No. 45744-0-II
Lewis County Superior Court No. 12-1-00413-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

RICK ALLEN RIFFE,
Defendant-Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Richard L. Brosey, Judge

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# APPELLANT'S REPLY BRIEF

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## I. REPLY ARGUMENT

In this brief, Riffe replies to only some of the State's arguments. This does not mean that Riffe agrees with the State's arguments on the issues he does not address in this reply. Rather, Riffe believes that no reply is required because the State's arguments are not persuasive.

### A. DR. REINITZ WAS QUALIFIED AS AN EXPERT

The trial judge appeared to reach this conclusion sua sponte because the State did not argue that Dr. Reinitz was unqualified in the trial court. Nonetheless, the State now argues that defense counsel was at fault for failing to provide sufficient proof of Dr. Reinitz's qualifications. RP 38-68.

> Trial counsel did not provide a curriculum vitae, a list (complete or representative) of Dr. Reinitz's published peer reviewed articles, what journals Dr. Reinitz's has edited, what type of research grants he has reviewed, or who he has testified for as an expert in memory and perception.

Response Brief at Page 51.

But, the State is incorrect. ER 702 provides that a witness can be an expert in five different ways: "knowledge, skill, experience, training, or education." Dr. Reinitz was an expert under all five of these criteria. Dr. Reinitz stated that he was Professor of Psychology at the University of Puget Sound and has taught there since 1999. Before that, he was a professor at Boston University in the psychology department and the

medical school. He had worked for 25 years in the area of human perception and memory. He stated that his experience included authorship of more than 20 peer reviewed articles about factors relevant to eye-witness accuracy. He said "I have given more than 50 representations including many invited addresses at universities and professional organizations both in the US and abroad." He also said he had reviewed major research grants for the National Science Foundation and the National Institution of Health, edited journals and consulted. He testified in both Washington and California, in the federal and superior courts. He reviewed copies of the police reports, witness statements, witness interviews, and photo montages in this case. He said that he would testify at a minimum about the factors relevant to eye-witness perception and eye-witness memory, which comprised the numbered list that appears below. He said that he would not make certain representations about whether the eye-witness testimony was accurate or not, and cited to the appropriate professional journals. He said that his testimony would allow the jury to evaluate in a reasonably informed fashion the principals and implications of whatever degree of in-trial confidence the witnesses displayed. He said that the information that he would discuss was generally accepted in the field of psychology, and

quoted the other learned treatises and articles that discussed the research. He stated that his conclusions came from controlled laboratory research.

The State admits that this information was before the trial court, but asks: "These statements could all be true but how is the trial court to know?" Response Brief at 53. The trial judge in an adversarial system knows these statements are true because the State did not present any countervailing evidence. If the State truly believed that Dr. Reinitz was not qualified, it would have presented the evidence it had to demonstrate its position.[1] The United States Supreme Court has stated that the gatekeeping function regarding expert qualifications is to ensure what an expert, whether basing testimony upon professional studies or personal experience, employs "in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). That Court also reminds litigants that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof by the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell*

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[1] The written objection filed by Lewis County before trial never once attacks Dr. Reinitz's qualifications.

*Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)

The State admitted it had Dr. Reinitz's CV. RP 3882-83. Presumably, the trial prosecutor reviewed that document, read the articles cited or called Dr. Reinitz's past and present employers and confirmed that he was indeed qualified. The State had every opportunity to present the results of its review of Dr. Reinitz's credentials. But rank speculation that Dr. Reinitz was not a qualified expert is not countervailing "evidence." Absent countervailing evidence, the preponderance of the evidence clearly establishes that Dr. Reinitz was qualified.

If the basis for the judge's exclusion of the testimony was that he just didn't believe Dr. Reinitz, that too was improper. Supreme Court precedent makes clear that questions of credibility are for the jury to decide. *See United States v. Bailey*, 444 U.S. 394, 414, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980).

Certainly, as compared to other experts who have been accepted by the appellate courts, Dr. Reinitz was fully qualified. For example, in *State v. Groth*, 163 Wn. App. 548, 261 P.3d 183 (2011), *review denied*, 173 Wn.2d 1026, 272 P.3d 852 (2012), Division I of the Court of Appeals approved the testimony of a man named Joel Harden. Mr.

Harden presented himself as a "human tracker." He opined that based upon certain intermingled footprints, two persons were both within each other's presence and had a dance or physical alteration together. *Id.* at 562. He also opined that based upon his experience, the two people were physically engaged on at least two different occasions. The defendant objected because Harden's testimony was unreliable and not within his expertise and were unhelpful to the jury. Division I held that Mr. Harden could testify to not only his tracking expertise, but his opinion that only one person was wearing a particular type of footwear.

*Groth* affirms that "expertise" is not exceptionally high bar. And defense experts should not be subjected to any greater level of scrutiny than experts proposed by the State.

## B. DR. REINITZ'S SCIENTIFIC THEORY HAS LONG BEEN ACCEPTED IN THE SCIENTIFIC COMMUNITY

The State did not make this argument below. The trial judge appeared to reach this conclusion sua sponte. Nonetheless, the State complains that trial counsel failed to demonstrate that eyewitness expert testimony is generally accepted in the scientific community.

But, both the State and the defense cited to *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830, 840 (2003). That case stated:

> The admissibility of expert testimony on the reliability of eyewitness testimony has received a great deal of attention

> over the past two decades. Where courts were once extremely reluctant to admit such testimony, at this point the significant majority of federal and state courts addressing the question have held that such evidence is admissible under an abuse of discretion standard

In short, even the State's own authority provided that eyewitness expert testimony relies upon generally accepted scientific theories.

In fact, it is difficult to believe that the trial judge was unaware that eyewitness expert testimony is generally accepted in the scientific community. Although not cited, the trial judge was surely aware of the recent guidance on this issue from the Court of Appeals and the Supreme Court in *State v. Allen*, 161 Wn. App. 727, 734-35, 255 P.3d 784, 787 (2011), *aff'd as amended*, 176 Wn.2d 611, 294 P.3d 679 (Feb. 8, 2013), the Court stated:

> Mistaken eyewitness identification is a leading cause of wrongful conviction. *See State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) ("'The vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect.'" (alteration in original) (quoting Brandon L. Garrett, *Judging Innocence*, 108 Colum. L.Rev. 55, 60 (2008))); *see also Eyewitness Identification Reform*, INNOCENCE PROJECT. Eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries. *See Riofta*, 166 Wn.2d at 377 & n. 5, 209 P.3d 467 (Chambers, J., concurring in dissent) (quoting *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (citing Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605 (1998) and other legal and psychological studies of the

> identification problem)). Recognition accuracy is poorer when the perpetrator is holding a weapon. *Bernal*, 44 P.3d at 190 (quoting Vaughn Tooley et al., *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. APPLIED SOC. PSYCHOL. 845, 854 (1987)).
>
> In affirming in the Supreme Court, the majority noted:
>
> Allen did not use expert evidence regarding the reliability of eyewitness testimony or cross-racial identification, though such evidence is available to defendants in Washington. *See State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003). While we recognize that the use of expert evidence may be limited due to cost and/or availability, there is no evidence its use was so limited in this case.

*Id.* at 624.

This acceptance is not new. Courts nationwide have recognized the potential value of expert testimony on this subject as early as 1984. *United States v. Mathis*, 264 F.3d 321, 339-40 (3rd Cir. 2001), *cert. denied*, 535 U.S. 908, 122 S.Ct. 1211, 152 L.Ed.2d 148 (2002) (examining an eyewitness expert's methods and "welcom[ing]" such testimony); *United States v. Smithers*, 212 F.3d 306, 311-18 (6th Cir. 2000) (finding that a district court erred in not admitting eyewitness-identification expert testimony from Dr. Sol Fulero); *United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir.), *reh'g denied*, 791 F.2d 928 (1986) (finding that, under some circumstances, eyewitness-identification expert testimony "properly may be encouraged"); *United States v. Downing*, 753 F.2d 1224, 1232 (3rd Cir. 1985) (reasoning that

"expert testimony on eyewitness perception and memory [should] be admitted at least in some circumstances"); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir.), *cert. denied*, 469 U.S. 868, 105 S.Ct. 213, 83 L.Ed.2d 143 (1984) ("The day may have arrived, therefore, when Dr. Fulero's testimony can be said to conform to a generally accepted explanatory theory.").

Finally, Dr. Reinitz's own offer of proof, which was filed and provided to the judge, cites to some of the scientific studies which support his generally accepted scientific testimony.

C. DR. REINITZ'S TESTIMONY WAS HELPFUL TO THE JURY – PARTICULARLY IN EVALUATING THE WEIGHT TO BE GIVEN TO A WITNESS'S LEVEL OF "CERTAINTY." THIS WAS PARTCULARY IMPORTANT BECAUSE THE STATE ELICITED TESTIMONY ABOUT MOST WITNESSES' LEVEL OF CERTAINTY IN ORDER TO BOLSTER ITS CASE.

It is difficult to believe that neither the prosecutor nor the trial judge was familiar with the significant problems with eyewitness identification in a 27-year-old case.

Despite the current scholarship and the *Allen* case, the State's primary argument is that "it is a matter of common sense that jurors understand the weaknesses with eyewitness identification." This is disingenuous. Here, the State relied upon the jurors' misconception about the lack of correlation between certainty and accuracy in

eyewitness identification. If it is "common knowledge" among jurors that the level of certainty about an in-court identification had no correlation to its accuracy, why did the prosecutors continually ask the witnesses "how certain" they were about their eyewitness identifications? *See* RP 235, 247, 616, 3484. In fact, the State knew that jurors would misunderstand and equate the witnesses' level of certainty with accuracy. And the defense was prohibited from presenting the expert testimony that would have provided the jurors with a framework to judge this evidence.

In fact, it so clear that jurors misjudge that accuracy of eyewitness testimony that, as of January 1, 2015, there is a new pattern instruction on the issue. WPIC 6.52 states:

> Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:
>
> The witness's capacity for observation, recall, and identification;
>
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;
>
> The emotional state of the witness at the time of the observation;

> The witness's ability, following the observation, to provide a description of the perpetrator of the act;
>
> [The witness's familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act;]
>
> The period of time between the alleged criminal act and the witness's identification;
>
> The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and
>
> Any other factor relevant to this question.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 6.52 (3d Ed.).[2]

The Supreme Court of Massachusetts has acted in a similar fashion. Just his month that Court found that:

> there are scientific principles regarding eyewitness identification that are "so generally accepted" that it is appropriate in the future to instruct juries regarding these principles so that they may apply the principles in their evaluation of eyewitness identification evidence.

*Com. v. Gomes,* -- N.E.3d --, 2015 WL 159372, *1 (Mass. 2015).

Finally, the

> Courts generally 'interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.

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[2] Other state appellate courts have conducted significant studies on the problem. *See, e.g.,* Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices (July 25, 2013) (Study Group Report), available at http://www.mass.gov/courts/d ocs/sjc/docs/eyewitness–evidence–report–2013.pdf [http://perma.cc/WY4M-YNZN] (last visited Jan. 8, 2015).

*Groth*, 163 Wn. App. at 564, citing *Moore v. Hagge*, 158 Wn. App. 137, 155, 241 P.3d 787 (2010), *review denied*, 171 Wn.2d 1004, 249 P.3d 181 (2011) (quoting *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)). Here, the trial court failed to apply this liberal standard to the Riffe's proposed expert.

## D. THE EXCLUSION OF DR. REINITZ'S TESTIMONY VIOLATED RIFFE'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

The accuracy of the eyewitness identifications in this case suffered from all of the factors that contribute to erroneous identifications: most of the witnesses had a very short opportunity to observe the person at the Yardbirds or in the Maurin's car; (2) in the case of most of the witnesses, 27 years had passed between the crime and their new identification of Riffe; (3) none of the critical witnesses knew Riffe; (4) the circumstances surrounding identification procedures used in 1984 and in the intervening years were unclear; (4) the later identifications in 2010 to 2012 were corrupted by intervening identifications and publicity; (5) witnesses failed to make an identification in earlier years or made an inconsistent identification before identifying Riffe; and (6) the credibility of some witnesses, such as Billy Forth, were in question.

The State's critical evidence in this case was the troubling "eyewitness" identifications. Even the State would have to admit that, until Detective Kimsey began questioning the witnesses again and showing them new photomontages, the State did not have enough evidence to even file charges. If the State had the evidence, the State would have charged Riffe years before. Thus, the trial judge's exclusion of Riffe's expert prevented Riffe from presenting a defense aimed directly at the State's case.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense.... This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 319-20 (2006).

The district court judge's exclusion of this evidence on relevancy grounds was also arbitrary and a disproportionate application of the evidentiary rules that infringed on Riffe's right to present a defense.

## E. THE EXCLUSION OF DR. REINITZ'S EXPERT TESTIMONY WAS PREJUDICIAL AND REQUIRES REVERSAL

In this case, Riffe's argument was that he did not murder the victims. He asserted that he was identified by the witnesses not because he was observed with the victims or the victims' vehicles, but because the eye witness identifications made 27 years later were unreliable and flawed. Even the trial judge stated that this case was based solely on "eyewitness" identification. RP 3945.

The trial court's error was not harmless because it "prevent[ed] the defendant from providing an evidentiary basis for his defense." *United States v. Saenz*, 179 F.3d 686, 689 (9th Cir. 1999).

On this issue, Riffe is entitled to a new trial.

> When the district court has erroneously admitted or excluded prejudicial evidence, we remand for a new trial. We do so even if the district court erred by failing to answer a threshold question of admissibility. We have no precedent for treating the erroneous admission of expert testimony any differently.

*Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 466 (9th Cir.) (en banc), *cert. denied*, 135 S.Ct. 55, 190 L.Ed.2d 30 (2014) (internal citations omitted).

This Court should reverse on this issue.

## F. THE DEFENSE DID MOVE FOR A MISTRIAL FOLLOWING IRWIN BARTLETT'S TESTIMONY

The defense asked for a mistrial in writing: "Subsequently, the defense requests that the charges against Rick Riffe be dismissed or in the alternative that a mistrial be declared with Prosecutor Will Halstead barred from representing the state." CP 182. The trial court clearly read the motion, understood the arguments and knew that Riffe was asking for dismissal.

The prosecutor provides no defense to the evidence that the trial prosecutor knowingly presented false evidence to the jury. The presentation of this evidence and the failure to correct it require reversal under *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

## G. THE DEFENSE OBJECTED TO THE INTRODUCTION OF THE TWO COMPOSITE SKETCHES

The defense objected to the introduction of the two composite sketches as hearsay. RP 758-59. Witnesses did identify Riffe from the sketches. RP 1826-27, 1861-62, 2363, 2405. The State clearly used these sketches to create a link between Amell's observations and Riffe. This Court should reverse on this issue.

## H. THE STATE FAILED TO PROVIDE EVIDENCE THAT RIFFE UNEQUIVOCALLY ADOPTED HIS BROTHER'S STATEMENT

The State fails cite to any case where the nod and snicker were unequivocal proof that the defendant adopted someone else's statement. The State fails to distinguish the cases cited by the defense that demonstrated otherwise. *See* Appellant's Opening Brief at 72-73.

*State v. Collins*, 76 Wn. App. 496, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995), cited by the State was significantly undermined in *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). *Stenson* was a prosecution for murder. The trial court refused to admit a tape recording offered as evidence by the defendant. The recording was from the defendant's telephone answering machine, and the caller was asking whether the defendant still intended to go to Texas to complete a business transaction. The defendant argued that the recording was relevant to show his intent to go to Texas, in order to show that he was in Texas at the time of the murders. On appeal, the defendant argued that the recording should have been admitted because he was offering it not for the matter asserted (that the caller believed the defendant intended to go to Texas), but for the statement's implication – that the defendant must have told the caller he intended to go to Texas. The Supreme Court disagreed, however, and held that the recording was properly excluded as hearsay. The court said the recording was being

offered to show the caller's belief, that the statement was relevant only if true, and that it would be unfair to admit the recording without any opportunity to cross-examine the caller. The Supreme Court specifically discounted the holding in *Collins*.

## II.
## CONCLUSION

For the reasons stated above, this Court must reverse all of Riffe's convictions and remand for a new trial.

DATED this 26th day of January, 2015.

Respectfully submitted,

Suzanne Lee Elliott

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## CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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