

# State high court waffles on racially charged eyewitness accounts

**Supreme Court: Judges don't have to warn jurors about problems of cross-racial identification**

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Upholding a 2009 criminal conviction, the state Supreme Court attempted to clarify when trial courts may caution jurors on the dangers of eyewitness identifications across racial lines.

In a fractured decision issued Tuesday, the high court upheld a harassment conviction won against a black man accused of threatening to kill a white man after a chance encounter in Seattle's University District. The victim's ability to identify his attacker across racial lines was key to the conviction.

Upholding the conviction, the Supreme Court held that lower courts are not required to warn jurors about the dangers of eyewitness identification – the type of testimony that is now widely acknowledged to have prompted most unjust convictions. Still, the court cleared the way for trial courts to offer jurors guidance on the issue should they choose to do so.

Only four of the court's nine justices joined the lead opinion. Three justices – divided themselves between two statements – agreed the man's conviction should stand but sympathized with the dissent issued by two justices.

An eyewitness account was the key piece of evidence used to convict Bryan Allen of threatening to kill a man during a brief but heated verbal exchange. Allen, who is black, was convicted in fall 2009 of harassment on allegations that he threatened to kill a white man after attempting to sell him marijuana.

Tried before King County Superior Court Judge Theresa Doyle, Allen was alleged to have approached the other man shortly before dusk and offered to sell him pot. The other man cursed at him, prompting Allen to threaten to kill him and display the grip of a pistol tucked into his waistband.

The other man called 911, and a University of Washington police officer arrested Allen nearby minutes later. A man who was with Allen when police arrived fled the area and does not appear to have been identified by police.

The victim was brought to the arrest location for a "show-up" and identified Allen as his assailant.

No drugs or money were found on Allen's person, nor was a gun recovered. The man Allen was with – the one who ran from police – didn't match the victim's description of his attacker's companion.

Allen himself was four or five inches taller than the victim initially described to police, and about 60 pounds heavier. After his arrest, police had Allen don a hat and sunglasses for the "show-up" identification so that he appeared as he would have during the incident.

Summarizing problems with the state's case also acknowledged in the lead opinion, dissenting Justice Charles Wiggins opined that prosecutors offered "barely any evidence corroborating the identification."

Underlying it all is the basic problem that white witnesses are not very good at correctly identifying black suspects. The reverse is also true, as are the other iterations of cross-racial identification.

Reviews of exonerations based on new DNA evidence show nearly 80 percent of wrongly convicted criminal defendants were found guilty because of faulty eyewitness identifications, according to studies cited by the dissenting justices. Forty percent of all DNA-based exonerations cases involved cross-racial identifications; nearly all of those – 36 percent of all exonerations – involved white witnesses misidentifying black defendants.

At trial, Allen's defense attorney asked that among the directives given to the jury would be an instruction noting that cross-racial identifications are especially difficult. Both proposed instructions noted that the problem exists in circumstances where a witness is not prejudiced and has extensive experience with people of other races.

Doyle declined to give such an instruction to the jury, and Allen's defense did not include an expert witness who addressed the issue of cross-racial identification. Allen was ultimately convicted of felony harassment and sentenced to 14 months in prison.

Appealing his conviction, Allen, now 23, contended the trial judge should have cautioned the jury as his attorney suggested at the time. Such instructions are mandatory in some jurisdictions; the blocked entirely in others as inappropriate comments on the evidence.

Allen's appeal was supported by several civil rights-oriented organizations, including the American Civil Liberties Union and the Innocence Network.

Authoring the lead opinion, Justice Charles W. Johnson noted that prosecutors didn't seriously dispute Allen's contention that scientific studies show eyewitness identifications, particularly those across racial lines, are unreliable.

While earlier decisions by the state Supreme Court allow judges to point out the problems with cross-racial identifications, they do not mandate such instructions. Such a mandate, Johnson opined, would violate the Constitution.

"Allen argues the world has changed, and we must change along with it," Johnson wrote for in the lead opinion. "We are not convinced, however, that the constitutionality of our case law on this issue has changed."

Johnson went on to say an eyewitness's credibility is best addressed through the trial process – by questioning the witness on the stand, or presenting expert testimony to rebut the witness's claims.

Allen's attorney did raise the issue of cross-racial identification during trial, Johnson continued. The jury simply wasn't persuaded.

In his dissent, Wiggins argued the prevailing justices failed to address a race-based problem they agree afflicts the justice system.

"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," Wiggins said in the dissent. "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."

Wiggins went on to claim the safeguards that Johnson pointed to in the lead opinion aren't up to the task.

Cross-examination of an eyewitness on the issue is “useless,” Wiggins explained, because the witness believes in the identification they’ve made. Expert witnesses on the issue may be valuable, but their solution is impractical – they are, the justice opined, “scarce and expensive.”

“Most felony defendants in state court are indigent, and public defenders cannot afford to pay expert fees either,” Wiggins said in the dissent. “This being the case, expert testimony for all defendants is not a solution but a pipe dream.”

While certainly not a cure-all, instructions to jurors like those suggested by Allen’s attorney would help guard against convictions based on bad evidence, Wiggins continued. Such instructions would also encourage police and prosecutors to be more aware of the problems inherent in cross-racial identification.

“The evidence is irrefutable that cross-racial identification is often faulty,” Wiggins told the court. “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.”

Two justices agreed with the sentiments expressed in the dissent – that a jury instruction on cross-racial identification is worthwhile – but ultimately sided with the lead opinion after finding evidence lacking that the trial judge abused her discretion.

Writing in concurrence, Justice pro tem Tom Chambers opined that such instructions like the one suggested by Allen should be “the standard in our courtrooms whenever it would be helpful.”

Chief Justice Barbara Madsen stuck a similar note in her concurring opinion, in which she agreed that Doyle did not abuse her discretion.

Madsen said she may have come to a different decision had the eyewitness identified Allen based on more race-specific factors, such as his hair, facial features or skin color. In her reading of the evidence in the case, Madsen found the eyewitness was more interested in Allen’s clothing and size – what she described as “race-neutral” descriptors.

Had the identification been based on racial factors, the trial judge would have been required to allow a jury instruction warning of the failings common in cross-racial identifications, Madsen opined.

Charles Johnson was joined in the lead opinion by Justices Susan Owens, James Johnson and Debra Stephens. Wiggins was joined in dissent by Justice Steven Gonzalez.

Justice Mary Fairhurst joined in the concurrence authored by Chambers, who was standing in for Justice Sheryl G. McCloud. Madsen stood alone in her concurring opinion.