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CHAMBERS, J.* (concurring in result) — I concur with much in the well reasoned dissent. The cross-racial instruction is correct and will be necessary from time to time to instruct the jury on the dangers of cross-racial identification. However, I join the lead opinion in result because I also agree with Chief Justice Madsen that under the facts of this case we cannot say the trial judge abused her discretion in declining to give the instruction.

I also write separately to stress that the lead opinion holds, and I agree, that expert testimony on the weakness of cross-racial identification is admissible when relevant and helpful. Lead opinion at 14 n.6 (citing *State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003)); *see also State v. Jaime,* 168 Wn.2d 857, 869, 233 P.3d 554 (2010) (Sanders, J., concurring). The recognition that expert testimony is admissible is very important to our justice system, which for so long has relied so heavily upon eyewitness identification to convict and sentence. The American Bar Association reports that "[a]pproximately three-quarters of the more than 200 wrongful convictions in the United States overturned through DNA [deoxyribonucleic acid] testing resulted from eyewitness misidentifications. Of that 77 percent, where race is known, 48 percent of the cases involved cross-racial eyewitness identifications." Am. Bar Ass'n, Criminal Justice Section, Report to the House of Delegates (ABA Report) 6 (Aug. 2008)[1] (citing Innocence Project Fact

[1]*Available at*

*Justice Tom Chambers is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

Sheets, *Eyewitness Misidentification* and *Facts on Post-Conviction DNA Exonerations*). The amici briefs submitted by college and university professors, the American Civil Liberties Union of Washington, the Fred T. Korematsu Center for Law and Equality, and the Innocence Network, joined by many others, brings a wealth of research demonstrating the dangers of cross-racial identification, which the State does not deny.

Unfortunately, the value of any expert testimony will be diluted without an instruction to guide the jury in bringing the expert's testimony into their deliberations in a reasoned way. We now know that such instructions are necessary to ensure a fair trial. *See* ABA Report (discussing the need for such an instruction). Indeed, the better practice may be instruct whenever cross-racial identification is implicated. *State v. Henderson*¸ 208 N.J. 208, 27 A.3d 872 (2011) (requiring such instructions). I also stress that we have long rejected the contention that such instructions function as unconstitutional comments on the evidence. *State v. Carothers*, 84 Wn.2d 256, 267-68, 525 P.2d 731 (1974).

We must learn from our mistakes; both liberty and justice depends upon it. Given the demonstrated weakness of eye witness testimony in general and cross-racial eye witness identification in particular, in my view, expert testimony and instruction to the jury on the weakness of cross-racial identifications should be the standard in our courtrooms whenever it would be helpful. I respectfully concur in result.

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http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_eyewitness.authcheckdam.pdf.

AUTHOR:
Tom Chambers, Justice Pro Tem.

WE CONCUR:

Justice Mary E. Fairhurst