions, the
topic of a witness's confidence if one side feels that the
court's charge on 'certainty' is not adequate to cover
'confidence'" (id. at 655). Defense counsel objected to the
ruling.

                              III.

          On December 21, 2003, Alarcon told an assistant
district attorney that he had in fact recognized someone in the
January 2003 lineup. Shown photographs of that lineup, he
identified defendant as the person he had recognized from the
attack. On January 20, 2004, Rios was shown a new lineup, in
which he identified Santiago.

          Following a suppression hearing, at which his motions
were denied, Santiago was tried before a jury. The victim
identified Santiago at the trial, insisting that there was no
doubt in her mind that he was her assailant. Rios and Alarcon
also identified defendant; the latter repeated that he was only

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     [1] We decided otherwise, with respect to postevent
information, in People v LeGrand, 8 NY3d 449, 458 [2007]).

"eighty percent sure" of his identification. The jury heard
about the prior photographic and lineup identifications.

After the defense rested, Santiago renewed his
objection to Supreme Court's refusal to admit the expert
testimony, moving to reopen his case. Supreme Court denied the
motion.

Defense counsel's summation stressed that certainty of
identification was not equivalent to accuracy of identification.
As promised, Supreme Court's final charge told the jury to
"[k]eep in mind that the witness's confidence or lack of
confidence in his or her testimony is not necessarily indicative
of accuracy of identification."

On February 5, 2004, the jury found Santiago guilty of
assault in the first degree. Supreme Court convicted him
accordingly, sentencing him to 25 years imprisonment, to be
followed by 5 years postrelease supervision.

Santiago timely appealed, raising several issues he has
since abandoned, as well as the argument we now consider – his
claim that Supreme Court abused its discretion in denying his
request for expert testimony on eyewitness identification. On
May 6, 2010, a fractured Appellate Division affirmed Supreme
Court's judgment. Two Justices concluded that there was no abuse
of discretion; another concurred, in an opinion expressing the
view that any error was harmless. The two dissenting Justices
would have held that Supreme Court abused its discretion, and one

of the dissenting Justices granted defendant leave to appeal to this Court. We now reverse.

IV.

A trial court may, in its discretion, admit, limit, or deny the testimony of an expert on the reliability of eyewitness identification, weighing a request to introduce such expert testimony "against other relevant factors, such as the centrality of the identification issue and the existence of corroborating evidence" (People v Lee, 96 NY2d 157, 163 [2001]). Because mistaken eyewitness identifications play a significant role in many wrongful convictions, and expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, "courts are encouraged . . . in appropriate cases" to grant defendants' motions to admit expert testimony on this subject (People v Drake, 7 NY3d 28, 31 [2006], citing People v Young, 7 NY3d 40 [2006]).

In People v LeGrand (8 NY3d 449 [2007]), we set out standards governing the discretion of trial courts in regard to the admission of expert testimony on eyewitness identification. LeGrand established a two-stage inquiry for considering a motion to admit such 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 trial

court finds itself with such a case, then it must proceed to the
second stage, which involves the application of four factors.
The court must decide whether the proposed "testimony is (1)
relevant to the witness's identification of defendant, (2) based
on principles that are generally accepted within the relevant
scientific community, (3) proffered by a qualified expert and (4)
on a topic beyond the ken of the average juror" (id.). If, on
the other hand, sufficient evidence corroborates an eyewitness's
identification of the defendant, then there is no obligation on
the part of the trial court to proceed to the second stage of
analysis, because testimony concerning eyewitness identifications
is unnecessary (see e.g. Young, 7 NY3d at 45).

In LeGrand, one witness to a murder, who saw the
perpetrator close up, identified the defendant as the killer in a
photographic array and in a lineup, conducted seven years later.
Two other witnesses, who identified the defendant at trial after
they had failed to identify him in a photographic array, had seen
his photograph in the array again in the district attorney's
office the night before they testified. No physical evidence
connected defendant to the killing. Defendant sought to
introduce expert testimony on research concerning factors that
may influence the perception and memory of eyewitnesses and the
reliability of their identifications. The trial court, after a
Frye hearing, precluded the testimony on the ground that the
expert's conclusions were not generally accepted in the relevant

scientific community.

We held that, with respect to much of the requested
expert testimony on eyewitness identifications, the hearing court
abused its discretion in failing to admit the testimony. In
particular, we ruled that there was sufficient evidence to
confirm that the principles underlying the expert's proposed
testimony regarding the lack of correlation between confidence
and accuracy of identification, confidence malleability, and the
effect of postevent information on identification accuracy were
generally accepted by social scientists and psychologists working
in the field, and that testimony concerning these issues should
not have been precluded (LeGrand, 8 NY3d at 458). By contrast,
we ruled that there was insufficient evidence to confirm that the
principles underlying the expert's testimony on weapon focus were
generally accepted by the relevant scientific community, so that
this testimony was properly excluded (id.).

We returned to the theme of expert testimony on
eyewitness identification in People v Abney and People v Allen
(13 NY3d 251 [2009]). In Abney, a teenage girl was robbed of a
necklace, on a subway station stairway, by a stranger wielding a
large knife. The only evidence against defendant was the
eyewitness identifications (in a photographic array and in a
lineup) of the girl. Defendant requested permission to elicit
expert testimony about the effects of event stress, exposure
time, event violence and weapon focus, cross-racial

identification, lineup instructions, and double blind lineups.

In Allen, two masked men robbed a barbershop; one carried a

knife. Two witnesses recognized the robber with the knife as an

individual whom they knew from the neighborhood, and then

identified defendant as that person in a photographic array.

Defendant sought to elicit testimony from an expert concerning

the effects of event stress, weapon focus, lack of correlation

between confidence and accuracy, and unconscious transference.

In both cases, expert testimony on eyewitness identifications was

excluded.

In Abney, where "it was clear that there was no

evidence other than [the victim's] identification to connect

defendant to the crime, and she did not describe him as

possessing any unusual or distinctive features or physical

characteristics" (13 NY3d at 268), we held that the trial court

abused its discretion in failing to allow expert testimony on the

subject of witness confidence and in refusing to hold a Frye

hearing with regard to the expert's proposed testimony on the

effect of event stress, exposure time, event violence and weapon

focus, and cross-racial identification.[2]

In Allen, on the other hand, the case against defendant

did not depend exclusively on one eyewitness's identification,

and we ruled that the trial court acted within its discretion.

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[2]   However, we ruled that expert testimony on lineup
instructions and double-blind lineups would have been irrelevant
to the victim's identification of defendant.

> "Allen is not a 'case [that] turns on the
> accuracy of eyewitness identifications
> [where] there is little or no corroborating
> evidence connecting the defendant to the
> crime' (LeGrand, 8 NY3d at 452). Critically,
> [a second eyewitness] independently
> identified defendant as the knife-wielding
> robber who searched him and stood nearby
> throughout the course of the robbery. And
> defendant was not a stranger to either
> [eyewitness]." (13 NY3d at 269.)

Whether a victim's or other eyewitness's identification

of a defendant is sufficiently corroborated by other eyewitness

identifications, so that the trial court need not proceed to the

second stage of the LeGrand analysis, is dependent on the

circumstances of the case. In LeGrand, no physical evidence

linked the defendant to the crime, and the two doubtful

eyewitness identifications did not sufficiently corroborate the

identification of the eyewitness who saw the perpetrator close

up. However, even when the evidence that a defendant was the

perpetrator of a crime consists entirely of eyewitness

identifications, the case is not necessarily one in which "there

is little or no corroborating evidence" (8 NY3d at 452). Thus,

in Allen, we held that the second eyewitness's identification of

the defendant constituted evidence corroborating an eyewitness

identification (13 NY3d at 269). We reached that conclusion

because the corroborating identification possessed strong indicia

of accuracy. In particular, the defendant in Allen was known to

the second eyewitness, who recognized him during the robbery

(id.).

V.

In the present case, when Supreme Court denied Santiago's *in limine* motion in December 2003, the evidence disclosed by the People consisted of the victim's identifications of him in a photographic array and a lineup. At that time, as Supreme Court noted, the case turned on the accuracy of a single eyewitness identification and there was <u>no</u> corroborating evidence connecting the defendant to the crime. The issue therefore becomes whether the four factors enumerated in the second stage of the <u>LeGrand</u> analysis apply to the proposed testimony.

Supreme Court abused its discretion when it refused to allow testimony on studies showing that eyewitness confidence is a poor predictor of identification accuracy and on studies regarding confidence malleability. Undoubtedly, such testimony is relevant to this case in which the primary evidence against defendant – the only evidence at the time of Supreme Court's first ruling – was the victim's identification, and she expressed her recognition with subjective certainty. Moreover, the principles concerning confidence about which the expert was to testify are generally accepted within the relevant scientific community, and are beyond the ken of the average juror (<u>Abney</u>, 13 NY3d at 268; <u>LeGrand</u>, 8 NY3d at 458). For similar reasons, Supreme Court abused its discretion when it excluded expert testimony on the effects of postevent information on eyewitness

memory (see LeGrand, 8 NY3d at 458).[3]

        Given that the People did not dispute that the victim
is a non-Hispanic Caucasian, the proposed testimony on inaccuracy
of identifications of Hispanic people by non-Hispanic Caucasians
appears relevant, and is beyond the ken of the average juror.
Supreme Court should also have given more adequate consideration
to whether the proposed testimony concerning exposure time,
lineup fairness, the forgetting curve, and simultaneous versus
sequential lineups was relevant to this case and beyond the ken
of the average juror, and if necessary held a Frye hearing, to
determine whether these factors are generally accepted as
reliable within the relevant scientific community.[4]

        By contrast, testimony concerning weapon focus, the
effects of lineup instructions, wording of questions, and
unconscious transference would have been irrelevant. The victim
was not aware that her assailant had a weapon, and the record
contains no evidence of improper lineup instructions, suggestive
wording, or the presence of defendant's image in photographs the
victim saw prior to identifying him in the photographic array she

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    [3] While we had not yet decided LeGrand at the time Supreme
Court reached its decision, the trial court should have held a
Frye hearing to investigate the scientific acceptability of the
principles related to eyewitness confidence and postevent
information.

    [4] We note that the fact that the victim assisted in the
creation of an artist's sketch of her attacker does not render
the expert testimony irrelevant.

viewed. In these respects, exclusion was proper.

VI.

A separate question is whether Supreme Court abused its discretion when, after the defense had rested, the court denied defendant's renewed request to call an expert witness on eyewitness identification. By this time, the People had introduced evidence of Alarcon's and Rios's identifications of defendants, in addition to the victim's.

The People argue that, because of this additional evidence, this is not a case in which "there is little or no corroborating evidence connecting the defendant to the crime" (LeGrand, 8 NY3d at 452), and consequently it could not have been an abuse of discretion to exclude the requested expert testimony. We disagree.

Here, as in LeGrand, several factors call the corroborating identifications into question. Like the victim, Alarcon saw only part of the perpetrator's face. Alarcon identified defendant as the perpetrator with only 80% confidence. It is also possible that Alarcon's December 2003 identification, using the photographs of the January 2003 lineup, was tainted by his memory of the photograph of defendant he had seen in the Spanish-language newspaper. Moreover, Rios's identification of defendant 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. Taking into account all these circumstances, we
do not consider the corroborating evidence sufficient to obviate
the second stage of the LeGrand analysis.

         Supreme Court, therefore, having erred in certain
respects in denying defendant's pretrial motion to admit expert
testimony regarding eyewitness testimony, erred in the same
respects in denying defendant's end-of-trial motion to reopen the
case and admit the expert testimony. Moreover, in its second
ruling, Supreme Court should have given specific consideration to
the proposed testimony concerning unconscious transference. That
testimony would have been relevant, given that Alarcon saw a
photograph of Santiago, and Rios saw a sketch of the perpetrator
based on the victim's description, and familiarity with these
images may have influenced these eyewitnesses' identifications.

         Finally, Supreme Court's errors were not harmless.
Trial 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
(People v Crimmins, 36 NY2d 230, 242 [1975]). Here, the proof of
defendant's guilt was not overwhelming; therefore, the errors
cannot be regarded as harmless. We need not decide the
probability that the verdict would have been different if the
expert testimony had not been excluded.

         Accordingly, the order of the Appellate Division should
be reversed and a new trial ordered.

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Order reversed and a new trial ordered. Opinion by Judge Pigott.
Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and
Jones concur.

Decided October 20, 2011