

**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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Kane Carpenter, incorporates the Jurisdictional Statement from page 7 of his Opening Brief.

STATEMENT OF FACTS

Carpenter incorporates the Statement of Facts from pages 8-14 of his Opening Brief. In addition, the State errs in stating that two identification cards were found, one in Commercial Way and another with the two sweaters (Resp. Br. 7). Scott's intermediate driver's license was found halfway down Commercial Way (Tr. 148, 164). No other identification card was found. Carpenter was stopped half a city block away, in the middle of Cherry Street where it intersected Commercial Way (Tr. 143, 148).

ARGUMENT

The State's argument contains five major flaws. First, despite the State's assertions, *Lawhorn* and *Whitmill* held that a trial court never abuses its discretion by excluding expert testimony on eyewitness identification and thus, expert testimony on eyewitness identification is routinely disallowed. Second, although the State may wish to ignore Section 490.065, the statute governs the admissibility of all expert testimony in Missouri and thus, its liberal standard for assessing relevance applies in this case. Third, the State acknowledges that courts in other jurisdictions allow expert testimony on eyewitness identification as a means of educating jurors about the risks of misidentification; it states that such testimony could be helpful in an appropriate case, but it then argues, in effect, that no case ever would be appropriate because all the factors relating to eyewitness identification are within the general knowledge of the jurors. Fourth, Dr. Lampinen's offer of proof was proper in that it set forth the substance of his testimony and did not contain inadmissible matters. Finally, despite the State's assertions, Carpenter was prejudiced by the exclusion of this evidence because the "protections" cited by *Lawhorn* and *Whitmill* are inadequate and the excluded evidence was vital to the defense; it is the State's burden to rebut the presumption of prejudice arising from the erroneous exclusion of evidence, and the State has failed to show the error was harmless beyond a reasonable doubt.

Under Lawhorn and Whitmill, a Trial Court Can Never Abuse its Discretion in Disallowing Expert Testimony on Eyewitness Identification

The State argues that *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988), and *State v. Whitmill*, 780 S.W.2d 45 (Mo. banc 1989), treat expert testimony on eyewitness identification the same as any other expert testimony (Resp. Br. 24). It argues that the expert testimony was not admissible simply because the factors relating to eyewitness identification proffered in those cases were within the general knowledge of the jury (Resp. Br. 21-25).¹

In arguing that these cases do not effectively bar expert testimony on eyewitness identification, the State misconstrues the holdings of *Lawhorn* and *Whitmill*. It ignores lower courts' interpretation of these cases, and it ignores its own position at the Court of Appeals. Notably, while arguing that a trial court could abuse its discretion by disallowing expert testimony on eyewitness identification (Resp. Br. 23-25), it fails to cite a single Missouri opinion where that in fact occurred.

In *Lawhorn*, the Court considered “whether a jury may consider the testimony of an expert witness on the subject of the reliability of eye witness identification.” *Id.*, 762 S.W.2d at 821; see also p. 822 (“This case “squarely presents the issue whether the defendant in a criminal case is entitled to present expert opinion testimony on the reliability of eyewitness identification.”). The Court implicitly held that defendants could not present such expert testimony. It held that courts had discretion to exclude expert testimony on

¹ The State posits that expert testimony on eyewitness identification could be proper in some hypothetical case, but does not state how.

eyewitness identification because jurors can rely on their own experience and knowledge in assessing the general principles regarding eyewitness identifications. *Id.* at 823. In addition, the Court held that exclusion of expert testimony would not leave the defendant without protection because the defendant could expose flaws in the eyewitness' identification through cross-examination and closing argument. *Id.* at 823 (citing *State v. Kemp*, 507 A.2d 1387, 1390 (Conn. 1986) (overturned by *State v. Guilbert*, 49 A.3d 705, 712 (Conn. 2012)).²

In *Whitmill*, the Court clarified the point. It rejected the defendant's contention that "trial courts must retain discretion as to the admissibility" of expert testimony on eyewitness identification. *Id.* at 46. The Court did not review *Whitmill*'s offer of proof to assess whether the testimony would have aided the jury. Instead, the Court simply held that because certain protections were available at trial, the trial court did not abuse its discretion in refusing the expert testimony. *Id.* at 47. Because those protections are available ***in any case***, the holding gave courts license to automatically exclude this evidence.³

² The Connecticut Supreme Court held that "the time has come to overrule *Kemp* ... and, further, that testimony by a qualified expert on the fallibility of eyewitness identification is admissible ... when that testimony would aid the jury in evaluating the state's identification evidence." *Id.* at 712 (internal citations omitted).

³ The State repeatedly states that in *Whitmill*, the Court found that the trial court did not abuse its discretion because the subject matter was within the general knowledge of the jurors (Resp. Br. 24-25, 29). But *Whitmill* did not so find. Instead, it held that because "the *Lawhorn* protections" were available at trial, no abuse of discretion occurred in excluding the expert testimony. *Id.* at 47.

The Western District’s opinion in this case is a perfect example. It simply affirmed the trial court’s discretion to exclude Carpenter’s eyewitness identification expert, based solely on its “obligation to follow” *Lawhorn*. *State v. Carpenter*, WD81702 (Mo. App. W.D. July 30, 2019); *see also State v. Naylor*, 505 S.W.3d 290, 298 (Mo. App. W.D. 2016) (stressing constitutional requirement to follow *Lawhorn* “regardless of how many years have passed since that decision was rendered”); *State v. Ware*, 326 S.W.3d 512, 528 (Mo. App. S.D. 2010) (relying on *Lawhorn* and *Whitmill* to affirm trial court’s ruling that expert eyewitness testimony would not aid the jury).

In addition, while the State *now* says that courts treat expert testimony on eyewitness identification the same as any other expert testimony, it argued the opposite in its brief filed in the Court of Appeals. There, the State argued that under *Lawhorn* and *Whitmill* and as Missouri appellate courts have consistently held, trial courts have no discretion to allow expert testimony on eyewitness identification:

In *Lawhorn*, the Missouri Supreme 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. The court held that the defendant was not entitled to present this testimony because “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.

The court reaffirmed this holding in *State v. Whitmill*, 780 S.W.2d 45, 47 (Mo. banc 1989), in which the court held that the trial court had not abused its discretion in excluding the testimony of a psychology professor ... regarding the “psychological factors affecting the reliability of eyewitness identification.” *Id.* at 47. The Court of Appeals has consistently followed the law established in *Lawhorn* and *Whitmill* in upholding the trial courts’ exclusion of expert testimony on the reliability of eyewitness identifications.

(State’s brief, WD81702, p.31, citing cases). The State noted that, “[n]otwithstanding the holdings in *Lawhorn* and *Whitmill*,” some appellate opinions suggest that a trial judge has discretion to allow such testimony (State’s brief, WD81702, p.33). It further argued that allowing a trial court discretion to allow the testimony “seemingly contravenes” this Court’s holdings in *Lawhorn* and *Whitmill* (State’s brief, WD81702, p.34). The State argued that the appellate court was “constitutionally bound” to follow *Lawhorn* and *Whitmill*’s holding that “a trial court does not abuse its discretion in refusing to permit expert testimony on the reliability of eyewitness identification and that such matters invade the province of the jury” (State’s brief, WD81702, p.34).

This was also the State’s stance at trial, that “Missouri courts have routinely held that experts in eyewitness identification are unnecessary and [that exclusion of such testimony does] not deprive a defendant of any right.” (D20, p.3). Despite what the State now argues, trial courts routinely disallow this evidence in any given case, believing it would never be an abuse of discretion to disallow the evidence.

The State Misconstrues Section 490.065

The State also misconstrues Section 490.065, which governs the admissibility of expert witness testimony. *State v. Boss*, 577 S.W.3d 509, 517 (Mo. App. W.D. 2019). In a footnote, the State argues that Section 490.065 has no relevance here because the statute adopted the *Daubert*⁴ standard for admissibility of expert testimony; it argues that *Daubert*

⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

relates only to whether that evidence is reliable, and the reliability of Dr. Lampinen's testimony "was not questioned or contested." (Resp. Br. 25, fn.3).

It is understandable that the State would wish to gloss over Section 490.065. After all, Section 490.065 provides that expert testimony is admissible when (1) the expert is qualified, (2) the testimony is relevant, and (3) the testimony is reliable. And in doing so, the statute employs a very liberal relevancy standard. As with the federal rules of evidence, Section 490.065 employs a "permissive backdrop," "liberal thrust," and "general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert*, 509 U.S. at 588-89; see also *id.* at 587 (under the federal rules, the "basic standard of relevance is a liberal one"); *State ex rel. Wright v. Gardner*, 562 S.W.3d 311 (Mo. App. E.D. 2018). 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. *Boss*, 577 S.W.3d at 519. 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).

Notably, other courts have held that expert testimony on eyewitness identification is admissible under *Daubert*/Rule 702. See, e.g., *United States v. Smith*, 156 F.3d 1046, 1053-54 (10th Cir. 1998) ("expert testimony on eyewitness identification may properly be admitted under *Daubert* in certain circumstances"); *United States v. Brownlee*, 454 F.3d 131, 144 (3rd Cir. 2006); *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993).

The State Also Ignores the Great Weight of Authority

The State acknowledges that courts in other jurisdictions have accepted expert testimony on eyewitness identification as a means of educating jurors about the risks of misidentification (Resp. Br. 42). It recognizes that such testimony can be helpful in an appropriate case (Resp. Br. 42). But it fails to state what such an appropriate case would be. Further, it then insists – against the vast weight of authority – that none of the factors relating to eyewitness identification are beyond the general knowledge of the jurors so as to necessitate expert testimony.

For example, the State insists that factors such as cross-racial identification,⁵ weapons focus, lighting, and hoods/disguises are well within the jurors’ general knowledge (Resp. Br. 26-27, 37-38). But courts have rejected this notion. In *State v. Clopton*, 223 P.3d 1103 (Utah 2009), the Utah Supreme Court specifically noted cross-racial identification and “the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit’s appearance, and the presence of a weapon or other distractions” as factors that make eyewitnesses especially prone to identifying the wrong person as the perpetrator of a crime. *Id.* at 1108. The court stressed that “there is little doubt that juries are generally unaware of these deficiencies in human perception and memory.” *Id.*; see also *Guilbert*, 49 A.3d at 731 (“Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions”); *State v. Lawson*, 291 P.3d 673, 695 (2012) (because factors

⁵ After Respondent’s brief was filed, the parties stipulated that the victim appeared to be Caucasian (See Stipulation), while Carpenter is African-American (Ex. A).

relating to eyewitness identification are “either unknown to the average juror or contrary to common assumptions ... federal and state courts around the country have recognized ... that cross-examination, closing argument, and generalized jury instructions” are not enough and expert testimony “may prove vital”).

Clopton was cited with approval by the United States Supreme Court in *Perry v. New Hampshire*, 565 U.S. 228 (2012). At issue in *Perry* was whether a trial court should exclude evidence of an unnecessarily suggestive identification where the suggestiveness was not the result of police conduct. *Id.* at 236. The Court held that exclusion was not warranted because constitutional safeguards and “protective rules of evidence” were employed at trial. *Id.* at 233, 237. Although the Court listed the same constitutional safeguards as this Court listed in *Lawhorn*, the Supreme Court’s list was not exclusive. *Id.* at 245-47. Moreover, in discussing rules of evidence that could be employed, the Court specifically noted that expert testimony was a permissible means for defendants to explain the hazards of eyewitness identification evidence. *Id.* at 247. The Court then cited *Clopton*: “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].” *Id.* (citing *Clopton*, 223 P.3d at 1113).

In *People v. Lerma*, 47 N.E.3d 985, 993 (Ill. 2016), the Illinois Supreme Court held that there was “no question” that expert testimony on eyewitness identification was both relevant and appropriate since factors such as “the stress of the event itself, the use and presence of a weapon, the wearing of a partial disguise, exposure to postevent information, nighttime viewing, and cross-racial identification” were all at issue in the case. The

problems with these factors “are largely unfamiliar to the average person, and, in fact, many [are] counterintuitive.” *Id.*; see also *Commonwealth v. Walker*, 92 A.3d 776, 782 (Pa. 2014) (observing that courts in 44 states, the District of Columbia, and all federal circuit courts that have ruled on the issue, permit expert testimony on eyewitness identifications “for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification”).

The Offer of Proof Was Sufficient

The State argues that Carpenter’s offer of proof was flawed because Dr. Lampinen testified about facts that, according to the State, were commonly known to jurors or were not relevant to the case (Resp. Br. 26-29). The State is raising this allegation for the first time in this Court; it did not raise it in its brief to the Court of Appeals or lodge any objection at trial. If the offer of proof was truly as faulty as the State now alleges, the State would have mentioned this previously. The State’s argument should be considered waived. *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo. banc. 2014).

At any rate, the offer of proof was not faulty. In discussing the various factors inherent in eyewitness identification, Dr. Lampinen was demonstrating his wide range of knowledge of the subject. Researchers divide the factors that affect the reliability of eyewitness identifications into two broad categories: “estimator variables” (factors that are inherent in the event itself) and “system variables” (factors that affect the reliability of the identification procedures). Courts across the country have recognized the scientific consensus identifying how both estimator and system variables bear on the likelihood that an eyewitness will misidentify the perpetrator and therefore speak to the reliability of

eyewitness identification evidence. *See, e.g., State v. Henderson*, 27 A.3d 872, 896-910 (N.J. 2011) (identifying eight system variables and ten estimator variables and describing their effect on the reliability of eyewitness identification evidence); *Lawson*, 291 P.3d at 686-88, 700-11 (same). Additionally, Dr. Lampinen's discussion of certain topics was necessary to lay the ground work for others or were intertwined with other topics. Everything within the offer of proof had the potential to be helpful to the jury.

The State argues that the offer of proof contains matters that would have been generally known to the jurors. But therein lies the problem. Matters that have been considered "known" to jurors have, after decades of research, been found not to be so. *See, e.g., Henderson*, 27 A.3d at 872. The State attempts to simplify these matters so that they seem obvious (Resp. Br. 26-27, 42), but they cannot be distilled so simply. For example, the State argues that it is obvious that if a person is looking at a gun, then he is not looking at the perpetrator (Resp. Br. 26, 38). But that's only half the story. The gun does not just distract the victim; it also elevates his stress level. As Dr. Lampinen explained, decades of research has proven that the stress caused by the presence of a gun greatly impairs facial recognition (Tr. 16, 24). So not only is the witness distracted by the gun, but also, his ability to recognize the perpetrator's face is impaired (Tr. 16, 24). This refutes the common misperceptions that stressful situations indelibly "burn" details into one's memory and that the presence of a gun puts a victim on "high alert" rather than distracting him. *Id.* at 904.

The State argues that jurors would understand that the reliability of an identification is lessened when the suspect was a stranger (Resp. Br. 27). But the jurors would not know the extent to which it is lessened. Dr. Lampinen discussed a study in which the participants

were presented with an individual who stood before them (Tr. 21-22). The participants were then asked to pick that person out of a ten-person photographic lineup (Tr. 21-22). Even with the individual still standing before them, the participants were incorrect 30% of the time (Tr. 21-22). Jurors would not know the extent of the difficulty people have in identifying strangers.

The State also argues that Dr. Lampinen did not explain why jurors would be unaware of the various system and estimator variables (Resp. Br. 29). Why else would Dr. Lampinen discuss various research studies? Most jurors do not busy themselves keeping up with this scientific field. Moreover, the State scolds Carpenter for “refining” the offer of proof (Resp. Br. 28), but Carpenter was merely emphasizing the more compelling portions of the offer of proof in showing why the expert testimony was needed.

Carpenter Suffered Prejudice by the Exclusion of the Crucial Defense Evidence

1. Other Protections Were Insufficient

The State claims that Carpenter suffered no prejudice by the exclusion of Dr. Lampinen’s testimony because defense counsel was able to cross-examine the State’s witnesses and highlight the fallibility of eyewitness testimony in opening statement and closing argument, and the jury received an instruction listing factors to consider regarding eyewitness identification (Resp. Br. 30-36). But the State fails to address the limitations of these avenues as set forth in Carpenter’s opening brief and numerous studies and court opinions that conclude that cross-examination, opening and closing, and jury instructions do **not** provide adequate protection. See, e.g., *Clopten*, 223 P.3d at 1109 (“It is apparent

from the research that the inclusion of expert testimony carries significant advantages over the alternatives, namely cross-examination and jury instructions.”).

Cross-examination is not effective when the witness is honest but mistaken. “[Cross-examination] is not particularly effective when used against eyewitnesses who believe they are telling the truth.” Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1277 (2005); see also *People v. Boone*, 30 N.Y.3d 521, 531 (2017); *Commonwealth v. Crayton*, 21 N.E.3d 157, 169 (Mass. 2014) (recognizing difficulty for defense counsel “to convince a jury that an eyewitness’s confident identification might be attributable to the suggestive influence of the circumstances surrounding the identification”); *Kemp*, 507 A.2d at 1390 (cross-examination is not as effective as expert testimony; “cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs ... [and] although cross-examination may expose the *existence* of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the *import* of these factors.”) (emphasis in original).

The State fails to acknowledge that defense counsel cannot assert facts in opening statement unless counsel in good faith expects evidence will be presented at trial in support of those facts. *State v. Powell*, 286 S.W.3d 843, 850 (Mo. App. W.D. 2009). So too, counsel may not argue facts in closing that were not presented as evidence at trial. *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006). At any rate, defense counsel’s statements or arguments, unsupported by evidence, would be viewed with skepticism or as “partisan rhetoric.” *Guilbert*, 49 A.3d at 726; see also *Ferensic v. Birkett*, 501 F.3d 469, 482 (6th

Cir. 2007) (without expert testimony, “jury ha[s] no basis beyond defense counsel’s word to suspect the inherent unreliability of the [eyewitnesses’] identifications.”).

Finally, jury instructions provide too little, and they come too late. Although jury instructions may list the variables the jury should consider, these instructions fail to explain how a given factor affects reliability. “Jury instructions do not explain the complexities about perception and memory in a way a properly qualified person can.” See Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 Fed. Cts. L. Rev. 1, 25 (2007). General jury instructions leave the jurors to evaluate the evidence based on their own personal – and often incorrect – beliefs. Even detailed jury instructions “do not explain the impact these factors can have on memory accuracy...they [also do not] instruct [the jury] on the physiology and psychology of the memory process.” Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceutical and Eyewitness Identification*, 16 Pace L. Rev. 237, 273 (1996).

In 1986, Utah adopted an instruction modeled on *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1979), but with more detail and incorporating more research. *Clopton*, 223 P.3d at 1110. But by 2009, the Utah Supreme Court, relying on subsequent research, recognized that even its enhanced instruction was insufficient and concluded that “a cautionary instruction does little to help a jury spot a mistaken identification.” *Id.* It noted that while this seems counterintuitive, commentators and social scientists had three explanations:

First, instructions “given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court” are unlikely to have much effect on the minds of a jury.

Second, instructions may come too late to alter the jury's opinion of a witness whose testimony might have been heard days before.

Third, even the best cautionary instructions tend to touch only generally on the empirical evidence. The judge may explain that certain factors are known to influence perception and memory, but will not explain how this occurs or to what extent.

Id. at 1110-11 (citing Cohen, *supra*, 16 Pace L.Rev. at 272 (“A powerful eyewitness’ testimony may be so firmly embedded in the jurors’ minds” that later instructions may not “undo potential prejudice” or change a juror’s mind); Fradella, *supra*, 2 Fed. Cts. L. Rev. at 25 (jury instructions are given “far too late in a trial to help jurors evaluate relevant eyewitness testimony with information beyond their common knowledge”).

2. Dr. Lampinen’s Testimony Mattered

The State argues that because of the circumstances of Carpenter’s arrest and the items found near him, Dr. Lampinen’s testimony would not have mattered (Resp. Br. 36-41). The State is wrong because Williams’ identification of Carpenter as one of the robbers was **the** critical issue in the State’s case. Otherwise, the State would not have felt it necessary to mention **six** times in closing that Williams was certain Carpenter was one of the people who robbed him (Tr. 180, 181, 184, 192).

This is precisely the type of case where expert testimony would have made a difference, especially since Williams’ identification of Carpenter involved not just one, but multiple factors that are commonly misunderstood by jurors yet would have heavily influenced them.

Empirical evidence shows that eyewitness confidence “is the most important single quality of testimony” influencing jurors to believe that the eyewitness identified the correct person. Gary L. Wells & Amy L. Bradfield, “*Good You’ve Identified the Suspect*”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 361 (1998) (citing several studies). The State led the jurors to believe that because Williams was certain he was identifying the correct person, he had to be right (Tr. 180, 181, 184, 192).⁶ But the defense had scientific evidence to refute this misleading belief. As Dr. Lampinen would have explained, a high confidence level does not mean the identification was accurate **unless** the identification was made under pristine conditions, which were **not** present here (Tr. 26-27). This testimony was crucial to the defense yet was kept from the jury.

The State’s case also relied on the jury’s belief that the police had conducted a reliable identification procedure. The State led the jurors to believe that the police did a great job with the quick arrest and identification (Tr. 177, 180). Dr. Lampinen would have contradicted this assertion, establishing that a show up is the most suggestive procedure possible. Show-ups increase the risks of a misidentification. (Tr. 26, 122, 124, 131).

Along the same line, Dr. Lampinen would have explained how memory actually works: encoding, storage and retrieval, and that contamination can occur at any of these stages (Tr. 14-17). He would have refuted the jury’s likely conclusion that Williams’

⁶ The State argues that there was a good basis for Williams’ confidence (Resp. Br. 37), but there was also a good basis to question that confidence (Tr. 26-27). Unfortunately, the jury never got to hear it.

memory was good, given that the identification occurred so quickly after the crime. Dr. Lampinen would have explained how the victim's identification of Carpenter could have been affected by post-event statements and subtle cues from the police officers (Tr. 122, 130, 135). He also would have refuted the common notion that witnesses are able to retrieve memories like replaying a video (Tr. 17).

The jury heard nothing about cross-racial identification but should have heard the scientific evidence about the cross-racial effect – we are much better at identifying those of our own race, not those of another (Tr. at 23-24). Had the jury heard just how difficult cross-racial identification is, the jurors may have reached a different verdict. *See, e.g., 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").

Finally, as explained above, Dr. Lampinen would have explained how the presence of a gun and Williams' high stress level impaired his ability to accurately identify Carpenter (See *supra*, p. 15; Tr. 16, 24). Exclusion of Dr. Lampinen's testimony on any one of these five factors would have warranted reversal given the importance of the eyewitness identification in the State's case and the inconsistencies in the State's evidence.⁷ But exclusion of his testimony on all five factors makes that conclusion inescapable. The State cannot show that the court's error in excluding Dr. Lampinen's testimony was harmless beyond a reasonable doubt.

⁷ See Appellant's opening brief, p. 47-49.

***In Sum, Missouri Courts Must Allow
Expert Testimony on Eyewitness Identification***

This Court must reverse *Lawhorn* and *Whitmill* or at a minimum, make clear that expert testimony on eyewitness identification is a vital measure for the prevention of wrongful convictions and is governed by the same lenient standard of admissibility as other types of expert testimony under Section 490.065.

Carpenter acknowledges that under the doctrine of *stare decisis*, this Court’s decisions “should not be lightly overruled, especially when ‘the opinion has remained unchanged for many years.’” *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. banc 2013) (quoting *Sw. Bell Yellow Pages, Inc. v. Dir. Of Revenue*, 94 S.W.3d 388, 391 (Mo. banc 2002)). But as this Court has held, “where it appears that an opinion is clearly erroneous and manifestly wrong, the rule [of] *stare decisis* is never applied to prevent the repudiation of such a decision.” *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 231 (Mo. banc 2017) (quoting *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 379 (Mo. banc 2014)). “[T]he adherence to precedent is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course.” *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 644 (Mo. banc 2012) (quoting *Med. Shoppe Intern., Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 335 (Mo. banc 2005)); see also *Unnerstall Contracting Co. v. City of Salem*, 962 S.W.2d 1, 10 fn. 9 (Mo. App. S.D. 1997) (established precedent may be overruled when “considerations of public policy demand it”).

After decades of research and exonerations, we know that mistaken eyewitness identification is the leading cause of wrongful conviction. We know that jurors do not inherently understand the pitfalls of eyewitness identification. And we know that cross-examination, opening and closing statements, and jury instructions do not cure the problem. Most importantly, we know we have a massive problem in Missouri – the wrongful conviction of innocent people – and that problem will not go away on its own.

Lawhorn and *Whitmill* were clearly erroneous and manifestly wrong in allowing courts to automatically exclude expert testimony on eyewitness identification. Caselaw upon which *Lawhorn* largely relied has now been overturned. *Lawhorn*, 762 S.W.2d at 823 (citing and quoting *Kemp*, 507 A.2d at 1389, 1390) (overruled by *Guilbert*, 49 A.3d at 712). The public policy in support of overturning these decisions could not be stronger.

This Court should heed the United States Supreme Court’s approval of expert testimony on eyewitness identification and follow the example of courts across the country in admitting expert testimony as a means to prevent wrongful conviction. Moreover, because Kane Carpenter was denied his right to present a defense due to the court’s exclusion of such testimony in a case where identification was the key point in contention, the Court must reverse Carpenter’s conviction and remand for a new trial.

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 5,598 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

A true and correct copy of the brief was sent through the e-filing system on February 24, 2020, to: Karen Kramer, Office of the Attorney General, at Karen.Kramer@ago.mo.gov.

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