

No. SC98088

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

KANE CARPENTER,

Appellant.

Appeal from the Cole County Circuit Court
19th Judicial Circuit
The Honorable Patricia S. Joyce, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant, Kane Carpenter, was charged by indictment with one count of robbery in the first degree (D2). On March 5, 2018, appellant's case went to trial before a jury in the Circuit Court of Cole County, the Honorable Patricia Joyce presiding (Tr. 39). Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

Jacob Williams lived with his mother on Riverside Drive in Jefferson City (Tr. 110). In October, 2016, he was working at Captain D's on Missouri Boulevard (Tr. 110). Williams walked to work every night, which took him about 45 minutes to an hour (Tr. 110). Williams would walk from his home down Riviera to East Capitol past the old Missouri State Penitentiary (Tr. 112). When he got near the capitol, he would branch off and go towards Highway 50 (Tr. 112).

On October 23, 2016, Williams was walking to work when he was approached by two men walking down East Capitol (Tr. 113). When Williams was near the old prison, he noticed two men walking behind them, one in a black hoodie and one in a red hoodie, with their hoods up (Tr. 113, 127). Williams turned to look at the men and then decided to cross the street because the men were following him (Tr. 113). The men were coming up on Williams at a fast pace (Tr. 113). One man was slimmer and taller than Williams; the

other was the same height but a little bigger (Tr. 113). Both men had their heads down with hoods up over their heads (Tr. 113).

As Williams started to cross East Capitol Street, he took his headphones out (Tr. 113-114). One of the men asked if he could use Williams's phone (Tr. 114). Williams lied and said that he didn't have a phone (Tr. 114). One of the men, later identified as appellant, then raised his shirt and said, "I have a weapon. Give me what you have." (Tr. 114). Williams could see the handle of a gun tucked into appellant's waistband (Tr. 115). Williams could see the wood grain handle of the gun with what appeared to be a black piece in the middle (Tr. 115). It appeared to be a .38 pistol (Tr. 115). Williams raised his hands (Tr. 115). Appellant took Williams's iPhone from his hand (Tr. 118). The other man took Williams's E-cigarette liquid out of his chest pocket (Tr. 114, 118). This took place in the middle of East Capitol in front of the old state penitentiary (Tr. 115-116). It wasn't exceptionally bright, but Williams could see his surroundings (Tr. 116). Williams focused on the gun while it was exposed, but focused on appellant's face while appellant was taking Williams's things (Tr. 116). Appellant was close enough to reach out and grab Williams's things (Tr. 116-117).

The two men then slowly backed away from Williams (Tr. 119). As they turned to run, one shouted to the other, "We got that brand new iPhone. Let's go." (Tr. 119). The two men ran down Lafayette Street (Tr. 119). About half

way down, they ducked down Commercial Way, which is an alley (Tr. 119, 121). Williams pursued them down Lafayette, but did not go down Commercial Way because he knew that they were armed (Tr. 119, 121). Williams flagged down two pedestrians on Lafayette and asked to borrow their cell phone to call 911 (Tr. 121). Williams called 911 and reported that he had been robbed on Capitol and Lafayette (Tr. 121).

At 7:50 p.m., Officer Tony Fisher was in the parking lot of the police department when the dispatch came out and he responded to the scene within seconds as it was approximately one block from the police department (Tr. 133, 138, 140-141). Ofc. Fisher contacted Williams at the corner of East High and Lafayette (Tr. 134). Williams appeared shaken up (Tr. 134).

Sgt. Andrew Lenart was at the police station when he heard the dispatch, so he got into his vehicle and responded to the scene as well (Tr. 139-142). Sgt. Lenart drove up as Ofc. Fisher was speaking with Williams (Tr. 142). Lenart asked what way the suspects had headed and was told they had gone east down Commercial Way, which is midblock between High Street and Capitol Avenue (Tr. 142-143). Sgt. Lenart went east on High Street and then turned north on the next block, Cherry Street (Tr. 143). There he saw two men walking eastbound across Cherry Street at Commercial Way (Tr. 143). They were three-quarters of the way across the street (Tr. 143). The two men were

subsequently identified as appellant and Robert Scott (Tr. 143). The men were located at 7:52, two minutes after the police dispatch went out (Tr. 143).

Sgt. Lenart pulled over, got out of his car, and asked if he could talk to them for a minute (Tr. 144). Appellant stopped immediately (Tr. 152). He was breathing heavily and sweating as though he had been running or engaged in hard physical activity (Tr. 159). Scott stopped but then but then took a few steps (Tr. 152). No one else was seen in the area (Tr. 159). Williams's cell phone and his earbuds were found under a bush about 6-7 feet away from appellant in Commercial Way (Tr. 145-147). Robert Scott's identification card was found on Commercial Way about halfway between Lafayette Street and Cherry Street (Tr. 148). Williams's e-cigarette device and a bottle of nicotine were found on Commercial Way right at Lafayette Street, 20 feet inside the alley (Tr. 148, 151). Two sweatshirts were found against a house on Commercial Way, along with Robert Scott's intermediate driver's license (Tr. 162, 164).

At 7:54 p.m., Sgt. Lenart radioed Ofc. Fisher and asked him to bring Williams to their location because two individuals who matched the description in the original 911 call had been apprehended at Cherry and Commercial Way, less than a block from the site of the robbery (Tr. 134, 138, 151). Williams got in the back seat of Officer Fisher's vehicle, and Fisher drove him over to Cherry

Street where they had two men sitting on the curb (Tr. 122, 136-137). It was within five minutes of Williams calling 911 (Tr. 122).

The police told Williams that if he could not positively identify them as the perpetrators, he should tell them that (Tr. 135). The police advised Williams that they did not want him to falsely identify anyone as that would mean the real suspect was still out there (Tr. 135). The police asked Williams if he recognized any of them (Tr. 122). The men were illuminated by the spotlight on the police cruiser (Tr. 122, 136). Williams could clearly see the men, and Williams identified appellant (Tr. 122). Appellant was no longer wearing the red jacket he had been wearing during the robbery (Tr. 124). Williams was 100% certain of his identification (Tr. 123). Williams's phone was found in a bush nearby (Tr. 124). Williams also got his e-cigarette back, but it was broken (Tr. 125).

After the close of evidence, instructions, and argument by counsel, the jury, upon deliberation, found appellant guilty of robbery in the first degree (D30; Tr. 196). Appellant waived jury sentencing (Tr. 39-40). The trial court sentenced appellant to ten years (D35; Tr. 209).

The Court of Appeals, Western District, affirmed appellant's case on direct appeal. *State v. Kane Carpenter*, No. WD81702. On October 29, 2019, this Court took transfer of appellant's case.

ARGUMENT

The trial court did not abuse its discretion in excluding the testimony of Dr. James Lampinen.

Appellant contends that the trial court abused its discretion in excluding the testimony of Dr. James Lampinen, an alleged expert in the field of eyewitness identification (App.Br. 16). Appellant asserts that Dr. Lampinen would have testified about the science and inherent weaknesses of eyewitness identifications, particularly where a “show up” is conducted (App.Br. 16). Appellant maintains that Dr. Lampinen’s testimony was critical to his defense and likely would have resulted in a different verdict, due to the fact that the strongest part of the state’s case was the victim’s identification as one of the men involved in the robbery (App.Br. 16). Appellant argues that 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.

A. Standard of review.

The standard of review for the admission of evidence is abuse of discretion. *State v. Williams*, 548 S.W.3d 275, 287 (Mo.banc 2018). The trial court has broad leeway in choosing to admit or exclude evidence; therefore, an exercise of this discretion will not be disturbed unless it is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *State v. Kemp*, 212 S.W.3d 135, 145 (Mo.banc 2007). If

reasonable persons can disagree about the propriety of the trial court's ruling, the trial court did not abuse its discretion. *Williams, supra*. Trial courts retain broad discretion over issues of relevancy and admissibility of evidence, and those decisions will not be interfered with unless there is a clear showing of abuse of discretion. *State v. Tokar*, 918 S.W.2d 753, 770 (Mo.banc 1996). Evidence will be relevant as long as it logically tends to prove or disprove a fact in issue. *Id.*

In addition, the trial court's ruling will be reversed only if any error was so prejudicial that it deprived the defendant of a fair trial. *Kemp, supra*. Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.*

B. Relevant facts.

1. Pretrial

Prior to trial, appellant filed a motion in limine seeking to admit the testimony of Dr. James Lampinen, whom he proffered as an expert in the field of eyewitness identification (D17 p1-7). The state filed a motion in limine to exclude Dr. Lampinen's testimony (D20 p1-5).

Appellant also filed a motion to suppress the identification, and Dr. Lampinen testified at the hearing on the motion to suppress (STr. 13). Dr. Lampinen testified as to his qualifications and his research and articles concerning eyewitness identification (STr. 13-16). Dr. Lampinen testified

about studies regarding the accuracy of show-up identifications, as well as whether the use of handcuffs on the suspect affected identification and the effect of giving an admonishment as to whether the witness had to identify anyone (STr. 16-21).

On cross-examination, Dr. Lampinen asserted that he did not necessarily have an issue with the suspect being handcuffed during the show-up because it is sometimes necessary for law enforcement safety (STr. 21-22). Dr. Lampinen agreed that for the purpose of officer safety, the safety of the general public, and even the suspect's safety, it was sometimes necessary to handcuff a suspect (STr. 22). Dr. Lampinen also agreed that telling the witness that the person they would see may or may not be the individual involved was a "fairly standard admonishment that's been used successfully in social science research." (S.Tr. 22). Dr. Lampinen said that he did not see anything to indicate improper conduct by the officers in appellant's case (STr. 25). Dr. Lampinen also acknowledged that he had never been allowed to testify in a Missouri court (STr. 26).

The trial court overruled appellant's motion to suppress (STr. 30). The trial court granted the state's motion in limine to exclude Dr. Lampinen's testimony (STr. 32).

At a subsequent court hearing, prior to trial, appellant made an offer of proof of Dr. Lampinen's testimony (Tr. 11). Dr. Lampinen again testified as to

his credentials, including his publications on memory, perception, and eyewitness identification (Tr. 11-14). Dr. Lampinen testified that the accuracy of an eyewitness identification can be affected by the following:

a. the amount of time the witness saw the suspect's face. Shorter exposure times are associated with worse face recognition (Tr. 15). It is not merely the total amount of time, but the total amount of time that is actually spent looking at the perpetrator's face (Tr. 15, 24). Witnesses are generally poor at estimating how long events took from memory alone (Tr. 15, 25).

b. whether the witness was focused on something else, such as a weapon. The more something captures one's attention, the better it will be remembered later on (Tr. 15). Weapons tend to capture one's attention, meaning that attention is drawn away from the perpetrator's face, resulting in poor face recognition (Tr. 16).

c. stress. Stress impairs identification accuracy (Tr. 16, 24).

d. encoding and retrieval of memories. Memories can be contaminated by post-event information, such as newspaper stories (Tr. 16-17).

e. impaired eyesight. Poor visual acuity and contrast sensitivity is associated with poor recognition of faces (Tr. 18).

f. lighting conditions. Face recognition is impaired when lighting conditions at the time of the event are poor (Tr. 19).

g. visibility of the suspect's face. Anything that blocks out or partially blocks out any part of the face will impair facial recognition (Tr. 19). Even a hat or a scarf can impair facial recognition (Tr. 20).

h. distance. Face recognition can be impaired when the viewing conditions are at longer distances (Tr. 20).

i. weather conditions. Factors like heavy rain or fog can decrease visibility and make it harder to see details (Tr. 20).

j. viewing angle. Viewing a face from a three-quarter view is better for recognition than a face-on view or a profile view (Tr. 20-21).

k. Repeated exposures. The more often one sees a person, the more one develops a “viewpoint invariant representation of the face.”¹ (Tr. 21).

¹ Dr. Lampinen did not explain what this term meant.

l. whether the witness is familiar with the suspect or the suspect is a stranger. Recognition of strangers is poor, while recognition of people one knows is much better (Tr. 21-22).

m. cross-race identification. People are better at recognizing members of their own racial or ethnic group than members of other racial or ethnic groups (Tr. 23).

n. whether the witness is intoxicated, ill, or otherwise impaired. All of these can impair memory (Tr. 23).

o. passage of time between exposure and identification. Memory gets worse as time progresses, and so the more time that passes after a crime, the worse the memory will get (Tr. 25).

p. confidence. Under the right conditions, confidence is a good predictor of accuracy (Tr. 26). The right conditions typically mean a lineup was done rather than a show-up, fillers for the lineup were picked in a fair manner, proper pre-lineup instructions were given, and the statement of confidence was obtained immediately after the identification and prior to the witness receiving any feedback (Tr. 26). But when these procedures are not followed, confidence is a “less useful marker for accuracy.” (Tr. 26). Confidence refers to a witness’s contemporaneous statement

of confidence at the time of the identification (Tr. 26-27). Statements of confidence made much later are less reliable (Tr. 27).

q. prior description. Studies show that there is a relatively low correlation between the accuracy of a description and the accuracy of a later recognition (Tr. 27-28).

r. multiple identifications. The initial identification is the one that matters (Tr. 28). Subsequent identifications may be contaminated by prior identifications (Tr. 28). Once a witness has seen a face in a lineup or mug shot, that face is in the person's memory, and later identifications may be of the person seen in the prior lineup, not the perpetrator (Tr. 28-29).

Dr. Lampinen also talked about the use of "show-ups," which is what occurred in the present case (Tr. 29-31). Dr. Lampinen asserted that show-ups are less reliable due to their inherent suggestiveness, and that even where a witness is highly confident of their identification, there is a risk of misidentification (Tr. 29-35). Dr. Lampinen acknowledged that show-ups are designed for exigent circumstances, and that there are reasonable grounds for using a show-up, but this did not render the procedure more reliable (Tr. 31). Dr. Lampinen also testified that the use of handcuffs in a show-up could

suggest to the witness that the police believed that the person was guilty (Tr. 34).

The trial court again ruled that Dr. Lampinen's testimony would not be admitted (Tr. 38).

2. At trial.

On October 23, 2016, Williams was walking to work when he was approached by two men walking down East Capitol Avenue (Tr. 113). When Williams was near the old prison, he noticed two men walking behind him, one in a black hoodie and one in a red hoodie, with their hoods up (Tr. 113, 127). Williams turned to look at the men and then decided to cross the street because the men were following him (Tr. 113). The men were coming up on Williams at a fast pace (Tr. 113). One man was slimmer and taller than Williams; the other was the same height but a little bigger (Tr. 113). Both men had their heads down with hoods up over their heads (Tr. 113).

As Williams started to cross East Capitol Avenue, he took his headphones out (Tr. 113-114). One of the men asked if he could use Williams's phone (Tr. 114). Williams lied and said that he didn't have a phone (Tr. 114). One of the men, later identified as appellant, then raised his shirt and said, "I have a weapon. Give me what you have." (Tr. 114). Williams could see the handle of a gun tucked into appellant's waistband (Tr. 115). Williams could

see the wood grain handle of the gun with what appeared to be a black piece in the middle (Tr. 115). It appeared to be a .38 pistol (Tr. 115).

Williams raised his hands (Tr. 115). Appellant took Williams's iPhone from his hand (Tr. 118). The other man took Williams's E-cigarette out of his chest pocket (Tr. 114, 118). This took place in the middle of East Capitol in front of the old state penitentiary (Tr. 115-116). It wasn't exceptionally bright, but Williams could see his surroundings (Tr. 116). Williams focused on the gun while it was exposed, but focused on appellant's face while appellant was taking Williams's things (Tr. 116). Appellant was close enough to reach out and grab Williams's things (Tr. 116-117).

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Williams was 100% certain of his identification (Tr. 123). Williams's phone was found in a bush nearby (Tr. 124). Williams also got his e-cigarette back, but it was broken (Tr. 125).

C. Analysis.

The trial court did not abuse its discretion in refusing to admit Dr. Lampinen's testimony regarding the science of eyewitness identifications. The decision to admit or exclude expert testimony is within the sound discretion of the trial court. *State v. Bowman*, 337 S.W.3d 679, 690 (Mo.banc 2011). The test for admissibility for expert testimony is whether it will be helpful to the jury. *State v. Mosley*, 526 S.W.3d 361, 365 (Mo.App.E.D. 2017). Expert testimony is helpful to the jury if the witness has specialized knowledge or skill from education or experience that gives the witness knowledge of the subject that is superior to the average juror. *Id.* Expert testimony is generally inadmissible if the subject of the testimony is one of everyday experience where the jurors are competent to decide the issues. *Mosely, supra.* Expert testimony "should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved." *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984) (quoting *Sampson v. Missouri Pacific Railroad Co.*, 560 S.W.2d 573, 586 (Mo. banc 1978)). "[P]roffered expert testimony should be excluded if it does not assist the jury, or if it unnecessarily diverts the jury's attention from

the relevant issues.” *State v. Lawhorn*, 762 S.W.2d 820, 822–23 (Mo. banc 1988). “Expert testimony is also inadmissible if it relates to the credibility of witnesses, for this constitutes an invasion of the province of the jury.” *Id.* at 823.

1. Expert testimony regarding eyewitness identifications is admissible in Missouri where it can be shown that it assists the jury, is not within the jury’s common experience, and is relevant to the issues at trial.

In *Lawhorn*, this Court considered “whether the defendant in a criminal case is entitled to present expert testimony on the reliability of eyewitness identification.” *Lawhorn*, 762 S.W.2d at 822. Lawhorn’s expert sought to testify about the inherent difficulty in cross-racial eyewitness identification, the fact that post-confrontation events affect the witness’s perception of what has occurred, and that no correlation existed between a witness’s confidence in his identification and the correctness of the identification. *Id.* On appeal, Lawhorn argued that the “modern trend” favored admission of expert testimony to aid the jury in evaluation of eyewitness identification evidence. *Id.* That “trend” was limited only by the condition that the expert not particularize his opinion in terms of any actual witness at the trial. *Id.*

This Court noted that expert testimony is admissible if it is clear that the subject of the testimony is one upon which the jurors, for want of experience

or knowledge, would otherwise be incapable of drawing a proper conclusion from the facts in evidence. *Id.* Proffered expert testimony should be excluded if it does not assist the jury, or if it unnecessarily diverts the jury's attention from relevant issues. *Id.* at 822-823. Expert testimony is also inadmissible if it relates to the credibility of witnesses because this would be an invasion of the province of the jury. *Id.* at 823.

Lawhorn argued that he should have been allowed to explain "the other race effect," which causes persons to have difficulty identifying individuals of a different race. *Id.* Lawhorn also wanted to explain how the effects of the passage of time, stress at the time of the crime, and how the human brain retrieves memories in facial recognition combine to diminish a witness's ability to make an accurate identification. *Id.* This Court found that such matters "are within the general realm of common experience of members of a jury and can be evaluated without an expert's assistance." *Id.* at 823. This Court observed that criminal defendants had due process protections in that identifications were not admissible if they were the product of unnecessarily suggestive police procedures, and the weaknesses of identifications could be explored on cross-examination and closing arguments. *Lawhorn*, at 823. As a result, this Court found that the trial court did not abuse its discretion in excluding the proffered expert testimony. *Id.*

This Court reaffirmed this holding in *State v. Whitmill*, 780 S.W.2d 45, 47 (Mo. banc 1989). In *Whitmill*, this Court stated that in *Lawhorn*, the Court had held that a trial court “*may, in its discretion,*” exclude expert testimony regarding the credibility of eyewitness identifications. *Whitmill, supra* (emphasis added). This Court then found that there were several safeguards in Whitmill’s case to ensure that Whitmill had the opportunity to apprise the jury of the problems inherent in eyewitness identifications. *Id.* Whitmill fully cross-examined the witnesses who identified him as the shooter, and discussed the problems of identification in opening statement and closing argument. *Id.* In addition, the trial court instructed the jury on the factors it should consider in determining whether the identification was reliable. *Id.*

Neither *Lawhorn* nor *Whitmill* established a *per se* rule that expert testimony regarding eyewitness identifications is inadmissible.² Rather, these

² That being said, particularized expert testimony regarding a witness’s actual identification should never be allowed as this would relate to the credibility of the witness and invade the province of the jury. Testimony regarding the generalities of eyewitness identification would potentially be admissible where it can be shown that the expert testimony was not within the common experience of the jury and would assist the jury. *See, e.g., State v. Churchill*,

cases recognized that the admission of such evidence was within the trial court's discretion. These cases applied the same standard of admissibility that is and has been applied to any other expert testimony in any other field. Expert testimony is admissible if it is clear that the subject of the testimony is one upon which the jurors, for want of experience or knowledge, would otherwise be incapable of drawing a proper conclusion from the facts in evidence. *Lawhorn, supra*. Proffered expert testimony should be excluded if it does not assist the jury, or if it unnecessarily diverts the jury's attention from relevant issues. *Id.* at 822-823. Expert testimony is also inadmissible if it relates to the credibility of witnesses because this would be an invasion of the province of the jury. *Id.* at 823. As it happens, in both *Lawhorn* and *Whitmill*, this Court found that the trial court did not abuse its discretion in excluding the proffered expert testimony because the subject matter of the testimony was one which this Court found was "within the general realm of common experience of

98 S.W.3d 536, 539 (Mo.banc 2003) (holding that trial court has broad discretion in admitting general testimony of behaviors of abused children, but particularized testimony must be rejected because it usurps the decision-making function of the jury).

members of a jury” and could be “evaluated without an expert’s assistance.” *Id.* at 823.³

2. The trial court did not abuse its discretion in excluding Dr. Lampinen’s proffered testimony.

To preserve a claim of improperly excluded evidence, the propoent must attempt to present the excluded evidence at trial, and if it remains

³ Appellant relies on §490.065 to argue that Dr. Lampinen’s testimony is admissible (App.Br. 21-24). The current version of §490.065, which was amended in 2017, adopts the *Daubert* standard for admissibility of expert testimony, whereas Missouri had previously used the *Frye* standard for admissibility. The purpose of *Daubert* and *Frye* is to determine whether the proffered expert testimony is reliable, that is, whether it “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 152 (1999). In the present case, Dr. Lampinen’s testimony was not excluded because it was deemed unreliable. In fact, the reliability of his testimony was not questioned or contested. Section 490.065 is not relevant to the question of admissibility presented in this case, which hinges upon whether the evidence would be helpful to the jury.

excluded, make a sufficient offer of proof. *State v. Hunt*, 451 S.W.3d 251, 253 (Mo.banc 2014). An offer of proof is required to demonstrate to the trial court what the rejected evidence would show, educate the court as to the admissibility of the testimony, and allow the trial court to consider the testimony in context. *State v. Hillman*, 417 S.W.3d 239, 244 n.3 (Mo.banc 2013). “Offers of proof must show what the evidence will be, the purpose and object of the evidence, and each fact essential to establishing admissibility. *Hunt*, 451 S.W.3d at 263.

Where an offer of proof consists of evidence which is admissible in part and inadmissible in part, the offer of proof fails in its entirety. *State v. Murphy*, 534 S.W.3d 408, 415 (Mo.App.E.D. 2017); *State v. Jones*, 322 S.W.3d 141, 144 (Mo.App.W.D. 2010); *State v. Broussard*, 57 S.W.3d 902, 911 (Mo.App.S.D. 2001). In the present case, appellant made an offer of proof by putting Dr. Lampinen on the stand and asking him questions. But most of Dr. Lampinen’s testimony was inadmissible because it would not have been helpful to the jury in that it discussed matters well within the common knowledge of the jury.

For example, Dr. Lampinen testified that the accuracy of an identification can be affected by how long the witness saw the suspect’s face (Tr. 15), whether the witness’s vision was focused on something else, like a gun (Tr. 15-16), impaired eyesight (Tr. 18), lighting conditions (Tr. 19), whether anything partially blocked the suspect’s face (Tr. 19-20), the distance from

which the face was viewed (Tr. 20), whether weather conditions were conducive to clear sight (Tr. 20), or whether the witness knew the suspect or the suspect was a stranger (Tr. 21-22). All of these topics are well within the common experience of a juror.⁴

Dr. Lampinen's offer of proof also failed because much of his testimony was about topics that were not relevant to the facts of the case. For example, there was no evidence that Williams's memory could have been contaminated by post-event information; the entire event from robbery to identification was less than 10-15 minutes (Tr. 114-123). There was no evidence that Williams had impaired eyesight. There was no evidence that the weather would have decreased visibility. There was no evidence as to Williams's viewing angle of the suspects' faces. Williams was not asked to make numerous identifications. There was no evidence that Williams was intoxicated, ill, or otherwise impaired.

⁴ Respondent identifies the most obvious topics that would have been within the common knowledge of the jury. In so doing, respondent does not concede that any other topics in Dr. Lampinen's testimony were the proper subject of expert testimony.

The proponent of the offer of proof has the responsibility to sever the good parts and the bad parts of the offer of proof. *State v. Malicoat*, 942 S.W.2d 458, 461 (Mo.App.S.D. 1997). Appellant did not do so in this case. On appeal, appellant tries to refine the claim by pointing out specific areas in which Dr. Lampinen’s evidence might have been relevant. Appellant argues that Dr. Lampinen could have testified that an eyewitness’s confidence level does not correlate with the accuracy of the identification (App.Br. 31-32), that eyewitnesses overestimate the duration of the crime (App.Br. 33-34), that stress and weapons focus affect reliability (App.Br. 33-34), that cross-racial identifications are prone to error (App.Br. 34), that show-ups are less reliable than line-ups (App.Br. 34-35),⁵ and that memory does not operate as expected (App.Br. 36-37). Instead Dr. Lampinen discussed numerous topics that were not relevant to the facts of the case and were not properly the subject of expert testimony. Appellant cannot use his brief to refine the offer of proof that he made to the trial court.

Because appellant’s offer of proof contained irrelevant, inadmissible evidence, the trial court did not abuse its discretion in rejecting the offer of

⁵ The subheading in appellant’s brief states that “Show-ups are Inherently Reliable.” (App.Br. 34). Respondent believes that was a typographical error.

proof and excluding Dr. Lampinen's testimony. *State v. Murphy, supra; State v. Jones, supra; State v. Broussard, supra; Malicoat, supra.*

It must also be noted that in both *Lawhorn* and *Whitmill*, the courts were faced with the question of admission of evidence similar to that in the present case. In *Lawhorn*, it was the difficulty in cross-racial eyewitness identification, the fact that post-confrontation events affect the witness's perception of what has occurred, and that no correlation existed between a witness's confidence in his identification and the correctness of the identification. In *Whitmill*, the expert wanted to testify about how stress, anger, and fear affect the reliability of eyewitness identifications. *Whitmill*, at 47. This Court found that these matters were within the common experience of jurors. Dr. Lampinen's testimony in appellant's offer of proof did not establish how any of these matters were *not* in the common experience of jurors and thus did not establish a basis for the trial court to reach a different conclusion than that reached by this Court in similar cases.⁶

⁶ This is not to say that such evidence could never be admissible under any circumstances. The facts and circumstances of any given case could render such evidence admissible, but it is incumbent on the proffering party to

3. Appellant was not prejudiced.

Appellant cannot show that he was prejudiced by the absence of Dr. Lampinen's testimony. As this Court found in *Lawhorn* and *Whitmill*, criminal defendants have due process protections in that identifications are not admissible if they are the product of unnecessarily suggestive police procedures, and the weaknesses of identifications can be explored on cross-examination and closing arguments. *Lawhorn*, at 823; *Whitmill*, at 47. The Supreme Court has also recognized that there are other safeguards built into our adversary system, other than the presentation of expert testimony, to caution juries against placing "undue weight on eyewitness testimony of questionable reliability." *Perry v. New Hampshire*, 566 U.S. 228, 245 (2012). These include the defendant's right to confront the eyewitness, exposition of the flaws in an eyewitness's testimony through cross-examination, highlighting the fallibility of eyewitness testimony during opening and closing arguments, eyewitness-specific jury instructions which warn the jury to take

demonstrate why such evidence is relevant. No such demonstration was made in the present case.

care in appraising identification evidence, and expert testimony on the hazards of eyewitness identification evidence. *Id.*⁷

These protections were present in appellant's case. On cross-examination, defense counsel established that Williams saw two African-Americans with their hoods up and their heads down (Tr. 127). Williams had never seen the men before (Tr. 127). The lighting was not exceptionally bright (Tr. 116). Williams said that the robbery lasted 20 to 30 seconds (Tr. 127). Williams acknowledged that he was stressed and his adrenaline was pumping (Tr. 127). Defense counsel established that Williams couldn't identify anything about what the men were wearing other than their sweatshirts (Tr. 128), and he couldn't remember who was wearing which (Tr. 128). Defense counsel established that appellant was handcuffed when Williams identified him and that Williams could see the police collecting evidence when he was asked to make the identification (Tr. 131).

⁷ Appellant notes that the Court in *Perry* also noted that some States allow expert testimony on the hazards of eyewitness identification evidence. *Perry*, at 247; App.Br. 25). The Court said that this could occur in "appropriate cases" – indicating that such testimony is not required and would be within the discretion of the trial court.

In closing argument, defense counsel argued about the problems with Williams's identification. He did not, as appellant suggests, merely argue that Williams was not credible because he had an SIS for possession of marijuana (App.Br. 18). Defense counsel argued that Williams was sincere, but mistaken (Tr. 188-190). He argued that eyewitness misidentification is the leading cause of wrongful incarceration. He argued that Williams couldn't remember who was wearing which hoodie (Tr. 130). Most telling of all, defense counsel established that Williams's description of the robber in his deposition did not match appellant. Williams, in a deposition, said that the gunman had a goatee and cornrows or dreadlocks (Tr. 130). But a picture of appellant taken an hour after he was arrested showed no cornrows and no goatee (Tr. 171, 176). Defense counsel argued as follows:

I have no doubt in my mind, none, that Jacob went through an awful experience. I think everyone can agree with that. I think we can agree that it was a traumatic experience, that it shook him deeply. I think we can agree that it was horrifying and stressful.

But that's why it's so important to make sure we get the right guy. We're not about just sending a random person to prison. We're about getting the right person, the person who robbed him. And that is not Kane Carpenter. Kane Carpenter

does not have cornrows, and he doesn't have a goatee. He's not the guy.

(Tr. 189-190).

Finally, the jury was given the following instruction:

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).

Given this evidence, arguments, and instruction, the jury was well able to determine what weight to give Williams's identification and could apply the factors listed in the eyewitness identification instruction (D28 p1). Williams observed the robbers, chased them down the street, saw them duck down Commercial Way, and then called the police, who arrived within three minutes and found appellant and his codefendant coming out of Commercial Way, a block from where Williams had left them (Tr. 141, 143-144, 151). The sweatshirts the robbers had been wearing and Williams's cellphone and e-cigarette device were found on Commercial Way in the half-block between where appellant was seen entering the alley and where the police found him exiting the alley. Williams identified appellant within five minutes of his 911 call, less than a block from the crime (Tr. 151). Given the circumstances of the crime and the apprehension of the suspects, within mere minutes of the crime itself and only a block away from where Williams had last seen them, it cannot be said that Dr. Lampinen's testimony would have seriously called into question Williams's identification of appellant.

Appellant, however, argues that Dr. Lampinen's testimony would have established that the jury should not rely on Williams's claim that he was 100% certain of his identification of appellant (App.Br. 31). But there was a basis in the evidence for giving credence to Williams's claim of confidence, in that Williams identified appellant within five minutes of his 911 call, which was made right after the robbery, less than a block from the crime at the end of the alley Williams had seen appellant and his accomplice enter (Tr. 151).

Appellant said that Dr. Lampinen would have testified that witnesses are poor at estimating how long an event lasted. There was no question, however, in the present case that the robbery was quite short. Williams said on cross-examination that the robbery lasted 20 to 30 seconds. Williams had said on direct that the robbery lasted 45 seconds (Tr. 116). It would not take an expert to show the jury that Williams was not sure how long the robbery lasted, but that it was less than a minute in any event. Dr. Lampinen's testimony on this matter would have added little. Moreover, the time element that was important and relevant, and was measured by police reports, was that the suspects were stopped five minutes after the 911 call and less than a block from the scene of the crime, exiting the alley that Williams saw them flee down after the robbery.

Appellant asserts that Dr. Lampinen would have testified that when a weapon is involved, it draws attention away from the perpetrator's face and

can lead to poor facial recognition (App.Br. 33). It does not take an expert to explain that if a witness is looking at a gun – which Williams said he did for part of the robbery – he is not looking at the perpetrator’s face at the same time. When Williams was asked where he was focused during the robbery he said: “I was focused mainly on the gun and trying to find a way to get out of the situation.” (Tr. 116). Williams said that he looked at the gun a “good 20 seconds” while the gun was exposed. Any attorney would be able to argue to the jury that for a substantial portion of this very short robbery, Williams was looking at the gun – not the perpetrator’s face.

Appellant argues that Dr. Lampinen could have testified that cross-racial identifications are prone to error (App.Br. 34). As noted above, this Court has found this particular phenomenon within the common experience of jurors.⁸ Moreover, Dr. Lampinen could not testify, obviously, that cross-racial identifications are impossible, and given the circumstances in this case wherein the victim followed the perpetrators to an alley, called 911, the police caught the suspects within five minutes at the other end of the alley, less than a half-block from where the robbery took place, and the victim’s property and

⁸ The trial record does not reflect the victim’s race.

the perpetrators sweatshirts were found in the alley, there was substantial evidence to support the accuracy of Williams's identification.

Appellant argues that Dr. Lampinen could have testified that show-ups are inherently suggestible and unreliable (App.Br. 34-35). It should be noted that "Missouri courts have routinely held that show-ups are acceptable if properly administered." *State v. Watkins*, 527 S.W.3d 204, 210 (Mo.App.E.D. 2017). A show-up is impermissibly suggestive only if the police unduly pressure the witness to make a positive identification. *Id.* It is not impermissibly suggestive for police to present a single suspect for identification shortly after the crime occurred, in or near a police vehicle, even when the suspect is in handcuffs. *Id.* Show-ups are justified by the exigencies of the situation; such action may immediately indicate to the officers whether the suspect should be released or held, or whether they should continue the search. *Id.* Appellant's own expert acknowledged that show-ups have a purpose (Tr. 31-32). Even assuming that show-ups are less accurate than, for instance, a line-up, Dr. Lampinen also testified, in the motion to suppress hearing, that Williams had been given a "fairly standard admonishment that's been used successfully in social science research" to reduce false identifications (STr. 22). In any event, it is within the general realm of common experience of members of a jury to understand that viewing a suspect in handcuffs in police custody

might taint a witness's identification, and this could certainly have been argued to the jury.

Appellant suggests that Dr. Lampinen could have testified how human memory works and doesn't work (App.Br. 36). Nothing in Dr. Lampinen's testimony in the offer of proof would have called into question an identification made within five minutes of the crime. In fact, Dr. Lampinen said that the first identification by the witness is the most important one (Tr. 28). Moreover, Dr. Lampinen also testified that memory gets worse as time progresses, and so the more time that passes after a crime, the worse the memory will get (Tr. 25). If anything, Dr. Lampinen's testimony as to this criterion would have lent credibility to Williams's identification.

Appellant also argues that he was prejudiced because his attorney could not explore the problems with Williams's identification (App.Br. 43). Appellant pointed out the following:

1. The crime occurred on a dark street with a streetlight potentially 100 yards away (App.Br. 47);
2. Williams's focus was on the gun or divided between the two robbers and trying to find a way to get away;
3. Williams had never seen the robbers before;
4. Williams gave conflicting accounts for how long the robbery lasted;

5. The police used a show-up, in which appellant was in handcuffs and the police were collecting evidence.

6. Williams's statements conflicted as to who wore the red hoodie and who wore the black hoodie.

7. Williams testified that appellant wore a white tee-shirt, but his booking photo showed a black t-shirt

8. Williams could not identify anything else the robbers were wearing;

9. Williams could not provide any detail as to the appellant's opinion except to say that his nose was "shorter" and "broader, kind of wide."

10. He said that the robber had a goatee and cornrows or dreadlocks, but appellant's booking photo, taken an hour after the robbery, showed that he had neither.

(App.Br. 47-49). All of this evidence could have easily been argued in closing, and the jury could have been asked to rely on their own common sense and common experience to infer from this evidence that Williams's identification was questionable. Defense counsel had the opportunity to address the alleged weakness of Williams's identifications without expert testimony. He was not prejudiced by the exclusion of Dr. Lampinen's testimony.

Appellant cites cases from other jurisdictions wherein the courts have determined that expert testimony is an effective way to educate jurors about the risk of misidentification (App.Br. 25-29). It may be that in certain cases, given the circumstances presented by the evidence in those cases, expert testimony on eyewitness identification might be helpful to the jury. But absent a showing made to the trial court that the facts and circumstances of the case before it present an issue that is actually outside the common knowledge of the jury, such expert testimony is not necessary and should not be admitted. It does not take an expert to understand that it is hard to recognize a face if the area is not well-lit. It does not take an expert to explain or to understand that it is hard to recognize a face if one's vision is focused on a weapon instead of the face. It does not take an expert to explain that an identification may be questionable where the suspect's face was blocked by a hood or a mask or a disguise. It does not take an expert to explain that an identification may be questionable where the witness got only a brief look at the suspect. It does not take an expert to explain that people who are intoxicated or have bad eyesight or are injured, etc. might have trouble accurately identifying a suspect. All of these matters can be adequately addressed through cross-examination, argument, and jury instructions.

In the present case, as discussed above, appellant's offer of proof discussed numerous topics that were within the common experience of jurors,

and appellant's expert did not explain how any of the topics he discussed would not have been within the common experience of jurors. The trial court cannot be faulted for failing to allow expert testimony when it was not shown that the expert testimony was necessary

This is not to say that there might not, in some cases, be a place for expert testimony on eyewitness identifications. But no such showing was made to the trial court in the present case, and it cannot be said that the trial court abused its discretion in excluding Dr. Lampinen's testimony.

In sum, the trial court was well within its discretion in excluding Dr. Lampinen's expert testimony. Appellant's offer of proof failed as it contained substantial irrelevant evidence that would not have been helpful to the jury. Even if the defense had made an offer of proof only as to the selected topics mentioned in appellant's brief, appellant has not shown that Dr. Lampinen's testimony would have likely resulted in a different outcome at trial. Appellant was not prejudiced because the evidence showed that the victim followed the two robbers until they went down an alley, and the police apprehended two men at the end of the alley, less than a block from the scene of the robbery, within five minutes of the 911 call. The victim's stolen property and the robbers sweatshirts were found discarded within the alley. Dr. Lampinen's testimony would not have established that Williams's identification was wrong, and under the circumstances of the case, wherein the men were stopped

by the police within a half-block of the scene and mere minutes after the robbery, it is highly unlikely that Dr. Lampinen's testimony would have resulted in a different outcome. Given the circumstances of the robbery, the victim's pursuit of the perpetrators, the quick response of the police, and the location of the suspects, the stolen property, and the discarded clothing of the perpetrators, there was not a reasonable probability that the exclusion of Dr. Lampinen's testimony affected the outcome of the trial. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

That the attached brief complies with Missouri Supreme Court Rule 84.06(b) and contains 8,803 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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