BENCH CARD: EXPERT TESTIMONY AND JURY INSTRUCTION ON CROSS-RACIAL MISIDENTIFICATION

In *State v. Cheatam*[1] and *State v. Allen*,[2] the Washington State Supreme Court held that state trial courts have discretion to allow **expert testimony** and **jury instruction** on **cross-racial misidentification** in relevant cases. This Bench Card explains the bounds of such discretion, which can be exercised to reduce wrongful convictions and racial disparity within the criminal justice system.

Why have these tools been authorized?

Expert testimony and jury instruction on cross-racial eyewitness misidentification have been authorized because of the need to educate jurors on this subject, which falls outside of common knowledge.[3]

There are many relevant factors at play:

- approximately **one-third** of eyewitness identifications in criminal investigations are mistaken;
- cross-racial identifications are over **1.5 times** more likely than same-race identifications to be mistaken;
- about **75%** of documented wrongful convictions have involved mistaken eyewitness identifications;
- most jurors are unaware of these and other relevant findings;
- honest but mistaken eyewitnesses often are impervious to cross-examination;
- racial minorities are more susceptible to misidentification and face worse outcomes once misidentified.[4]

Research shows that the use of expert testimony and jury instruction can help to educate jurors and prevent them from giving undue weight to cross-racial identifications.[5]

What are the bounds of a trial court's discretion to allow or deny these tools?

Expert testimony: Expert testimony on cross-racial misidentification is admissible if it is (1) helpful to the jury, (2) based on generally accepted principles, and (3) from a person who is qualified as an expert.[6] The first two elements will be met whenever cross-racial misidentification is relevant, because this phenomenon is not a matter of common knowledge but has gained wide acceptance in the scientific community.[7]

The third element, qualification, will depend on the circumstances. Qualification is a threshold inquiry, distinct from the weight to be given to an expert's testimony, which is for the jury to decide. A proffered expert need not have the foremost degrees, wide recognition, or scholarly publications. As long as the proffered expert has a legitimate basis for specialized knowledge on the subject, and reasonable proficiency with the particular issues to be discussed, that person qualifies as an expert. If a person's qualification to opine is "fairly debatable," then the trial court has discretion to admit or deny the testimony.[8]

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[1] 150 Wn.2d 626, 81 P.3d 830 (2003).
[2] 176 Wn.2d 611, 294 P.3d 679 (2013).
[3] *See Cheatam*, 150 Wn.2d at 645-46; *Allen*, 176 Wn.2d at 616-17, 624 & n.7 (C. Johnson, J., lead opinion); *id.* at 632-33 (Madsen, C.J., concurring); *id.* at 634-35 (Chambers, J., concurring).
[4] *See* Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861, at Part II (2015).
[5] *See id.* at Part III.
[6] *Cheatam*, 150 Wn.2d at 645.
[7] *See, e.g.*, *Cheatam*, 150 Wn.2d at 646; Flevaris & Chapman, *supra*, at Part IV.A.
[8] *E.g.*, *State v. McPherson*, 111 Wn. App. 747, 761, 46 P.3d 284 (2002); *see* Flevaris & Chapman, *supra*, at Part IV.B-C (citing cases).

Jury instruction: A trial court has wide discretion to craft jury instructions that are appropriate for each case.[9] A trial court also has discretion to instruct on cross-racial misidentification in particular.[10] Thus, a trial court can instruct on cross-racial misidentification whenever it is relevant.

In some cases, refusal to instruct will constitute an abuse of discretion. The Washington State Supreme Court has not yet decided the precise limits on a trial court's ability to refuse, but many of the Justices have suggested that an instruction may be **required** in the following circumstances:

- when "a victim makes a cross-racial identification based on a suspect's facial features, hair, or other physical characteristic implicating race";[11]
- when "eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically requests the instruction";[12]
- when "the use of expert evidence [is] limited due to cost."[13]

When should these tools be allowed?

Trial courts should allow expert testimony and jury instruction on cross-racial misidentification **whenever relevant**. Regular use of these tools will reduce wrongful convictions and avoid needless reversals on appeal. If a particular eyewitness identification does not warrant expert testimony or jury instruction in a given case, the identification should be excluded as too unreliable or prejudicial.

How should the jury be instructed?

Based on research to date, the following instruction is likely to be effective:[14]

> The testimony given by an eyewitness is an expression of his or her beliefs and those beliefs may or may not be accurate. In general, researchers have found that eyewitness identifications in criminal investigations are incorrect approximately one-third of the time. You should take into account that the confidence displayed by an eyewitness does not necessarily indicate that the testimony is accurate. It is possible for eyewitnesses to be confident and still be wrong. Or, eyewitnesses may be unsure but still be correct in their identification. You should also take into account that people tend to have unique difficulty identifying persons of another race, although this is not always the case. In experiments, eyewitnesses trying to identify a stranger of a *different* race tend to make a misidentification over 1.5 times more often than eyewitnesses identifying a stranger of the *same* race. If, after examining the testimony and all the evidence, you have reasonable doubt that a correct identification was made, you must find the defendant not guilty.

What about same-race identifications?

Although cross-race identifications are more prone to error, same-race identifications also are often mistaken and result in wrongful convictions. Thus, many of the same considerations and principles should also apply to eyewitness identification in general.

For a fuller discussion of these issues, including detailed legal analysis and citation to relevant authorities, *see* Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861 (2015).

[9] *See, e.g.*, *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011).
[10] *See Allen*, 176 Wn.2d at 624 (C. Johnson, J., lead opinion); *id.* at 632 (Madsen, C.J., concurring); *id.* at 634 (Chambers, J., concurring).
[11] *Allen*, 176 Wn.2d at 632 (Madsen, C.J., concurring).
[12] *Id.* at 635 (Chambers, J., concurring); *see also id.* at 637 (Wiggins, J., dissenting).
[13] *Id.* at 624 n.6 (C. Johnson, J., lead opinion).
[14] *See* Flevaris & Chapman, *supra*, at Part VI.B.