
Public Safety Committee

SSB 5714

Brief Description: Concerning the reliability of evidence in criminal proceedings.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Dhingra, Padden, Salomon, Kuderer, Billig, Darneille, Das and Hasegawa).

Brief Summary of Substitute Bill

- Establishes a work group on eyewitness identification procedures, requires local law enforcement agencies to adopt protocols for eyewitness identification procedures, and requires specialized training on eyewitness identification procedures to be made available.
- Establishes a work group on the reliability of informant testimony, requires local prosecuting attorneys to adopt protocols on the use of informants, and requires specialized training on the use of informants to be made available.
- Requires courts to provide juries with an instruction on exercising caution in evaluating informant testimony.

Hearing Date: 3/19/19

Staff: Kelly Leonard (786-7147).

Background:

Any person of sound mind and discretion may be a witness in a court proceeding. Witnesses, however, are prohibited from testifying to evidence that is inadmissible under court rule, statute, or the federal or state constitutions. The court makes pretrial determinations regarding the admissibility of evidence and the ability of certain witnesses to testify. Juries are instructed to judge the credibility of witnesses and the weight of the evidence.

Eyewitness Evidence. An eyewitness is a person who has actually seen the defendant and/or the crime. During a criminal investigation, law enforcement may ask an eyewitness to identify a suspect from a lineup or an array of photos. Recent research suggests that these identification

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procedures may influence witnesses' memories. Eyewitness testimony, typically based on both the crime and any subsequent lineup or photo array, often plays a role in criminal prosecutions.

In 2015 the Washington Association of Sheriffs and Police Chiefs published a model policy for eyewitness identification procedures. The policy contains preferred procedures for lineups, instructions to witnesses, and minimizing suggestiveness and witness contamination.

Informants. The rules of evidence do not specifically address the issue of testimony offered by informants, although there is a jury instruction that can be used in the case of accomplice testimony.

In the case of accomplice testimony given on behalf of the state, the court may provide a jury instruction that directs the jury to subject the accomplice's testimony to careful examination and to act upon the testimony with great caution. The instruction further provides that the jury should not find the defendant guilty upon the accomplice's testimony alone unless, after careful consideration, the jury is satisfied beyond a reasonable doubt of its truth. This instruction is mandatory in cases where the prosecution relies solely on the uncorroborated testimony of the accomplice. Washington appellate courts have ruled that a trial court is not required to give a jury instruction cautioning the jury regarding informant testimony.

Under *Brady v. Maryland* and subsequent case law, the prosecution is required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. This obligation extends not only to exculpatory evidence, but also to evidence impeaching the credibility of a government witness. In the case of an informant, the prosecution is obligated to disclose to the defense any benefit or advantage the informant receives, as well as other material evidence impacting the credibility of the informant.

Summary of Bill:

Eyewitness Evidence.

Work group. A work group is established for the purpose of maximizing the reliability of eyewitness evidence collected by law enforcement. The work group is composed of 11 members jointly appointed by Speaker of the House and the President of the Senate and representing specified interests and organizations. The work group must:

- develop model guidelines for the collection of eyewitness evidence consistent with the model policies adopted in 2015 by the Washington Association of Sheriffs and Police Chiefs and the Washington Association of Prosecuting Attorneys;
- design and implement statewide law enforcement training for the collection and documentation of eyewitness evidence based on the model guidelines developed by the work group; and
- collect locally adopted protocols on eyewitness identification.

The work group must complete its tasks and report to the Legislature by November 30, 2019; in addition, the work group must reconvene every three years to revise the model guidelines.

Local protocols. By December 31, 2020, law enforcement agencies must adopt and implement a written protocol for the collection of eyewitness evidence consistent with the model guidelines

developed by the work group. If a law enforcement agency chooses to adopt different guidelines, those guidelines must:

- be based on credible field, academic, or laboratory research on eyewitness testimony;
- be designed to reduce erroneous eyewitness identifications and enhance the reliability and objectivity of eyewitness identifications; and
- include standards for: a blind administration of the identification procedure; filler selection; instructions to the witness; and documenting a statement for witness confidence immediately following any positive identification.

Training. Specialized training based on the training curriculum developed by the work group must be made available to persons responsible for the collection of eyewitness identification evidence during criminal investigations.

Informants.

"Informant" means any person who: was previously unconnected to the criminal case as either a witness or a codefendant; claims to have relevant information about the crime; is currently charged with a crime, is facing potential criminal charges, or is in custody; and at any time receives consideration in exchange for providing the information or testimony.

Jury Instruction. A judge must provide the jury with an instruction on exercising caution in evaluating the testimony of an informant. Unless the Washington Pattern Instructions Committee adopts its own language by December 1, 2019, the instruction should be substantially similar to specified language.

Work group. A work group is established for the purpose of assisting prosecuting attorneys in evaluating the reliability of information or testimony offered by informants. The work group is composed of nine members jointly appointed by the Speaker of the House and the President of the Senate and representing specified interests and organizations. The work group must:

- develop model guidelines to direct prosecutors in determining whether to use an informant in a criminal proceeding;
- design and implement statewide training for prosecutors and defense counsel based on the model guidelines developed by the work group;
- and collect locally adopted protocols on informants.

The work group must complete its tasks and report to the Legislature by November 30, 2019.

Local Protocols. By December 31, 2020, county prosecuting attorneys must adopt and implement a written protocol for the use of informants consistent with the model guidelines developed by the work group. If a county prosecuting attorney chooses to adopt different guidelines, the guidelines must articulate adequate preliminary disclosures to the defense and include a list of procedures for prosecuting attorneys to follow when evaluating the reliability of an informant. A list of mandatory disclosures is included. County prosecuting attorneys must also establish and maintain a central confidential record of informants used in the course of criminal proceedings as well as formal offers to give testimony or other information.

Training. Specialized training based on the training curriculum developed by the work group must be made available to prosecuting attorneys and criminal defense attorneys.

Appropriation: None.

Fiscal Note: Requested on March 18, 2019.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.