No. 64466-1-I, State of Washington v. Bryan Edward Allen

Ellington, J. (concurring). Under State v. Laureano,[1] we are constrained to affirm. I write separately because we should advise jurors of a fact known to us but contrary to their intuition: that cross-racial identification should be carefully scrutinized. We can draft such an instruction without making a judicial comment on evidence, and I believe it is past time to do so.

As the majority points out, modern research establishes that cross-racial identification of strangers is much less reliable than same-race identifications. Most jurors, however, have no such understanding. Yet this little known fact matters greatly to a juror's assessment of such testimony.

Previous Washington cases suggest instead the use of expert witnesses to educate the jury. But such experts are few and expensive, and it is unrealistic to suppose an expert will be available and affordable in every case where cross-racial identification is a key part of the State's evidence.

Basic fairness requires that jurors be informed about established frailties in certain kinds of evidence when such frailties are not common knowledge. Accordingly, we instruct on the reliability of accomplice testimony. This does not constitute a comment by the trial judge on the evidence at trial, but rather is a cautionary statement of "the attitude of the courts generally toward the testimony of witnesses of this type . . . which has been garnered from many years of observation of the prosecutorial process."[2]

---

[1] 101 Wn.2d 745, 682 P.2d 889 (1984).

[2] State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974).

The experience of courts has similarly revealed the frailties of cross-racial identification, and a simple cautionary instruction can be crafted that does not comment on the evidence. For example, the language below serves to advise the jury of the pitfalls inherent in such evidence without commenting upon it:

> Testimony of a witness identifying a person of another race who is a stranger to the witness should be considered with care, because research shows that some people have greater difficulty accurately identifying members of a different race.

We are not immune from wrongful convictions based upon mistaken eyewitness identifications. An instruction informing jurors of the known research should be approved for use by Washington trial courts.

Ellington, J.

I CONCUR:

Cox, J.