Missouri Law Review

Volume 86 | Issue 3 Article 11

Summer 2021

A "20/20" Vision: Supreme Court of Missouri Revisits Admissibility of Eyewitness Expert Testimony After More Than 30 Years

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NOTE

A "20/20" Vision: Supreme Court of Missouri Revisits Admissibility of Eyewitness Expert Testimony After More Than 30 Years

State v. Carpenter, 605 S.W.3d 355 (Mo. 2020)

Emily Miller[*]

I. INTRODUCTION

Since 1989 the admissibility of expert testimony regarding eyewitness identifications has been unaddressed in Missouri's courts.[1] During this time, over 2,000 scientific studies have illustrated the fallibility of eyewitness testimony.[2] The United States Supreme Court has long recognized the "vagaries" of eyewitness identification and the real potential for erroneous identifications leading to wrongful convictions.[3] Most recently, advanced capabilities with DNA evidence have highlighted the tragic consequences of erroneous eyewitness identification.[4] Indeed,

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1. State v. Carpenter, 605 S.W.3d 355 (Mo. 2020) (en banc); State v. Whitmill, 80 S.W.2d 45 (Mo. 1989) (en banc); State v. Lawhorn, 762 S.W.2d 820 (Mo. 1988) (en banc).

2. "The volume of that research has been remarkable: over two thousand studies on eyewitness memory have been published in a variety of professional journals over the past 30 years." Report of the Special Master at 9, State v. Henderson, 27 A.3d 872 (2011) (No. 62,218) (available at https://www.physics.smu.edu/pseudo/Eyewitness/NJreport.pdf [https://perma.cc/YDL6-C7Z7]).

3. United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

4. Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCH. SCI. IN THE PUB. INT. 45, 48 (2006),

a now often-cited fact: Of the 375 exonerations since 1989, nearly seventy percent involved wrongful convictions founded at least in part on eyewitness identification.[5]

One method used to combat erroneous eyewitness identification is expert testimony.[6] Two Supreme Court of Missouri decisions from the late 80s, however, *State v. Lawhorn* and *State v. Whitmill*, regularly allowed Missouri's appellate courts to affirm trial court decisions excluding expert testimony related to eyewitness identification.[7] In *State v. Carpenter*, the Supreme Court of Missouri revisited the standard of admissibility for expert testimony on eyewitness identification, holding that its earlier decisions no longer controlled.[8] The decision in *State v. Carpenter* is significant, as it changes a long-standing precedent and aligns Missouri's approach to eyewitness expert testimony with the majority of the country.[9]

The Court's holding in *Carpenter* is a much-needed improvement for defendants seeking to admit eyewitness expert testimony. This Note argues, however, that in the larger scheme of combatting erroneous eyewitness identification and subsequent wrongful convictions, *Carpenter* is only one step. Part II of this Note provides *Carpenter*'s procedural background and the Supreme Court of Missouri's holding. Then, Part III explains the fallibility of eyewitness identifications and outlines the legal framework of various safeguards that are designed to combat such fallibility. Part IV details the *Carpenter* majority's departure from Missouri's long-standing precedent and ultimate conclusion that the trial court erred when it excluded eyewitness expert testimony. Finally, Part V posits additional measures that Missouri should take, including providing more informative jury instructions and implementing identification procedure reform.

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https://journals.sagepub.com/doi/pdf/10.1111/j.1529-1006.2006.00027.x [https://perma.cc/NYC8-N32Z] ("Rather, the advent of forensic DNA testing has changed the way the legal system views eyewitness evidence.").

5. *Eyewitness Identification Reform*, INNOCENCE PROJECT, https://www.innocenceproject.org/eyewitness-identification-reform/ [https://perma.cc/43JL-E7PZ] (last visited Apr. 12, 2021).

6. State v. Lawson, 291 P.3d 673, 696 (Or. 2012) ("[E]xpert testimony is one method by which the parties can educate the trier of fact concerning variables that can affect the reliability of eyewitness identification.").

7. State v. Lawhorn, 762 S.W.2d 820 (Mo. 1988) (en banc); State v. Whitmill, 780 S.W.2d 45, 46 (Mo. 1989) (en banc).

8. State v. Carpenter, 605 S.W.3d 355, 359 (Mo. 2020) (en banc).

9. *Id.*; Commonwealth v. Walker, 92 A.3d 766, 782 (Pa. 2014) (noting that forty-four states permit expert testimony on eyewitness identifications "for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification").

II. FACTS AND HOLDING

On the evening of October 23, 2016, Jacob Williams, a young white man, walked down Capitol Avenue in Jefferson City, Missouri listening to music on his headphones.[10] In the darkness, dimly lit by a streetlight some distance away, Williams noticed two black men approaching.[11] The men wore hoodies pulled low over their faces and quickly overtook Williams.[12] Williams tried to cross the street to avoid the men, but they blocked his path, one standing in front of Williams and the other behind.[13]

The assailant in front of Williams demanded to use Williams's phone, but Williams said he did not have one and explained that his music was playing on an iPod.[14] The assailant lifted his shirt, revealing what Williams believed was a pistol tucked into the man's waistband, and ordered Williams to "[g]ive me what you have, or I'll shoot you."[15] He took Williams's iPhone and headphones while the other assailant grabbed Williams's e-cigarette and nicotine cartridge.[16] The two men fled. The encounter lasted less than one minute.[17]

Williams tried to follow the men, but lost sight of them as they ran toward an alley.[18] Williams asked a nearby couple to use their phone to report the robbery. While on the phone, Williams reported to the 911 operator that two young black men, one in a red hoodie and one in a black hoodie, had accosted him in the street.[19] Five minutes elapsed between Williams first noticing his assailants and officers arriving on scene.[20] Moments later, a sergeant drove by the alley where Williams had last seen his attackers.[21] The sergeant stopped his car when he saw Carpenter and another young black man and asked to speak with them.[22] Carpenter stopped immediately, while the other young man took a few steps as if he might run, before stopping as well.[23] The sergeant found an iPhone, with headphones still attached, near to the place Carpenter was standing.[24] The sergeant asked other responding officers to bring Williams to where he

10. *Carpenter*, 605 S.W.3d at 357.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

had found Carpenter and the other young man to see if Williams could identify them as the robbers.[25] The officers drove Williams to the sergeant's location and informed him that he would see the potential robbers and be asked if he recognized them.[26] When Williams arrived, an officer shone a spotlight on the two young men who were now handcuffed and seated on the curb.[27] From the car, and less than ten minutes after the crime was committed, Williams confirmed that the two men were the robbers.[28] Williams specifically identified Carpenter as the man who threatened him with a pistol but noted Carpenter was not wearing the red hoodie he wore during the robbery.[29] Carpenter and his companion were placed under arrest.[30]

Carpenter was charged with one count of first-degree robbery.[31] The prosecution's case against him was predominately, but not completely, built on Williams's "show up" identification.[32] Before trial, Carpenter's counsel gave notice that he would call an expert witness, Dr. James Lampinen, to testify about the factors that can impact eyewitness reliability.[33] The state successfully moved to exclude the expert, arguing such testimony should be inadmissible under *State v. Lawhorn* and its progeny.[34]

At trial, Williams testified that he was "one hundred percent certain" Carpenter was the man who had threatened and robbed him.[35] Carpenter's counsel again sought to admit Dr. Lampinen's testimony, but the circuit court sustained the State's objection.[36] After the close of all evidence, the judge instructed the jury using Missouri Approved Instruction–Criminal ("MAI-CR") 310.02, which lists seventeen factors juries should consider when evaluating an eyewitness identification.[37] The jury found Carpenter guilty of first-degree robbery.[38] Carpenter appealed, claiming the circuit

25. *Id.* at 357–58.

26. *Id.* at 358.

27. *Id.* at 358.

28. *Id.* at 358.

29. *Id.* at 358.

30. *Id.* at 358.

31. *Id.* at 356. Victim confirmed the iPhone was his as he was able to unlock it with his fingerprint. *Id.* at 358. Additionally, Victim's e-cigarette and nicotine cartridge were found in the alley where Victim had seen the two men running, along with the driver's license of the young man that was with Defendant. *Id.* Right off the alley, one black hoodie and one red hoodie were found. No pistol was ever found. *Id.*

32. *Id.*

33. *Id.* at 358.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 358 n.1.

38. *Id.* at 358.

court erred in excluding Dr. Lampinen's expert testimony.[39] The Supreme Court of Missouri granted transfer, holding that the trial court abused its discretion in excluding Dr. Lampinen's testimony and, moreover, that *Lawhorn* and its progeny were no longer controlling precedent. It held instead that RSMo § 490.065.2, enacted in 2017, governed the issue.[40]

III. LEGAL BACKGROUND

Erroneous eyewitness identification has become ubiquitously known as the leading cause of wrongful convictions.[41] As a result, over time, the criminal justice system has implemented safeguards designed to mitigate inaccurate identifications and prevent wrongful convictions when misidentifications do occur.[42] This Part briefly addresses the fallibility of eyewitness identification and discusses two safeguards – jury instructions and eyewitness expert testimony – focusing on the development of Missouri law regarding each.

A. Memory: Malleable and Fallible

An understanding of memory – the way in which the mind stores and recalls information – is essential to the study of eyewitness identification.[43] Elizabeth Loftus, a leading expert on false memories and eyewitness misidentification, describes memory like a "Wikipedia page," that is, "[Y]ou can go in there and change it, but so can other people."[44] This notion, however, is counterintuitive; people believe memory functions like

39. *Id.*

40. *Id.* at 356–57, 359.

41. State v. Guilbert, 49 A.3d 705, 729–30 (Conn. 2012); State v. Henderson, 27 A.3d 872, 878 (N.J. 2011) ("Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.").

42. *Henderson*, 27 A.3d. at 912 ("Beyond the scientific community, law enforcement and reform agencies across the nation have taken note of the scientific findings. In turn, they have formed task forces and recommended or implemented new procedures to improve the reliability of eyewitness identifications.").

43. *See* Cara Laney & Elizabeth F. Loftus, *Eyewitness Testimony and Memory Biases*, NOBA, https://nobaproject.com/modules/eyewitness-testimony-and-memory-biases [https://perma.cc/EL83-5QSJ] (last visited Apr. 18, 2021) ("In addition to correctly remembering many details of the crimes they witness, eyewitnesses often need to remember the faces and other identifying features of the perpetrators of those crimes. Eyewitnesses are often asked to describe that perpetrator to law enforcement and later to make identifications from books of mug shots or lineups.").

44. TED, *How reliable is your memory? Elizabeth Loftus*, YOUTUBE (Sep. 23, 2013), https://www.youtube.com/watch?v=PB2OegI6wvI [https://perma.cc/3C38-UQAJ] (comment starts at 5:25).

a videotape, "accurately and thoroughly capturing and reproducing a person, scene, or event."[45] Research, however, shows otherwise, that memory is instead "a constructive, dynamic and selective process."[46]

Specifically, the memory process is split into three stages: encoding, storage, and retrieval.[47] Encoding is the process by which an individual takes in and learns of information.[48] Next, storage describes the process of retaining encoded information in an individual's memory and the amount retained.[49] Lastly, retrieval involves accessing stored information.[50]

In the context of eyewitness identification, various factors can impact one or multiple stages of the memory process and affect the accuracy of identification.[51] These are categorized into "estimator" variables and "system" variables.[52] Estimator variables are those beyond the control of law enforcement,[53] for example, the cross-race effect: the race of the victim compared to the race of the perpetrator; the weapon-effect: whether the perpetrator used a weapon; and the confidence of the eyewitness in his or her identification.[54] In contrast, system variables are within the control of law enforcement and involve the procedures for obtaining an eyewitness identification.[55] For example, whether police use a line-up or show-up, line-up construction, blind administration, and pre-identification instructions are all factors controlled by law-enforcement authorities that may affect the accuracy of an eyewitnesses' identification.[56]

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45. Report of the Special Master, *supra* note 2, at 9 ("The central precept is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event . . . Memory is, rather, a constructive, dynamic and selective process.").

46. *Id.* (emphasis added).

47. *How Memory Works*, HARVARD UNIV., https://bokcenter.harvard.edu/how-memory-works [https://perma.cc/RNK5-H6LH] (last visited Apr. 23, 2021).

48. *Id.*

49. *Id.*

50. *Id.*

51. Report of the Special Master, *supra* note 2, at 10 ("At each of those stages, the information ultimately offered as 'memory' can be distorted, contaminated and even falsely imagined.").

52. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 279 (2003). Professor Gary Wells first used these terms in the 1970s when the breadth of research that exists today was just spring boarding. *See* Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978).

53. Report of the Special Master, *supra* note 2, at 11–12.

54. Miko M. Wilford & Gary L. Wells, *Eyewitness System Variables*, *in* REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 23, 25 (B. L. Cutler ed., 2013).

55. Wells & Olson, *supra* note 52, at 279.

56. *Id.*

Although the general fallibility of eyewitness testimony is commonly known, studies continually show jurors do not understand *why* memory can be unreliable.[57] Without understanding the particular factors affecting eyewitness identification accuracy, jurors do not know how to assess a particular eyewitness's testimony.[58]

1. Estimator Variables

Some estimator variables, such as the quality of lighting at the witnessed event or the distance from which the victim viewed the perpetrator, and their potential impact are more intuitive.[59] Others are more difficult to understand and explain.[60]

First, the cross-race effect – also known as "Other-Race Effect" or "Own-Race Bias" – describes the phenomenon that individuals are better at remembering the faces of individuals of the same race.[61] Indeed, studies consistently show eyewitnesses are more likely to falsely identify a

57. State v. Guilbert, 49 A.3d 705, 723 (Conn. 2012) ("Although the[] findings [regarding the variables] are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive."); *see* Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 116 (2006); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177, 193–198 (2006); Elizabeth F. Loftus et al., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 1 (4th ed. 2007).

58. State v. Clopten, 223 P.3d 1103, 1108 (Utah 2009); State v. Lawson, 291 P.3d 673, 696 (Or. 2012) ("[M]any of the system and estimator variables that we described earlier are either unknown to the average juror or contrary to common assumptions[.]").

59. State v. Henderson, 27 A.3d 872, 910 (N. J. 2011) ("Some of the findings [factors] described above are intuitive. Everyone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person's face. Some findings are less obvious.").

60. Report of the Special Master, *supra* note 2, at 48 ("Studies examining whether and to what extent jurors (or potential jurors) know or correctly intuit the findings reported in the eyewitness identification literature report that laypersons are largely unfamiliar with those findings and often hold beliefs to the contrary.") ("The 2006 study, comparing juror acceptance of the same research findings (24T 57-62), found that jurors were substantially less receptive to such concepts as cross-race bias (90% acceptance by experts, 47% by jurors), weapons focus (87% by experts, 39% by jurors), weak correlation between confidence and accuracy (87% by experts, 38% by jurors), and memory decay (83% by experts, 33% by jurors.")); *Guilbert*, 49 A.3d at 723 ("Although the[] findings [regarding the variables] are widely accepted by scientists, they are largely unfamiliar to the average person and, in fact, many of the findings are counterintuitive.").

61. John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, *in* THE HANDBOOK OF EYEWITNESS PSYCHOLOGY 257, 257–58 (David F. Ross et al. eds., 2006).

perpetrator of another race.[62] Studies also show, however, that jurors do not understand the cross-race effect. For example, in one study, forty-eight percent of potential jurors believed that cross-race and same-race identifications were equally reliable, and eleven percent believed cross-race identifications could actually be more reliable.

Second, the presence of a weapon at the witnessed event negatively impacts the accuracy of subsequent identifications.[63] The literature terms this the "weapon-focus effect."[64] Specifically, studies explain that the "visible presence of a weapon diverts a witness's attention away from the face of the perpetrator and reduces the witness's ability to encode, describe and identify the face."[65] A third factor, related to the weapon-focus effect, is the stress of an event. The highly stressful nature of victimization can decrease the reliability of an eyewitnesses' identification.[66] While the individual may not forget the event itself, highly stressful events can interfere with the encoding process.[67]

Finally, one common misconception is that the level of confidence an eyewitness expresses when testifying at trial is a reliable predictor of the accuracy of the identification.[68] This relationship, termed the confidence-accuracy relationship, hypothesizes that as an individual's confidence in the identification increases, so does the likelihood of its accuracy.[69] The reality, however, is that confidence and accuracy are only weakly correlated.[70] This fallacy is particularly concerning, as research shows

62. Report of the Special Master, *supra* note 2, at 48.

63. *Id.* at 44.

64. *Id.*

65. *Id.*

66. *Id.* at 43. The scientific literature reports that, while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator. *Id.*

67. Report of Special Master, *supra* note 2, at 43. Stress and fear ensure that the witness will not forget the event, but they interfere with the ability to encode reliable details. *Id.* "The effect of stress is illustrated in a 2004 field study involving 500 active-duty military personnel in a survival- school program, who were subjected to 12 hours of confinement followed by two 40-minute interrogations, one under high stress with physical confrontation and the other under low stress, conducted by different interrogators. When asked the following day to identify their interrogators, the participants correctly identified the high- stress interrogator at only half the rate they identified the low-stress interrogator; some, indeed, were even unable to identify the high-stress interrogator's gender." *Id.*

68. *Id.* at 50 ("What jurors primarily rely on in assessing identification accuracy is the confidence expressed by the witness in the identification, although, as previously discussed, the literature demonstrates that the confidence/accuracy correlation is weak at best and that confidence is highly malleable.").

69. *Id.*

70. *Id.*

jurors primarily rely on an eyewitness's expressed confidence when assessing that witness's testimony.[71]

2. System Variables

System variables include all the ways that law enforcement retrieves and records a witness' memory.[72] One system variable with significant influence on the accuracy of identifications includes the type of identification procedure used: show-up, line-up, or photo array.[73]

A show-up occurs when a police officer takes a witness to a location to show the witness an apprehended suspect.[74] Show-ups are different than other identification procedures, such as line-ups or photo arrays, because show-ups involve only one suspect.[75] Frequently, the suspect is already handcuffed or in the back of a police car when the witness arrives.[76] As the New Jersey Supreme Court recognized there is a "commonsense notion that one-on-one show-ups are inherently suggestive . . . because the victim can only choose from one person, and, generally, that person is in police custody."[77]

B. Safeguards

This Section will address the legal framework regarding safeguards against misidentification and resulting wrongful convictions, including jury instructions and eyewitness expert testimony generally and will also describe Missouri law concerning each.

1. Jury Instructions

Jury instructions are one safeguard designed to protect against the fallibility of eyewitness identification. The United States Supreme Court

71. *Id.*

72. *The Science Behind Eyewitness Identification Reform*, INNOCENCE PROJECT, https://innocenceproject.org/science-behind-eyewitness-identification-reform/ [https://perma.cc/AH5U-VPXZ] (last visited July 26, 2021).

73. *Id.*

74. *Eyewitness Identification*, CALIFORNIA INNOCENCE PROJECT, https://californiainnocenceproject.org/issues-we-face/eyewitness-identification/ (last visited April 25, 2021).

75. Report of the Special Master, *supra* note 2, at 29 ("A showup is an identification procedure in which just a single suspect is presented to the witness.").

76. *Eyewitness Identification*, *supra* note 74.

77. State v. Herrera, 902 A.2d 177, 183 (N.J. 2006); NATIONAL RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 31 (2014) ("The U.S. Supreme Court, in its 1977 ruling in *Manson v. Brathwaite,* set out the modern test under the Due Process Clause of the U.S. Constitution that regulates the fairness and the reliability of eyewitness identification evidence.").

has recognized the value of, but not mandated, the use of jury instructions for this purpose.[78] State courts vary as to whether a jury instruction should be given and,[79] when given, how comprehensive the instruction should be.[80] New Jersey – whose jury instruction Missouri later considered using to model its own – believes that a comprehensive jury instruction, which thoroughly explains factors affecting eyewitness reliability, should be mandated in all cases involving eyewitness identification.[81] Indeed, in *State v. Henderson*, the New Jersey Supreme Court revised its legal framework regarding eyewitness identification including adopting a comprehensive cautionary jury instruction and mandating its use in all cases with an eyewitness identification.[82]

In 2016, Missouri adopted Missouri Approved Instruction-Criminal 310.02, which apprises the jury of seventeen factors to consider when evaluating eyewitness testimony.[83] Initially, Missouri considered patterning its instruction after that in *State v. Henderson*. Ultimately, however, Missouri pared down the instruction to a version that provided less explanation.[84]

2. Expert Testimony

Expert testimony is an additional method to inform jurors of particular factors that contribute to the unreliability of eyewitness identification.[85] Before 1983, however, courts regularly excluded eyewitness expert testimony.[86] In fact, before 1983, every reported

78. *See* Perry v. New Hampshire, 565 U.S. 228, 233 (2012); *see also* U.S. v. Telfaire, 469 F.2d 552, 558 (Dist. Ct. App. D.C. 1972).

79. *See* WILLIAM CARROLL & MICHAEL SENG, *Jury Instructions, in Eyewitness Testimony: Strategy and Tactics* § 9:5 (2d ed. 2009) (comparing state court approaches to the use of jury instructions for eyewitness testimony).

80. State v. Henderson, 27 A.3d 872, 925–27 (N. J. 2011) (comprehensive jury instructions); *see also* MASS. COURT SYS, MODEL EYEWITNESS IDENTIFICATION INSTRUCTION 9.160 1–11 (2015) (comprehensive jury instructions).

81. *State v. Henderson*, 27 A.3d at 928.

82. *See* NATIONAL RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 34–35 (2014) (discussing jury instructions in *Henderson*).

83. Mo. Jury Instr. Crim. MAI-CR 310.02 [2016 New] Eyewitness Identification Testimony.

84. Tricia Bushnell & Amol Sinha, *Show Me Real Eyewitness ID Reform*, ST. LOUIS POST-DISPATCH (2016).

85. Com. v. Walker, 92 A.3d 766, 784 (Pa. 2014).

86. State v. Lawhorn, 762 S.W.2d 820, 823 (Mo. 1988) (en banc) (noting that "[a]lmost uniformly, state and federal courts have upheld the trial court's exercise of discretion to exclude expert testimony on eyewitness identification…" and collecting cases); *see also* Com. v. Francis, 453 N.E.2d 1204, 1210 (Mass. 1983) (collecting cases).

appellate opinion to consider the admissibility of eyewitness expert testimony upheld a trial court's decision to exclude it.[87] Some courts prohibited eyewitness expert testimony altogether,[88] while other courts left trial judges with discretion on the issue. Even under the latter approach, trial judges often excluded such testimony.[89] Courts' usual justifications for excluding eyewitness expert testimony included that it invaded the province of the jury, the testimony's subject matter was within the common knowledge of jurors, and/or cross-examination, as well as opening and closing arguments, adequately protected the defendant.[90]

Today, however, the national trend shows states are more frequently allowing experts to testify as to the unreliability of eyewitness identification.[91] Many state supreme courts have overturned years of case law supporting an absolute prohibition of defendants' attempts to admit eyewitness expert testimony.[92] Additionally, courts have repeatedly invalidated the formerly proffered justifications for excluding eyewitness expert testimony.

Despite this trend, for over thirty years, Missouri's case law has consistently excluded expert testimony regarding eyewitness identification. In *State v. Lawhorn*, the Supreme Court of Missouri considered, as an issue of first impression, whether a trial court had abused its discretion in excluding the defendant's expert testimony on the reliability of eyewitness identification.[93]

In *Lawhorn*, the defendant, on trial for first-degree burglary, sought to introduce expert testimony to explain how the other-race effect, the effects of the passage of time, stress at the time of the crime, and how the human brain retrieves memories of facial recognition combine to diminish a witness's ability to make an accurate identification.[94] The court

87. HON D. DUFF MCKEE, 35 Am. Jur. Proof of Facts 3d 1 (Originally published in 1996); State v. Chapple, 660 P.3d 1208, 1224 (Ariz. 1983) (en banc) (first appellate decision holding that the trial court's exclusion of expert eyewitness testimony was abuse of discretion).

88. *See Walker*, 92 A.3d at 775.

89. *See Lawhorn*, 762 S.W.2d at 822–23.

90. *Id.* at 823 ("We believe, however, 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."); State v. Kemp, 507 A.2d 1387, 1390 (Conn. 1986) ("The weaknesses of identifications can be explored on cross-examination and during counsel's final arguments to the jury.").

91. *See, e.g.*, Com. v. Gomes, 22 N.E.3d 897, 910 (Mass. 2015); State v. Guilbert, 49 A.3d 705, 730–31 (Conn. 2012); People v. LeGrand, 867 N.E.2d 374, 375–76 (N.Y. Ct. App. 2007); U.S. v. Graves, 465 F. Supp. 2d 450, 460 (E.D. Pa. 2006); *see also* Com. v. Walker, 92 A.3d 766, 782–83 (Pa. 2014) (collecting cases).

92. *See Walker*, 92 A.3d at 783–84 (2014) (collecting state supreme court decisions abandoning the absolute exclusion of eyewitness expert testimony).

93. *Lawhorn*, 762 S.W2d at 822.

94. *Id.* at 822–23.

articulated that eyewitness 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.[95] Otherwise, if expert testimony will not assist the jury or if it unnecessarily diverts the jury's attention from relevant issues, it should be excluded.[96] Additionally, the court posited that "expert testimony is also inadmissible if it relates to the credibility of witnesses, for this constitutes an invasion of the province of the jury."[97]

Applying this framework, the court concluded the subject of Lawhorn's expert's testimony was "within the general realm of common experience of members of a jury and can be evaluated without an expert's assistance."[98] The court also thought that cross-examination would adequately expose any issues with the eyewitness' identification and that the issue could be reiterated in closing arguments.[99] Thus, the Missouri court ultimately held that the trial court did not abuse its discretion in excluding the expert testimony.[100]

One year later, the Supreme Court of Missouri affirmed *Lawhorn*'s holding in *State v. Whitmill*.[101] In *Whitmill*, the court described *Lawhorn* as holding that a trial court "may, in its discretion," exclude expert testimony regarding the *credibility* of eyewitness identifications.[102] Despite the purported "wide discretion" given to a trial judge, *Lawhorn* and *Whitmill*, when applied, created a near-*per se* ban on eyewitness expert testimony.[103]

Most recently, in 2017, Missouri enacted Missouri Revised Statute Section 490.065.2 as the new standard for the admissibility of expert testimony in civil and criminal cases.[104] In American jurisprudence, the admissibility of expert testimony is predominately governed by either the

95. *Id.*

96. *Id.*

97. *Id.* at 823.

98. *Id.*

99. *Id.*

100. *Id.*

101. State v. Whitmill, 780 S.W.2d 45, 47 (Mo. 1989) (en banc).

102. *Id.*

103. *See* State v. Carpenter, 605 S.W.3d 355, 359 (Mo. 2020) (en banc) ("After *Lawhorn*, such evidence has routinely–if not uniformly –been excluded.").

104. Tim McCurdy, *Missouri Adopts Daubert: Sea Change or Ripple on the Pond?*, MISSOURI BAR BLOG (April 25, 2021, 11:00 AM), https://burgerlaw.com/wp-content/uploads/2020/03/missouri-adopts-daubert.pdf [https://perma.cc/V2MQ-4JZH]. The new law signed by Gov. Greitens adopts verbatim the language of FRE 702. *Id.* The new language combined with the Supreme Court's jurisprudence dating back to Daubert will raise the standard required for parties to introduce expert testimony. *Id.*

Frye or *Daubert* standard.[105] Before 2017, in criminal cases, Missouri courts applied *Frye* when determining the admissibility of expert testimony.[106] Section 490.065.2, however, was an exact codification of the *Daubert* standard. [107] Despite this change, it was unclear whether courts would begin to admit eyewitness expert testimony. After all, *Lawhorn* already purported to leave the decision within the judge's discretion.[108] Thus, while Section 490.065.2 would now apply to expert testimony in criminal cases, this did not guarantee a change in outcome for the admissibility of eyewitness expert testimony.[109]

IV. INSTANT DECISION

In *State v. Carpenter*, the majority quickly ushered *Lawhorn v. State* and its progeny away, asserting they no longer controlled the admissibility of eyewitness expert testimony because they were abrogated in 2017 by Missouri's enactment of Section 490.065.2.[110] Judge Wilson, writing for

105. *See generally* MARGARET A. BERGER, THE ADMISSIBILITY OF EXPERT TESTIMONY 12 (2011). Under *Frye,* an expert opinion is admissible if the scientific technique on which the opinion is based is "generally accepted" as reliable in the relevant scientific community. *Id.* In contrast, under *Daubert,* a trial judge takes the role of a "gatekeeper" and must consider factors such as 1) whether the expert's technique or theory can be tested and assessed for reliability, 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, 4) the existence and maintenance of standards and controls, and 5) whether the technique or theory has been generally accepted in the scientific community. Anjelica Cappellino, *Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony*, EXPERT INST. (July 24, 2020), https://www.expertinstitute.com/resources/insights/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/ [https://perma.cc/CNG3-SK28].

106. McCurdy, *supra* note 104.

107. MO. REV. STAT. § 490.065.2 (2017). The new law signed by Gov. Greitens adopts verbatim the language of FRE 702 The new language combined with the Supreme Court's jurisprudence dating back to Daubert will raise the standard required for parties to introduce expert testimony. Gary Burger, *New Expert Rules under HB 153 and other Expert tips* (May 2017), https://burgerlaw.com/wp-content/uploads/2017/05/expert_presentation.pdf [https://perma.cc/7LE9-ZX9X].

108. State v. Lawhorn, 762 S.W.2d 820, 823 (Mo. 1988) (en banc).

109. MO. REV. STAT. § 490.065.2.

110. State v. Carpenter, 605 S.W.3d 355, 359–60 (Mo. 2020) (en banc). In his dissenting opinion, Judge W. Brent Powell, joined by Judge Zel M. Fischer, agreed with the majority that *Lawhorn* and its progeny were abrogated by § 490.065.2, but opined that the exclusion was valid on independent grounds. *Id.* at 371 (Powell, J., dissenting). Specifically, Judge Powell noted that expert testimony is admissible if it will "help the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Judge Powell also noted that a trial court does not abuse its discretion by rejecting an offer of proof if it includes admissible and inadmissible evidence. *Id.* Judge Powell said that "[w]hile some of Dr. Lampinen's testimony may have been admissible, portions of his testimony would not have assisted the jury in understanding the

the majority,[111] then summarized Section 490.065.2 by stating that expert testimony is admissible when it is based on sufficient facts and reliable principles that have been reliably applied if such testimony helps the jury understand the evidence and decide contested issues.[112] Specifically, the court clarified that, whereas in *Lawhorn*, expert testimony was admissible only if the jury *could not* proceed in its absence, under Section 490.065.2, the only question is whether expert testimony *helps* the jury.[113]

The majority then proceeded to apply Section 490.065.2 to the facts of the case.[114] First, the court emphasized it did not need to question, nor did the State, whether the reliability requirements of Section 490.065.2(1)(b)-(d) were met, in light of the "unanimous" conclusion, "near perfect scientific consensus," and "widespread judicial recognition" that eyewitness identification is potentially unreliable.[115]

Next, the court addressed whether, under Section 490.065.2, Dr. Lampinen's testimony would have helped the jury evaluate and understand the eyewitness identification testimony.[116] The state argued the jury was *capable* of assessing the eyewitness identification without Dr. Lampinen's testimony because jurors are familiar with the factors affecting eyewitness reliability.[117] In response, the court acknowledged that under the *Lawhorn* framework – where the court need not admit expert testimony unless the jury could not proceed without testimony – this argument may have worked.[118] But under Section 496.065.2, the only question is whether the expert testimony helps the jury.[119] The court emphasized that jurors rarely know that eyewitness identifications are unreliable, and often, the science runs contrary to jurors' commonsense understandings.[120] Thus, the majority ultimately rejected the State's argument and concluded that the expert testimony would help the jury.[121]

Second, the State argued that credibility assessments are solely within the province of the jury.[122] The court also rejected this argument,

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evidence at hand." *Id.* As an example, Judge Powell said Lampinen's proffered testimony addressed the effects of impaired eyesight on eyewitness identification, which was not relevant to Carpenter's case. *Id.* Therefore, Judge Powell concluded that the proffered testimony was inadmissible. *Id.*

111. *Id.* at 356 (majority opinion).
112. *Id.* at 360.
113. *Id.*
114. *Id.* at 361.
115. *Id.*
116. *Id.* at 362.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 363.
122. *Id.*

explaining that the State conflated credibility and accuracy.[123] The court explained that while it is true that it is solely within the jury's province to decide whether a witness is telling the truth or attempting to mislead – credibility – eyewitness expert testimony explains the factors that cause an eyewitness to believe he is telling the truth but be wrong – inaccuracy.[124] Ultimately, the question Dr. Lampinen would have helped the jury decide was not whether Williams was telling the truth but whether Williams's identification was accurate.[125]

V. COMMENT

This case represents a long-overdue change in how the Supreme Court of Missouri views eyewitness expert testimony and finally brings Missouri into alignment with the vast majority of states. This Part discusses the positive change that *State v. Carpenter* represents, considers the practical effect of this precedent for defendants, and suggests there still is a need for further reform.

A. What Changed?

In both *State v. Lawhorn* and *State v. Carpenter*, the court held that whether an eyewitness expert may testify is a decision left within the discretion of a trial judge.[126] So then, why is *Carpenter*'s holding significant?

While it purported to give trial judges broad discretion regarding the admissibility of eyewitness experts, *Lawhorn*, in effect, completely barred expert testimony, at least as to certain subject matter.[127] Specifically, in *Lawhorn*, the proffered expert testimony included factors such as the cross-race effect, the impact of the stress of an event, and the effect of the passage of time.[128] Once *Lawhorn* excluded this testimony, those subjects were repeatedly held to be "within the common knowledge" of the jury, meaning experts could not testify to them.[129] But, if these factors – which studies repeatedly show jurors do not understand – were considered to be within the common knowledge of jurors, what kind of information would be outside common knowledge?[130]

123. *Id.*

124. *Id.* at 363–64.

125. *Id.*

126. State v. Lawhorn, 762 S.W.2d 820, 828 (Mo. 1988) (en banc); *Carpenter*, 605 S.W.3d at 370.

127. *Lawhorn*, 762 S.W.2d at 823.

128. *Id.*

129. *Carpenter*, 605 S.W.3d at 360.

130. *Id.* at 363 n.5.

Ultimately, the change *Carpenter* spurred stems from finally acknowledging the breadth of scientific literature that has long shown the factors *Lawhorn* repeatedly categorized as "within the common experience" of jurors are in fact not understood by jurors.[131] Moreover, *Carpenter* admitted *Lawhorn*'s conflation of accuracy and reliability.[132] This decision finally abandons *Lawhorn*'s flawed rationale, and, for defendants with the capability of proffering expert testimony, it opens the door for an opportunity to have such testimony admitted.[133]

B. Beyond Carpenter, Further Reform is Needed

There are various advantages and disadvantages to jury instructions and expert testimony, respectively. While this Part does not argue one safeguard is superior to the other, it focuses on two considerations: (1) many defendants, even those erroneously accused, opt for plea deals, which renders the availability of jury instructions or expert testimony moot, and (2) many defendants cannot afford expert testimony. Consequently, Missouri must implement reforms to its identification procedures. Additionally, practically, more defendants may benefit from the accessibility of jury instructions. Therefore, Missouri needs to revise its existing jury instruction to better inform jurors of the way factors impact the reliability of eyewitness identification.

1. Shortcomings of Expert Testimony and Jury Instructions

First, expert testimony and jury instructions, both potentially effective methods for limiting the effect of erroneous eyewitness identifications, only benefit defendants at trial.[134] Yet the vast majority of defendants never go to trial but, instead, opt for plea deals.[135] Indeed, even

131. *Lawhorn*, 762 S.W.2d at 823; *Carpenter*, 605 S.W.3d at 360.

132. *Carpenter*, 605 S.W.3d at 362.

133. *Id.* at 370.

134. Svein Margnussen, et. al., *An Examination of the Causes and Solutions to Eyewitness Error*, FRONTIERS IN PSYCHIATRY (Aug. 13, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4131297/ [https://perma.cc/3FA9-YMYD] (discussing how jury instructions and expert testimony do not help jurors accurately assess eyewitness identification and emphasizing the importance of a safeguard that attacks the source of the problem rather than post misidentification).

135. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE NEW YORK REVIEW (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/9ZL9-23KT] ("In 2013, while 8 percent of all federal criminal charges were dismissed (either because of a mistake in fact or law or because the defendant had decided to cooperate), more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial. The plea bargains largely determined the sentences imposed. While corresponding statistics for the fifty states combined are not available, it is a rare state

falsely accused individuals plead guilty rather than risk going to trial.[136] In the plea context, jury instructions and expert testimony are irrelevant, which emphasizes the necessity of a safeguard that prevents misidentifications in the first place.

Second, experts are costly, not only for defendants, but for all parties involved in the adjudication process.[137] While the expense of experts should not devalue the importance of eyewitness expert testimony,[138] the reality is that many defendants cannot afford experts.[139] Additionally, defendants typically do not have a constitutional right to expert testimony.[140] Therefore, for the indigent defendant, it is unclear whether *State v. Carpenter* warrants much celebration.[141]

2. Identification Procedure Reform

Certainly, expert testimony and jury instructions are important safeguards designed to mitigate the effect of misidentifications and help the jury detect when the likelihood of misidentification is high.[142] But,

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where plea bargains do not similarly account for the resolution of at least 95 percent of the felony cases that are not dismissed . . . .").

136. *See id.* ("Third, and possibly the gravest objection of all, the prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed. For example, of the approximately three hundred people that the Innocence Project and its affiliated lawyers have proven were wrongfully convicted of crimes of rape or murder that they did not in fact commit, at least thirty, or about 10 percent, pleaded guilty to those crimes.").

137. *Identifying the Culprit: Assessing Eyewitness Identification*, NATIONAL RESEARCH COUNCIL 40 (2014), https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification [https://perma.cc/5M3M-KER6] (select "read online").

138. *Id.* at 39 ("Expert testimony on eyewitness memory and identifications has many advantages over jury instructions as a method to explain relevant scientific framework evidence to the jury: (1) Expert witnesses can explain scientific research in a more flexible manner, by presenting only the relevant research to the jury; (2) Expert witnesses are familiar with the research and can describe it in detail; (3) Expert witnesses can convey the state of the research at the time of the trial; (4) Expert witnesses can be cross-examined by the other side; and (5) Expert witnesses can more clearly describe the limitations of the research.").

139. *Id.*

140. *Id.* ("In *Ake v. Oklahoma*, the Supreme Court held that an indigent defendant has a constitutional due process right to assistance by an expert witness only if that expert assistance is so crucial to the defense (or such a 'significant factor') that its denial would deprive the defendant of a fundamentally fair trial.").

141. *See* State v. Carpenter, 605 S.W.3d 355 (Mo. 2020) (en banc).

142. Amy Cynkar, *Order in the Court*, AMERICAN PSYCHOLOGICAL ASSOCIATION (June 2007), https://www.apa.org/monitor/jun07/order [https://perma.cc/P8LP-ZNZF].

identification procedures are front-end safeguards that seek to prevent misidentification to begin with.[143]

In 1999, the Department of Justice published a comprehensive guide for law enforcement, which covered procedures aimed at obtaining more accurate eyewitness identifications.[144] Since then, twenty-four states have implemented identification procedure reform.[145] In 2016, Missouri proposed, but did not pass, Senate Bill 842, which would have required statewide adoption of the best practices for identification procedures.[146] The bill's failure is unfortunate as "[t]he most potent means available to the legal system to reduce eyewitness error is to conduct proper eyewitness interviews and identification procedures."[147] Indeed, "[i]t is much easier to prevent eyewitness errors than to detect them once they have occurred."[148]

3. Improved Jury Instruction

Jury instructions, unlike expert testimony, are readily available and not costly.[149] In fact, in *State v. Henderson*, the New Jersey Supreme Court preferred jury instructions over expert testimony as a reform measure for these very reasons.[150] Regardless of whether one views expert testimony or jury instructions as superior, when used, courts should seek to maximize the efficacy of each.

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143. *Id.* ("Judge and jury education, however, is only part of the solution, says Wells. Going to the source of the problem-improving how police conduct eyewitness interviews and identification procedures-may hold the best chances for reducing false convictions, he says.").

144. Report of the Special Master, *supra* note 2, at 52 ("In 1999, based on the work of the Technical Working Group, the NIJ published its Guide of best practice recommendations for law enforcement, which was followed in 2003 by the Training Manual. Both Guide and Manual were distributed to law enforcement agencies nationwide.").

145. *Eyewitness Identification Reform*, *supra* note 5 ("These states are: California, Colorado, Connecticut, Georgia, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, West Virginia and Wisconsin.").

146. S. 842, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

147. Margnussen, *supra* note 134.

148. *Id.*

149. *Id.*; *see also* State v. Henderson, 27 A.3d 872, 925 (N.J. 2011) (noting enhanced jury instructions, are "focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free"); State v. Carpenter, 605, S.W.3d 355, 368 (Mo. 2020) (en banc) ("This Court hoped, when it approved this instruction, that defendants could obtain the benefit of this science without the delay and expense of having to adduce expert testimony in each case.").

150. *Henderson*, 27 A.3d at 925.

Currently, Missouri's jury instruction apprises the jury of seventeen factors it may consider when evaluating an eyewitness's testimony.[151] Specifically, the instruction provides:

> 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] [her] identification, bearing in mind that a person may be certain but mistaken;

151. MAI-CR 310.02, *supra* note 83.

> *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 lineup.) In determining the reliability of the identification made at the lineup, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the lineup, who was in the lineup, the instructions given to the witness during the lineup, and any other circumstances which may affect the reliability of the identification;]
>
> [iii (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*, [other factors.] [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] [her] guilty.[152]

These instructions, however, fail to adequately explain *how* the factors may impact the reliability of an eyewitness.[153] For example, factor

152. *Id.* (endnotes omitted).

153. Elizabeth F. Loftus, *Juries Don't Understand Eyewitness Testimony*, NEW YORK TIMES (Sept. 1, 2011), https://www.nytimes.com/roomfordebate/2011/08/31/can-we-trust-eyewitness-identifications/juries-dont-understand-eyewitness-testimony [https://perma.cc/BQB7-4NXX] ("Psychological scientists have long known that many jurors hold misconceptions about the accuracy of eyewitness testimony and the specific ways it can go awry."); Margnussen, *supra* note 134 ("Lastly, jurors have trouble integrating their knowledge of eyewitness factors into the facts of a criminal case").

nine alludes to the cross-race effect by instructing the jury to consider the respective race of the defendant and the eyewitness.[154] But, how does a juror know which way this factor cuts? If the perpetrator and the eyewitness are of the same race, does this indicate that identification is more likely to be accurate or inaccurate? And, studies repeatedly show that jurors *do not* understand how race affects the accuracy of identifications.[155] Additionally, factor ten advises of "stress" and that the jury ought to consider the "presence of a weapon."[156] Yet, again, this does not tell the jury whether this factor tends to make an eyewitness identification more or less accurate. Indeed, *Carpenter* recognized "[n]othing in MAI-CR 310.02 tells the jury whether the presence of a particular factor increases or decreases reliability, and nothing in that instruction explains to the jury why these factors have the effect they do or how they can interact."[157]

The use of jury instructions and expert testimony is premised on the idea that jurors do not understand how or the degree to which various factors affect eyewitness testimony.[158] And, importantly, many factors are actually counterintuitive.[159] For example, one may think that if an event is highly stressful, one is more likely to remember it accurately.[160] Thus, while factor ten tells the juror to consider stress, an uninformed juror might believe that, when a weapon is present, an eyewitness is likely to have better remembered a perpetrator due to extreme stress – a conclusion contrary to scientific consensus.[161] Missouri's eyewitness instruction may alert the jury to a checklist, but does not indicate whether checking off certain factors indicates the juror should be more suspicious of the identification or believe that it is likely to be more accurate.

The scientific community has relentlessly sought to help the criminal justice system understand that jurors, attorneys, and even judges, do not know why eyewitness testimony is more likely to be inaccurate in a

154. MAI-CR 310.02, *supra* note 83.

155. Loftus, *supra* note 153 ("For example, many respondents believed that a cross-racial identification (identifying a stranger of a different race) would be just as reliable as or even more reliable than a same-race identification.").

156. MAI-CR 310.02, *supra* note 83.

157. State v. Carpenter, 605 S.W.3d 355, 368 (Mo. 2020) (en banc).

158. *See* State v. Guilbert, 49 A.3d 705, 731 n.32 (Conn. 2012).

159. Benton, *supra* note 57.

160. State v. Guilbert, 49 A.3d 705, 724 (Conn. 2012) ("Similarly, the average person is likely to believe that eyewitnesses held at gunpoint or otherwise placed in fear are likely to have been acutely observant and therefore more accurate in their identifications.").

161. *Id.* at 732 (recognizing "high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events").

particular case.[162] Unfortunately, the factors listed in MAI-CR 310.02, without giving the juror an indication of how to consider each factor, are not sufficiently informative.[163]

Considered solely for its improvement to the admissibility standard for eyewitness expert testimony, *State v. Carpenter* certainly moved Missouri law in the right direction.[164] But when taking a broader view and considering the entirety of Missouri's jurisprudence and general criminal justice schema for combatting the leading cause of wrongful convictions – erroneous eyewitness testimony – *State v. Carpenter* is but a step.

VI. CONCLUSION

State v. Carpenter represents a massive change in attitude toward eyewitness expert testimony and exposes the weaknesses in Missouri's general schema for combatting erroneous eyewitness identification. Despite the positive step *Carpenter* takes, expert eyewitness testimony alone is insufficient to protect against the fallibility of eyewitness identification. Missouri must not let another thirty years pass before addressing other safeguards designed to protect defendants from misidentification. Instead, Missouri should proactively implement identification procedure reform and improve its existing jury instruction.

162. *See* Kate A. Houston, et. al., *Expert Testimony on Eyewitness Evidence: In Search of Common Sense*, BEHAV. SCI. LAW (2013), http://www.pc.rhul.ac.uk/sites/rheg/wp-content/uploads/2011/05/Houston-Hope-Memon-and-Read-20132.pdf [https://perma.cc/DG5A-VCGK].

163. MAI-CR 310.02, *supra* note 83.

164. State v. Carpenter, 605 S.W.3d 355 (Mo. 2020) (en banc).