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Supreme Court No. 86119-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EDWARD ALLEN,

Petitioner.

PETITIONER'S RESPONSE TO BRIEF OF *AMICUS CURIAE*
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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A. SUMMARY OF ANSWER

Eyewitness identification testimony is “riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.” United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967). To counter the risk of wrongful conviction based upon misidentification, many jurisdictions require that cautionary instructions accompany eyewitness testimony. The need for such instructions is greatest in the case of cross-racial identifications, which account for the substantial majority of eyewitness misidentifications.

Amicus Curiae Washington Association of Prosecuting Attorneys (WAPA) urges this Court to reject instructions on cross-racial eyewitness identifications based on the single contention that they are barred by article IV, section 16’s prohibition on judicial comments on the evidence. WAPA primarily relies upon general statements made during the constitutional convention, but fails to relate these to this Court’s decisions interpreting the provision. WAPA also points to other jurisdictions whose constitutions contain a ban on judicial comments, but WAPA’s discussion of pertinent decisions is incomplete and its claim that these jurisdictions disallow such instructions inaccurate.

Notably, WAPA wholly omits discussion of the standard articulated by this Court to assess what type of instruction will constitute a

prohibited comment. Under this Court's decisions, WAPA must show that "the jury must be able to infer from what the court said or did not say a personal belief regarding the testimony in question or the merits of the case." State v. Becker, 132 Wn.2d 54, 78, 935 P.2d 1321 (1997). WAPA can make neither showing.

A cautionary instruction in cases involving cross-racial identifications would not convey the judge's personal belief regarding the testimony or the merits of the case. Further, such an instruction would help ensure the reliability of convictions, consistent with the accused's due process right to a fair trial. This Court should reject WAPA's contention that a cross-racial eyewitness identification instruction would violate Washington's constitutional prohibition on comments on the evidence.

B. ARGUMENT

1. WAPA HAS FAILED TO SHOW THAT A JURY INSTRUCTION ON CROSS-RACIAL EYEWITNESS IDENTIFICATIONS WOULD BE A COMMENT ON THE EVIDENCE.

WAPA advances what essentially is a policy argument in support of its position that a special jury instruction in cases involving a cross-racial identification would be a comment on the evidence. By dint of an exhaustive recitation of the framers' debate regarding the provision,

WAPA stresses that our state constitution's framers chose to include a specific prohibition on "comments" in article IV, section 16.

WAPA does not cite to this Court's many opinions construing Wash. Const. art. IV, § 16, as such an analysis confirms that a cross-racial identification instruction fits well within this Court's jurisprudence approving similar instructions. Indeed, in its 11-page brief, WAPA mentions only two Washington decisions, this Court's opinion in State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003), and the Court of Appeals opinion in this case.

WAPA relies instead upon opinions from other jurisdictions, but these decisions are of little use to the question presented here. In fact, certain of these jurisdictions have either approved a specific instruction or indicated that an instruction could be crafted that would not violate their state constitution. This Court should reject WAPA's arguments and hold a special jury instruction should be given in cases involving a cross-racial identification.

a. WAPA's discussion of jurisdictions that prohibit comments on the evidence is misleading. WAPA urges this Court to follow the example of other jurisdictions whose constitutions include prohibitions on judicial comments on the evidence. Br. Amicus Curiae WAPA at 5. But WAPA's discussion of the rule in these jurisdictions and

pertinent decisions is incomplete, if not misleading. For example, in State v. Valencia, 575 P.2d 335 (Ariz. 1977), the Arizona appellate court disapproved the verbatim instruction from United States v. Telfaire, 469 F.2d 552 (D.C. App. 1972), explaining that care should be taken when utilizing instructions approved by federal courts because federal courts do not prohibit judicial comments on the evidence. Valencia, 575 P.2d at 336-37. The Court found that part of the instruction was a comment and part was inapplicable to the case. Id. at 337.¹

More recent authority from Arizona suggests that an appropriately-crafted instruction may be warranted in eyewitness identification cases where an accused person has made a preliminary showing that the identification was unduly suggestive. State v. Machado, 230 P.3d 1158, 1178-79 (Ariz. App. 2010). A so-called “factors” instruction, such as the Telfaire instruction, which sets forth factors to consider in evaluating certain evidence, “must be tailored to have relevance to the evidence in the particular case, but it cannot be so tailored that it becomes a comment on that evidence.” State v. Gates, 897 P.2d 1345, 1350 (Ariz. App. 1994). The Court in Gates commented that crafting a “factors” instruction would

¹ In Conley v. State, 607 S.W.2d 328 (Ark. 1980), the Arkansas Supreme Court likewise refused a Telfaire instruction, but it is not clear that an Arkansas court has revisited the issue of eyewitness identification instructions that are not patterned on the Telfaire instruction. See Hopson v. State, 940 S.W.2d 479, 480-81 (Ark. 1997).

be challenging given the prohibition on judicial comments, but not that such an instruction would always be unconstitutional.

WAPA cites Nevius v. State, 699 P.2d 1053 (Nev. 1985), for the proposition that in Nevada specific instructions on eyewitness identification need not be given because they are duplicative of general instructions on witness credibility and reasonable doubt. Br. Amicus Curiae WAPA at 5-6 n. 12. The Nevada Supreme Court has retrenched from Nevius, however, commenting in a later decision that “such instructions might be called for in a case where the eyewitness identification was questionable.” Lee v. State, 813 P.2d 1010, 1011 (Nev. 1991).

Almost a decade ago, in Garden v. State, 815 A.2d 327, 341 (Del. 2003), the Delaware Supreme Court opined in a dictum that the principles underlying cross-racial jury instructions “implie[d] a degree of certainty that social science rarely achieves,” and so lacked the accuracy required to raise a “proposition to the level of a rule of law.”² Garden, 815 A.2d at 341. This premise is simply no longer true. See State v. Henderson, 27 A.3d 872, 916 (N.J. 2011) (“Experimental methods and findings have

² The court did not foreclose the possibility of such an instruction in an appropriate case, noting, “we need not decide whether, as a general matter, a jury instruction on cross-racial identification may be necessary under some . . . circumstances.” Garden, 815 A.2d at 340.

been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings”); Br. Amici Curiae College and University Professors at 8-10 (discussing “robust” findings regarding the effect of own-race bias) (and citations therein).

As WAPA acknowledges, Tennessee has a constitutional provision similar to Washington’s.³ The Tennessee Supreme Court nevertheless abrogated its prior precedent holding an instruction on the fallibilities of eyewitness identification improper under its constitution, predicated on the recognition that:

accuracy of eyewitness testimony is affectable by the usual universal fallibilities of human sense perception and memory. This phenomenon, which could obviously affect other forms of evidence also, is potentialized by the fact that this testimony is prone to many outside influences (police interrogations, line-ups, etc.) and is often decisive.

State v. Dyle, 899 S.W.2d 607, 612 (Tenn. 1995).

The Court concluded that the Telfaire instruction impermissibly commented on the evidence and invaded the province of the jury. The Court thus promulgated a different instruction for use in criminal cases, compatible with its state constitutional limitations, in order to minimize the risk of unjust convictions based upon faulty eyewitness identification

³ Tenn. Const. art. 6, § 9 provides, “The Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.”

testimony.⁴ The Court further directed that the instruction “must be given when identification is a material issue”⁵ and that failure to give an instruction under these circumstances will be plain error. Id. (emphasis added).

⁴ That instruction provides:

One of the issues in this case is the identification of the defendant as the person who committed the crime. The state has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:

- (1) The witness' capacity and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting, and whether the person who committed the crime was a prior acquaintance of the witness;
- (2) The degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness' own recollection;
- (3) The occasions, if any, on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial; and
- (4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications.

Again, the state has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which he or she is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

Dyle, 899 S.W.2d at 612.

⁵ The Tennessee Supreme Court explained that identification would be a “material issue” in a case when the defendant puts it at issue or when the eyewitness testimony is uncorroborated by circumstantial evidence. Dyle, 899 S.W.2d at 612 n. 4.

In short, WAPA's suggestion that jury instructions on the fallibility of eyewitness identification testimony are not permitted in other jurisdictions whose constitutions prohibit comments on the evidence is simply incorrect. Tennessee recognizes that such instructions help ensure that convictions are reliable, and other courts with state constitutional provisions similar to Washington's article IV, section 16 have not foreclosed the use of properly-crafted instructions in an appropriate case.

b. This Court's jurisprudence decisively confirms that a jury instruction on cross-racial identifications would not offend article IV, section 16's prohibition on judicial comments on the evidence. Article IV, section 16 provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This Court has consistently held that "an instruction which does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge under Const. art. IV, § 16." Hamilton v. Department of Labor and Industries, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). By contrast,

An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question.

Id.; accord Becker, 132 Wn.2d at 78; Hizey v. Carpenter, 119 Wn.2d 251, 271, 830 P.2d 646 (1992); State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990); State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988); State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974); State v. Cerny, 78 Wn.2d 845, 855, 480 P.2d 199 (1971); Dennis v. McArthur, 23 Wn.2d 33, 38, 158 P.2d 644 (1945).

WAPA does not evaluate the cross-racial identification instruction in light of this Court's jurisprudence. Indeed, WAPA does not once mention the pertinent standard for analysis of whether an instruction is an impermissible comment. Rather than cite to any authority, WAPA prefers simply to opine about hypothetical instructions' possible deficits. See Br. Amicus Curiae WAPA at 7. Arguments not supported by authority or meaningful analysis need not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 529 (1992).

Even assuming WAPA's argument to be properly before this Court, its underlying premise – that instructions telling juries to view certain kinds of evidence with caution or differently from other kinds of evidence are prohibited in Washington – is simply incorrect. This Court rejected such an argument in Hamilton. Hamilton, 111 Wn.2d at 571 (instruction stating opinion of tort claimant's attending physician should be given "special consideration" was not impermissible comment).

In Carothers, this Court stressed that “[f]ar from being superfluous or objectionable, a cautionary instruction is mandatory if the prosecution relies upon the testimony of an accomplice.” 84 Wn.2d at 269 (emphasis added). Pertinent to WAPA’s claims here, this Court explained:

While the cautionary instruction may, in the circumstances of the case, apply only to one witness and the jury will have no doubt about the witness to whom the instruction is referable, the court does not give the jury its evaluation of the particular witness before it. Rather, it instructs the jury about the provisions of a rule of law applicable to the class to which the witness belongs. It is a rule which has long found favor in the law, evolved for the protection of the defendant.

Id.

In Murgatroyd v. Dudley, 184 Wash. 222, 230-31, 50 P.2d 1025 (1935), based on similar reasoning, this Court rejected the contention that an expert witness instruction violated the constitutional prohibition.⁶ And the Court of Appeals has approved special instructions telling jurors to exercise caution when considering dog track evidence, and has even found the failure to issue such an instruction where it was requested and the evidence was otherwise uncorroborated reversible error. State v. Wagner,

⁶ By comparison, this Court found unconstitutional an instruction that told the jury they had the right to disregard the testimony of a “motorman”, called by the plaintiff in a tort action, if they found his testimony “on any fact was contrary to the greater weight of the credible testimony.” Peizer v. City of Seattle, 174 Wash. 95, 99, 24 P.2d 444 (1933).

36 Wn. App. 286, 287-88, 673 P.2d 678 (1983) (citing State v. Loucks, 98 Wn.2d 563, 566-67, 656 P.2d 480 (1983)).

WAPA briefly attempts the argument that a cross-racial identification instruction would violate the judge-as-witness prohibition contained in ER 605. As the above discussion demonstrates, WAPA's belief is not only unfounded, it is at odds with long-standing Washington precedent. WAPA's strained construction of the judge-as-witness prohibition as a bar on cross-racial eyewitness identification instructions is unconvincing.

2. A SPECIAL INSTRUCTION IN CASES INVOLVING
A CROSS-RACIAL EYEWITNESS
IDENTIFICATION WOULD MINIMIZE THE RISK
OF WRONGFUL CONVICTION.

WAPA alternatively suggests that accused persons' rights are adequately protected by cross-examination and the right to call expert witnesses.⁷ Br. Amicus Curiae WAPA at 8. Allen commends WAPA's defense of the right to compulsory process and hopes this Court will encourage the appointment of experts in all cases involving an eyewitness identification, especially as most of the conclusions of the social science research are counterintuitive for lay jurors. See Supplemental Brief of

⁷ To the extent that WAPA's argument is based upon the implicit premise that existing procedures should remain unchanged, it is these procedures that have resulted in the convictions, and even executions, of innocent people.

Petitioner at 7-10; Br. Amici Curiae College and University Professors at 22-25 (and citations therein).

Nevertheless, as the concurring judges below recognized, “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.” State v. Allen, 161 Wn. App. 727, 757, 255 P.3d 784 (2011) (Ellington and Cox, J., concurring). Further, many jurisdictions have come to recognize that in addition to expert testimony, special jury instructions on eyewitness identifications may improve the reliability of convictions. Perry v. New Hampshire, 565 U.S. ___, 132 S.Ct. 716, 729 n. 7, ___ L.Ed.2d ___ (2012) (and citations therein). As Amici Curiae College and University Professors point out, provided the instructions are science-based and carefully-crafted, social science research indicates such instructions are more effective at educating juries than Telfaire instructions. See Br. Amici Curiae College and University Professors at 22-25.

In short, WAPA has failed to show that article IV, section 16’s prohibition on judicial comments bars the issuance of a special instruction in cases involving a cross-racial eyewitness identification. WAPA’s discussion of the history of the constitutional provision is unilluminating. WAPA cannot show that a cross-racial identification instruction would

convey the court's personal belief or attitude towards the merits of the action, and WAPA does not even try to address this standard. WAPA's reliance upon the rules of other jurisdictions whose state constitutions contain provisions similar to Wash. Const. art. IV § 16 is unpersuasive and ultimately misguided. WAPA's contention that the instruction is foreclosed by the judge-as-witness bar is unsupported by authority and unconvincing. WAPA's belief that existing procedures adequately ensure the reliability of convictions involving eyewitness identifications is at odds with the statistical data.⁸

The Supreme Court recently hailed the adoption of instructions on the fallibility of eyewitness testimony as one of the "safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." Perry, 132 S.Ct. at 728. This state remains one of the few jurisdictions that has not implemented this important safeguard. Given the numerous factors that may affect the reliability of cross-racial identifications, many of which are present in this case, this Court should exercise its supervisory authority and require the issuance of special instructions in cases involving such identifications. In

⁸ See generally, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last accessed February 15, 2012); http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last accessed February 15, 2012).

this case, the failure to give such an instruction requires reversal of the conviction.

C. CONCLUSION

For the foregoing reasons, as well as for the reasons argued in the Supplemental Brief of Petitioner and the several excellent submissions by other amici curiae, this Court should reject WAPA's ill-reasoned arguments and exercise its supervisory authority to require Washington courts to issue special instructions in all cases involving cross-racial jury instructions.

DATED this 15th day of February, 2012.

Respectfully submitted:

/s/ Susan F. Wilk
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, |) | |
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| Respondent, |) | |
| |) | NO. 86119-6 |
| v. |) | |
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| BRYAN ALLEN, |) | |
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| Petitioner. |) | |

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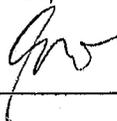
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