No. 86119-6

WIGGINS, J. (dissenting)—The most important lesson of this case is that every member of this court would support giving a cross-racial identification instruction in an appropriate case—but we differ on what constitutes an appropriate case. The four-justice lead opinion declines to adopt a rule of general application defining the circumstances under which an instruction should be given and equally rejects a rule that a cross-racial instruction should never be given. Lead opinion at 15 ("[Our prior decision in *Laureano*[1]] does not support a rule of general application, but neither does it support a rigid prohibition against the giving of a cautionary cross-racial identification instruction. Indeed, such a prohibition would be inconsistent with the abuse of discretion standard, which we applied in *Laureano*, and which the Court of Appeals has applied in the cases following *Laureano*."). The three concurring justices more explicitly state that they would support the instruction in an appropriate case. Concurrence (Chambers, J., joined by Fairhurst, J.) at 1 ("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."); concurrence (Madsen, C.J.) at 1 ("I write separately because I believe in a hypothetical case where a victim makes a cross-racial

[1] *State v. Laureano*, 101 Wn.2d 745, 767-68, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

identification based on a suspect's facial features, hair, or other physical characteristic implicating race, a trial judge likely would abuse his or her discretion if he or she refused to provide a cross-racial identification instruction."). The two dissenting justices would offer more specific guidance for determining when an instruction should be given and would reverse this conviction for the failure to give an instruction here.

Given the unanimous fundamental agreement of this court that cross-racial instructions are appropriate at least some of the time, trial courts and counsel should consider the appropriateness of a cross-racial instruction in any case involving a cross-racial identification.

I now explain the circumstances in which I believe the instruction should be given. I agree with the lead opinion that we need not adopt an across-the-board rule requiring a cross-racial identification instruction in every case potentially raising the issue. But courts should be required to give an instruction where eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically *asks* for an instruction.

I. The lead opinion overlooks a number of critical facts in concluding that an explanatory instruction was not proper.

When all relevant facts are taken into account, it is plain that this is precisely the factual scenario calling for a jury instruction on the dangers of cross-racial identification. Consider the facts:

1. The case involved a cross-racial identification of a black suspect by a white

victim, the racial combination accounting for most identification errors. *See* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207, 211 (2001) (citing *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 720, 208 Cal. Rptr. 236 (1984), *overruled on other grounds by People v. Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000)).

2. There is barely any evidence corroborating the identification of the State's witness, Gerald Kovacs:
    a. The person who was with Bryan Allen when he was stopped did not match the description of the armed suspect's companion.
    b. Allen himself did not match Kovacs' description, being four or five inches taller and 60 pounds heavier than Kovacs' description.
    c. No gun, weapon, or other item that could be mistaken for a gun was found on Allen.
    d. No drugs or other evidence were recovered on Allen to corroborate Kovacs' claim that Allen was selling drugs.
3. The identification occurred under circumstances calling its accuracy into question.
    a. The incident occurred at dusk, limiting Kovacs' ability to identify the suspect.
    b. A weapon was involved, making it harder for Kovacs to accurately

identify the suspect due to "weapon focus." Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 11 (2009).

c. The suspect wore a cap and sunglasses. The use of disguises compromises identification accuracy. Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 Conn. L. Rev. 435, 456 (2009).

d. The identification was based in part on the cap and sunglasses, which the police required Allen to wear for the show-up so that he more closely resembled the suspect. The police also instructed Allen to pull his cap low over his face before the showup.

4. A jury instruction would have been especially helpful in this case given that there was already misinformation about eyewitness testimony in evidence. The State's chief law enforcement witness claimed that eyewitness evidence is not made more reliable by corroborating evidence and also claimed that the "most reliable" identification is "shortly after a crime has been committed and there is a showup." Report of Proceedings (Oct. 21, 2009) at 54, 56. Both of these claims are contradicted by prevailing authority. *See* Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement 27 (1999) (discussing shortcomings of eyewitness identification testimony and the

"inherent suggestiveness" of showup identifications in particular), *available at* https://www.ncjrs.org/pdffiles1/nij/178240.pdf.

The lead opinion is correct that the jury instruction Allen requested would be *most* helpful where identification was based solely on facial-feature recognition. But the contrapositive does not follow. This case demonstrates that, even where identification is not facially oriented, cross-racial identification is fraught with peril and can be highly inaccurate.

II. Cross-racial identification is unreliable

There is a large body of persuasive scientific research concluding that eyewitness testimony is frequently unreliable. Nearly 80 percent of all wrongful convictions exonerated by DNA (deoxyribonucleic acid) evidence were founded on faulty eyewitness testimony. *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009). Research shows jurors are unable to correctly distinguish between reliable and unreliable eyewitness identification testimony, and jurors consistently over-believe such testimony. Gary L. Wells & Elizabeth A. Olson*, Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 284-85 (2003).

We also know that the problem is most dramatic when the identifying witness and the suspect are of different races: 40 percent of wrongful convictions exonerated by DNA involve faulty cross-racial identifications, and 36 percent involve whites mistakenly identifying blacks. James M. Doyle, *Discounting the Error Costs*: *Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 Psychol.

Pub. Pol'y & L. 253 (2001). In these cases, a witness's ability to accurately identify a suspect is severely undermined by the cross-racial effect. Rutledge, *supra*, at 211. Eyewitnesses are 1.56 times more likely to misidentify a suspect when the identification is cross-racial. *See* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 15 (2001). Compounding the problem, jurors believe cross-racial identification is *more* accurate than same-race identification when in fact research shows the opposite. Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 200 (2006).

The cross-racial identification problem creates a racial disparity at the entry point into the criminal justice system, eventually leading to racial disparity throughout the system. I do not take the lead opinion as disagreeing with the basic premise of this dissent; it is almost beyond dispute that cross-racial identification is problematic. That is not where the lead opinion goes wrong. Instead, the lead opinion makes two faulty assumptions leading it to conclude that no instruction was proper and that we should reject a rule requiring an instruction in certain cases. Both assumptions are unsupported and so is the lead opinion's position.

III. Existing safeguards against misidentification are inadequate

The lead opinion first incorrectly assumes that our criminal justice system incorporates adequate safeguards against the dangers of cross-racial identification.

This is too optimistic. The lead opinion suggests that cross-examination, expert testimony, and closing argument sufficiently guard against the problem. But cross-examination is a useless tool for educating jurors about cross-racial bias. The very nature of the cross-racial problem is that witnesses are unaware of it; witnesses believe their identification is accurate, making traditional impeachment methods inadequate for ferreting out the truth. Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109, 135 (2006) (concluding that "because the use of suggestive procedures and unreliable identifications almost always occur with eyewitnesses who honestly believe their own mistaken identification, cross-examination is nearly useless"). Social science confirms this logic: studies show that cross-examination fails to increase juror sensitivity to the inaccuracy of eyewitness testimony. *See* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychol. Pub. Pol'y & L. 909, 923-25 (1995).

Nor is expert testimony a practical solution. Expert testimony seems like a natural way to educate jurors about cross-racial bias, except that it is far too costly. Experts are both scarce and expensive. *See* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 375 & n.199 (1995). Most felony defendants in state court are indigent, and public defenders cannot afford to pay expert fees either. *See* Caroline Wolf

Harlow, U.S. Dep't of Justice, Defense Counsel in Criminal Cases 1 (2000) ("At the end of their case approximately . . . 82% of felony defendants in large State courts were represented by public defenders or assigned counsel."), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf. This being the case, expert testimony for all defendants is not a solution but a pipe dream.

Likewise, it is a hollow exercise to educate jurors about faulty cross-racial identification in closing argument where an attorney has been deprived of the raw materials integral to building an effective defense. Without evidence or some other form of authority, it is difficult to imagine why jurors would believe defense counsel's unsupported assertions about cross-racial identification.

The lead opinion also argues that a reasonable doubt instruction safeguards against the dangers of cross-racial identification, but I do not see how this can be. *See* lead opinion at 13-14. The implication here seems to be that since the State's burden of proof is so high in a criminal case, it is not harmful to permit the State to use inaccurate and misleading evidence. I reject this notion, failing to see how a reasonable doubt instruction—a feature of *every* criminal case—protects defendants from the unique inaccuracies of cross-racial identification evidence.

The lead opinion is too quick to assume that our justice system contains adequate safeguards against inaccurate cross-racial identification.

IV. A jury instruction helps cure the cross-racial problem in certain cases

The lead opinion is also mistaken in assuming that a jury instruction on the

inaccuracy of cross-racial identifications is unhelpful. Jury instructions are in many ways an ideal way to deal with this disparity; the heart of the problem is that jurors believe cross-racial identification is equally or *more* accurate than same-race identification, when in fact it is far *less* accurate. Thus, educating jurors is precisely what is called for. Consider the benefits of a jury instruction. First, it costs nothing. Second, jury instructions are focused, concise, and authoritative (jurors hear them from a trial judge, not from a witness called by one side). Third, a jury instruction avoids the problem of dueling experts and eliminates the risk of an expert invading the jury's role or opining on an eyewitness's credibility. Fourth, jurors may be more likely to discuss racial differences and the cross-racial problem in deliberation if bolstered by the credibility of an instruction.

There are benefits beyond the juror box as well. For the courts to recognize that cross-racial eyewitness identification is frequently erroneous would encourage police and prosecutors to approach these identifications cautiously when making charging and investigative decisions. *Cf. State v. Martin*, 101 Wn.2d 713, 723, 684 P.2d 651 (1984) (concluding same regarding hypnosis evidence). For example, law enforcement personnel might try to find more corroborating evidence where the only link between a suspect and a crime is a cross-racial identification. These "upstream effects," combined with all the other advantages of a jury instruction, demonstrate the unsoundness of the lead opinion's assumption that a jury instruction is unhelpful.

Once the lead opinion's false assumptions are cleared away, little reason

remains to reject the palliative measure proposed by the petitioners. I would embrace a version of the rule adopted in other jurisdictions, holding that a court must give the instruction where cross-racial eyewitness identification is a central issue in the case, where there is little corroborating evidence, and where the defendant asks for the instruction. *See People v. Wright*, 45 Cal. 3d 1126, 755 P.2d 1049, 1059, 248 Cal. Rptr. 600 (1988); *see also State v. Long*, 721 P.2d 483, 492 (Ut. 1986). In such cases, there is an impermissible risk of wrongful conviction that is best mitigated by an instruction.

Because this would be a new rule, I would adopt it on a prospective basis only. *See Wood v. Morris*, 87 Wn.2d 501, 514, 554 P.2d 1032 (1976). However, in Allen's case, I would hold that the facts so strongly called for a curative instruction that the trial court committed reversible error by refusing it and that Allen is entitled to a new trial.

V. Conclusion

The evidence is irrefutable that cross-racial identification is often faulty. Unlike most problems of racial disparity, here we have a simple way to mitigate the damaging effects; a solution that is not only cost-free but also tested, other states having found it workable. We have every reason to adopt this rule and no reason not to. Where we can take simple steps to reduce racial disparity, we should do so rather than turning our backs on the problem.

I respectfully dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:

Justice Steven C. González