

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2004AP630-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

FOREST SHOMBERG,
Defendant-Appellant-Petitioner.

**ON APPEAL FROM A DECISION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT IV**

**NON-PARTY BRIEF OF THE WISCONSIN
INNOCENCE PROJECT OF THE FRANK J.
REMINGTON CENTER, UNIVERSITY OF
WISCONSIN LAW SCHOOL**

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INTRODUCTION

As undersigned *amici* have previously written in a brief to this Court, eyewitness error is the leading cause of wrongful convictions in this country, present in up to 84% of all such cases.¹ Eyewitness error is a prominent factor in wrongful convictions both because eyewitnesses are frequently wrong, and because jurors are largely unaware of the fallibility of eyewitnesses and the procedures that can affect eyewitness reliability.

Fortunately, Wisconsin's criminal justice system is taking important strides to improve eyewitness evidence. The Wisconsin Assembly's Avery Task Force has studied the scientific research, and has issued a model set of guidelines that, if adopted, will significantly improve the reliability of eyewitness evidence.² More recently, the Wisconsin Attorney General's Office has issued a comprehensive set of best practices that adopt the latest scientific knowledge.³

Despite these advances, eyewitnesses remain inherently fallible, and will still make mistakes. Neither the Avery Task Force's recommendations nor the Attorney General's new procedures are mandatory; some law enforcement entities may continue conducting flawed identification procedures. And even the most pristine procedures minimize, but do not eliminate, identification errors.

¹ See Brief of Amicus Curiae in *State v. Dubose*, Case No. 03-1690-CR.

² See Avery Task Force, <http://www.law.wisc.edu/fjr/innocence/AveryTaskForce.htm>.

³ See State of Wisconsin, Office of Attorney General, Model Policy and Procedure for Eyewitness Identification, available at <http://www.law.wisc.edu/fjr/innocence/AttorneyGeneralEyewitness.htm>.

It therefore remains important that factfinders be made aware of the fallibility of eyewitness evidence and the factors that can affect eyewitness reliability. The science of perception and memory—the very science behind the Avery Task Force and Attorney General’s guidelines—is not common knowledge, but is critical to a fair understanding of eyewitness evidence. Expert testimony is the only empirically proven way to educate jurors about the counter-intuitive science underlying identification evidence. For this reason, *amici* urge this Court to adopt a presumption of admissibility of eyewitness expert testimony.

EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION SHOULD BE PRESUMED ADMISSIBLE IN EVERY CASE INVOLVING DISPUTED EYEWITNESS IDENTIFICATION EVIDENCE.

A. Eyewitness expert testimony—routinely excluded based upon fallacies about the nature of eyewitness identifications—should be admissible under Wisconsin’s liberal expert testimony standard.

Wisconsin’s standard for admitting expert testimony turns on the relevancy of the proffered testimony. If the information will “assist the trier of fact to understand the evidence or to determine a fact in issue,” then it may be admitted. Wis. Stat. §907.02 (2003-04). Unlike the more restrictive *Daubert* and *Frye* standards, the standard in Wisconsin does not instruct trial judges to evaluate the reliability of scientific testimony; Wisconsin trial judges are not gatekeepers. *Ricco v. Riva*, 2003 WI App 182 ¶21, 266 Wis. 2d 696, 669 N.W.2d 193.

Although the decision whether to admit expert testimony is discretionary, an effective exercise of discretion requires accurate knowledge. *State v. St. George*, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777. Wisconsin courts frequently, as in this case, exclude eyewitness expert testimony based on misunderstandings about perception and memory and the scientific knowledge that experts can contribute. As this Court said in 1979, courts often exclude experts on eyewitness identification on the belief that when testimony speaks to “facts which similarly affect all persons’ ability to accurately perceive...the need for expert testimony would seem to diminish significantly.” *Hampton v. State*, 92 Wis. 2d 450, 461, 285 N.W.2d 868 (1979). Relying on that reasoning, appellate courts have continued to hold that “the information the expert would provide was well within the jurors’ common knowledge.” *State v. Hamm*, 146 Wis. 2d 130, 148, 430 N.W.2d 584 (Ct. App. 1988).

Information that courts believe to be common knowledge, however, is widely misunderstood. The 1979 *Hampton* opinion predates many widely accepted findings that current experts would present. It is now clear that, instead of obscuring the true issues, this type of expert testimony is required to clarify them. Under Wisconsin’s “relevancy” standard, such expert testimony should be admissible in almost every case with disputed eyewitness evidence.

B. Scientific research has revealed the fallibility of memory and recognition, shed light on the major causes of eyewitness error, and suggested remedies that can reduce that error.

Because we all have memories, we believe we

intuitively understand how memory works. Over the past 25 years, however, scientific research has established that many of the “common sense” rules used to assess eyewitness evidence are unreliable or mistaken.

For example, many people believe perception and memory work like a video camera, with the brain dutifully recording everything that the senses take in. According to this analogy, when we remember something, we replay the tape.⁴

The research, however, demonstrates that memory is much more complicated—and fragile.

Unlike a camcorder, we do not record everything we see and hear. A classic study demonstrated that, although most people have seen thousands of pennies, fewer than half could pick out the actual design from fourteen alternatives.⁵

Moreover, we tend to perceive and remember fewer details when under great stress or arousal.⁶ We focus on whatever is most important, limiting our ability to remember surrounding details. A typical expression of these phenomena in criminal cases is the “weapon focus” effect, where the threat of a weapon both causes stress and draws witnesses’ attention away from other details like an attacker’s facial features.⁷

Memory is also more dynamic than people realize.

⁴ Loftus & Ketcham, *THE MYTH OF REPRESSED MEMORY* 4 (1994).

⁵ Nickerson & Adams, “Long-term memory for a common object,” 11 *Cognitive Psychology* 287, 287 (1979).

⁶ Loftus, “Common Beliefs about Eyewitness Accounts,” in *EYEWITNESS TESTIMONY* 172 (1980).

⁷ Wells & Olson, “Eyewitness Testimony,” 54 *Annual Review of Psychology* 277, 282 (2003).

Rather than replaying a videotape, our brains retrieve relevant pieces of information—a scene here, an event there—and then interpolate between them to complete the details of the story.⁸ In short, memory is a construction.

In part because memory is reconstructive, witnesses viewing lineups tend to prefer to make relative judgments (comparing one suspect to another to identify the one who looks most like their memory of the perpetrator) rather than absolute judgments (comparing each individual suspect to their memory of the perpetrator). Witnesses viewing a simultaneous lineup or photospread tend to identify the person who looks most like the perpetrator, even when the actual perpetrator is not included.⁹ Research has demonstrated that when a perpetrator is removed from a lineup without replacement, subjects will tend to identify the “next best” person present rather than indicate that the perpetrator is absent.¹⁰

Comment: New Section

Memory is also susceptible to taint by suggestion. The act of remembering can reinforce some details, but can also inject new information. Thus, suggestive procedures can “contaminate” the memory and spoil the evidence, causing a permanent change in the witness’s memory of events.¹¹ Once a memory has been altered, the false memory is essentially

⁸ Loftus & Ketcham at 39.

⁹ Wells, et al., “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,” 22 *Law and Human Behavior* 9, 10 (1998)(hereinafter “Wells, Recommendations”).

¹⁰ Wells & Loftus, “Eyewitness Memory for People and Events,” in *HANDBOOK OF PSYCHOLOGY. VOL. 11: FORENSIC PSYCHOLOGY* 149, 158 (Goldstein, et. al. eds., 2003)(hereinafter “Wells & Loftus 2003”).

¹¹ Loftus, et al., “Semantic integration of verbal information into a visual memory,” 1 *Journal of Experimental Psych. and Human Learning* 19, 19 (1978).

indistinguishable from a real one.¹²

Suggestion can also artificially inflate confidence in the accuracy of memories. For example, if the officer conducting the lineup offers confirming feedback, the witness's confidence in the identification will rise dramatically, even though the chances of an accurate identification have not changed.¹³ This “confidence malleability” is especially damaging because juries often mistakenly judge the accuracy of witnesses based on the confidence they show at trial.¹⁴ Compounding this error, recent evidence shows that false memories are expressed with more confidence than real ones.¹⁵ Artificially inflating confidence through the use of suggestive procedures increases the chance that the jury will accept a mistaken identification as being reliable—or a reliable one as being mistaken because the witness emphatically misremembers some detail that conflicts with other evidence.

Comment: New Section

Confidence is not only malleable, but it is also not highly correlated to accuracy.¹⁶ And any correlation between confidence and accuracy is destroyed by post-identification feedback of the type that virtually all witnesses receive by the time of trial.¹⁷ Yet confidence is the single most important factor determining whether jurors credit eyewitness

¹² Loftus, “Searching for the neurobiology of the misinformation effect,” 12 *Learning and Memory* 1, 2 (2005).

¹³ Wells, Recommendations at 20.

¹⁴ *Id.* at 19.

¹⁵ Loftus, “Our changeable memories: legal and practical implications,” 4 *Nature Reviews: Neuroscience* 231, 232 (March 2003).

¹⁶ Wells, Recommendations at 15.

¹⁷ *Id.* at 23.

testimony.¹⁸

Jurisdictions nationwide—including Wisconsin—are recognizing these scientific findings and adopting new procedures designed to minimize the risks inherent in doing things the old way.¹⁹ Expert testimony can help jurors understand the importance of these procedures, especially in a case like this where many of these safeguards were not employed. These best practices, which have been shown to substantially reduce eyewitness errors, include:

- Paying heightened attention to selecting fillers in lineups and photospreads that accurately match the description given by the witness;
- Using double-blind identification procedures, where the officer conducting the photospread or lineup does not know who the suspect is, and therefore cannot accidentally influence the witness;²⁰
- Instructing witnesses that the actual perpetrator may not be in the lineup or photospread;²¹
- Presenting subjects in a lineup or photospread sequentially rather than simultaneously, to overcome the relative judgment process;²²
- Withholding confirming feedback to the witness as

¹⁸ *Id.* at 15-16.

¹⁹ See Avery Task Force, <http://www.law.wisc.edu/fjr/innocence/AveryTaskForce.htm>; Attorney General's Guidelines, *supra*, at <http://www.law.wisc.edu/fjr/innocence/AttorneyGeneralEyewitness.htm>.

²⁰ Wells & Olson at 289.

²¹ Wells & Loftus 2003 at 158.

²² Wells, Recommendations at 31.

to whether they selected the suspect, which avoids artificially inflating witness confidence;²³

- Recording witness confidence immediately after the identification, before confidence becomes artificially inflated;²⁴
- Performing only one identification procedure per witness, to avoid tainting memory by the act of remembering itself;
- Using separate procedures for separate witnesses, so the witnesses cannot influence one another.

Efforts to reform eyewitness identification procedures are gaining traction nationwide.²⁵ New Jersey adopted similar guidelines in 2001, and fourteen states have pending or expected legislation on eyewitness identification procedures.²⁶

But evidence collection procedures can only go so far. The evidence must ultimately be weighed by a jury. Trial-level safeguards should equip jurors with the best tools possible to find the truth.

²³ Wells, et al., “Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay,” 9 *Journal of Experimental Psychology: Applied* 42, 50 (2003).

²⁴ Wells, Recommendations at 27.

²⁵ See, e.g., National Institute of Justice, Technical Working Group for Eyewitness Evidence, “Eyewitness evidence: A guide for law enforcement” (1999).

²⁶ Ehlers, “Eyewitness Identification: State Law Reform,” *The Champion* 34 (April 2005).

C. Accurate understanding of eyewitness memory is not “common sense,” and expert testimony is the only legal safeguard that effectively educates jurors.

Contrary to popular myth, people do not intuitively understand much of what science now teaches about perception and memory.

Even judges misunderstand the science. In 2004, researchers surveyed 160 U.S. judges on their knowledge and beliefs about eyewitness testimony. These judges were asked to assess the accuracy of fourteen statements about which there is widespread agreement in the scientific community.²⁷ Only three of the fourteen statements were answered correctly by at least 80% of the judges. More strikingly, fewer than half of the judges answered correctly on seven out of the fourteen questions—half of these important issues were missed by a majority of judges. Even though many states are currently considering the benefits of sequential over simultaneous presentation of lineup subjects, only 19% of the judges selected the correct answer on this topic.²⁸ Even on those topics where the judges scored well, their depth of knowledge appeared shallow because of low scores on fundamentally related topics.²⁹

Recent Wisconsin cases illustrate the problem. Judges continue to misjudge the importance of police instructions to

Comment: MAJOR PROBLEM: doesn't seem to deal with 'not common sense' problem straight-forward-ly, but instead goes right to judge studies.

Comment: Jurors=factfinders?

Comment: More general intro?

Comment: Structure of this sentence

²⁷ Kassin, et al., “On the ‘General Acceptance’ of Eyewitness Testimony Research: A New Survey of the Experts,” 56 *American Psychologist* 405, 405 (May 2001).

²⁸ Wise & Safer, “What US Judges Know and Believe About Eyewitness Testimony,” 18 *Applied Cognitive Psych.* 427, 432 (2004).

²⁹ *Id.* at 432-33.

witnesses about whether the suspect might or might not be present in a given identification procedure. In both *State v. Avery*, No. 86-1831-CF (Ct. App. 1987)(unpublished), and *State v. Dubose*, No. 03-1690-CR (Ct. App. 2004)(unpublished), appellate courts incorrectly asserted that there was no error in instructing a witness that the suspect might be present in a photospread, because that only stated the obvious. The “obvious,” however, was incorrect; research shows that, to counteract misguided intuition, the witnesses should have been instructed that the suspect might *not* be present.

Furthermore, judges generally do not recognize the degree to which jurors misunderstand these topics:

[A]ttorneys and law officers are generally unaware that jurors overestimate the accuracy of eyewitness identification, and that expert testimony can be useful in correcting jurors’ misconceptions about eyewitness testimony....³⁰

Yet lay people are notably ignorant about how perception and memory actually work.³¹

Comment: Expand this paragraph somewhat? Perhaps to show how wrong they are, and scope of misconceptions.

Contrary to the common belief amongst judges, studies show that legal safeguards such as voir dire, cross-examination, closing argument, and jury instructions are not effective at sensitizing jurors to these eyewitness factors.³²

Comment: Which eyewitness factors? “these” seems to refer to voir dire, etc.

³⁰ *Id.* at 428.

³¹ Penrod & Cutler, “Preventing Mistaken Convictions in Eyewitness Identification Trials: The Case Against Traditional Safeguards,” in *PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE* 89, 114 (1999)(hereinafter “Penrod & Cutler 1999”).

³² *Id.* at 111.

One reason for the failure of traditional legal safeguards may be that attorneys and judges do not recognize that jurors are often misinformed.³³ Also, attorneys do not know enough of the recent science to effectively educate jurors during cross-examination or closing argument.³⁴ Even when judges or attorneys manage to communicate information to the jury on eyewitness factors, it does not appear to affect juror behavior or accuracy.³⁵

Comment: Put in cites to show that these are often cited as reasons? Do we have a section on how judges often cite "common knowledge" as a reason?

According to the scientific research, expert testimony is more effective:

[E]xpert testimony is the only legal safeguard that is effective in sensitizing jurors to eyewitness factors.... Nonetheless, the most common reason judges give for excluding eyewitness expert testimony at trial is that the expert's testimony is within the knowledge of the jury....³⁶

Comment: Use less block quotes?

The past two decades of research have shown that expert testimony increases jurors' sensitivity to factors affecting the reliability of eyewitness testimony.³⁷ When an expert presents the information completely and coherently, jurors tend to rely less on eyewitness confidence and more accurately assess eyewitness reliability.³⁸

An oft-cited concern with expert testimony has been

³³ Wise & Safer at 429

³⁴ *Id.* at 439.

³⁵ Cutler & Penrod, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 263 (1995).

³⁶ Wise & Safer at 429.

³⁷ Penrod & Cutler 1999 at 113.

³⁸ *Id.*

possible adverse effects, such as prejudicing the jury or making jurors so skeptical that they begin to disregard accurate testimony. This appears to underlie the State’s unfounded speculation in this case that expert testimony will invite jury nullification. Many studies have sought evidence of these effects, but the scientific consensus is that the studies “lend little support to the assertions that juries uncritically accept expert evidence.”³⁹

The scientific consensus is that expert testimony gives jurors deeper understanding and better equips them to spot unreliable witnesses, but does not overwhelm them or lead them to a general skepticism about all testimony. Studies find that there are “generally no skepticism effects. The expert testimony sensitized jurors to the importance of witnessing and identification conditions and the relative lack of importance of witness confidence.”⁴⁰

Comment: Second sentence of this quote may not be needed, we show it above. This paragraph deals with skepticism, not sensitization.

Unguided judicial discretion is an arbitrary way to determine admissibility, because those judges who are unaware of the problems are unwilling to allow the solution.⁴¹ Those judges who are already somewhat informed tend to allow safeguards that better prepare jurors, while those who are not tend to aggravate the problem by excluding the science that often belies “common sense.”⁴² Hence, the problem is aggravated, rather than corrected, by giving trial judges wide discretion.

³⁹ Vidmar et al., Amicus Brief: *Kumho Tire v. Carmichael*, in 24 *Law & Hum. Behav.* 387, 395 (2000).

⁴⁰ Penrod & Cutler 1999 at 113.

⁴¹ Wise & Safer at 434.

⁴² *Id.*

D. Therefore, expert testimony should be presumptively admissible.

Courts in other jurisdictions are recognizing that eyewitness expert testimony should be admissible because “the body of information available” on eyewitness identification is “sufficiently beyond common experience” that it can “assist the trier of fact.” *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984), *overruled on other grounds*, *People v. Mendoza*, 4 P.3d 265 (Cal. 2000). *See also State v. Dubray*, 77 P.3d 247, 255 (Mont. 2003)(relying upon “the scholarship on the subject of eyewitness testimony over the last decade”); *United States v. Stevens*, 935 F.2d 1380, 1401 (3rd Cir. 1991); *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000); *United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986).

It is time that Wisconsin courts recognize the value of eyewitness expert testimony. Eyewitness experts should be excluded only if the proffered testimony is on a matter that is truly common knowledge—like the fact that poor views make for less accurate identifications. This exception would rarely bar expert testimony altogether, given the breadth of the field and the scope of common misconceptions, and because rarely would a competent attorney ask for an expert merely to make such an obvious point. The vast majority of proffered testimony would address probative but misunderstood factors, such as the confidence-accuracy relation, confidence malleability, the relative judgment process, and the effects of suggestive procedures.

Circuit courts retain the discretion to limit the *extent* of the testimony—such as barring an expert from opining about the reliability of an eyewitness’s testimony. But courts

should not prevent experts from explaining the underlying science or applying that science to the identification procedures employed in a given case.

CONCLUSION

For these reasons, *amici* urge this Court to hold that, in cases in which identification evidence is disputed, expert testimony on eyewitness identification is presumptively admissible.

Dated this 6th day of July, 2005.

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I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2977 words.

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