IN THE
MISSOURI SUPREME COURT
SC# 98088

STATE OF MISSOURI,

Respondent,

vs.

KANE CARPENTER,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI
19TH JUDICIAL CIRCUIT, DIVISION IV
THE HONORABLE PATRICIA S. JOYCE, PRESIDING

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Kane Carpenter appeals his conviction after a jury trial in Cole County, Missouri, for one count of robbery in the first degree, Section 569.020. Cole County is within the jurisdiction of the Western District Court of Appeals. Section 477.070. On April 18, 2018, Judge Patricia S. Joyce signed a final judgment wherein she sentenced Carpenter to ten years' imprisonment (D35, p.1; Appx. 11-12).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, § 3, Mo. Const. Following an opinion by that court, this Court granted Carpenter's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const.; Rule 83.04.

STATEMENT OF FACTS

On Saturday, October 23, 2016, shortly before 8:00 p.m., Jacob Williams was walking up a hill on East Capitol Avenue in Jefferson City, when he looked behind him (Tr. 110, 112-13).[1] Two men wearing hoodies with the hoods over their heads and with their heads down were walking toward Williams at a fast pace (Tr. 113). The black men made Williams suspicious, so Williams took out his ear buds and started to cross the street (Tr. 113, 126). The men followed (Tr. 113).

In the middle of the road, one of the men asked to borrow Williams' phone (Tr. 114-16). Williams lied and said he did not have a phone (Tr. 114). One of the men lifted his shirt and said, "I have a weapon. Give me what you have" (Tr. 114). In the man's waistband, Williams saw a handle of what appeared to be a .38 pistol (Tr. 115). The handle had a black piece in the middle and was wood-grained (Tr. 115). Williams was scared, fearing for his life (Tr. 115).

Williams focused his attention on the gun and trying to find a way out of the situation (Tr. 116). As long as the gun was exposed – about twenty seconds – Williams focused solely on the gun "staring straight at it" (Tr. 116). Otherwise, he looked between the robbers and the street, trying to figure a way to get away (Tr. 116). Williams estimated that he looked at the robber anywhere from 20 to 30 or 45 seconds (Tr. 116, 127).

During the robbery, Williams raised his hands (Tr. 114). The larger of the two men, the one with the gun, took Williams' phone from his hand and his e-cigarette from his

[1] Williams was twenty-one years old at the time of trial (Tr. 110), so he was either nineteen or twenty at the time of the crime.

pocket (Tr. 114). This man was the same height as Williams but a little bigger, and he wore a red jacket (Tr. 113-14). The second man, who was slimmer and taller than Williams, took Williams' e-cigarette liquid from his chest pocket (Tr. 113, 118). He wore a lighter colored jacket (Tr. 124).[2] The second man stood as to block Williams from getting away (Tr. 117). After the men took Williams' things, they slowly backed away and then ran (Tr. 119). Williams had never seen the two men before (Tr. 127).

The robbery occurred on a dark street (Tr. 114). A streetlight within 100 yards lit the area (Tr. 116). Although the lighting was not exceptionally bright, Williams said he could see (Tr. 116).

The two men ran down East Capitol Avenue and turned left on Lafayette Street before running down an alleyway (Tr. 119). Williams chased them down Lafayette, some twenty yards behind them, but did not enter the alleyway (Tr. 119, 121). Near the alleyway, the two ducked in by some homes (Tr. 121).

As he was running on Lafayette, Williams saw some pedestrians and borrowed their phone to call 911 (Tr. 121). At 7:49 p.m., Williams reported that he had been robbed by two African-American men (Tr. 126). One wore a black or a lighter colored hoodie, and the other, a red hoodie (Tr. 124, 126-27).

Jefferson City Police Officer Schuler and officer-in-training Fisher responded to the call (Tr. 133-34). Williams was shaken up and talking fast (Tr. 134). The officers calmed

[2] Williams also testified it was a black hoodie (Tr. 126-27).

him down so that he could tell them what happened, and they could relay the information to other officers (Tr. 134).

Sergeant Andy Lenart drove to High Street and Lafayette, where Williams was speaking with the two officers (Tr. 142). He pulled up and quickly asked Williams which direction the robbers had run, and then he drove east on High Street and north on Cherry (Tr. 143). He did not activate his police siren or lights (Tr. 152). When Lenart turned on Cherry Street, he saw two "suspects," two black teens, walking eastbound across Cherry at Commercial Way, an area with significant hills (Tr. 143, 153, 160). They were the only ones in the area (Tr. 159). At 7:52 p.m., he reported to the dispatcher that he saw two "suspects" at Commercial Way and Cherry (Tr. 144).

The suspects were eighteen-year-old Robert Scott and seventeen-year-old Kane Carpenter (Tr. 144; D35, p.1; Ex. 17). Lenart drove halfway up the block, parked his car, and got out (Tr. Tr. 144). He asked the teenagers to talk to him (Tr. 144; D35, p.1; Ex. 17). Carpenter immediately stopped and cooperated with Lenart (Tr. 153). He was breathing heavily and sweating (Tr. 159-60). He wore a white tee-shirt, not a hoodie, and Lenart did not see him throw anything (Tr. 124, 131, 153, 157). Scott initially stopped but then took a few steps away from Lenart (Tr. 152). Lenart focused on Scott, fearing he might bolt (Tr. 152).

Sergeant Lenart coordinated efforts to conduct a show-up (Tr. 147, 154). Five minutes after the 911 call, Fisher and Schuler put Williams in their patrol car and told him they found the people who might be responsible for the crime (Tr. 122, 130). They told Williams they found the two suspects nearby on Cherry Street (Tr. 122, 130). This was

likely Officer Fisher's first involvement with a show-up (136-37). Fisher vouched that he and Schuler instructed Williams that they had two people who could be the suspects, but may not be, but they matched the description and were "kind of" in the area (Tr. 135). They told Williams that they did not want him to falsely identify anyone and to let the officers know if he could not positively identify the people; otherwise the real robbers would be loose on the street (Tr. 135-36).

At Cherry Street, two teens in t-shirts sat handcuffed on the curb (Tr. 122, 124, 131). Police officers were collecting items from the area (Tr. 131). It was dark; officers shone flashlights on the two teens and Fisher shone the car's spotlight on them and asked Williams if he could positively identify them or not (Tr. 122, 135-37). Williams identified Carpenter and Scott and said he was 100% certain Carpenter had robbed him (Tr. 122-24, 143). No line-up was conducted in this case (Tr. 137-38).[3]

Williams could not recall anything about the first robber's shoes or pants, other than he wore a belt (Tr. 128-29). He did not recall anything about scars or tattoos (Tr. 129). He thought the robber had a goatee and could have had cornrow dreadlocks (Tr. 130). Williams said his memory had been failing him when he previously described the first robber's hoodie as black; it was red (Tr. 130). He described the first robber's nose as short, broad, and wide (Tr. 130). Williams did not recall whether the second robber had facial hair or scars, and he could not describe the man's pants or shoes (Tr. 128).

[3] Sergeant Lenart testified that within an hour of Carpenter's arrest, the police would have taken him to the county jail, fingerprinted him, gotten his height and weight entered on the computer, and taken a booking photograph (Tr. 155-56).

Police found evidence on Commercial Way and near the intersection of Commercial Way and Cherry Street (Tr. 124, 145, 147-48, 151, 162, 164-65). Williams' cell phone and ear buds were in a bush about six or seven feet from where Sergeant Lenart stopped Carpenter (Tr. 124, 145, 147). Williams' e-cigarette was found on Commercial Way, about fifteen to twenty feet from Lafayette Street (Tr. 148). His bottle of nicotine fluid was found in a grassy area in the alleyway (Tr. 151). Scott's intermediate driver's license was found in the grass on Commercial Way about half-way between Lafayette and Cherry (Tr. 148, 162, 164). A jacket and a black hooded sweatshirt (also referred to as a sweater and also as a jacket) were found tucked against a house near Commercial Way, at 210 Cherry (Tr. 162, 164-65, 167). Williams did not say whether the clothing found against the house was the same clothing worn by the robbers. The police searched for a gun on Lafayette Street, Commercial Way, and Cherry Street but could not find one (Tr. 154, 156).

The defense case was limited to cross-examination of the State's witnesses and admission of Defense Exhibit A, a booking photo of Carpenter, showing his appearance on the night of his arrest (Tr. 171-172, Def. Ex. A). The defense requested that Dr. James Lampinen be allowed to testify as an expert on eyewitness identification (Def. Ex. B, Tr. 172-173).

The defense offer of proof in support of Dr. Lampinen's testimony included scientific evidence that a witness' confidence level in his identification does not correlate with the accuracy of the identification (Tr. 26-27). A witness' stress, including that caused from focusing on a weapon, can adversely affect the accuracy of the identification (Tr. 15-16, 24). Cross-racial identifications are less accurate than same-race identifications (Tr.

23-24). Dr. Lampinen explained the scientific process of memory – encoding, storage, and retrieval (Tr. 14-17).

A witness' memory can be contaminated from identification procedures, including multiple showing of a suspect to a witness (Tr. 28-29) and the suggestiveness of show-ups (Tr. 29-35). Witnesses are poor at estimating the duration of an event (Tr. 25) and a low correlation exists between their description of the suspect and the accuracy of their identification (Tr. 27-28). Accurate facial recognition depends on a number of factors, including viewing angles, distance, lighting, obstructions, length of exposure, and the contrast sensitivity allowing recognition of details (Tr. 15, 18, 19-20, 21).

Dr. Lampinen's credentials established him as a distinguished professor in the Department of Psychological Science at the University of Arkansas, having earned his Ph.D. in cognopsychology from Northwestern University and experience teaching cognitive psychology, perception, advanced research, general psychology, statistics, and a variety of seminars on eyewitness identification, memory, and perception (Tr. 11-13).

Dr. Lampinen had researched memory, perception, and eyewitness identification and was familiar with the research literature on those topics (Tr. 12). He published two books on these topics, "The Psychology of Eyewitness Identification" and "Memory 101" and two edited volumes, "Protecting Children from Violence," and "The Self and Memory" (Tr. 12-13). His peer-reviewed articles on these topics had been published in scientific journals, including "Applied Cognopsychology," the "Journal of Applied Research in Memory and Cognition," the "Journal of Experimental Psychology: Learning, Memory, and Cognition," and "Law and Human Behavior" (Tr. 13).

Dr. Lampinen was a certified law enforcement instructor in the state of Arkansas and as such, had taught law enforcement on eyewitness identification procedure (Tr. 13). He also advised the Arkansas Association of Chiefs of Police on eyewitness identification policies. (Tr. 14).

The trial court denied this proffered testimony without explanation (Tr. 38, Tr. 171-172). It instructed the jury that presence at the scene alone is not sufficient to make a defendant responsible for the offense (Inst. 10; D28, p. 3); and listed factors to consider when evaluating the eyewitness identification testimony (Instruction 9; D28, p. 1-2).

In its closing argument, the State argued that the police's quick action made this case (Tr. 177). According to the State, the eyewitness, Jacob Williams, was unbiased and had no reason to lie (Tr. 179). The State emphasized that Williams was "100 percent certain" of his identification, repeating the witness' confidence level six times during the closing argument (Tr. 180, 181, 184, 192). The State criticized the defense for "clawing" at Williams' credibility and painting him as a criminal (Tr. 192).

During the jury's deliberation, jurors asked to see all the evidence that had been assembled (Tr. 194). They had questions (Tr. 194). The trial judge did not make a record of the questions, but defense counsel indicated that, "one of those questions was whether or not fingerprints had been taken" (D31, p. 3). The court instructed the jury to "be guided as the evidence and instructions has been given." (Tr. 196). A little more than an hour after the court's response, the jury reached a verdict finding Kane Carpenter guilty of robbery in the first degree (Tr. 196). The trial court sentenced him to ten years' imprisonment (Tr. 209; Appx. 11-12). Notice of appeal was timely filed (D37, p. 102).

POINT RELIED ON

The trial court erred and abused its discretion in barring Dr. James Lampinen, an expert in the field of eyewitness identification, from testifying for the defense about the science and inherent weaknesses of eyewitness identifications, particularly when a "show up" is conducted, because this ruling violated Carpenter's rights to present a defense, due process, and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Dr. Lampinen's testimony was critical to Carpenter's defense of mistaken identity and likely would have resulted in a different outcome due to the fact that the State's case hinged on Jacob Williams' identification of Carpenter as one of the two men involved in the robbery. Dr. Lampinen's testimony would not have invaded the province of the jury, but instead would have assisted the jury in its evaluation of the evidence.

State ex rel. Gardner v. Wright, 562 S.W.3d 311 (Mo. App. E.D. 2018);

State v. Clopton, 223 P.3d 1103 (Utah 2009);

State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988);

State v. Whitmill, 780 S.W.2d 45 (Mo. banc 1989);

United States Constitution, Amendments V, VI, and XIV;

Missouri Constitution, Article I, sections 10 and 18(a); and

Section 490.065.

ARGUMENT

The trial court erred and abused its discretion in barring Dr. James Lampinen, an expert in the field of eyewitness identification, from testifying for the defense about the science and inherent weaknesses of eyewitness identifications, particularly when a "show up" is conducted, because this ruling violated Carpenter's rights to present a defense, due process, and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Dr. Lampinen's testimony was critical to Carpenter's defense of mistaken identity and likely would have resulted in a different outcome due to the fact that the State's case hinged on Jacob Williams' identification of Carpenter as one of the two men involved in the robbery. Dr. Lampinen's testimony would not have invaded the province of the jury, but instead would have assisted the jury in its evaluation of the evidence.

Kane Carpenter was unable to present his defense and provide jurors with relevant information so they could decide the case utilizing reliable, scientific evidence. The exclusion of Dr. Lampinen, an expert on eyewitness identification, harmed Carpenter. The jury likely thought the police did a great job, did great police work, and their quick action made the case (Tr. 177, 180). In truth, the police used the most suggestive procedure possible – a show-up of Carpenter and his co-defendant (Tr. 122, 124, 131). The police did not follow guidelines for good identification procedures (blind administration, line-up with proper fillers, and proper recording of the procedure) (Tr. 26). Making matters worse, the police likely contaminated the witness' memory, suggesting they had suspects in

custody, using a show-up, and conducting the identification procedure while collecting evidence at the scene (Tr. 122, 130, 135).

The jury must have thought Williams' 100 percent confidence in his identification meant it was reliable; in truth, no matter how many times he and the prosecutor said he was 100 percent certain (Tr. 122-124, 143, 180, 181, 184, 192), that did not correlate with a reliable identification (Tr. 26). The jurors were left to think Williams was reliable because he was on high alert, afraid for his life, and focused on the gun (Tr. 114-115). They didn't get a chance to hear the truth – that stress and gun focus, in particular, detract from the identification process and decrease reliability (Tr. 16, 24). The jury heard nothing about cross-racial identification and should have heard the scientific evidence about the cross-racial effect – we are better at identifying those of our own race, not those of another (Tr. at 23-24). The jury likely thought that the witness' memory was good, given that the identification occurred so quickly after the crime. The jurors were not allowed to hear how memory actually works: encoding, storage and retrieval, and that contamination can occur at any of these stages (Tr. 14-17).

The only reason the jury did not hear this scientific evidence in Carpenter's defense was that the State objected (D20, p.1-5) and the trial court ruled that the testimony was inadmissible (Tr. 38, 172). Many courts, trial and appellate, read *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988), and *State v. Whitmill*, 780 S.W.2d 45, 47 (Mo. banc 1989), as an absolute bar to expert testimony on eyewitness identification. Thirty years later, the science shows it is time for a change. Section 490.065 shows it is time for a change. No

rational reason exists to treat this type of expert testimony any differently than other expert testimony when assessing its admissibility.

Carpenter's right to present a defense and his right to a fair trial require a change. Without expert testimony, defense counsel could not show the jury the truth, that the eyewitness testimony was unreliable. The jury was left with the impression that defense counsel was challenging the witness' credibility and painting him as a criminal, unworthy of belief (Tr. 192). But, the truth here, as with many misidentifications, is that witnesses can be sincere, but mistaken. They have no basis to know how their identifications have been contaminated. As a result, cross-examination is not an adequate substitute for expert testimony. The jury should hear all the relevant evidence to decide the case. This Court should reverse, overrule *Lawhorn* and *Whitmill*, and rule that expert testimony on eyewitness identification is admissible at trial.

I. Preservation

This issue is preserved for review. Pretrial, Carpenter moved that he be allowed to present expert testimony on the reliability of eyewitness identification (D17, p.1-7). The next day, the State filed a motion asking the court to bar the defense from presenting such evidence (D20, p.1-5). The State argued that the expert would only be testifying regarding general principles of eyewitness identification, not about the victim in particular (D20, p.2-3). At a pretrial hearing, defense counsel presented the testimony of Dr. James Lampinen as an offer of proof (Tr. 11-35). Without elaboration, the court sustained the State's motion to exclude (Supp. Tr. 32; Tr. 38). After the State rested, defense counsel again asked to

present the testimony of Dr. Lampinen (Tr. 171-72). The court again denied the request (Tr. 172). The issue is included in the motion for new trial (D31, p.10-14).

II. Standard of Review

The determination of whether to admit evidence is within the sound discretion of the trial court. *State v. Zink*, 181 S.W.3d 66, 72 (2005). A court abuses its discretion when it makes a ruling that is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id*. at 72-73. The court reviews for prejudice, not mere error. *State v. Forrest*, 183 S.W.3d 218, 223-24 (Mo. banc 2006). However, "the erroneous exclusion of evidence in a criminal case creates a rebuttable presumption of prejudice." *State v. Miller*, 372 S.W.3d 455, 472 (Mo. banc 2012).

III. Kane Carpenter Had the Right to Present His Defense

A defendant in a criminal case has a constitutional right to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984); U.S. Const. Amend. V, VI, and XIV; Mo. Const., Art. I, § 10, 18(a). The right to present a defense is "a fundamental element of due process of law" and is applicable to the states through the due process clause of the Fourteenth Amendment. *Washington* v. *Texas*, 388 U.S. 14, 17-19 (1967).

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers v. Mississippi, 410 U.S. 284, 294 (1973). The opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence…when such evidence is central to the defendant's claim of innocence." *Id*.

IV. Missouri Courts Must Allow Expert Testimony on Eyewitness Identification to Aid the Jury and Avoid Wrongful Convictions

Thirty-one years ago, this Court addressed the admissibility of expert testimony on eyewitness identification in *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988). At that time, most courts upheld the trial court's discretion to exclude expert testimony on eyewitness identification since jurors could rely on their own experiences in deciding the weight to be given to eyewitness testimony. *Id*. at 823. The Court held that there was no need for expert testimony on issues relating to eyewitness identification such as the cross-racial effect or the effect of stress and the passage of time on eyewitness identification, because these topics were within the general realm of the jurors' common experience. *Id.* at 823. The defendant's due process rights were protected, the Court concluded, because he had a full opportunity to cross-examine the witness and to argue the issue in closing. *Id*.

One year later, in *State v. Whitmill*, 780 S.W.2d 45, 47 (Mo. banc 1989), the Court upheld a per se exclusionary rule for expert testimony on eyewitness identification. It held that the defendant had sufficient opportunity to warn the jurors of the difficulties inherent in eyewitness identification though cross-examination of the witnesses, opening statement and closing argument, and the court's instruction on the factors to be considered when assessing eyewitness identification evidence. *Id*.

Much has changed in the three decades since these decisions were handed down. First, the Missouri legislature has amended Section 490.065 to incorporate a standard for admission of expert testimony that, while giving the court a role as gatekeeper, favors

admissibility and allowing the jury to assess weight and credibility. Second, many courts that address the issue now hold that, when the State's case hinges on eyewitness testimony, expert testimony on eyewitness identification is admissible to address the factors relating to the reliability of the identification.

A. Under Section 490.065, RSMo 2017, Expert Testimony is Admissible if it is Relevant, Reliable, and Proffered by a Qualified Expert

Traditionally, Missouri followed the *Frye* standard for admissibility of scientific expert testimony in a criminal case. *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 315-16 (Mo. App. E.D. 2018); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). An expert opinion based on a scientific technique was inadmissible unless the scientific technique was "generally accepted" as reliable in the relevant scientific community. *Frye*, 293 F. at 1014. This was a "rigid" and "austere" standard. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588-89 (1993). As to non-scientific expert testimony in a criminal case, Missouri courts followed general principles, assessing whether the testimony would assist the jury because the subject was outside the jurors' knowledge or experience. *Wright*, 562 S.W.3d at 316-17.

However, the Missouri legislature amended Section 490.065, effective August 28, 2017. *Id*. (Appx. 2-3). The legislature left unchanged the first subsection, applying to specified civil cases. *Id*. But it added a subsection for criminal cases and those civil cases not covered by subsection one. *Id*. This new subsection adopted, word-for-word, the Federal Rules of Evidence. *Id*. at 317.

Subsection 2 of Section 490.065 sets forth the requirements for admission of expert testimony in Missouri criminal trials:

> 2. In all actions except those to which subsection 1 of this section applies:
>
> (1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case.

(Appx. 2-3).

Because Section 490.065.2 mirrors the Federal Rules of Evidence, federal precedents construing those rules provide "strong persuasive authority for how we should view admissibility under our statute." *Wright*, 562 S.W.3d at 317 (citing *Huffman v. State*, 703 S.W.2d 566, 568 (Mo. App. S.D. 1986)). In *Daubert*, the Supreme Court contrasted *Frye*'s austere, rigid approach to the Federal Rules' "permissive backdrop," "liberal thrust," and "general approach of relaxing the traditional barriers to "opinion' testimony." *Daubert*, 509 U.S. at 588-89 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

Daubert instructed that courts must engage in a flexible inquiry focusing on relevance and reliability. 509 U.S. at 594-95. The court's gatekeeping function boils down to whether (1) the expert is qualified; (2) the testimony is relevant: and (3) the testimony

is reliable. *Wright*, 562 S.W.3d at 319 (citing federal cases). Evidence is relevant if it would assist the trier of fact, *i.e.*, if it "was helpful to the jury because it has a connection to the case." *Wright*, 562 S.W.3d at 317. The relevance standard is a liberal one; evidence is 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 than it would be without the evidence." *Daubert*, 509 U.S. at 587. In determining reliability, the trial court may consider the following factors, among others: "(1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied and the existence and maintenance of standards and controls; and (4) whether the technique or theory has been generally accepted in the scientific community." *Wright*, 562 S.W.3d at 317 (citing *Daubert*, 509 U.S. at 593-94).

The Court dismissed the fear that the relaxed standard under the Rules would result in a "free-for-all" in which juries would be confused by irrational pseudoscientific assertions. *Daubert*, 509 U.S. at 595. Rather than excluding evidence outright as under the uncompromising *Frye* test, courts should allow the jury to consider and weigh the evidence subject to the safeguards already in place. *Id*. at 595-96. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id*. at 595.

Mirroring the federal rules, Section 490.065.2 requires only that expert testimony be relevant, reliable, and proffered by a qualified expert. *Wright*, 562 S.W.3d at 319.

Evidence is relevant if it "contains specialized knowledge that will assist the trier of fact to understand the evidence." *Id.*; see also *State v. Suttles*, 581 S.W.3d 137, 145 (Mo. App. E.D. 2019) (evidence is relevant if it "assist[s] the jury in areas that are outside of everyday experience or lay experience"). Evidence is reliable if it is "based on sufficient facts or data, reliable principles and methods and reliable application thereof." *Wright, 562 S.W.3d at 319; see also Jones v. City of Kansas City*, 569 S.W.3d 42, 54 (Mo. App. W.D. 2019) (applying § 490.065.2). Finally, an expert is qualified by "knowledge, skill, experience, training, or education." Section 490.065.2(1) (Appx. 2-3).

The trial court serves as a gatekeeper, but its role "is not intended to serve as a replacement for the adversary system." *Wright*, 562 S.W.3d at 317. As long as testimony is relevant, reliable, and proffered by a qualified expert, it is admissible. *Id*. at 319. Its weight and credibility, then, are the province of the jury. *State v. Boss*, 577 S.W.3d 509, 519 (Mo. App. W.D. 2019). As *Daubert* stressed, this is consistent "with the 'liberal thrust' of the rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'" *Wright*, 562 S.W.3d at 318 (quoting *Daubert*, 509 U.S. at 588).

B. Other Courts Routinely Allow Expert Testimony on Eyewitness Identification

When this Court decided *Lawhorn* and *Whitmill*, DNA testing was in its infancy as a tool for excluding innocent people from guilt.[4] In the thirty years that have followed, numerous studies and the lessons learned from DNA exonerations have demonstrated that

[4] The Missouri State Highway Patrol Crime Lab had its first DNA case in October 1990. https://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CLD/documents/CrimeLabDivision-History.pdf, at p. 5.

eyewitness identification carries significant risk of error.[5] Yet the problems with eyewitness identification are counterintuitive and outside the juror's everyday experience.[6] With the benefit of thirty years' experience and knowledge, this Court should follow courts across the country in recognizing that expert testimony on eyewitness identification is essential to ensure that jurors understand the limitations of eyewitness identification so the jurors may gauge its weight accurately.

The Supreme Court itself has acknowledged that "expert testimony on the hazards of eyewitness identification evidence" is a valid safeguard against wrongful convictions. *Perry v. New Hampshire*, 565 U.S. 228, 247 (2012). In doing so, the Court cited *State v. Clopton*, 223 P.3d 1103, 1113 (Utah 2009) ("We expect ... that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence]")).

In *Clopton*, the Supreme Court of Utah held that expert testimony on eyewitness identification "should be admitted whenever it meets the requirements of Rule 702 of the Utah Rules of Evidence." *Clopton*, 223 P.3d at 1112.[7] It further stressed, "We expect this

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[5] See, e.g., Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013 (1995); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1273, 1276 (2005).

[6] Studies have shown that that much of what is known about eyewitness identification is not "within the jury's common knowledge." Handberg, *supra* fn. 5, at 1035 (describing study in which 500 participants answered questions designed to test their knowledge of factors that influence eyewitness identifications). "[J]urors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell L.Rev. 1097, 1099 n. 7 (2003).

[7] Utah's Rule 702 is largely analogous to Section 490.065.2, RSMo.

application of Rule 702 will result in the liberal and routine admission of eyewitness expert testimony, particularly in cases where, as here, eyewitnesses are identifying a defendant not well known to them." *Id*. The jury's decision-making abilities must be supported by the best information available. *Id*. at 1118-19.

> If unreliable identifications are not addressed properly at trial, then there exists an unacceptable risk of the innocent being punished and dangerous criminals remaining at large. We therefore hold that, in cases where eyewitnesses are identifying a stranger and one or more established factors affecting accuracy are present, the testimony of a qualified expert is both reliable and helpful, as required by Rule 702. Such eyewitness expert testimony should therefore be routinely admitted, regardless of whether the trial judge decides to issue a cautionary instruction.

Id. at 1118.

In *State v. Guilbert*, 49 A3d 705, 731 (Conn. 2012), the Connecticut Supreme Court stressed that "the reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror... Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions, and expert testimony is an effective way to educate jurors about the risks of misidentification." The Court overruled its prior holding that such expert testimony was generally inadmissible. *Id*. at 734. Instead, expert testimony on eyewitness identification is subject to the same reliability and relevant requirements as any other expert testimony. *Id*.

In *Commonwealth v. Christie,* 98 S.W.3d 485, 490 (Ky. 2002), the Kentucky Supreme Court held that eyewitness expert testimony was appropriate under some circumstances, especially regarding cross-racial identification, identification after a long

delay, identification after observation under stress, and such psychological phenomena as the feedback factor and unconscious transference.

In *People v. Lerma*, 47 N.E.3d 985, 993-95 (Ill. 2016), the Illinois Supreme Court reversed for a new trial because the trial court abused its discretion in barring expert testimony on eyewitness identification. The State's case relied entirely on eyewitness identifications, and the experts would have testified to factors that were present in the case, such as "the stress of the event itself, the use and presence of a weapon, the wearing of a partial disguise, exposure to post-event information, nighttime viewing, and cross-racial identification." *Id*. at 993. Exclusion of the expert testimony was not harmless because the jury was prevented "from hearing relevant and probative expert testimony relating to the State's sole testifying eyewitness, in a case lacking any physical evidence linking defendant to the crime." *Id*. at 997.

In *State v. Lawson*, 291 P.3d 673, 696 (Or. 2012), the Oregon Supreme Court stressed that because many of the variables involved in eyewitness identification are not known by the average juror, or fly in the face of common beliefs, expert testimony is useful to educate the jury regarding the factors that may affect the accuracy of eyewitness identification. Expert testimony allows the jurors to learn of scientific research or other indicia of reliability. *Id*. "[T]he use of experts may prove vital to ensuring that the law keeps pace with advances in scientific knowledge, thus enabling judges and jurors to evaluate eyewitness identification testimony according to relevant and meaningful criteria." *Id*.

The Pennsylvania Supreme Court, in *Commonwealth v. Walker*, 92 A.3d 766, 789 (Penn. 2014), held that "the potential fallibility of eyewitness identification is 'beyond [the knowledge] possessed by the average layperson,' … indeed, may be counterintuitive, and so [we] conclude that expert testimony on that subject could potentially assist the trier of fact to understand ... the factors which potentially impact eyewitness testimony." The court stressed that, "in light of the magnitude of scientific understanding of eyewitness identification and marked developments in case law during the last 30 years, it is no longer advisable to ban the use of expert testimony to aid a jury in understanding eyewitness identification." *Id*. at 791. Admission is proper when the defendant's offer of proof shows that the expert's testimony "will focus on particular characteristics of the identification at issue and explain how those characteristics call into question the reliability of the identification." *Id*. at 792-93.

The Montana Supreme Court recognized that "a large body of research exists which demonstrates that eyewitness testimony can be unreliable." *State v DuBray*, 77 P.3d 247, 255 (Mont. 2003). It held that "[i]t shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists." *Id*.

In *State v. Frazier*, 592 S.E.2d 621, 623 (S.Car. 2004), the South Carolina Supreme Court held that exclusion of expert testimony on the issue of eyewitness reliability constitutes an abuse of discretion in cases where "the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independent reliability."

In *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007), the Tennessee Supreme Court noted that "[r]esearch over the past thirty years has shown that expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors." *Id.* at 299; see also *United States v. Smithers*, 212 F.3d 306, 316 (6th Cir. 2000) ("Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive."); *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) ("Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct); *Minor v. United States*, 57 A.3d 406, 413-14 (D.C. 2012) (reiterating a prior holding that expert testimony on eyewitness reliability is permissible because the court had "learned much to cause us to reexamine our view that average lay persons serving as jurors are well equipped to call upon their common sense" to assess the credibility of eyewitness identification testimony).

V. Dr. Lampinen's Testimony Was Admissible – It Was Relevant, Reliable and Offered by a Qualified Expert

A. Dr. Lampinen's Testimony was Relevant

In *Wright*, the court considered the admissibility, under Section 490.065.2, of expert testimony regarding the proclivity of abused children to delay reporting sexual abuse. 562 S.W.3d at 312. The State vouched that its expert would not testify particularly about the alleged victim but only about the general behavior of children who allege abuse. *Id.* The defendant argued that the expert's testimony was not relevant, as the average juror was well aware of delayed disclosure given the advent of the "me too" movement in which

adult women disclosed sexual abuse that occurred years before. *Id*. at 314. The trial court excluded the testimony because the jury understood delayed disclosure and the expert was only testifying from what she observed, without any specialized knowledge. *Id*. at 314-15.

The Court of Appeals reversed, holding that the expert's testimony was relevant. *Id*. at 322. Expert testimony is relevant "if it contains specialized knowledge – either scientific, technical, or otherwise – that will assist the trier of fact" to understand the evidence. *Id*. at 319. The expert's "generalized testimony" on delayed disclosure "can assist the jury in making that credibility assessment of a child alleging sexual abuse." *Id*. at 320 (citing *State v. Baker*, 422 S.W.3d 508, 513 (Mo. App. E.D. 2014)). Without the expert testimony, the jury would not know that it was common for children to delay disclosure. *Id*. at 320. Finally, the court stressed that even though the court serves as a gatekeeper, the jurors truly should be the ones assessing the weight and credibility of the expert's testimony:

> [T]he trial court's role as gatekeeper under the federal rules and our statute is not intended to serve as a replacement for the adversary system. The trial court's and Defendant's concerns can and should be addressed on cross-examination, not by outright exclusion of [the expert's] testimony before trial.

Id. at 322. "[I]t was error for the trial court to rule out the possibility that [the expert's] testimony could ever be relevant." *Id*.

Like the testimony of the expert in *Wright*, Dr. Lampinen's proffered testimony was relevant, in that it related to numerous areas which were "outside of everyday experience or lay experience." *Wright*, 562 S.W.3d at 319. It was akin to expert testimony, typically deemed admissible, regarding the behavior of sexually abused children. That testimony,

Missouri courts have held, "plays a useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of the popular myths." *Id*. at 319-20 (quoting *State v. Williams*, 858 S.W.2d 796, 799 (Mo. App. E.D. 1993)).

So, too, Dr. Lampinen's testimony would have disabused the jurors about popular misconceptions regarding eyewitness identification. Each of these factors played a role in this case.

1. An Eyewitness' Confidence Level Does Not Correlate with the Accuracy of the Identification

Most people believe that a witness' confidence or level of certainty in his or her identification of the suspect is a useful predictor of accuracy (Tr. 26); see *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) ("Many people believe that identifications expressed with certainty are more likely to be correct… People confuse certitude with accuracy and so are led astray"); see also Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 190 (1990) (jurors give disproportionate weight to the confidence of the witness).

But, as Dr. Lampinen testified in the offer of proof, this belief is only true under pristine conditions. The required conditions are a line-up (not a show-up), with fillers picked in a fair manner; where the witness receives proper pre-line-up instructions; where the line-up is administered double blind (where the person conducting the line-up does not know who the suspect was); and the witness makes a statement of confidence immediately after the identification and before receiving any feedback (Tr. 26-27).

Statements of confidence obtained later in time are less reliable because they rely on the witness' memory of how confident he was at the time of the identification (Tr. 27). Those memories are reconstructions and thus, subject to error (Tr. 27). Moreover, any comments about the identification from others tend to inflate the witness' confidence and even his memory of how confident he was at the time of the identification (Tr. 27).

At trial, Williams testified that he was 100% certain that Kane Carpenter was one of the two men who robbed him (Tr. 123). The State stressed this fact no less than six times in urging the jury to convict Carpenter (Tr. 180, 181, 184, 192). The jurors should have been allowed to consider Dr. Lampinen's testimony in assessing whether Williams' confidence truly was a valid measure of the reliability of his identification.

2. Eyewitnesses Generally Overestimate the Duration of the Crime

Dr. Lampinen testified that most witnesses are poor at estimating, based on memory alone, how long an event lasted (Tr. 25). In one study, witnesses watched a thirty-second crime video (Tr. 25). Forty-eight hours later, they were asked how long the crime took (Tr. 25). The average response was that the crime lasted one minute – more than ninety percent of the witnesses overestimated the time (Tr. 25). Not even ten percent were correct or gave a lower estimate of the duration of the crime (Tr. 25). See also *Lawson*, 291 P.3d at 702 ("Studies also show that witnesses consistently and significantly overestimate short durations of time (generally, durations of 20 minutes or less), especially during highly stimulating, stressful, or unfamiliar events") (citing Loftus, *Time Went by so Slowly*, 1 Applied Cognitive Psychol. 3 (stress compounds this factor; witnesses are more likely to overestimate short durations of time in high-stress situations than in low-stress situations);

A. Daniel Yarmey, *Retrospective Duration Estimations for Variant and Invariant Events in Field Situations*, 14 Applied Cognitive Psychol. 45 (2000)).

This factor was important in the instant case, because Williams estimated he looked at the robber anywhere from 20 to 30 or 45 seconds (Tr. 116, 127). The prosecutor argued in closing that Williams was face to face with the robber for 45 seconds (Tr. 181). Whether Williams overestimated the time he spent looking at the robber was import to the reliability of his identification, since the jurors would have given the identification more weight the longer Williams looked at the robber.

3. Stress and Weapons Focus Affect Reliability

Dr. Lampinen stressed that when a weapon is involved, as it was in this case, it draws attention away from the perpetrator's face and can lead to poor facial recognition (Tr. 16). Because the witness' attention is diverted, the witness has less ability to encode facial details into memory, resulting in decreased accuracy in later identifications. *Lawson*, 291 P.3d at 673. The presence of a weapon also increases the victim's stress level, further impairing his ability to accurately identify his assailant. *Id*. at 701-702. Decades of research has shown that stress also impairs the accuracy of eyewitness identification (Tr. 16, 24). For example, a study at Yale University involved military personnel in survival school (Tr. 16). The study found that in high stress conditions, the soldiers' memory was greatly impaired (Tr. 16). Thus, Dr. Lampinen's testimony refuted "a common misconception that faces seen in highly stressful situations can be 'burned into' a witness's memory." *Lawson*, 291 P.3d 673, 701 (2012) (expert testimony refutes jurors' incorrect belief that "stress *increases* reliability") (emphasis in original).

4. Cross-Racial Identifications are Prone to Error

In this case, the victim was white and the robbers were black (Ex. A; D28, p. 1).[8] As Dr. Lampinen explained, studies have shown people are better at recognizing members of their own racial or ethnic group than members of other racial or ethnic groups (Tr. 23). A large-scale meta-analysis of this research found that people are about 1.4 times more likely to recognize members of their own race, and 1.5 times more likely to falsely recognize members of another race (Tr. 23-24). See also Timothy P. O'Toole et al., *District of Columbia Public Defender Eyewitness Reliability Survey*, Champion, Apr. 2005, 28, 28–32 (finding, in a survey of approximately 1,000 potential jurors, that they overestimate the reliability of cross-racial identification); *Com. v. Christie*, 98 S.W.3d 485, 491–92 (Ky. 2002) (Had the defendant been able to attack the accuracy and reliability of the witnesses' cross-racial identifications of him, "the jury very well may have reached a different verdict").

5. Show-Ups are Inherently Reliable

Dr. Lampinen also discussed the inherent suggestibility of show-ups as was conducted here (Tr. 29). Social science has shown that show-ups are considerably less reliable and are more prone to errors than line-ups (Tr. 29). In recent research, witnesses were exposed to mock crimes but led to believe the crimes were real and were administered

[8]The trial court submitted Instruction 9 on Eyewitness Identification and included paragraph nine on whether the witness and the person in question are of different races or ethnicities (D28, p.1; Appx. 8). Note on use 1 indicates this instruction is to be given only if the race of the witness and alleged perpetrator are different (Appx. 6). Carpenter's trial counsel has indicated that Williams was white, and the defense is attempting to supplement the record.

show-ups by actual law enforcement (Tr. 30). Very high error rates – 40 to 50 percent mistaken identifications – resulted when the suspect was innocent (Tr. 30). In follow-up questioning, a large proportion of the witnesses who made an identification reported they felt pressured or obligated to make an identification even though the officers explicitly told the witnesses that they were not required to make an identification (Tr. 30). Even highly-confident witnesses who made identifications from show-ups identified an innocent person about 25 percent of the time or more (Tr. 31, 34).

The risks inherent in a show-up exist even if the show-up is conducted shortly after the crime (Tr. 33-34). Research by Dr. Stacy Wetmore found very high error rates even with retention intervals of about five minutes between the simulated crime and the show-up procedure (Tr. 34). The research showed that a line-up conducted two days after an event is more accurate than a show-up five minutes after an event (Tr. 34).

Errors persist even when the best practices are followed (Tr. 29, 33). With the best practices developed by the Los Angeles County Sheriff's Office, studies showed mistaken identification rates of 40 to 50 percent (Tr. 33).

Social science research also shows that about a third of witnesses who make an identification in a show-up where the suspect is handcuffed mention the handcuffs as part of the reason they made their identification (Tr. 35). Thus, the International Association of Chiefs of Police recommend not having the suspect in handcuffs if at all possible (Tr. 34-35).

6. Human Memory Often Does Not Operate as Expected

"It is a common misconception that a person's memory operates like a videotape, recording an exact copy of everything the person sees." *Lawson*, 291 P.3d at 701. As Dr. Lampinen explained, scientists have overwhelmingly rejected this misperception (Tr. 17). Memory retrieval is a reconstructive process (Tr. 17). Bits of information are pieced together from the event itself, from information gained after the event, and from inferences the witness made about the event (Tr. 17). As a result, the retrieved memory is a reconstruction or a best guess of what occurred, not a replay (Tr. 17).

Dr. Lampinen explained the scientific process of memory – encoding, storage, and retrieval (Tr. 14-17). He explained that the first identification by the witness is the most important one (Tr. 28). If there are multiple attempts to identify, the first attempt will contaminate the later ones (Tr. 28). Once a witness sees someone in a lineup, that person's face is in the witness' memory, so when the witness sees that person again, he or she looks familiar (Tr. 28). As a result, the witness is more likely to select that person as the perpetrator, not because he truly is the perpetrator, but because that face is in the witness' memory (Tr. 28). Research shows that if multiple identifications are attempted from a line-up, the accuracy is lower on the second attempt (Tr. 29).

Most lay people do not know that seeing a person straight on is not the best angle for facial recognition. Yet studies show that viewing someone at a three-quarter view, where part of the front of the face and part of the profile are visible, is better for recognition than seeing the face head-on or from the side (Tr. 20-21).

Most jurors do not understand just how poor an ability witnesses have in recognizing people they have only seen once previously. Dr. Lampinen explained that in one study, individuals were presented with a stranger standing in front of them (Tr. 21-22). As the person stood there, the witnesses were asked to select that person from a ten-person photographic lineup (Tr. 22). Even with the person standing right there, the witnesses were wrong thirty percent of the time (Tr. 22). When the witnesses were shown one photograph and asked whether the person in the photograph was the stranger standing before them, the witnesses were wrong twenty percent of the time (Tr. 22).

Dr. Lampinen would have dispelled the misconception that if a witness accurately described the suspect, the identification must given more credence. As he explained, a relatively low correlation exists between the accuracy of a suspect's description and the accuracy of later recognition (Tr. 27-28). Memory psychologists know that recognition and recall are quite separate things that act differently and are mediated by different brain regions (Tr. 27).

B. Dr. Lampinen's Testimony Met the Remaining Requirements of Section 490.065(2)

Dr. Lampinen's testimony was not only relevant; it was reliable and offered by a qualified expert. Section 490.065.2(1)(b),(c) (Appx. 2-3). As the Tennessee Supreme Court held, "[e]xpert testimony concerning the limitations and weaknesses of eyewitness identification is firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as an impressive peer review literature." *Copeland*, 226 S.W.3d 287, 299 (Tenn. 2007). So too, the Utah

Supreme Court held it was "appropriate to take judicial notice of 'general acceptance' of those principles in the community of researchers that specialize in the study of eyewitness identification. *Clopton*, 223 P.3d at 1114 (where State conceded that "the testimony of eyewitness experts is based on sufficiently reliable principles to merit admission") (citing *State v. Rammasch*, 775 P.2d 388, 398 (Utah 1989)).

Moreover, Dr. Lampinen was certainly qualified to testify as an expert on this topic. Under Section 490.065.2(1), an expert is qualified by "knowledge, skill, experience, training, or education" (Appx. 2-3). Dr. Lampinen's credentials established him as a distinguished professor in the Department of Psychological Science at the University of Arkansas, having earned his Ph.D. in cognopsychology from Northwestern University and experience teaching cognitive psychology, perception, advanced research, general psychology, statistics, and a variety of seminars on eyewitness identification, memory, and perception (Tr. 11-13).

Dr. Lampinen had researched memory, perception, and eyewitness identification and was familiar with the research literature on those topics (Tr. 12). He published two books on these topics, "The Psychology of Eyewitness Identification" and "Memory 101" and two edited volumes, "Protecting Children from Violence," and "The Self and Memory" (Tr. 12-13). His peer-reviewed articles on these topics had been published in scientific journals, including "Applied Cognopsychology," the "Journal of Applied Research in Memory and Cognition," the "Journal of Experimental Psychology: Learning, Memory, and Cognition," and "Law and Human Behavior" (Tr. 13).

VI. Kane Carpenter Was Prejudiced by the Exclusion of Dr. Lampinen's Testimony

Because a defendant in a criminal case has a constitutional right to present a complete defense, "the erroneous exclusion of evidence in a criminal case creates a rebuttable presumption of prejudice." *State v. Taylor*, 2019 WL 5875162, at *3 (Mo. App. W.D., Nov. 12, 2019) (mandate issued Dec. 4, 2019). The State may only rebut this presumption by proving that the error was harmless beyond a reasonable doubt. *State v. Miller*, 372 S.W.3d 455, 472 (Mo. banc 2012) (citing *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007)). To do so, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Rice*, 573 S.W.3d 53, 71 (Mo. banc 2019).

The State cannot meet that burden here. The court's ruling deprived Carpenter of his "basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane v. Kentucky*, 476 U.S. 683, 690–91 (1986) (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)). "[C]ourt[s] *must remember* that one of the fundamental rights of due process afforded to a defendant is the right to present witnesses in his defense." *State v. Litherland*, 477 S.W.3d 156, 165 (Mo. App. E.D. 2015) (emphasis in *Litherland*) (granting new trial after defendant was denied continuance to obtain presence of key witness) (quoting *State v. Simonton*, 49 S.W.3d 766, 781 (Mo. App. W.D. 2001) (excluding testimony of expert witness for discovery violation was drastic remedy that prejudiced defendant, warranting a new trial)).

In *State v. Carter*, 641 S.W.2d 54, 56 (Mo. banc 1982), the defendant pleaded not guilty by reason of mental disease or defect, but refused to disclose the report of a

psychiatrist who evaluated him but would not be testifying at trial. The trial court ordered the defendant to disclose the report. *Id*. At trial, over defense objection, the State presented the testimony of that psychiatrist to rebut the defendant's evidence of his mental condition. *Id*.

This Court upheld the trial court's actions in ordering disclosure of the report and allowing the expert witness to testify. *Id*. at 58-59. Public policy considerations weighed heavily in favor of disclosure in a case where the defendant's mental state was the "only live and vital question." *Id*. at 58. Allowing the jury to hear the expert's testimony on that key issue allowed the jury to reach "an intelligent, fair and just verdict" and thus advanced the fundamental purpose of a criminal trial, the fair ascertainment of the truth. *Id*.

> Not only the defendant, but also the State of Missouri, has a direct interest in an accurate, just and informed verdict based upon all available relevant and material evidence bearing on the question. The trier of the fact must not be so effectively deprived of valuable witnesses as to undermine the public interest in the administration of justice.

Id. (internal citations and quotations omitted).

Here, the key issue was the reliability of Williams' identification of Carpenter as one of the robbers. Dr. Lampinen would have advanced the truth-seeking function of the trial by equipping the jurors with information on the various aspects of eyewitness identification so often misperceived by jurors. As discussed above, eyewitness identification involves multiple factors that are often misperceived by the average juror. Dr. Lampinen could have discussed how a witness' confidence level in his identification does not correlate with the accuracy of the identification (Tr. 26-27). He could have explained that witnesses are poor at estimating the duration of an event (Tr. 25) and that a

low correlation exists between their description of the suspect and the accuracy of their identification (Tr. 27-28). He could have informed the jurors how a witness' stress, including that caused from focusing on a weapon, can adversely affect the accuracy of the identification (Tr. 15-16, 24) and quantified just how much less accurate cross-racial identifications are than same-race identifications (Tr. 23-24). Dr. Lampinen could have explained the scientific process of memory – encoding, storage, and retrieval – and explained how a witness' memory can be contaminated from identification procedures (Tr. 14-17, 28-29), especially the suggestiveness of show-ups (Tr. 29-35). Finally, Dr. Lampinen could have informed the jurors how the accuracy of facial recognition depends on a number of factors, including viewing angles, distance, lighting, obstructions, length of exposure, and the contrast sensitivity allowing recognition of details (Tr. 15, 18, 19-20, 21). Without Dr. Lampinen's testimony, too great a risk exists that the jury's verdict was founded on incorrect beliefs.

Each of these factors was present here. Thus, testimony by a qualified expert on the nature of these factors "would have significantly assisted the jury in evaluating the accuracy of the State's most important witness[es]." *Clopten*, 223 P.3d at 1117. It would have "given the jury a valuable context within which to assess [Williams'] eyewitness identification." *Copeland*, 226 S.W.3d at 302. The Sixth Circuit recognized that, "[t]he significance of [the expert's] testimony cannot be overstated. Without it, the jury had no basis beyond defense counsel's word to suspect the inherent unreliability of the [eyewitnesses'] identifications." *Ferensic v. Birkett*, 501 F.3d 469, 482–83 (6th Cir. 2007) (reversing for a new trial). Dr. Lampinen's testimony could have had "a powerful effect."

See, e.g., *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) ("[E]vidence that there is no relation between certitude and accuracy may have a powerful effect"). Moreover, as the Oregon Supreme Court held in *Clopton*, and is true here, "the critical importance" of the eyewitness "forces the conclusion that the proffered testimony might have had a 'substantial influence in bringing about a different verdict.'" *Clopten*, 223 P.3d at 1117; see also *Frazier*, 592 S.E.2d at 624 ("Dr. Loftus' testimony demonstrating a lack of reliability in the eyewitness identification of Frazier was essential to the defense and its exclusion cannot, under the facts of this case, be deemed harmless error").

"[F]ederal and state courts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification – cross-examination, closing argument, and generalized jury instructions – frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications." *Lawson*, 291 P.3d at 695.

Defense counsel could elicit certain basic facts through cross-examination – that Williams gave few details about the robbers and had been inconsistent in his descriptions; that Williams was under a lot of stress at the time of the crime; that Williams identified Carpenter from a show-up, not a line-up. But defense counsel could not elicit the result of research studies on the factors underlying eyewitness identification. He could not elicit what decades of research had proven, by cross-examining a lay witness who had no knowledge of that research. While counsel might superficially touch upon the weaknesses of eyewitness identification, counsel would not be able to go into the topics in the depth

that an expert would, nor would counsel have the credibility of an expert with years of education and experience.

The following transcript excerpt shows the limitation of cross-examination:

> Defense counsel: And as part of your training, did anyone ever talk to you that a show-up might be inherently suggestive?
>
> Officer Fisher: No, sir.
>
> Defense counsel: That did not come up?
>
> Officer Fisher: No, sir.

(Tr. 138). The jury could infer from such cross-examination that the topic did not come up because show-ups were not, in fact, inherently unreliable.

Had counsel tried to suggest that Williams overestimated the certainty of his identification or overestimated the duration of the time he had to see the robbers, this too would have back-fired. Williams would not know he had overestimated those facts, so he would just insist he had been correct. This would have further cemented that the identification was accurate, even when a substantial risk existed that it was not. "When an unconscious and innocent mistake causes the misidentification, cross-examination becomes a less useful tool because it only causes the witness to reassert confidence." Susan M. Campers, *Time to Blow Up the Showup: Who Are Witnesses Really Identifying?*, 48 Suffolk U. L. Rev. 845, 848–49 (2015). Further, "this exaggerated witness confidence produces a tendency in jurors to almost unquestionably accept eyewitness testimony." *Id.* at 849 (internal quotation omitted). What's worse, then the prosecutor could claim, as the

prosecutor did here, that defense counsel was "clawing" at the witness' credibility (Tr. 192).

Nor were the opening statement or closing argument an adequate substitute for expert testimony. "[U]nsworn remarks of counsel in opening statements … or in arguments are not evidence of the facts asserted." *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006). The purpose of an opening statement is to inform the jury of the general nature of the case and describe the evidence that the party plans to introduce. *Marshall v. State*, 567 S.W.3d 283, 294 (Mo. App. E.D. 2019); see also *State v. Thompson*, 68 S.W.3d 393, 394 (Mo. banc 2002) ("Opening statements are limited to factual statements that can be proved [at trial]"). So too, closing argument is limited to the evidence presented at trial. *State v. Holmsley*, 554 S.W.3d 406, 410 (Mo. banc 2018). But because the State would not be pointing out the weaknesses of eyewitness identification, and the defense could not adequately do so through cross-examination, Carpenter would be barred from mentioning such facts in opening statement or closing argument. Defense counsel needed the testimony of an expert as evidence of the well-established research regarding the problems with eyewitness identification.

Finally, the instructions did not cure the problem. See *Clopten*, 223 P.3d at 1113 (testimony of an expert on eyewitness identification "should not be considered cumulative or duplicative of cautionary instructions to the jury"). Instruction 9, modeled on MAI-CR4th 410.02, briefly set forth the factors relating to eyewitness identification but did not place those factors into context:

INSTRUCTION NO. 9

Eyewitness identification must be evaluated with particular care.

In order to determine whether an identification made by a witness is reliable or mistaken, you should consider all of the factors mentioned in Instruction No. 1 concerning your assessment of the credibility of any witness. You should also consider the following factors.

One, the witness's eyesight;

Two, the lighting conditions at the time the witness viewed the person in question;

Three, the visibility at the time the witness viewed the person in question;

Four, the distance between the witness and the person in question;

Five, the angle from which the witness viewed the person in question;

Six, the weather conditions at the time the witness viewed the person in question;

Seven, whether the witness was familiar with the person identified;

Eight, any intoxication, fatigue, illness, injury or other impairment of the witness at the time the witness viewed the person in question;

Nine, whether the witness and the person in question are of different races or ethnicities;

Ten, whether the witness was affected by any stress or other distraction or event, such as the presence of a weapon, at the time the witness viewed the person in question;

Eleven, the length of time the witness had to observe the person in question;

Twelve, the passage of time between the witness's exposure to the person in question and the identification of the defendant;

Thirteen, the witness's level of certainty of his identification, bearing in mind that a person may be certain but mistaken;

Fourteen, the method by which the witness identified the defendant, including whether it was

i. at the scene of the offense;

ii. In a live or photographic show-up. A "show-up" is a procedure in which law enforcement presents an eyewitness with a single suspect for identification. In determining the reliability of the identification made at the show-up, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the show-up, the instructions given to the witness during the show-up, and any other circumstances which may affect the reliability of the identification;

Fifteen, any description provided by the witness after the event and before identifying the defendant;

Sixteen, whether the witness's identification of the defendant was consistent or inconsistent with any earlier identification(s) made by the witness; and

Seventeen, any other factor which may bear on the reliability of the witness's identification of the defendant.

It is not essential the witness be free from doubt as to the correctness of the identification. However the state has the burden of proving the accuracy of the identification of the defendant to you, the jury, beyond a reasonable doubt before you may find him guilty.

(D28, p.1-2; Appx. 8-9).

Expert testimony was needed to give meaning to the instruction. For example, the instruction told the jurors to consider "the length of time the witness had to observe the person in question." But without expert testimony, the jurors would not know that eyewitnesses often overestimate that length of time. The instruction told the jurors to consider whether the witness was affected by any stress (D28, p.1; Appx. 8), but did not refute the common misperception that stress actually cements the event in a witness' memory. *Lawson,* 291 P.3d 673, 701 (2012) (expert testimony refutes jurors' incorrect belief that "stress *increases* reliability") (emphasis in original). The instruction told the

jurors to consider "whether the witness' identification of the defendant was consistent or inconsistent with any earlier identification by the witness" (D28, p.2; Appx. 9) But expert testimony was needed to explain that a relatively low correlation exists between the accuracy of a suspect's description and the accuracy of later recognition; memory psychologists know that recognition and recall are quite separate things that act differently and are mediated by different brain regions (Tr. 27-28).

The State's evidence of guilt was not so strong as to render harmless the court's error in the exclusion of this critical defense evidence. Other than Williams' testimony, the State had scant evidence tying Carpenter to the crime. Carpenter was stopped several blocks from the crime and was sweating and breathing hard, and items taken from Williams were found nearby in the bushes (Tr. 124, 145, 159-60). But the police never saw Carpenter running or disposing of any evidence (Tr. 143, 153). Not surprisingly, the jury wondered whether Carpenter's fingerprints were found on these items, but the trial court left them with the evidence and instructions they had been given. (D31, p. 1; Tr. 196).

Carpenter immediately stopped when the officer asked to speak with the teens and fully cooperated with the officer (Tr. 1535). If Carpenter really had been running away from the scene of the crime, he likely would have been much farther away. In addition, although Williams claimed the robbers had a gun, the police searched but could not find one (Tr. 154, 156).

The crime occurred on a dark street with a streetlight potentially as far away as the length of a football field (Tr. 114, 116). Williams' focus was on the gun and otherwise was divided between the two robbers ***and*** looking around to try to get away (Tr. 116). He

had never seen the robbers before (Tr. 127). He gave conflicting accounts for how long the robbery lasted; it was either 20 to 30 seconds (Tr. 127), or 45 seconds (Tr. 116).

Although the prosecutor argued in closing that the police did great police work (Tr. 180) and made the case (Tr. 177), the police actually used the most suggestive procedure possible, did not follow guidelines for good identification procedures, and contaminated the witness' memory. The police told Williams they had caught two people who matched the description and were "kind of" in the area (Tr. 135). Carpenter and Scott were handcuffed and sitting on the curb (Tr. 122, 124, 131). The police shone flashlights and a spotlight on them (Tr. 122, 135-37). Williams saw police officers nearby collecting what he perceived to be evidence of the crime (Tr. 131).

Williams told the police that the robbers both wore hoodies, one black, the other red (Tr. 113, 126-27, 130). Pretrial, he told defense counsel that the first robber wore a black hoodie, but at trial, said it was a red hoodie, citing "that was my memory failing me" (Tr. 130). He also testified that the first robber was instead wearing a jacket, and also that they both were wearing jackets (Tr. 114, 124). In addition, he testified that instead of wearing a black hoodie, the second robber wore a lighter-colored jacket (Tr. 124). Williams testified that Carpenter wore a white tee-shirt (Tr. 131), when actually his tee-shirt was black (Ex. A).

Williams recalled that the first robber had a belt but could not say what else the robbers were wearing (Tr. 128-29). He gave little description of the first robber's face. Initially, when asked, Williams just said the robber had a nose; when asked for more detail, he stated the nose was "shorter" and "broader, kind of wide" (Tr. 129-30). He said that the

robber had a kind of goatee and could have had cornrow dreadlocks (Tr. 130). Carpenter has neither (Ex. A).

Finally, during the jury's deliberation, jurors asked to see all the evidence that had been assembled (Tr. 194). They had questions (Tr. 194). The trial judge did not make a record of the questions, but defense counsel indicated that, "one of those questions was whether or not fingerprints had been taken" (D31, p. 3). The court instructed the jury to "be guided as the evidence and instructions has been given." (Tr. 196).

VII. Kane Carpenter Must Receive a New Trial

Thirty years of scientific advancement and the lessons learned from DNA exonerations demonstrate that expert testimony on eyewitness identification is vital to ensure that convictions are not founded on falsities but rather, reliable, scientific evidence. Newly amended Section 490.065.2, supports admission of such evidence, by relaxing the traditional barriers to opinion testimony. Moreover, courts across the country have acknowledged jurors' lack of understanding of the various factors underlying eyewitness identification and stress the need for expert testimony to ensure verdicts that are reliable and worthy of confidence. The time has come for Missouri to overrule *Lawhorn* and *Whitmill* and rule that expert testimony on eyewitness identification is admissible at trial.

Kane Carpenter did not receive a fair trial. Even though the State's case hinged on Williams' identification of Carpenter as one of the men who robbed him, Carpenter was denied his right to subject the State's case to meaningful adversarial testing through the testimony of an expert in eyewitness identification. As a result, the jurors were led to believe that the police did a great job, when actually the police used the most suggestive

procedure possible, did not follow guidelines for good identification procedures, and likely contaminated the witness' memory. In addition, the jurors were encouraged to believe that Williams' identification was reliable based on many factors that Dr. Lampinen would have flatly refuted. The State then took advantage of the jurors' misperceptions in arguing for conviction. The State cannot show beyond a reasonable doubt that the jury's misperceptions – which would have been removed had Dr. Lampinen testified – did not contribute to the guilty verdict. Reversal is warranted.

CONCLUSION

Kane Carpenter respectfully requests that the Court vacate his conviction and sentence and remand for a new trial. He further requests that the Court overrule *Lawhorn* and *Whitmill* and rule that expert testimony on eyewitness identification is admissible at trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13 point font. The brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, and this certification, the brief contains 12,935 words, which does not exceed the 31,000 words allowed for an appellant's brief.

A true and correct copy of the brief and appendix was sent through the e-filing system on December 20, 2019, to: Karen Kramer, Office of the Attorney General, at Karen.Kramer@ago.mo.gov.

/s/ Rosemary E. Percival
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