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The Admissibility of Eyewitness-Identification Expert Testimony in Oklahoma

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COMMENT

The Admissibility of Eyewitness-Identification Expert Testimony in Oklahoma

I. Introduction

"There is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[1] This proclamation by Justice Brennan drives home the significance of eyewitness testimony at trial; it is perhaps the most compelling of all testimony.[2] On the other hand, it may also be the most fallible type of testimony. The United States Supreme Court long ago recognized the potential unreliability of eyewitness identification by declaring that the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[3] Furthermore, the Court acknowledged that eyewitness misidentification "probably accounts for more miscarriages of justice than any other single factor."[4] According to The Innocence Project at the Benjamin N. Cardozo School of Law, eyewitness misidentification was critical to convictions in over seventy-five percent of cases in which the defendant was later exonerated by DNA evidence, making it the number one cause of wrongful conviction in the United States.[5]

It is true that mistaken identifications and wrongful convictions abound in the American criminal justice system, but, for many people, these tales only exist in the abstract. Arvin McGee of Tulsa, Oklahoma, knows the reality of witness misidentification all too well. In 1987, a man entered a laundromat and attacked the twenty-year-old woman working there.[6] The victim was bound and locked in the bathroom of the laundromat until her attacker returned

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1. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

2. Two journalists appropriately classified eyewitness testimony as the "crack cocaine of the criminal justice system." *See* Steve McGonigle & Jennifer Emily, *A Blind Faith in Eyewitnesses: 18 of 19 Local Cases Overturned by DNA Relied on Heavily Eyewitness Testimony*, DALLAS MORNING NEWS, Oct. 12, 2008 at 1A, 27A, *available at* http://www.dallasnews.com/sharedcontent/dws/news/politics/local/stories/DN-DNAlineups_05pro.ART.State.Edition2.4a899db.html.

3. United States v. Wade, 388 U.S. 218, 228 (1967).

4. *Id.* at 229.

5. THE INNOCENCE PROJECT, EYEWITNESS MISIDENTIFICATION (2009), http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php.

6. THE INNOCENCE PROJECT, KNOW THE CASES: BROWSE PROFILES: ARVIN MCGEE (2009), http://www.innocenceproject.org/Content/209.php.

and carried her over his shoulder and placed her in a car.[7] The perpetrator then drove to an isolated area and raped the victim.[8] Two years and three trials later, Arvin McGee was convicted for this offense and sentenced to 365 years in prison.[9]

The principal evidence against McGee was the victim's identification.[10] During trial, multiple discrepancies in the victim's description of her assailant were revealed, but to no avail.[11] Testing of a semen sample collected from the victim did not exclude McGee as the potential perpetrator.[12] McGee adamantly denied his involvement in the crime, offering an injury as a defense.[13] McGee's injury required surgery and would have made him physically incapable of committing the crime.[14] Nevertheless, McGee was convicted of rape, kidnapping, forcible sodomy, and robbery after his third trial.[15]

McGee spent over twelve years in prison before the Oklahoma Indigent Defense System took his case and arranged for testing of the DNA evidence.[16] The test excluded McGee as the contributor of the semen, and therefore, as the perpetrator of the crime; a second test confirmed the results.[17] McGee was exonerated in February 2002, and a jury eventually awarded him fourteen million dollars for wrongful incarceration.[18] The jury award was the largest ever in the United States for wrongful incarceration.[19] The DNA results linked another man, Edward Alberty, to the crime, and Alberty was subsequently charged, but a 2002 law could not be applied retroactively to permit his prosecution.[20]

Arvin McGee has resumed what most would consider a normal life. Since his release, he has married, become a father and stepfather, and resumed a relationship with a son who was an infant at the time of his conviction in

7. *Id.*
8. *Id.*
9. *Id.* McGee's sentence was later reduced to 298 years.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*; Nicole Marshall, *Man Who Avoided Rape Trial Charged in Burglary*, TULSA WORLD, June 13, 2007, at A9, A11, *available at* http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=070613_1_A9_SHALL04072&archive=yes. The fourteen million dollar award was later reduced to twelve-and-a-half million in a settlement.
19. Marshall, *supra* note 18.
20. *Id.*

1989.[21] He became involved in his church and enrolled in college classes, and now enjoys caring for his children and exercising.[22] McGee is not angry over his wrongful imprisonment, though he has every reason to be.[23]

Arvin McGee's story sheds light on the rampant problem of misidentification. He was deprived of a substantial portion of his life but, fortunately, was freed before it was too late. Nevertheless, his is not the only story of an innocent person fighting a wrongful conviction premised on witness misidentification.[24] It is not known how many innocent people are spending their days in America's, and Oklahoma's, prisons due to mistaken identification. One potential solution to this crisis is the introduction of eyewitness-identification expert testimony.

Stripped down to its most basic function, eyewitness-identification expert testimony focuses on the reliability of eyewitness identification. The expert is usually a trained psychologist who will discuss the psychological processes of perception and memory and how they factor into witness identification. The goal of the expert testimony is to expose the weaknesses of eyewitness testimony, encouraging the jury to more carefully determine the reliability of eyewitness testimony, and thereby prevent a wrongful conviction premised on mistaken identification. Currently, most state courts have adopted one of three rules regarding the admissibility of such testimony. Some jurisdictions categorically exclude eyewitness-identification expert testimony,[25] while others leave the question of admissibility to the trial judge's discretion.[26] A third view requires admissibility in limited circumstances.[27] A few states, including Oklahoma, have not explicitly addressed the admissibility of eyewitness-identification expert testimony.[28]

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21. Ginnie Graham, *Building a New Life: The Ultimate Legacy*, TULSA WORLD, Apr. 6, 2007 at A1, A6, *available at* http://www.tulsaworld.com/news/article.aspx?subjectid=239&articleid=070406_238_A1_hFree21100&archive=yes.

22. *Id.*

23. *Id.*

24. *The Innocence Project* has identified four other individuals who were wrongfully convicted by Oklahoma courts due, at least partially, to eyewitness misidentification. For details of these cases, and many others, see http://www.innocenceproject.org (follow "Know the Cases" hyperlink; then follow "Search Profiles" hyperlink; then search with "Eyewitness Misidentification" as the Contributing Cause).

25. *See* discussion *infra* Part IV.B.

26. *See* discussion *infra* Part IV.A.

27. *See* discussion *infra* Part IV.C.

28. See Gregory G. Sarno, Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R. 4TH 1047 (2009), for a selection of cases from each state that has addressed the admissibility of eyewitness-identification expert testimony. States notably missing from the list include Hawaii, Mississippi, New Hampshire, New Mexico, Oklahoma, and Virginia.

At present, Oklahoma relies on statutory and case law regarding expert testimony in general, but these rules do not clarify whether Oklahoma courts should admit eyewitness-identification expert testimony.[29] The frequency of misidentification and the severity of its consequences emphasize the importance of this testimony at trial.

Eyewitness-identification expert testimony has been allowed in Oklahoma courts, but on an inconsistent basis.[30] Oklahoma courts must take a stronger stance in their view toward the admissibility of such testimony. The Oklahoma Court of Criminal Appeals should seize the first opportunity to fill this jurisprudential void and thereby remove the uncertainty regarding the admissibility of this type of testimony. This comment examines the science behind eyewitness identification and analyzes the case law regarding the admissibility of eyewitness-identification expert testimony, with the purpose of providing Oklahoma courts with some assistance in developing a better-defined standard. A clear standard will be beneficial to both courts and practitioners, as it will promote efficiency, consistency, and justice.

Part II of this comment explains the science of perception, memory, and facial recognition and the expert's role in informing the jury as to how these psychological factors might affect eyewitness identification. Part III discusses the general admissibility of expert testimony, focusing on the relevant sections of the Oklahoma Evidence Code and *Taylor v. State*[31]—Oklahoma's leading opinion on expert testimony—and its adoption of the United States Supreme Court standard, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[32] Part III also recounts the few Oklahoma cases specifically regarding eyewitness-identification expert testimony. Part IV examines the cross-jurisdictional treatment of eyewitness-identification expert testimony, as well as the three approaches to admissibility that have materialized from the case law. Part V analyzes the merits of each approach. Part VI concludes that Oklahoma courts would be best served by embracing the limited admissibility rule for cases where eyewitness identification is uncorroborated and factors undermining its reliability are present; while also establishing admissibility guidelines consistent with case law and scientific research for trial judges in all other cases.

29. *See* discussion *infra* Part III.A-C.
30. *See* discussion *infra* Part III.C.
31. 1995 OK CR 10, 889 P.2d 319.
32. 509 U.S. 579 (1993).

II. Perception, Memory, Facial Recognition, and the Expert's Role

There are four basic reasons for eyewitness misidentification: the witness may be lying, the witness's perception may be impaired, the witness's memory may have failed him, or the witness's recollection may have been influenced by subsequent suggestions.[33] To determine the likelihood that a misidentification has occurred, a thorough understanding of psychological principles pertaining to perception, memory, and facial recognition is necessary.[34] This section presents the psychological factors affecting the formation of memory in eyewitnesses identification to which experts have most often testified. It then focuses on specific factors affecting facial recognition, and briefly explains the role of an eyewitness-identification expert witness.

A. Eyewitness Memory Formation

A witness's perception of an event and the creation of a corresponding memory occur in three stages: acquisition, retention, and retrieval.[35]

1. Acquisition

The acquisition stage, also known as perception, is where the witness actually experiences the given event.[36] Psychologists recognize two types of factors that affect an eyewitness's perception—event factors and witness factors.[37]

a) Event Factors

The first type of factor, known as an event factor, is a quality inherent in the event itself.[38] The lighting conditions at the time and location of the given

33. LAWRENCE TAYLOR, EYEWITNESS IDENTIFICATION 7 (1982).

34. Volumes have been written on the psychological processes affecting eyewitness identification. It is nearly impossible to cover every issue inherent in witness identification in complete detail without the science becoming the dominant focus. For a thorough treatment of the subject, see BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: VOL. I: MEMORY FOR EVENTS (Michael P. Toglia et al. eds., 2006); THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: VOL. II: MEMORY FOR PEOPLE (R.C.L. Lindsay et al. eds., 2007); ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, (Matthew Bender & Co. 4th ed. 2007) (1987); TAYLOR, *supra* note 33.

35. LOFTUS ET AL., *supra* note 34, at 13.

36. *Id.*

37. *Id.*

38. *Id.* at 15.

event can affect a witness's perception.[39] As common sense indicates, humans have better vision in good lighting than in poor lighting.[40] Good lighting allows a person to store more information about an event in his memory; consequently, he will have to remember more upon later recall.[41] The duration of an event also plays a role in perception, as the longer one observes an event, the more precise his memory of that event will be.[42] Another event factor that may be of substantial importance is violence.[43] When a person witnesses a violent act, his ability to recall details of the crime is reduced, but the effect on his ability to identify the perpetrator is uncertain.[44] A phenomenon known as "weapon focus" also shows that the presence of a weapon inhibits an individual's ability to remember other details of a crime, as well as the perpetrator.[45] An overarching concern is that some event factors are simply harder to remember than others.[46] For instance, important facts, such as physical characteristics of a defendant or colors of clothing, are recalled with varying degrees of ease and accuracy.[47]

b) Witness Factors

Witness factors, which are characteristics inherent in the witness, are the second type of factor that has the potential to affect perception.[48] There is a range of individual factors that may play a role in a witness's perception. Age of the witness has been shown to affect one's perception. Generally, children give less detailed accounts than adults, but their narratives are not necessarily less accurate.[49] Experimental data reveals that twelve-to-fourteen-year-olds

39. *See id.* at 16-19 (identifying how lighting conditions at the time of observation affect perception and subsequent memories).

40. *Id.* at 16.

41. *Id.*

42. Kenneth R. Laughery et al., *Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph*, 55 J. APPLIED PSYCHOL. 477, 483 (1971).

43. *See* LOFTUS ET AL., *supra* note 34, at 24-28 (explaining how observation of a violent event may impair witness perception and memory).

44. *Id.* at 21 (citing Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J. L. & PSYCHIATRY 265 (2004)).

45. Elizabeth F. Loftus et al., *Some Facts about "Weapon Focus"*, 11 LAW & HUM. BEHAV. 55, 55-62 (1987).

46. *See* LOFTUS ET AL., *supra* note 34, at 21 (differentiating between varying degrees of ease with which different types of facts are perceived and recalled).

47. *Id.* at 21.

48. *Id.* at 15.

49. *Id.* at 39.

are more accurate in identifying faces than six-to-nine-year-olds.[50] Not only does recognition improve with age in children, but memory does as well.[51] Conversely, elderly witnesses are less accurate than younger adults.[52] It has been shown that eyewitness competence increases until the late teenage years and gradually falls off after the age of sixty.[53] This may be due to physiological factors that are unavoidable with time, such as decrease or loss of hearing and vision.[54] A witness's vision is critical to accurate eyewitness identification; a jury cannot expect a nearsighted witness to provide accurate testimony concerning an event observed at a considerable distance.[55] It may also be helpful for the jury to know whether the witness wears glasses (and whether he was wearing them at the time of the event), is colorblind, or suffers from any other visual defect.[56]

There is no clear-cut answer as to which gender provides more accurate eyewitness testimony. However, it does appear that males more accurately remember culturally male-oriented items and females more accurately remember culturally female-oriented items.[57] An example of a male-oriented item might be the make of a car, whereas a female-oriented item may be a piece of clothing.[58] This result may suggest that men and women pay different amounts of attention to particular details.[59] In spite of this difference, gender does not usually affect the reliability of identification of persons.[60]

Individuals with special training (i.e., law enforcement) may be able to recognize and remember certain unique details better than untrained individuals, but ordinary details are not usually better remembered.[61] A good example of a precise detail that may be noticed by a law enforcement officer, but not necessarily a layperson, is an individual wearing a jacket on a warm day, perhaps suggesting the concealment of a weapon.[62] Drugs and alcohol also have palpable effects on memory, but the extent depends on circumstances in which the drug is used and the individual's tolerance to the

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50. TAYLOR, *supra* note 33, at 15.
51. *Id.*
52. LOFTUS ET AL., *supra* note 34, at 39.
53. TAYLOR, *supra* note 33, at 14.
54. *Id.* at 18.
55. *Id.* at 26.
56. *Id.* at 26-28.
57. LOFTUS ET AL., *supra* note 34, at 44.
58. Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 16 (2006).
59. LOFTUS ET AL., *supra* note 34, at 44.
60. Fradella, *supra* note 58, at 16.
61. LOFTUS ET AL., *supra* note 34, at 46.
62. *Id.* at 45.

drug.[63] Finally, if a person has certain expectations of an event, those expectations may cause him to "see" or "hear" things that never really happened.[64]

2. Retention

Retention is the second stage of memory formation, occurring during the time that passes after acquisition and before retrieval.[65] Unfortunately, memories may fade during this time period. As one would expect, retention is often accompanied by forgetting; the length of retention interval may affect forgetting.[66] A late nineteenth century German study of memory centered on the concept of "forgetting" and showed that a significant amount of new information is forgotten soon after acquisition, and forgetting then becomes steadier along the "forgetting curve."[67] In contrast, more recent studies have shown that memories do not fade as severely or as quickly.[68] One study, focused particularly on facial recognition, shows that after a brief encounter, a face is forgotten in less than a year.[69]

There are two distinct causal categories of forgetting. The first cause, known as "interference," occurs when certain events interfere with others, creating a distorted memory or causing a person to completely forget.[70] Most people engage in numerous activities in their lives, thereby making it difficult to keep the memory of each experience in order.[71] The second cause is called "deliberate" or "motivated" forgetting, where a person forgets simply because they want to do so.[72]

Information obtained through certain activities occurring after a person witnesses an event, often referred to as after-acquired information, has the potential to distort the memory of that event.[73] For example, information gathered by talking to authorities or other witnesses, questions from authorities, or viewing media accounts of the event may enhance a memory or completely alter it.[74] Furthermore, a person's own internal wishes, thoughts,

63. *Id.* at 46.
64. *Id.* at 36-37.
65. *Id.* at 13.
66. *See id.* at 53-57 (citing studies that demonstrate increasing forgetfulness over time).
67. *Id.* at 53-55.
68. *Id.* at 56.
69. *Id.* at 57 (citing Kenneth Deffenbacher, *On the Memorability of the Human Face*, *in* ASPECTS OF FACE PROCESSING (H.D. Ellis et al. eds., 1985)).
70. *Id.* at 57.
71. *Id.*
72. *Id.*
73. *Id.* at 59.
74. *Id.* at 59, 62.

and desires may alter his recollection post-event.[75] These factors may affect how well a witness retains the memory of the event he perceived.

3. Retrieval

The retrieval stage occurs when the witness tries to recall stored information.[76] The manner in which a memory is retrieved affects how the witness recounts what he saw.[77] For instance, the particular method of questioning used when interrogating a witness may inhibit his recollection of the specific details of the event.[78] A witness who is allowed to give his own narration of the event, rather than only give responses to leading questions, is more likely to provide an accurate, although less complete, story than one who is asked specific questions.[79] Leading questions are permissible to ask of certain witnesses at trial, particularly hostile ones, but such questions may elicit a different type of response (and perhaps a different account) than a more general question would.[80]

The significance of this difference is most obvious when one considers child witnesses. Courts often allow counsel to ask leading questions of children, even though children are extremely vulnerable to suggestive questioning.[81] By leading a child to an answer through phrasing a question in a certain way, counsel is essentially putting words in the child's mouth.[82] This technique effectively alters the child's retrieval process and thereby may produce an inaccurate memory due to a child witness's willingness to comply.[83] While children are not necessarily more impressionable witnesses than their more mature counterparts, they may be in certain situations, such as on direct or cross-examination.[84]

B. Facial Recognition

There are many variables that affect facial recognition; however, there are two that are especially important to eyewitness identification—cross-racial identification and unconscious transference.[85] That an individual can better

75. *Id.* at 66.
76. *Id.* at 13.
77. *Id.* at 70.
78. *See id.* at 70-72 (addressing how the questioning method, particularly wording, dictates what type of answer is received).
79. *Id.* at 70.
80. *Id.* at 71.
81. TAYLOR, *supra* note 33, at 17.
82. *Id.*
83. *Id.*
84. LOFTUS ET AL., *supra* note 34, at 39.
85. *Id.* at 103-108.

recognize faces of his own race compared to those of a different race is well established.[86] Studies in this area have led to the conclusion that an eyewitness is more likely to misidentify a member of another race than a member of his own race.[87]

Unconscious transference occurs when a person seen in one instance is confused with a person seen in a second instance.[88] The witness's brain unconsciously superimposes memories on top of each other, usually at the expense of memorial accuracy.[89] Even when a witness is confident in his identification, this confusion of memories may cause him to misremember exactly when and where he actually saw the identified person—whether at the scene of the crime or only later in a lineup at the police station.

C. The Expert's Role

One study has perfectly described the role of an eyewitness-identification expert at trial: "[t]ypically, eyewitness-identification experts are prepared to testify in court about the extent to which the research literature explains how a particular factor, considered alone or in combination with others, likely would affect the reliability of an identification."[90] Eyewitness-identification expert testimony is general, rather than specific, in nature. This means that an expert may not give an opinion as to whether the specific identification in the case is reliable.[91] An eyewitness-identification expert (typically a psychologist) may also testify to the psychological factors, such as those mentioned above, that might have affected the identification at issue.[92]

By maintaining impartiality, a psychologist can objectively educate the jury regarding factors of which the jurors have little or no knowledge and about which they often possess biased (and often incorrect) beliefs.[93] An eyewitness-identification expert may begin with a general explanation of the basic psychological factors relating to the eyewitness process; yet he must be careful not to speak too generally, such that the only function of the testimony is to

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86. *See* Roy S. Malpass & Jerome Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 330-34 (1969) (finding that white students recognized faces of their own race more precisely than faces of black students).

87. *See* LOFTUS ET AL., *supra* note 34, at 103-06 (citing multiple studies that demonstrate such a result).

88. *Id.* at 106.

89. TAYLOR, *supra* note 33, at 39.

90. Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 180 (2006).

91. Hon. Robert P. Murrian, *The Admissibility of Expert Eyewitness Testimony Under the Federal Rules*, 29 CUMB. L. REV. 379, 380 (1998-1999).

92. *Id.*

93. CUTLER & PENROD, *supra* note 34, at 57.

promote general awareness.[94] To ensure that an expert witness can take the stand, his testimony must relate to a material issue in the case.[95] The factors he explains must specifically relate to the facts of the case at hand, or the information will be of no assistance to the jury. This is not uncommon, as many of the abovementioned factors are critical to cases that turn on eyewitness identification.[96] These issues form the basis of an expert's testimony, with the goal of challenging a jury's natural predisposition of confidence in the reliability of an eyewitness.[97]

An eyewitness-identification expert is, in a sense, competing with the eyewitness at trial.[98] The eyewitness is recounting what he actually saw (or believes he saw), whereas the expert's knowledge is based on research gathered in a laboratory or university.[99] Thus, an expert must be convincing to the degree that jurors do not rely on their own preconceived (and often misplaced) beliefs. He also must be able to convey his message through the use of ordinary language so the ordinary juror can process its complexities. Once he has testified, the expert's task is complete. In making its final credibility assessment, the jury is free to accept any, all, or even none, of the expert's testimony.

III. Eyewitness-Identification Expert Testimony Complies with the Applicable Sections of the Oklahoma Evidence Code

Before any expert witness is allowed to testify, his testimony must comply with the applicable evidentiary rules. In Oklahoma, the Oklahoma Evidence Code[100] (Code) provides the proper standards to which the testimony must conform. These rules fall into two principal categories: relevancy and expert testimony.

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94. LOFTUS ET AL., *supra* note 34, at 354.

95. *Id.* at 354-55.

96. *See id.* at 355 (identifying specific factors that frequently provide opportunities for the introduction of eyewitness-identification expert testimony).

97. *Id.* at 353.

98. *Id.* at 356.

99. *See id.* (discussing the comparison jurors must make between lay witness testimony and expert testimony).

100. The sections of the Oklahoma Evidence Code discussed in this comment are virtually identical to the Federal Rules of Evidence. *Compare* 12 OKLA. STAT. § 2403 (Supp. 2003) (adds "unfair and harmful surprise" and deletes "waste of time"), *with* FED. R. EVID. 403; *compare* 12 OKLA. STAT. § 2702 (Supp. 2003) (deletes "thereto"), *with* FED. R. EVID. 702.

A. Relevancy

Relevancy is a hurdle that must be cleared before any piece of evidence, including expert testimony, is admitted at trial.[101] Sections 2401, 2402, and 2403 of the Code primarily govern relevancy. Section 2402 provides that "all relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible."[102] For purposes of the Code, evidence is logically relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."[103]

An eyewitness identification of a defendant will nearly always be a fact of consequence in a criminal case. Yet to be logically relevant, eyewitness-identification expert testimony must also make the accuracy of the identification more probable or less probable.[104] An eyewitness-identification expert will likely testify to the psychological factors apparent from the particular facts of the case in which he is testifying. By testifying to these influences, the expert aids the jury in determining whether an accurate witness identification is more probable or less probable. Thus, eyewitness-identification expert testimony satisfies the threshold relevancy requirements of the Code and is therefore admissible.

Nevertheless, Section 2403 provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."[105] The preferred view of this test is that in balancing relevancy against a potential danger, the court should resolve any doubt in favor of relevancy, and therefore, in favor of admissibility.[106] The literal language of the statute further supports this view, specifically through inclusion of the word "substantially."[107] On the other hand, the inclusion of the word "may" implies that this determination rests entirely within the trial judge's discretion and will only be disturbed upon a finding of an unambiguous abuse of discretion.[108] A Section 2403 inquiry depends on the precise facts of each

101. This is apparent from a portion of the title of Section 2402 of the Code declaring "Irrelevant Evidence Inadmissible." 12 OKLA. STAT. § 2402 (Supp. 2003).

102. *Id.*

103. *Id.* § 2401.

104. *Id.*

105. *Id.* § 2403.

106. Leo H. Whinery, *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Cumulative Nature of Evidence*, *in* 1 OKLAHOMA PRACTICE, COURTROOM GUIDE TO THE OKLAHOMA EVIDENCE CODE § 2403, at 286 (2009).

107. Roberts v. State, 1994 OK CR 1, ¶ 32, 868 P.2d 712, 722.

108. *See* Tansy v. Dacomed Corp., 1994 OK 146, ¶ 31, 890 P.2d 881, 889 (holding that an

case, such that a sweeping general conclusion as to whether eyewitness-identification expert testimony is always admissible cannot be reached. Relevant expert testimony may only be deemed admissible upon a finding that none of the listed dangers substantially outweigh the testimony's probative value.[109] Even if the eyewitness-identification expert testimony overcomes the low hurdle of admissibility for relevance, it must also satisfy the Oklahoma Evidence Code's provisions pertaining to expert testimony generally.[110]

B. Expert Testimony: The Daubert Standard

Oklahoma case law offers no real guidance on the admissibility of eyewitness-identification expert testimony. Consequently, Oklahoma courts principally rely on the Code's rules governing expert testimony in general to determine the reliability and, thus, admissibility of the testimony. The most significant of these rules is Section 2702 of the Code.[111] Section 2702—like its federal counterpart, Federal Rule of Evidence 702—embraces the United States Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[112] *Daubert* embodies an ideological shift away from the prior expert testimony standard established in *Frye v. United States*.[113] Oklahoma adopted the *Daubert* holding in *Taylor v. State*,[114] a 1995 Court of Criminal Appeals case. In *Taylor*, the Court of Criminal Appeals acknowledged the amorphous boundaries of Oklahoma law concerning expert testimony; the contemporaneous adoption of *Daubert* provided direction where the courts had once wandered somewhat aimlessly.[115] Observance of the *Daubert* standard also guaranteed that state courts could properly incorporate the Oklahoma Evidence Code into their decision-making.[116] Within the *Taylor* opinion, the Court of Criminal Appeals thoroughly discussed the *Daubert* test and its requirements.[117]

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appellate court will not overturn a lower court's section 2403 finding unless it is a clear abuse of discretion).

109. 12 OKLA. STAT. § 2403 (Supp. 2003).

110. *See* Taylor v. State, 1995 OK CR 10, ¶ 14, 889 P.2d 319, 326 (opining that admission of expert testimony is subject to Section 2702 of the Oklahoma Evidence Code).

111. For the remaining sections of the Oklahoma Evidence Code governing expert testimony, see 12 OKLA. STAT. §§ 2703-2705 (Supp. 2003).

112. 509 U.S. 579 (1993).

113. 293 F. 1013 (D.C. Cir. 1923). The *Frye* test requires that expert testimony must be based on a scientific technique that has gained "general acceptance" in its field. *Id.* at 1014.

114. 1995 OK CR 10, 889 P.2d 319.

115. *Id.* ¶ 16, 889 P.2d 319, 329.

116. *Id.*

117. *Id.* ¶¶ 17-21, 889 P.2d at 329-30.

At its core, *Daubert* recognizes the trial judge's role as a gatekeeper who must require both the reliability and relevancy of novel scientific evidence.[118] These requirements are delineated in Federal Rule of Evidence 702.[119] To be found reliable, the expert's testimony must be based on "scientific . . . knowledge," which, in turn, "must be derived by the scientific method."[120] "Scientific" means the testimony must be grounded in the practices of science, whereas "knowledge" implies a higher standard than personal opinion or uncorroborated conjecture.[121]

The *Daubert* opinion recognized several general factors that can assist the trial judge in determining whether expert testimony is "scientific knowledge."[122] These factors serve as a guide to a trial judge in fulfilling his gatekeeping responsibility. Initially, a judge may determine whether the theory or technique underlying the testimony can be or has been tested. [123] Another consideration is whether the theory or technique has been published and analyzed by peers.[124] A third concern is the known or potential rate of error of the proffered theory or technique.[125] Finally, a judge may consider whether the theory or technique has been generally accepted in the scientific community.[126] To be sure, these factors are not an exhaustive list the trial judge must complete before making his determination; there is no set standard to which the judge must adhere.[127] Rather, the trial judge possesses some discretion in resolving which factors to use and how to use them. Additional considerations not explicitly articulated in *Daubert* may also factor into the reliability equation.[128]

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118. *Id.* ¶ 17, 889 P.2d at 329.

119. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993); Rule 702 was amended to reflect the *Daubert* holding and currently reads as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

120. *Id.* at 589-90.

121. *Id.* at 590.

122. *Id.* at 593-95.

123. *Id.* at 593.

124. *Id.*

125. *Id.* at 594.

126. *Id.*

127. *Id.* at 593.

128. *See id.* (clarifying that the factors specified in the opinion are not necessarily

It appears that eyewitness-identification expert testimony is, in fact, "scientific knowledge." The methodology of eyewitness reliability research is well established in the scientific community.[129] Data is gathered through studies or experiments, then analyzed, and finally reviewed by peers before publication.[130] To become generally accepted in the scientific community, a hypothesis must be tested several times and consistently confirmed.[131]

Research into the reliability of eyewitness testimony is relatively uncontroversial—the consistency of the research results has been described as "impressive."[132] The "core findings" in the field are virtually undisputed, and have been tested in more than 2,000 studies conducted over the past three decades.[133] In the end, the judge's conclusion as to whether the testimony is "scientific knowledge" will depend on the particular theory or theories to which the expert purports to testify and whether they actually comply with *Daubert* requirements.[134]

The relevancy requirement of Rule 702, which is adhered to in *Daubert*, expands on Federal Rules of Evidence 401, 402, and 403, as well as to the equivalent rules in the Code.[135] Rule 702 requires that the expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."[136] Courts, including the United States Supreme Court and the Oklahoma Court of Criminal Appeals, often recognize this requirement as one of "fit," meaning that some connection must exist between the expert testimony and the pertinent issue.[137] The rule also requires that an expert be qualified by "knowledge, skill, experience, training, or education."[138]

In cases in which an eyewitness-identification expert is called to testify, the accuracy of a witness identification of the defendant is often a central issue.[139] As discussed above, numerous factors may be at play with regard to the

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"definitive").

129. Schmechel et al., *supra* note 90, at 179.

130. *Id.*

131. *Id.*

132. People v. McDonald, 690 P.2d 709, 718 (Cal. 1984).

133. Schmechel et al., *supra* note 90, at 180.

134. *Cf.* Murrian, *supra* note 91, at 395-396 ("The proponent of such evidence has the burden of proving, by a preponderance of the evidence, that the expert testimony is admissible.").

135. The Oklahoma equivalents are sections 2401, 2402, and 2403 of the Oklahoma Evidence Code. See *supra* Part III.A, for an exposition of their requirements.

136. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591 (1993).

137. *Id.* at 591-92; Taylor v. State, 1995 OK CR 10, ¶ 20, 889 P.2d 319, 330.

138. FED. R. EVID. 702.

139. According to Federal Rule of Evidence 704(a), as well as Oklahoma Evidence Code Section 2704, expert testimony may address an ultimate issue in the case. FED. R. EVID. 704(a); 12 OKLA. STAT. § 2704 (Supp. 2003).

accuracy of the identification.[140] The specific factors depend on the facts of the case, but frequently these factors are beyond the common knowledge of the laypersons serving as jurors.[141] Jurors may possess a certain degree of understanding of factors that may cause a mistaken identification, but they often do not have an expert's training in determining the extent to which those factors may render an identification unreliable.[142]

An expert explanation of the specific factors arising from the facts of each case serves to assist the jury in determining whether the identification is accurate, and provides the requisite connection to the resolution of the issue. Eyewitness-identification experts are usually psychologists who are well informed of "the cognitive and social factors affecting eyewitness testimony."[143] They are frequently employed by large universities, are well-read in the literature on eyewitness identification, and are suitably trained in scrutinizing identifications.[144] Because they possess these characteristics, eyewitness-identification experts should be easily qualified as experts within the meaning of the Code.

C. Oklahoma's Ambiguous Law Regarding Eyewitness-Identification Expert Testimony

Eyewitness-identification expert testimony must satisfy evidentiary standards, but also should be subjected to a more specific analysis. However, Oklahoma currently has no substantial case law to which its courts can look for guidance in determining whether to admit eyewitness-identification expert testimony. The Court of Criminal Appeals has only addressed this issue on a relatively small number of occasions and has not articulated a clear standard.[145] Thus, Oklahoma does not fit neatly into any of the three categories described in Part IV *infra*.

In 1982, Oklahoma decided its first reported case involving eyewitness-identification expert testimony.[146] In *King v. State*, the Court of Criminal Appeals upheld the admission of expert testimony concerning psychological factors affecting eyewitness identification although the court's reasoning was

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140. *See* discussion *supra* Part II.

141. Schmechel et al., *supra* note 90, at 204.

142. Fredric D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1017 (1977).

143. *Id.* at 1015.

144. LOFTUS ET AL., *supra* note 34, at 358.

145. *Compare* Bristol v. State, 1988 OK CR 244, ¶ 8, 764 P.2d 887, 890 (allowing expert testimony without explaining its reasoning), *with* Smith v. State, 1982 OK CR 89, ¶ 9, 656 P.2d 277, 281 (upholding exclusion under a discretionary standard).

146. King v. State, 1982 OK CR 15, 640 P.2d 983.

not revealed.[147] Only a portion of the expert's testimony, about a totally nonrelated case, was excluded because it would not have been helpful to the jury.[148] The court referred to Sections 2701 through 2705 of the Oklahoma Evidence Code as the foundation for the partial exclusion.[149] Later that year, the Court of Criminal Appeals issued an opinion that offers the only real guidance on the admissibility of eyewitness-identification expert testimony.

In *Smith v. State*, the Court of Criminal Appeals upheld the trial court's decision to exclude the testimony of an eyewitness-identification expert.[150] The trial court found that the testimony would not aid the jury in its determination, and the Court of Criminal Appeals held that the trial court did not abuse its discretion in so finding.[151] The precedent for this holding was *Riggle v. State*, a case which dealt with whether a doctor who had graduated from medical school five days prior to the examination to which he testified qualified as an expert, rather than whether his testimony would be helpful to the jury.[152]

Eberhart v. State provides another example of the Court of Criminal Appeals declining to overturn a trial court's admission of expert testimony.[153] In that particular case, the appellant actually contended that the trial court erred in failing to give a proper jury instruction on the untrustworthiness of eyewitness identification.[154] The appellate court recognized the predicament presented by the eyewitness testimony and the resultant need to warn the jury of its potential unreliability.[155] The jury heard expert testimony on the subject, which the court acknowledged was certainly as helpful as, if not more helpful than, a jury instruction.[156] Again, the court allowed eyewitness-identification expert testimony but did not provide its justification for doing so.

The same issue arose in *Bristol v. State*.[157] An expert for the appellant testified that eyewitness identification is questionable and inconsistent; furthermore, the expert conveyed that eyewitness identification is reliable only one-quarter of the time.[158] Nevertheless, the appellant claimed that the trial court erred by declining to give a jury instruction regarding the unreliability

147. *Id.* ¶ 14, 640 P.2d at 987.
148. *Id.*
149. *Id.*
150. 1982 OK CR 89, ¶ 9, 656 P.2d 277, 281.
151. *Id.*
152. 1978 OK CR 121, ¶¶ 24-28, 585 P.2d 1382, 1387-88.
153. 1986 OK CR 160, 727 P.2d 1374.
154. Eberhart v. State, 1986 OK CR, 160, ¶ 10, 727 P.2d 1374, 1377.
155. *Id.* ¶ 12, 727 P.2d at 1378.
156. *Id.*
157. 1988 OK CR 244, 764 P.2d 887.
158. *Id.* ¶ 5, 764 P.2d at 889.

of eyewitness identification.[159] The Court of Criminal Appeals did not find reversible error because the jury had already been warned of the unreliability by the expert's testimony.[160] Once again, the court acquiesced in the admission of eyewitness-identification expert testimony, but neglected to explicitly provide its logic.

All of these cases were decided several years before the Court of Criminal Appeals approved and adopted the *Daubert* holding.[161] Additionally, these cases do not provide any specific, comprehensible rules on eyewitness-identification expert testimony. This combination calls for a reevaluation of the admissibility principles concerning this brand of testimony. Most other states and federal courts currently have more defined rules governing admissibility;[162] although adherence to these rules is not mandatory, they may be persuasive for future Oklahoma cases. The standards of other jurisdictions are set forth in Part IV of this comment.

IV. An Overview of the Case Law on the Admissibility of Eyewitness-Identification Expert Testimony

The Supreme Court of Florida, in *McMullen v. State*, succinctly grouped the different approaches to the admissibility of eyewitness-identification expert testimony into three categories.[163] The first category of approach, known as the "discretionary" view, is followed by a majority of jurisdictions and allows for a trial judge to exercise his discretion when determining the admissibility of expert testimony regarding eyewitness identification.[164] The second approach is one of per se exclusion.[165] In these jurisdictions, eyewitness-identification expert testimony is categorically prohibited regardless of circumstances.[166] The third category is one of "limited admissibility," where it is an abuse of discretion to exclude eyewitness-identification expert testimony in the absence of corroborating evidence.[167] However, the Florida Supreme Court neglected to address a fourth and final category of approach, or lack thereof. There is a small, but not insignificant, number of states that have not explicitly voiced an opinion on the issue. Oklahoma is one of these

159. *Id.* ¶ 7, 764 P.2d at 889.

160. *Id.* ¶ 8, 764 P.2d at 890.

161. *See* Taylor v. State, 1995 OK CR 10, ¶ 15, 889 P.2d 319, 328 (adopting *Daubert* as the appropriate standard for the admissibility of expert testimony in Oklahoma).

162. *See* discussion *infra* Part IV.

163. 714 So. 2d 368, 370-71 (Fla. 1998).

164. *Id.* at 370.

165. *Id.* at 371.

166. *Id.*

167. *Id.*

states and before determining which approach its state courts should follow, it is helpful to examine each one in detail.

A. The Majority Rule: Pure Discretion

The "discretionary" rule provides that the decision to admit eyewitness-identification expert testimony rests soundly within the trial judge's discretion and should only be disturbed if the court abuses its discretion.[168] Although this is the majority rule, its application is far from uniform.[169] Because discretion is so heavily dependent on facts and circumstances, there is no certainty in the rule's cross-jurisdictional treatment. These jurisdictions have failed to establish any universal rules concerning what facts might lead to an abuse of discretion finding. Consequently, different jurisdictions have reached wide-ranging conclusions about the admissibility of such testimony.[170]

1. Judicial Deference: A Majority within the Majority

Trial courts often exclude testimony on the reliability of eyewitness identification, and appellate courts simply defer to the lower court's decision.[171] Courts have consistently offered two broad justifications for excluding expert testimony on the factors affecting eyewitness identification—either it invades the province of the jury or is not "helpful" to the jury.[172] More narrow arguments may arise subject to the precise facts of

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168. *See, e.g.*, State v. Fontaine, 382 N.W.2d 374, 378 (N.D. 1986) (defining an abuse of discretion as acting "in an unreasonable, arbitrary, or unconscionable manner").

169. *Compare* Manley v. State, 672 S.E.2d 654, 660 (Ga. 2009) (upholding exclusion of eyewitness-identification expert testimony because sufficient corroborating evidence existed), State v. Miles, 585 N.W.2d 368, 372 (Minn. 1998) (deferring to trial court's exclusion of expert testimony when each witness was sufficiently cross-examined and the jury was instructed accordingly), *and* State v. Long, 575 A.2d 435, 463 (N.J. 1990) (failing to find an abuse of discretion when expert testimony was excluded when the subjects were within the common knowledge of the jury), *with* State v. Chapple, 660 P.2d 1208, 1220-21 (Ariz. 1983) (finding an abuse of discretion when the trial court's exclusionary ruling was based on its determination that the testimony was within the common experience of the jury), *and* State v. Copeland, 226 S.W.3d 287, 298 (Tenn. 2007) (remanding when exclusion of expert testimony was predicated on precedent holding that a jury can adequately assess reliability with the aid of direct and cross-examination).

170. *Compare* State v. Werner, 851 A.2d 1093 (R.I. 2004) (upholding exclusion of expert testimony), *with* Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002) (finding exclusion to be an abuse of discretion).

171. *Cf.* State v. Kelly, 2000 ME 107, ¶¶ 16-17, 752 A.2d 188, 191-92 (Me. 2000) (leaving the question of admissibility of eyewitness-identification expert testimony to the trial court's discretion).

172. *Cf.* United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996) (finding that expert testimony affects the jury's unique role in determining credibility); Johnson v. State, 526 S.E.2d

each case, particularly under the "unhelpfulness" rationale.[173] A survey of the cases involving eyewitness-identification expert testimony indicates that appellate courts will most often defer to a trial court's exercise of discretion.

a) Expert Testimony Invades the Province of the Jury

At trial, the jury is the sole determinant of witness credibility.[174] Consequently, any interference with this determination may usurp the jury's role.[175] On the federal level, the Second Circuit has found that the exclusion of eyewitness-identification expert testimony is not an abuse of discretion when it would affect the jury's assessment of the eyewitness's credibility.[176] In *United States v. Lumpkin*, the expert proposed to testify that witness confidence does not necessarily correlate to an accurate identification.[177] The court ruled that a witness's demeanor, confidence included, bears on his credibility, and credibility assessments belong exclusively to the jury.[178] The court believed that, by testifying to the relationship, or lack thereof, between confidence and accuracy, the expert basically would have offered his own view of credibility.[179] The Second Circuit held that the testimony invaded the province of the jury, and consequently, the district court's exclusion was not erroneous.[180]

The Eighth Circuit similarly upheld the district court's ruling in *United States v. Kime*, reasoning that the expert's testimony invaded the province of the jury.[181] The court held that by offering specific testimony, the eyewitness-identification expert was impeding on the jury's credibility assessment, which is a realm exclusive to the trier of fact.[182]

549, 554-55 (Ga. 2000) (abstaining from a definitive determination that expert testimony would have been helpful to the jury); State v. Buell, 489 N.E.2d 795, 804 (Ohio 1986) (holding that trial court's finding should be upheld when abundant corroborating evidence exists).

173. *See* discussion *infra* Part IV.A.1.b.

174. *See* 75A AM. JUR. 2D *Trial* § 613 (2009) (making clear that witness credibility is decided by the jury rather than the court).

175. *See* Murrian, *supra* note 91, at 380 (concluding that expert testimony on the veracity of a particular witness "clearly would be a usurpation of the function of the jury").

176. United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999).

177. *Id.* at 288.

178. *Id.* at 289.

179. *Id.*

180. *Id.*

181. United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996).

182. *Id.*

b) Expert Testimony is Not "Helpful" to the Jury

Courts often find that the exclusion of eyewitness-identification expert testimony is not an abuse of discretion because such testimony may not assist the jury in its determination for three possible reasons: sufficient corroborating evidence exists,[183] cross-examination and jury instructions adequately serve the same function,[184] or the subject of the testimony is within the common experience of the jurors.[185]

(1) Sufficient Corroborating Evidence Exists

Eyewitness-identification expert testimony may be needless presentation of cumulative evidence, particularly in the presence of corroborating evidence or multiple eyewitnesses. *Manley v. State* provides a good example of this analysis.[186] The Supreme Court of Georgia identified seven separate pieces of evidence, other than the eyewitness identification, connecting the defendant to the crime.[187] The court held that because sufficient corroborating evidence was offered, the trial court's exclusion of expert witness testimony was not an abuse of discretion.[188] The Supreme Court of Ohio, in *State v. Buell*, held that the exclusion of eyewitness-identification expert testimony did not likely affect the trial verdict when the identification was substantially corroborated.[189] The identification was accompanied by a substantial amount of physical evidence implicating the defendant.[190] The physical evidence was the principal factor in reaching the verdict of guilt; therefore, the exclusion was innocuous and not an abuse of discretion.[191]

In *Cook v. State*, the Indiana Supreme Court upheld a trial court's refusal to admit testimony from an expert on witness identification.[192] The consistency of several witness accounts, without proof of witness collaboration, and the absence of evidence demonstrating impaired witness perception led the court to determine expert testimony would have been of no assistance to the jury.[193] The court provided some guidance in finding that

183. *See* discussion *infra* Part. IV.A.1.b.i.
184. *See* discussion *infra* Part. IV.A.1.b.ii.
185. *See* discussion *infra* Part. IV.A.1.b.iii.
186. 672 S.E.2d 654 (Ga. 2009).
187. *Id.* at 659.
188. *Id.* at 660.
189. 489 N.E.2d 795, 804 (Ohio 1986).
190. *Id.* at 798-99.
191. *Id.* at 804.
192. 734 N.E.2d 563, 571 (Ind. 2000).
193. *Id.*

eyewitness-identification expert testimony is typically admissible when there is a single eyewitness and the identity of the perpetrator is the main issue at trial.[194]

The Sixth Circuit Court of Appeals, in *United States v. Smith*,[195] has found that the presence of strong corroborating evidence may render the exclusion of eyewitness-identification expert testimony harmless. The defendant, Smith, was on trial for a bank robbery in Ohio.[196] Three bank employees independently identified Smith as one of the robbers, and Smith's palm print was found at the crime scene.[197] The presence of the palm print was particularly damning because it directly contradicted Smith's alibi defense that he had never once been inside the robbed bank.[198] The Sixth Circuit held that the specific facts of the case led to a finding that the exclusion of expert testimony did not prejudice the defendant.[199] This case also implicitly lends support to the view that the decision to admit eyewitness-identification expert testimony should be addressed on a case-by-case basis, where adequate consideration can be given to the precise facts of the case.

(2) Cross-Examination and Jury Instructions Are Acceptable Substitutes

On occasion, courts have held that cross-examination can adequately expose a possible misidentification, and jury instructions can sufficiently inform the jury of the potential weaknesses of witness identification.[200] The Minnesota Supreme Court relied on long-standing precedent in finding that exclusion on these grounds was not an abuse of discretion.[201] The trial court instructed the jurors on the factors to consider in determining whether the identification was accurate.[202] Additionally, each of the eyewitnesses was vigorously cross-examined in order to unearth any potential unreliability.[203] This combination was enough, according to the court, to render the expert's testimony unhelpful.[204]

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194. *Id.*
195. 736 F.2d 1103 (6th Cir. 1984).
196. *Id.* at 1104.
197. *Id.* at 1104-05.
198. *Id.* at 1107.
199. *Id.* at 1107-08.
200. *See, e.g.*, State v. Werner, 851 A.2d 1093, 1102-03 (R.I. 2004) (holding that it is not an abuse of discretion to exclude expert testimony when eyewitnesses are cross-examined and the jury is properly instructed).
201. State v. Miles, 585 N.W.2d 368, 372 (Minn. 1998).
202. *Id.*
203. *Id.*
204. *Id.*

In *State v. Werner*, the Supreme Court of Rhode Island ruled that a trial judge did not abuse his discretion in excluding the testimony of an eyewitness-identification expert because he gave a comprehensive jury instruction.[205] The cautionary instruction directed the jury to consider the stress under which the witness observations occurred, post-event information, and that a witness's certainty is insufficient to determine the accuracy of identification.[206] Furthermore, the defendant had the opportunity to address each of these issues on cross-examination so expert testimony was unnecessary.[207]

The federal circuits have also upheld exclusion when jury instructions or cross-examination were substituted for eyewitness-identification expert testimony. The Seventh Circuit, in *United States v. Curry*, did not find an abuse of discretion when the district court rebuffed a proffer of eyewitness-identification expert testimony.[208] The district court found that the factors that may affect identification were brought to the jury's attention through *voir dire* and cross-examination.[209] This finding was enough, in the Seventh Circuit's eyes, to allow for exclusion under the Federal Rules of Evidence.[210] The First Circuit has also observed that it is not an abuse of discretion to exclude eyewitness-identification expert testimony when cross-examination can adequately expose the possible effects to which the expert would testify.[211] When cross-examination can be used effectively, eyewitness-identification expert testimony is less helpful than in situations when the factors affecting identification cannot be demonstrated through cross-examination.[212]

In *United States v. Rincon*, the Court of Appeals for the Ninth Circuit held that the district court's comprehensive jury instruction was adequate to inform the jury, thus obviating the need for eyewitness-identification expert testimony.[213] Likewise, the Eighth Circuit buttressed its conclusion to uphold exclusion in *United States v. Kime* by acknowledging that a comprehensive jury instruction was given to address the information about witness identification that would have been provided by an expert.[214]

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205. 851 A.2d 1093, 1102-03 (R.I. 2004).
206. *Id.* at 1102.
207. *Id.*
208. 977 F.2d 1042, 1050 (7th Cir. 1992).
209. *Id.* at 1051.
210. *Id.*
211. United States v. Rodríguez-Berríos, 573 F.3d 55, 72 (1st Cir. 2009).
212. *Id.*
213. United States v. Rincon, 28 F.3d 921, 925-26 (9th Cir. 1994).
214. United States v. Kime, 99 F.3d 870, 885 (8th Cir. 1996).

(3) The Subject of Expert Testimony is Common Knowledge

Information conveyed by an eyewitness-identification expert through his testimony is sometimes described as "common knowledge,"[215] not "outside the common experience of mankind,"[216] or not "beyond the ken" of the jury.[217] Whether the subject of the testimony is actually "common knowledge" is a determination for the trial judge.[218] If a judge determines it is, the testimony is often excluded.[219]

The Supreme Court of Connecticut has held that a trial court did not abuse its discretion in excluding eyewitness-identification expert testimony, because the trial judge correctly characterized the testimonial subjects as being within the common knowledge of the jury.[220] The expert proposed to testify to the relationship between confidence and accuracy, and the effects of lighting and the duration of observation, among other things.[221] The court believed that jurors knew that a witness account could be erroneous or forgotten over time.[222] This knowledge, in the court's judgment, was sufficient to allow the jury to evaluate the reliability of the eyewitness's testimony without the aid of expert testimony.[223]

In *Johnson v. State*, the proposed eyewitness-identification expert testimony would have covered the effects of lighting and weather conditions, stress, weapon focus, cross-racial identification, and the confidence/accuracy relationship.[224] The trial court refused to admit the testimony and the Supreme Court of Georgia held that the exclusion was not a "clear" abuse of discretion.[225] The court acknowledged that the testimony *might* have been helpful, at least as it pertained to the factors "less likely to be fully understood by jurors," such as cross-racial identification and weapon focus.[226] Although

215. State v. McClendon, 730 A.2d 1107, 1115 (Conn. 1999).

216. *Id.*

217. *See, e.g.*, State v. Long, 575 A.2d 435, 463 (N.J. 1990) (holding that the subject of the expert's testimony was not "beyond the ken of the average juror").

218. *Cf.* State v. Miles, 585 N.W.2d 368, 371 (Minn. 1998) ("It is the trial court's responsibility to scrutinize the proffered expert testimony . . . and exclude it where . . . otherwise unhelpful.").

219. *See, e.g.*, United States v. Stokes, 388 F.3d 21, 25 (1st Cir. 2004) (affirming trial court's exclusion based on finding that testimony was a "matter of common experience").

220. *McClendon*, 730 A.2d 1107, 1115 (Conn. 1999).

221. *Id.*

222. *Id.*

223. *Id.*

224. 526 S.E.2d 549, 554 (Ga. 2000).

225. *Id.* at 555.

226. *Id.* at 554-55.

it is a foundation commonly rested upon to exclude eyewitness-identification expert testimony, the "beyond the ken" rationale is not immune to criticism.[227]

2. "Narrow Circumstances": When an Appellate Court Will Most Often Find an Abuse of Discretion

Appellate courts so often defer to a trial court's exercise of discretion that the majority rule appears to be discretionary in name only. In operation, it more closely resembles a rule of per se exclusion. Yet while the trend in many states is to uphold exclusion of eyewitness-identification expert testimony, some state courts have found exclusion to be an abuse of discretion under specific factual circumstances.[228]

The Arizona Supreme Court was the first to thoroughly address the issue of eyewitness-identification expert testimony and rule in favor of admissibility under certain factual circumstances. In *State v. Chapple*,[229] the court held that a trial court's order to exclude an expert's testimony was erroneous and, thus, an abuse of discretion.[230] The trial court believed that the information to be presented was within the "common experience" of the jury,[231] but the Arizona Supreme Court ruled that the jury was not necessarily aware of the effects of factors inherent to the situation, such as stress, post-event information, unconscious transfer, and witness confidence.[232] The court explicitly stated that such knowledge could not be assumed, and the expert's testimony would have assisted the jury in resolving the factual issues before it.[233] Although the court ultimately ruled in favor of admissibility, it established a caveat to its holding—the standard allowing for a trial court to exercise its discretion in ruling on the admissibility of expert testimony would remain in place.[234] The court's reversal was dictated by the distinctive set of factual inconsistencies to be resolved by the jury and the need for assistance to reach a proper verdict.[235]

State v. Whaley provides another model for the circumstances in which a trial court abuses its discretion.[236] The Supreme Court of South Carolina held that eyewitness-identification expert testimony is admissible, subject to the trial judge's discretion, when the core issue is the offender's identity, the only

227. *See* discussion *infra* Part V.A.1.b.
228. *E.g.*, State v. Whaley, 406 S.E.2d 369, 372 (S.C. 1991).
229. 660 P.2d 1208 (Ariz. 1983).
230. *Id.* at 1224.
231. *Id.* at 1220.
232. *Id.* at 1220-1221.
233. *Id.* at 1222.
234. *Id.* at 1224.
235. *Id.* at 1222-24.
236. 406 S.E.2d 369 (S.C. 1991).

proof of identity is eyewitness identification, and there is no other evidence to corroborate the identification and make it independently reliable.[237] When eyewitness-identification expert testimony is excluded under such conditions, as it was by the trial court, it is likely an abuse of discretion.[238] This holding resembles the "limited admissibility" rule, discussed *infra*, but does not unequivocally adopt such a view.

The Supreme Court of Kentucky followed a similar line of reasoning in *Commonwealth v. Christie*.[239] Under the facts of the case, eyewitness identification was the key evidence against the defendant, other direct evidence against the defendant was lacking, and the circumstantial evidence against the defendant was anemic.[240] The trial court's exclusion of eyewitness-identification expert testimony under such circumstances was an abuse of discretion under Kentucky Rule of Evidence (KRE) 403,[241] the analog to Oklahoma Evidence Code section 2403. Moreover, the court also found the trial court abused its discretion under KRE 702 because satisfactory "narrow circumstances" existed to admit the testimony.[242] "Narrow circumstances" may include cross-racial identification, unconscious transference, significant time between the event and identification, and observation under duress, among other things.[243]

The Tennessee Supreme Court recently overruled its prior rule of per se exclusion of eyewitness-identification expert testimony in *State v. Copeland*.[244] At trial, the defendant was convicted of murder and sentenced to death after being denied the opportunity to introduce expert testimony on issues relating to the reliability of eyewitness identification.[245] On appeal, the court, citing the findings of multiple studies, expressed its apprehension over jury insensitivity to factors affecting eyewitness memory, the imprudent replacement of expert testimony with cross-examination and jury instructions, and the increasing number of wrongful convictions due to misidentification.[246] Because the expert's proffered testimony "would have given the jury a valuable context within which to assess the eyewitness identification," the court held that the

237. *Id.* at 372.
238. *Id.*
239. 98 S.W.3d 485 (Ky. 2002).
240. *Id.* at 491.
241. *Id.*
242. *Id.* at 490-91.
243. *Id.* at 490.
244. 226 S.W.3d 287 (Tenn. 2007).
245. *Id.* at 289-90.
246. *Id.* at 299-300.

exclusion of the expert's testimony was in error.[247] Because the error was not harmless, the court remanded the case for a new trial.[248]

The New York Court of Appeals recently broke from its long-standing tradition of consistently deferring to a trial court's discretion in excluding eyewitness-identification expert testimony.[249] In *People v. LeGrand*, the court conceded that the admission of expert identification testimony is within the trial court's discretion, but found that the New York County Supreme Court, in excluding such testimony, abused its discretion under the circumstances of the case.[250] Because there was no corroborating evidence, resolution of the case centered on the witness identifications and the expert's testimony would have helped the jury to assess whether the identifications were accurate.[251]

B. Per Se Exclusion

A few jurisdictions never allow experts to testify to the accuracy of eyewitness identifications.[252] The Kansas Supreme Court has consistently adhered to a per se rule that eyewitness-identification expert testimony is inadmissible because the problems inherent in eyewitness identification are well known to the lay juror.[253] At one point, Kansas left the admissibility of expert testimony regarding eyewitness identification to the trial judge's discretion, but eventually moved to a rule of per se exclusion.[254] In lieu of expert testimony, judges may give a cautionary jury instruction on specific identification factors.[255] Such an instruction, when paired with cross-examination, is sufficient, in the eyes of the Kansas Supreme Court, to "protect

247. *Id.* at 302.

248. *Id.* at 304.

249. *See* People v. Lee, 750 N.E.2d 63, 65 (N.Y. 2001) (finding that the discretion to admit identification expert testimony is exclusively within the trial court's domain, and such discretion was not abused in the case); *see also* People v. Mooney, 559 N.E.2d 1274, 1274 (N.Y. 1990) (holding that the trial court's discretion was properly exercised and, consequently, the appellate court's ability to review was restricted).

250. 867 N.E.2d 374, 378-80 (N.Y. 2007).

251. *Id.* at 379.

252. Although Kansas and Nebraska still follow a rule of per se inadmissibility, other states have abandoned the use of such a rule. *See* State v. Schutz, 579 N.W.2d 317, 320 (Iowa 1998) (overruling precedent applying a per se rule and adopting the discretionary approach); State v. Copeland, 226 S.W.3d 287, 300-01 (Tenn. 2007) (rescinding Tennessee's blanket prohibition of eyewitness-identification expert testimony).

253. *See, e.g.*, LaPointe v. State, 214 P.3d 684, 695 (Kan. 2009) (finding that the reliability of eyewitness identification is within the realm of jury knowledge).

254. *See* State v. Gaines, 926 P.2d 641, 646-49 (Kan. 1996) (detailing the evolution of the Kansas Supreme Court's eyewitness-identification expert testimony jurisprudence).

255. *Id.* at 647.

the rights of the defendant."[256] The Supreme Court of Nebraska has also ruled against the admission of eyewitness-identification expert testimony on this subject, describing it as "unnecessary."[257] The court has consistently held fast to precedent that eyewitness identification is a matter of "common experience" and testimony on the issue would invade the province of the jury.[258]

On the federal level, the Eleventh Circuit has held that eyewitness-identification expert testimony is inadmissible per se.[259] This principle is based on the idea that allowing the testimony provides an opportunity for the expert to remark on the credibility of his opponent's witnesses.[260] Furthermore, the Eleventh Circuit reasoned that any potential identification problems could be parsed out by cross-examination and the jurors' common sense.[261] Although followed by a very small minority, the rule of per se exclusion remains a solution to which some courts still resort.

C. Limited Admissibility

The "limited admissibility" rule essentially holds that it is an abuse of discretion to prevent an eyewitness-identification expert from testifying when there is no substantial corroborating evidence in the case.[262] The Supreme Court of California, in *People v. McDonald*, was the first to adopt this rule.[263] The trial court excluded expert testimony on the unreliability of eyewitness identification because it would not only fail to assist the jury, but would also usurp the jury's role.[264] In an argument opposing the traditional rationales relied upon by courts in discretionary jurisdictions, the appellate court held that this was an abuse of discretion and provided an in-depth explanation of exactly how such testimony can assist the trier of fact and why it does not usurp the role of the jury.[265] It was conceded that some factors affecting identification, like lighting, distance, and duration, are within the general knowledge of the jury.[266] However, the defense expert's proposed testimony also would have addressed the effects on perception of "the observer's state of mind, his expectations, his focus of attention at the time, the suddenness of the incident, the stressfulness of the situation, and differences in the race and/or

256. *Id.*
257. State v. George, 645 N.W.2d 777, 790 (Neb. 2002).
258. *Id.*
259. United States v. Smith, 122 F.3d 1355, 1358 (11th Cir. 1997).
260. *Id.* at 1357.
261. *Id.*
262. State v. McMullen, 714 So. 2d 368, 371 (Fla. 1998).
263. 690 P.2d 709, 727 (Cal. 1984).
264. *Id.* at 724-26.
265. *Id.* at 722-27.
266. *Id.* at 715.

age of the observer and the observed."[267] The court concluded that the vast amount of information in these areas was outside the realm of common experience, such that its introduction through expert testimony would in fact aid the jury in its determination.[268]

The California Supreme Court also addressed the trial court's concern over eyewitness-identification expert testimony invading the province of the jury.[269] The court found that because the expert did not dispute the accuracy of an identification made by a specific witness in the case, he did not attempt to impose on the jury's credibility judgment.[270] Any information communicated by the expert would have explained the effects of the particular facts as they would pertain to the typical witness.[271] The jury still held onto the ability to assess the weight and credibility of the eyewitness testimony, thus the expert did not invade the province of the jury.[272] Furthermore, the jurors were not bound by the expert testimony as they could freely reject any or all of his testimony without restraint.[273]

The crux of the court's holding, however, was its determination of the particular circumstances under which exclusion is an abuse of discretion. The court unenthusiastically acknowledged the discretionary standard, while advocating for a new and different view.[274] This novel outlook holds exclusion in error when eyewitness identification is substantially uncorroborated and the expert testifies to psychological factors, apparent from the record, that are not commonly known to jurors.[275]

Montana has also adopted the limited admissibility rule, declaring it "an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."[276] While these limited circumstances do not arise in every case involving eyewitness identification, they are of substantial importance in providing guidance as to when eyewitness-identification expert testimony should be admitted without question. The limited admissibility rule does not do away with the discretionary rule, except under narrowly-defined circumstances. It may be best described as a subdivision of the discretionary rule.

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267. *Id.*
268. *Id.* at 721.
269. *Id.* at 722.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 727.
275. *Id.*
276. State v. DuBray, 2003 MT 255, ¶ 43, 317 Mont. 377, ¶ 43, 77 P.3d 247, ¶ 43.

The Third Circuit has promulgated a limited admissibility rule and is the only federal court to set such precedent. In *United States v. Downing*, the Third Circuit held that eyewitness-identification expert testimony must be admitted in some circumstances.[277] The court relied on the *Chapple* and *McDonald* holdings, finding their "narrow circumstances" rationales persuasive.[278] The court ruled that the testimony at issue would have assisted the jury in its determination and therefore complied with Federal Rule of Evidence 702.[279] It is worth noting that the Third Circuit and the Supreme Court of California established this rule several years before the first DNA exoneration in the United States in 1989.[280] Since then, 249 individuals have been exonerated based on DNA testing; in seventy-four percent of these cases, eyewitness misidentification was a determinant factor in conviction of the defendant.[281] These numbers expose the frailty of eyewitness identification, and the consequent significance of ensuring that every identification is accurate.

The Supreme Judicial Court of Massachusetts has hinted at the appropriateness of the limited admissibility rule. In *Commonwealth v. Santioli*, the trial court was faced with a proffer of eyewitness-identification expert testimony in a case in which the eyewitness identifications were corroborated by physical evidence.[282] The judge excluded the expert's testimony, due to substantial corroboration, and the Supreme Judicial Court of Massachusetts upheld the ruling.[283] Even so, the court took care to refer to the "narrow circumstances" rationale of *Chapple*, *McDonald*, and *Whaley*.[284] The court was implicitly guiding lower courts by supplying a detailed factual scenario upon which a finding of abuse of discretion may be predicated.[285] Furthermore, the court acknowledged the "disparate" results that may be reached under the discretionary rule and the lack of direction in this area.[286]

277. *See* United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) (agreeing with the *McDonald* holding, insofar as it pertains to the specific circumstances in which expert testimony may be helpful to the jury).

278. *Id.* at 1230-32.

279. *Id.* at 1232.

280. THE INNOCENCE PROJECT, FACTS ON POST-CONVICTION DNA EXONERATIONS (2009) http://www.innocenceproject.org/understand/Content/351.php.

281. *Id.*

282. 680 N.E.2d 1116, 1117-18 (Mass. 1997).

283. *Id.* at 1118-20.

284. *Id.* at 1119.

285. *See id.* at 1119-20 (recounting the holdings of those cases in which expert testimony was admitted under particular facts).

286. *Id.* at 1120.

This holding is not an overt adoption of the limited admissibility rule, but may be viewed as an approval of the rule.

This is merely a summary of the case law emerging from the three views toward the admissibility of eyewitness-identification expert testimony. As explained above, Oklahoma does not currently follow any of these three views.[287] Each one has proven itself workable in its respective jurisdictions, but further analysis is necessary to recommend the proper approach for Oklahoma courts.

V. Analysis of the Three Approaches to Admissibility in Order to Make a Suggestion for Oklahoma Courts

Due to the lack of case law specifically addressing eyewitness-identification expert testimony, Oklahoma basically has a blank slate from which to work. Accordingly, Oklahoma is in an ideal situation to clarify its position given the opportunity. Before determining how Oklahoma should handle the admissibility of eyewitness-identification expert testimony, it may be helpful to further scrutinize the three approaches identified by the *McMullen* court and the relevant scientific research as it relates to each view. Each approach must be critically examined before deciding the one to which Oklahoma should look for guidance.

A. Exploring the Discretionary Standard

The discretionary rule often leads to disparate outcomes which invite a meticulous critique of the rationales underlying the application of this rule. One element particularly lacking from the results reached under the discretionary view is consistency. Because courts have reached varying conclusions under the rule, it is important to examine the reasoning of the various holdings.

1. The Rationales for Exclusion are Often Unpersuasive

Judicial reasons for exclusion are often unpersuasive. They do not necessarily reflect the strength of the scientific research and are frequently unsupported. The following sub-parts examine these rationales and why they are unconvincing.

287. *See* discussion *supra* Part III.C.

a) Expert Testimony Does Not Invade the Province of the Jury

Each juror's job is to determine the weight and credibility accorded to a particular piece of evidence, including eyewitness testimony.[288] Eyewitness-identification expert testimony may interfere with this determination, thereby invading the province of the jury.[289]

To avoid this problem, an expert only testifies to the general factors that may affect any eyewitness identification, rather than the specific identification in the case.[290] Any concern that an expert is substituting his view for that of the jury is further obviated by the jury's freedom to reject any or all of the expert's testimony, just as it may reject the eyewitness's testimony.[291] Such freedom allows the jury to make its own credibility assessment, regardless of expert opinion.

b) Experts Often Testify to Matters That Are Not Commonly Known

In excluding eyewitness-identification expert testimony, some courts proceed on the notion that the subject of the testimony is within the common understanding or everyday experience of the lay juror.[292] This view is partially correct, as some factors that have an effect on eyewitness identification may be intuitive to the layman.[293] The effects of lighting, visual acuity, and observation distance on eyewitness identification are factors of which the lay juror is normally cognizant.[294] These factors can be fully and capably addressed on argument and cross-examination.[295] Certain other factors, however, are less conspicuous, more complicated, and run counterintuitive to common belief.[296] As to these factors, there is some dissonance between judicial belief and science.[297]

One prominent study has appropriately described such factors as "beyond the ken" of the ordinary juror.[298] This study was undertaken by three attorneys

288. *See, e.g.*, VERNON'S OKLA. FORMS 2D § 10-8 (2009) (charging the jury to "determine the credibility of each witness and the weight to be given the testimony of each witness").

289. *See* discussion *supra* Part IV.A.1a.

290. TAYLOR, *supra* note 33, at 93.

291. People v. McDonald, 690 P.2d 709, 722 (Cal. 1984).

292. *See* discussion *supra* Part IV.A.1.b.iii.

293. HON. D. DUFF MCKEE, CHALLENGE TO EYEWITNESS IDENTIFICATION THROUGH EXPERT TESTIMONY, 35 AM. JUR. PROOF OF FACTS 3D 1, 10 (2009).

294. *Id.*

295. *Id.*

296. *Id.*

297. *See* Schmechel et al., *supra* note 90, at 192 (demonstrating the sizeable disparity between the scientific findings and judicial impressions).

298. *Id.* at 177.

and one psychologist and aimed to determine "whether jurors understand, as a matter of common sense, what makes some eyewitness identifications more or less reliable that others."[299] In the absence of expert opinion, jurors are relegated to relying on their own intuitive beliefs to provide a measure for determining the accuracy of a particular eyewitness identification.[300] The results of the study indicate that these intuitive beliefs are often mistaken, both as to the general workings of memory and the specific factors affecting reliability.[301] The study also found that the common misperceptions often were found in substantial numbers amongst jurors.[302]

In general, jurors do not adequately understand the "complexity, selectivity, and malleability" of memory, and thus cannot practically assess the accuracy of identification.[303] Further inhibiting this assessment is their lack of basic understanding of the specific factors affecting perception and memory.[304] One factor is"weapon focus," where, in the presence of a weapon, a witness tends to focus on the weapon rather than the defendant's appearance.[305] The research indicates that identifications are more likely to be accurate when a gun is hidden compared to when it is in plain sight.[306] The Schmechel study further revealed that 37% of survey participants believed that the presence of a weapon increases reliability of eyewitness identification; 33% believed that it would not affect reliability or were unsure of its effect; and 30% believed that the presence of a weapon decreases reliability of perception and memory.[307] When two-thirds of potential jury members' common understanding does not comport with reality, the educational value of an eyewitness-identification expert witness is obvious, and exclusion of his testimony should be considered an abuse of discretion.

Another factor pertaining to reliability is whether an event was violent, and the associated stress under which the identification was made.[308] Studies have indicated that a witness's memory of an event is less likely to be accurate if the

299. *Id.* at 180. The researchers drafted a questionnaire consisting of roughly twenty questions designed to ascertain the average juror's knowledge of memory and eyewitness identification, and then contacted approximately 1,300 potential jurors in the Washington, D.C. area by telephone. Slightly over 1,000 participants completed the survey; the questions and responses are reproduced in the appendix to the article.

300. *Id.*

301. *Id.* at 204.

302. *Id.*

303. *Id.* at 195.

304. *Id.*

305. *Id.* at 196.

306. *Id.*

307. *Id.* at 197.

308. *Id.*

event is violent.[309] Here, slightly less than 40% of survey respondents thought that violence leads to a more reliable memory; 33% again believed that violence has no effect on reliability or were unsure of the effect; and 30% properly comprehended the effect of violence.[310] Eyewitness-identification expert testimony again seems necessary in these cases, and its exclusion should be considered an abuse of discretion.

Witnesses often have trouble estimating the duration of an event during which an identification is made.[311] The suggestion that identification accuracy increases as observation duration increases is certainly within the realm of juror common knowledge. What jurors might not understand, however, is that *time assessments themselves* are often overestimated.[312] The survey results indicate that only 37% of participants believed this finding to be true and 25% thought that witnesses actually underestimate the time of observation.[313]

It is commonly believed that there is a high correlation between witness confidence and accurate identification.[314] The research supporting this proposition is thin, however.[315] Accordingly, juries should not accord great weight to a witness expressing tremendous confidence in his identification. Confidence is affected not only by the conditions under which the observation occurred, but by subsequent interaction with police and other witnesses.[316] The Schmechel survey found that 40% of participants believed that confidence is an "excellent indicator" of reliability, whereas only 17% knew that the correlation between confidence and accuracy is weak.[317]

Cross-racial identification is another psychological factor to which experts frequently testify.[318] The basic theory, supported by research, is that witnesses generally have more trouble in identifying individuals of other races as opposed to individuals of their own race.[319] Cross-racial identification is a volatile topic in eyewitness identification, as it has been shown that at least 40% of the DNA exonerations based on eyewitness misidentification have

309. *Id.*
310. *Id.*
311. *Id.* at 197-98.
312. *Id.*
313. *Id.* at 198.
314. *Id.*
315. *Id.*
316. *Id.* at 198-99.
317. *Id.* at 199.
318. *See, e.g.*, White v. State, 926 P.2d 291, 294 (Nev. 1996) (Rose, J., dissenting) (listing cross-racial identification as one of several factors to which the expert should have been allowed to testify).
319. *Id.* at 200.

involved a cross-racial identification.[320] Thirty-six percent of survey-takers believed that cross-racial identifications are less reliable, and almost half of participants thought that cross-racial identifications are just as reliable as same-race identifications.[321] Judges often describe the above issues as matters of common sense.[322] The results of this survey demonstrate that they are not; thus, a judicial reevaluation of these principles should be in order.

Survey results like these above provide excellent guidelines to a trial judge. In exercising his discretion, a trial judge should go through a three-phase process. First, a judge should think about the traits of the individual witness, such as age, gender, race, intelligence, and life experience. At the same time, he must consider the facts of the case and search for memory-disruptive event factors, such as stress, "weapon focus," duration of the event, or cross-racial identification. Second, he must carefully consider whether any of these factors could have affected the identification in the case at hand. Third, he must examine the proffer of expert testimony to determine if it will be helpful in explaining the potential effects of the relevant factors. In order to be helpful, expert testimony must be sufficiently narrowly tailored, such that the factors to which the expert testifies are evident from the facts of the case. For example, expert testimony on cross-racial identification is only proper if the witness and the accused are of different races.

If any of the "beyond the ken" factors are of significant magnitude in determining reliability and the testimony is relevant, a judge should lean toward admissibility under the discretionary standard. Eyewitness-identification expert testimony is not just helpful in these instances—it is essential.

c) Jury Instructions and Cross-Examination are Inadequate Replacements for Expert Testimony

Another common judicial belief is that jury instructions regarding the frailties of eyewitness identification adequately fulfill the same purpose as expert testimony.[323] Although true in some instances, this belief is often mistaken.[324] This point is best illustrated by two examples from state court jury instructions.

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320. THE INNOCENCE PROJECT, *supra* note 280.

321. Schmechel et al., *supra* note 90, at 200.

322. *See* discussion *supra* Part IV.A.1.b.iii.

323. *See* discussion *supra* Part IV.A.1.b.ii.

324. *See* State v. Clopten, 2009 UT 84, ¶ 16, No. 20080631, 2009 WL 487740, at *4 (Utah Dec. 18, 2009) (acknowledging the "serious shortcomings" of jury instructions and cross-examination).

The first example is the Oklahoma Uniform Jury Instruction regarding eyewitness identification.[325] According to the Oklahoma Court of Criminal Appeals, this instruction is to be given when eyewitness identification is a central issue in the case and the reliability of the identification is seriously challenged.[326] The instruction's foremost directive is that eyewitness identifications should be "scrutinized with extreme care."[327] It also advises the jury to consider "the possibility of human error or mistake and the probable likeness or similarity of objects and persons."[328] Then, the instruction lists five factors that may affect the jury's credibility assessment of the eyewitness account.[329] These factors, general in nature, include: (1) whether the witness had a clear opportunity to perceive the defendant, (2) the certainty of the witness identification, (3) whether the witness failed to previously identify the defendant, (4) the certainty of the witness identification after cross-examination, and (5) the accuracy of the witness's prior description of the defendant.[330] Finally, the instruction charges the jury to find the defendant not guilty if any of these factors (or any other evidence) create a reasonable doubt as to the defendant's guilt.[331]

This instruction is too generic to be of any tangible benefit to the jury. An array of factors may affect any given identification, and the requisite jury instruction does nothing to promote juror awareness of any of these concerns. In fact, it twice emphasizes eyewitness certainty, which studies have shown does not correlate with the accuracy of eyewitness identification. On the other hand, eyewitness-identification expert testimony could amply explain each identification-related issue and its potential effect on witness identification.

A second, more comprehensive instruction relating to eyewitness testimony comes from the state of California.[332] In order to properly assess the witness's credibility, the instruction guides the jury to consider twelve factors, including the stress under which the observation occurred, cross-racial identification, and the time elapsed between the criminal act and the identification.[333] Even if more detailed than Oklahoma's instruction, the California instruction still fails to show the jury how to apply the factors to the case at hand. The listing of

325. VERNON'S OKLA. FORMS 2D § 9-19 (2009).

326. McDoulett v. State, 1984 OK CR 81, ¶ 9, 685 P.2d 978, 980.

327. VERNON'S OKLA. FORMS 2D § 9-19.

328. *Id.*

329. *Id.* This appears to be an incomplete list, as indicated by the inclusion of the words "such as."

330. *Id.*

331. *Id.*

332. CALIFORNIA JURY INSTRUCTIONS – CRIMINAL § 2.92 (2009).

333. *Id.*

each factor simply brings them to the jury's attention, but without more, there is no explanation of exactly what they mean and how they may affect identification.

Furthermore, jury instructions are given at the end of a trial, when it is too late to be of any assistance to the jury in appraising the reliability of an identification.[334] When used alone, jury instructions are of little help to a jury in appreciating the hazards of eyewitness identification.[335] Jury instructions should not be given in place of expert testimony, because expert testimony can explain the scientific findings on perception and memory much more substantially than a simple jury instruction.[336]

Judges also frequently suggest that cross-examination is a passable replacement for expert testimony.[337] This rationale assumes that counsel can bring the factors affecting eyewitness identification to the jury's attention. This approach is inadequate because it is premised on the belief that these factors are commonly known to lay jurors.[338] As discussed above,[339] many of these factors are not known or understood by the jury. Because they are beyond the layman's understanding, these factors cannot be sufficiently developed through argument and cross-examination. Furthermore, it has been noted that when a witness is confident in his identification, even if mistaken, cross-examination cannot effectively expose faults in his testimony.[340] Even if cross-examination can reveal the factors at issue, it is not helpful in the application of such factors to the facts of the case. Cross-examination is more apt to reveal consciously false eyewitness testimony than mistaken testimony given in good faith.[341] Thus, eyewitness-identification expert testimony is necessary to inform the jury of their potential effects on witness identification.[342]

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334. Sandra G. Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1517 (2008).

335. Alisa A. Johnson, *Utah Loosens Restrictions on Admitting Expert Testimony About Eyewitness IDs*, 86 CRIM. L. REP. 375 (forthcoming 2010).

336. Fradella, *supra* note 58, at 28.

337. *See* discussion *supra* Part IV.A.1.b.ii.

338. Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1038 (1995).

339. *See* discussion *supra* Part V.A.1.b.

340. United States v. Downing, 753 F.2d 1224, 1231, n.6 (3d Cir. 1985).

341. Johnson, *supra* note 335.

342. *Cf.* MCKEE, *supra* note 293, at 10 (acknowledging that cross-examination may be insufficient to fully reveal any weaknesses in eyewitness testimony).

2. The "Narrow Circumstances" Exception

Under the discretionary rule, a few courts have allowed eyewitness-identification expert testimony in the presence of "narrow circumstances."[343] What constitutes a narrow circumstance depends on the particular court. For example, the Arizona Supreme Court characterized the proper conditions as certain psychological factors that are beyond the common experience of the jury.[344] The New York Court of Appeals and the Supreme Court of South Carolina identified the appropriate circumstances as those involving uncorroborated identification.[345] Kentucky's highest court defined narrow circumstances as particular testimonial subjects, such as cross-racial identification and unconscious transference.[346] Allowing testimony under such circumstances will likely be upheld, while exclusion will likely be reversed as an abuse of discretion.[347] Thus, this division of the discretionary rule is a rare example of when the application of the discretionary rule is fairly predictable.

These cases, and others following similar rationales, are the most helpful under the discretionary rule because they specify when expert testimony is beneficial. Accordingly, they provide clear direction under a rule that otherwise generally lacks it. Before deciding whether to admit or exclude expert testimony, a trial court should carefully examine the facts of the case and determine whether they are similarly situated to the "particular" or "narrow" circumstances acknowledged by other courts. If so, an inclination toward admissibility may be proper.

B. Dismissing the Per Se Rule

Any thought given to adopting a per se rule of inadmissibility should be summarily dismissed, as it would be much too harsh. In the absence of eyewitness-identification expert testimony, a defendant's primary opportunity to inform the jurors of the potential unreliability of eyewitness testimony comes through a jury instruction or cross-examination.[348] As explained above,[349] these methods are deficient proxies for expert testimony. Eyewitness-identification expert testimony is intended to reduce the possibility

343. *See* discussion *supra* Part IV.A.2.

344. State v. Chapple, 660 P.2d 1208, 1223-24 (Ariz. 1983).

345. People v. LeGrand, 867 N.E.2d 374, 378 (N.Y. 2007); State v. Whaley, 406 S.E.2d 369, 372 (S.C. 1991).

346. Commonwealth v. Christie, 98 S.W.3d 485, 491 (Ky. 2002).

347. *See* discussion *supra* Part IV.A.2.

348. *Cf.* Woocher, *supra* note 142, at 1029 (identifying jury instructions and cross-examination, among others, as inadequate methods of exposing misidentification).

349. *See* discussion *supra* Part V.A.1.c.

of false identification.[350] As the number of misidentifications grows, the significance of expert testimony on eyewitness reliability grows proportionately. If it is categorically excluded, jurors are on their own, and often will not be able to properly apply the relevant theories to the facts of the case. Consequently, the probability of wrongful conviction will rise and, in turn, kindle the flame expert testimony is designed to extinguish.

C. Embracing the Limited Admissibility Rule

The limited admissibility rule only applies in cases where the identification is uncorroborated and the jury does not understand the subject of the expert testimony.[351] In all other cases, the trial judge retains discretion to admit or exclude expert testimony.[352] Even in these instances, eyewitness-identification expert testimony is often critical to a just resolution of the case. When eyewitness identification is the only evidence against the defendant, the identification must be accurate. In order to determine accuracy, the jury must be aware of the factors affecting the identification. Eyewitness-identification expert testimony is the primary tool to promote such awareness.

The limited admissibility rule only applies in the narrowest of circumstances, such that relatively few cases meet its requirements. Even so, the rule is an improved version of the discretionary rule. This rule guarantees consistent rulings when the identification at issue is uncorroborated and the subjects of the expert's testimony are normally unknown to, or misunderstood by, the jury.[353] If a trial judge does not allow expert testimony under these conditions, it should be overturned as an abuse of discretion.[354] Accordingly, the limited admissibility rule provides the uniformity so often missing from the pure discretionary rule: an explicit statement of what constitutes an abuse of discretion.

Due to its restricted application, many cases involving eyewitness identification do not fall within the bounds of the rule.[355] Nevertheless, the

350. *See* Kristy A. Martire & Richard I. Kemp, *The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony*, 33 LAW & HUM. BEHAV. 225, 225 (2009) (identifying expert testimony as a potential "safeguard" against erroneous conviction based on eyewitness misidentification).

351. *See, e.g.*, People v. McDonald, 690 P.2d 709, 727 (Cal. 1984) (describing the circumstances under which "it will ordinarily be error to exclude [eyewitness-identification expert] testimony").

352. *See id.* (reinforcing the notion that the admissibility of expert testimony is normally left to the discretion of the trial judge).

353. *See id.* (using the word "ordinarily" in the court's holding indicates some measure of consistency).

354. *Id.*

355. *Cf.* United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) (affirming that

implications of the rule for the cases it does reach are significant.[356] The rule's firmness serves as a base guideline for trial judges and eliminates the uncertainty so deeply rooted in the discretionary rule.

VI. Conclusion

It is indisputable that eyewitness misidentification occurs at an astonishing frequency. The exact number of misidentifications can never truly be known, but the number of exonerations in cases in which eyewitness testimony is a principal factor in conviction may serve as an indicator. Since 1989, approximately 185 people have been exonerated after being wrongfully convicted due to misidentification.[357] This number of wrongful convictions does not represent the ascertainment of the truth or just determination of proceedings, two stated goals of the Oklahoma Evidence Code.[358] In order to help prevent the occurrence of mistaken identification in Oklahoma trials and promote the goals of the Code, courts should allow the use of eyewitness-identification expert testimony.

Because Oklahoma does not have an established rule regarding the admissibility of eyewitness-identification expert testimony, it is in a unique position to determine exactly how this question should be answered. The best solution is an adoption of the limited admissibility rule for cases involving an uncorroborated identification and factors that are beyond the knowledge of jurors. In these circumstances, both courts and practitioners can presuppose that eyewitness-identification expert testimony is admissible. This certainty will allow for greater efficiency and practicality in the criminal justice system. Admissibility will increase the likelihood that the jury is responsive to the psychological factors that can render eyewitness identification unreliable.

In theory, the limited admissibility rule is a feasible solution to the question of when eyewitness-identification expert testimony should be admitted. Its effect is limited, as the rule only applies to circumstances that arise infrequently and is not broad enough to govern all cases in which eyewitness-identification expert testimony is necessary. Therefore, in all other cases involving a proffer of eyewitness-identification expert testimony, the trial judge should retain the discretion to admit or deny the testimony. In

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application of the limited admissibility is triggered only "under certain circumstances").

356. *Cf.* State v. DuBray, 2003 MT 255, ¶ 43, 317 Mont. 377, 387-88, 77 P.3d 247, 255 (Mont. 2003) (declaring explicitly that it "shall be an abuse of discretion" to exclude expert testimony when a witness identification is uncorroborated).

357. *See* THE INNOCENCE PROJECT, *supra* note 280 (showing that seventy-four percent of 249 exonerations were convictions premised on erroneous identification).

358. 12 OKLA. STAT. § 2102 (Supp. 2003).

exercising his discretion, a trial judge should be sensitive to several accompanying determinants. First, it is important to take note of the factors to which the expert will testify. If the accompanying research indicates that the factors are not commonly understood by the layperson (or the judge for that matter), such as unconscious transference or cross-racial identification, then the judge's inclination should be in favor of admissibility. If it is a factor that is commonly understood, such as the effect of lighting, then a judge need not be inclined to admit the testimony, but still may do so at his discretion.

Furthermore, a judge must also consider whether the testimony "fits" the facts of the case. That is, the testimony must be in unity with the facts of the case. This is essentially a determination of relevancy. Additionally, a judge must consider whether a jury instruction or cross-examination can adequately expose any weakness in the identification at issue. The judge must be conscious of the aptitude and experience of the jurors and be careful not to project his own understanding onto the jury. Upon considering these issues, it may be determined that eyewitness-identification expert testimony is unnecessary. This determination should only be reached after a careful weighing of the subject matter of the proffered testimony and the circumstances of the case. In no case should expert testimony be denied without a thorough inquiry into its application to the case and identification at hand.

These proposals are merely suggestions. They will certainly not eliminate the problem of misidentification, but hopefully will help to reduce its frequency. Oklahoma courts have a unique opportunity to stand on the front lines of the fight against misidentification. One can only hope they will take advantage of it and give serious consideration to the admission of eyewitness-identification expert testimony.

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