

State v. Allen (Bryan Edward)

No. 86119-6

MADSEN, C.J. (concurring)—I agree with the lead opinion that *State v. Laureano*, 101 Wn.2d 745, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989), and subsequent Court of Appeals’ decisions have rejected the categorical use of a *Telfaire*¹ instruction. I further agree with the lead opinion that the trial court did not abuse its discretion in this case because there was no indication that Gerald Kovacs’ identification of Bryan Allen was based upon facial features or other specific physical characteristics beyond the mere fact that Allen is African American.

I write separately because I believe in a hypothetical case where a victim makes a cross-racial 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 dissent properly recognizes that cross-examination, expert testimony, and closing argument may not provide sufficient safeguards against cross-racial misidentification because the very

¹ *United States v. Telfaire*, 152 U.S. App. D.C. 146, 469 F.2d 552 (1972).

nature of the problem is that witnesses believe their identification is accurate. Further, as discussed by the dissent, with social science data increasingly casting doubt on the reliability of cross-racial identification, our courts must carefully guard against misidentification.

However, the dissent's concerns are misplaced in this case. The identification here simply did not implicate the type of physical characteristics that give rise to erroneous cross-racial identifications or the need for an instruction. Besides reporting the suspect to be African American, Kovacs described the man in race-neutral terms: mid-20s; about 5'9" in height and 210-220 pounds; wearing a black hooded sweatshirt, dark blue jeans, big gold-framed sunglasses, and a dark baseball cap; and possessing a gun. When asked by the 911 operator if the man had any facial hair, Kovacs responded vaguely, "Not that I remember," signaling a lack of attention to facial features. I Verbatim Report of Proceedings (Oct. 22, 2009) at 5. At trial, when Kovacs described how he identified Allen as the man who had threatened him, he referred to Allen's hat, clothes, and sunglasses. Indeed, Kovacs did not even mention Allen's facial features, hair, or other physical characteristics. While one might infer from Kovacs' estimate of the older suspect's age and the lengthy encounter between Kovacs and both suspects that Kovacs must have considered facial features at some point, this would be purely speculative. Instead, the record in this case supports the lead opinion's conclusion that the identification here was based primarily on race-neutral factors.

Therefore, I agree with the lead opinion that the trial court did not abuse its

discretion when it refused to give an instruction on cross-racial identification in this case.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:
