Case No. 20080631-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Respondent,

vs.

DEON LOMAX CLOPTEN,
Defendant/Petitioner.

Brief of Respondent

On Writ of Certiorari to the Utah Court of Appeals

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Brief of Appellee

STATEMENT OF JURISDICTION

This case is before the Court on a writ of certiorari to the Utah Court of Appeals from its decision in *State v. Clopten*, 2008 UT App 205, 186 P.3d 1004 (Addendum A). The Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102(5) (West Supp. 2008).

STATEMENT OF THE ISSUE

Issue. Should a timely request for expert testimony regarding the reliability of eyewitness identification be presumed admissible?

Standard of Review. On certiorari, the Supreme Court reviews the decision of the court of appeals for correctness. *State v. Visser*, 2000 UT 88, ¶ 9, 22 P.3d 1242. "The correctness of the court of appeals' decision turns on whether that

court accurately reviewed the trial court's decision under the appropriate standard of review." *Id.*

"Whether expert testimony on the inherent deficiencies of eyewitness identification should be allowed is within the sound discretion of the trial court." *State v. Butterfield*, 2001 UT 59, ¶ 43, 27 P.3d 1133. Under this standard, the appellate court will not reverse a trial court's decision to admit or exclude expert testimony absent an abuse of discretion, that is, "'unless the decision exceeds the limits of reasonability.'" *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (quoting *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993)).

RELEVANT PROCEDURAL RULES

Rule 702, Utah Rules of Evidence, is relevant to a determination of this case. The text of that provision, as it appeared at the time of trial, is reproduced in Addenda B. The amended provision, effective November 1, 2007, is also reproduced in Addendum B, together with the Advisory Committee Note.

STATEMENT OF THE CASE

A jury found the defendant, Deon Clopten, guilty of murder, a first degree felony, and failure to respond to an officer's signal to stop, a third degree felony. R. 609-11. The trial court found him guilty of the bifurcated charge of possession of a firearm by a restricted person, a second degree felony. R. 572-73. The court sentenced Clopten to consecutive prison terms of five-years-to-life for

murder, zero-to-five-years for failure to respond to an officer's signal to stop, and one-to-fifteen years for possession of a firearm by a restricted person. R. 612-14. Clopten appealed, but the court of appeals affirmed his convictions. *See Clopten*, 2008 UT App 205. This Court granted certiorari review.

STATEMENT OF FACTS

On the evening of December 1, 2002, Tony Fuailemaa took his girlfriend, Shannon Pantoja, to a gangster rap concert at a nightclub in Salt Lake City. R. 645: 31-32. When the couple walked into the club, they passed a group of four men—Deon Clopten, his cousin Freddie White, Brandon Grissett, and Grissett's brother Andre Hamby. R. 645: 34. Clopten was wearing a red hooded sweatshirt and red sweatpants. R. 645: 36; R. 646: 199, 206, 213, 218, 234-35, 246-47; SE9. White was wearing a red T-shirt and navy blue or black pants, "like Dickies or Levis." R. 645: 84; R. 646: 213, 218, 235, 237; SE7. Grissett and Hamby were wearing earth tone, button-down plaid shirts, with no red. R. 646: 218, 235; SE8; SE10.

When Fuailemaa and Pantoja walked into the club, Grissett, a prior acquaintance of Pantoja, exchanged greetings with her. R. 645: 34. Clopten was facing away from the couple when they entered, but turned and looked at Pantoja "right in the face." R. 645: 35, 64, 66, 95, 99. Fuailemaa asked if she knew the men, but Pantoja told him that she knew only Grissett. R. 645: 35-36,

65, 100. Fuailemaa asked if she knew "[t]he guy all flamed up" in red, "Deon Clopten." R. 645: 35-36.[1] When Pantoja said that she did not, Fuailemaa told her that Clopten "had some problems with some of the homies out in the prison." R. 645: 36.

Several undercover officers from the Metro Gang Unit were monitoring activity at the concert, including Officer Saul Bailey, who knew Pantoja. R. 645: 45, 103-04, 147-48; R. 646: 191, 194-95. While monitoring the crowd as they filed into the club, Bailey and another officer noticed Clopten, who "seemed to stand out" because he was "wearing a red kind of jumpsuit, red sweatpants and a red sweatshirt." R. 645: 105. The two officers recognized Clopten, but could not recall his name. R. 645: 105-06, R. 646:210. As the concert was drawing to an end, an officer observed "some sort of [non-verbal] confrontation" between Clopten's group and a group that included Fuailemaa, but it ended without incident when one of the two groups walked away. R. 645: 107-11.

Fuailemaa and Pantoja left the concert early to avoid the rush. R. 645: 37. As they walked back to their car, Pantoja saw the three men who she had seen with Clopten earlier that evening "kind of like hiding behind—crouched behind the building. . . . [A]ll three peeked out and then immediately ducked back

[1] When Fuailemaa told Pantoja Clopten's name, she mistook Clopten's name as "Compton." R. 645: 35-36, 53-54, 100.

again." R. 645: 38. On seeing the men, the couple stopped walking and Fuailemaa said to Pantoja, "I think I'm going to have some problems with these guys." R. 645: 38-39. Pantoja stepped back a few feet and urged Fuailemaa to go back, but he refused. R. 645: 39-40. Clopten then emerged from a recessed doorway, holding a small, black handgun with his arm fully extended. R. 645: 40, 43, 72, 81; *see* SE2. Pantoja yelled, "Baby, look out!" R. 645: 40, 73. But just as Fuailemaa turned to look, Clopten said, "What's up now, Homie?" and fatally shot Fuailemaa twice in the back of the head. R. 645: 40, 43-44, 73.

After Fuailemaa dropped to the ground, Clopten fired another shot and fled toward his friends and the parking lot to the east. R. 645: 44-45. Officer Bailey was near the club when he heard the gunshots. R. 646: 192, 194. He ran around the corner, saw Pantoja kneeling down next to Fuailemaa, and asked the hysterical Pantoja "who did it." R. 645: 45-46; R. 646: 192, 194. Pantoja pointed east and answered, "It's the guy in all red." R. 645: 46; R. 646: 195. Officer Bailey looked up and saw a man clad in all red running eastbound, just beginning to round a corner midway through the block. R. 646: 195-97, 227.

Officer Bailey pursued the red-clad man into a parking lot, where he got into a Ford Explorer and began to exit. R. 646: 196-97. Bailey drew his weapon, identified himself, and ordered the driver to stop. R. 646: 199-201. Bailey recognized the driver as the same man he had seen earlier that night dressed in

all red. R. 646: 198-99. Clopten looked at Bailey briefly, and then accelerated out of the parking lot. R. 646: 199-202. Officers in vehicles immediately picked up the pursuit, and after a high speed chase, stopped Clopten and the other three men at an exit ramp on I-15. R. 645: 113-21, 154-55.

After police apprehended Clopten and the other three men, Officer Bailey rode with Pantoja to the location of the stop for a show-up identification. R. 645: 50-51; R. 646: 207-08. Bailey explained that they had stopped "some guys" and told her that they "need[ed] her to go identify [them], see if they're the ones." R. 645: 50. During the ride to the show-up, Pantoja identified the gunman by name, telling Officer Bailey that "Deon Compton" was the shooter. R. 646: 209-10. Once Pantoja gave the shooter's name, Bailey immediately recalled that it was Deon Clopten that he had seen earlier dressed in all red. R. 646: 210-11. Using flood lights, the men were presented to Pantoja one by one from a distance of about 25 feet, starting with Clopten. R. 645: 51-53. Pantoja immediately recognized Clopten as the shooter and said, "That's the one." R. 645: 52. She identified White as one of the three men ducking behind the building just prior to the shooting. R. 645: 54. She also identified the other two men with Clopten that night—Grissett and Hamby. R. 645: 54-55. At a lineup a year later, Pantoja again identified Clopten as the shooter. *Id.* at 57-59.

Melissa Valdez, another concert attendee, also witnessed the shooting. Before the concert, Valdez talked with a group of men about getting tickets, one of whom was dressed in all red. R. 646: 243-44, 246-47. After leaving the concert early, she passed the same man dressed in all red she had spoke with earlier that evening. R. 646: 245-46, 247. Recognizing him from their earlier encounter, she asked if he had gotten into the club. He responded, "yeah," but appeared "very cold, like a man on a mission." R. 646: 246-48. After passing him, Valdez looked over her shoulder in time to see the red-clad man shoot Fuailemaa in the back of the head. R. 646: 249. Valdez later identified Clopten as the shooter from two photo arrays. R. 646: 254-56.

Christopher Hamby also fingered Clopten as the shooter. R. 633: 23. Hamby testified at the preliminary hearing, *see* R. 633, but could not be found to testify at trial. R. 646: 318-22. The trial court declared him unavailable and his testimony at the preliminary hearing was read to the jury. R. 646: 318-22.[2]

Hamby confirmed that Fuailemaa and Clopten had a "commotion" in the club earlier that evening. R. 633 21. He said that when the four men returned to their car after leaving the concert, Clopten angrily declared that he was "goin' to shoot [Fuailemaa]" and secured a 9 mm semi-automatic pistol from Freddie

[2] The transcript of his preliminary hearing testimony is attached to the trial transcript at R. 646. The State will cite to those portions as R. 633.

White. R. 633: 23, 47-48, 59. Hamby said that White also armed himself with a gun. R. 633: 48-49. Hamby testified that Clopten then walked back toward the club, followed by Hamby, White, and Grissett. R. 633: 23, 59. Hamby testified that after he and the other two men fell back a short distance away, Clopten approached Fuailemaa and his girlfriend, threw on his hood, "and, at point-blank range, . . . shot [Fuailemaa] in the back of the head." R. 633: 23, 26-30, 50-52; SE45.

Hamby also testified that as the four men fled in the Ford Explorer, Clopten gave White the gun and White tossed it out of the window. R. 633: 33-34, 58-59. Police later recovered a Hi-Point 9 mm handgun and a Bersa .380 handgun, which a bicyclist had found along the escape route. R. 645: 162-63, 169-76. A ballistics test confirmed that the shell casings and bullet fragments recovered at the scene of the murder were fired from the 9 mm handgun. R. 646: 377-80.

Following his arrest, Clopten was taken to the Utah State Prison. R. 646: 342. There, he spoke with Robert Land, an inmate who had been in prison with both Clopten and Fuailemaa in 1997. R. 646: 347-50. Land explained that Clopten considered Fuailemaa an enemy because he had jumped Clopten during a fight at the prison in 1997. R. 646: 347-51. He testified that after Clopten was imprisoned following his arrest for Fuailemaa's murder, Clopten

told him what had happened. Confirming the observations of police officers and Hamby, Clopten told Land that he and Fuailemaa confronted each other earlier that night at the club. R. 646: 346. Clopten said that during the confrontation, he told Fuailemaa that he "better go call his mom because that's the last time he'll talk to her." R. 646: 346. Clopten told Land that he "domed" Fuailemaa after he left the concert. R. 646: 352.[3] He also told Land that they threw the guns out the window during the high-speed chase. R. 646: 353.

* * *

Prior to trial, the defense gave notice of its intention to call as an expert witness Dr. David H. Dodd, an associate professor of psychology at the University of Utah. R. 252-58. The defense wished to elicit testimony from Dr. Dodd regarding the factors that research has shown may influence the accuracy of eyewitness identifications, specifically, the effects of trauma, weapon use, cross-racial identification, and suggestive influences such as show-ups and police commentary. R. 259-64; R. 639: 7-10. The State objected. R. 296-303, 470-74. After considering and re-considering the proffered testimony, the trial court concluded that the testimony would be "superfluous" to the cautionary jury instruction on eyewitness identification and "would have no bearing on the jury's decision." R. 644: 12-14.

[3] Land explained that to dome someone means to "[s]hoot him in the head." R. 646: 352.

On appeal, the court of appeals concluded that the trial court's exclusion of the proffered expert testimony was not an abuse of the trial court's discretion. *Clopten*, 2008 UT App 205, ¶¶ 13-21. After noting the problems associated with eyewitness identifications, the court of appeals observed that Defendant did not object to the subject matter of the instruction given on eyewitness identification. *Id.* at ¶ 16 & n.4. Then, relying on precedent from this Court, it held that "'expert testimony [on eyewitness identification] is the type of lecture testimony that, in cases such as these, can be adequately conveyed to the jury through an instruction.'" *Id.* at ¶ 18 (quoting *State v. Hubbard*, 2002 UT 45, ¶ 19, 48 P.3d 953)). The court of appeals held that "the trial court did not exceed its discretion" in concluding that under the circumstances of the case, the cautionary jury instruction was sufficient. *Id.* at ¶ 21.

The court of appeals also concluded that even if the expert testimony should have been admitted, its exclusion was harmless, noting that Defendant's associate, Andre Hamby, fingered him as the shooter, and that the other two witnesses were also not complete strangers to Defendant. *Id.* at ¶ 20.

SUMMARY OF ARGUMENT

Defendant invites this Court to "chart a different course" by creating a presumption of admissibility for expert testimony on eyewitness identification. No court has adopted such an approach, nor should this Court. This Court should adhere to the abuse of discretion standard applied in all other cases involving expert testimony. Like other expert testimony, the admissibility of expert testimony on eyewitness identification is properly governed by rule 702, Utah Rules of Evidence. When applied to the facts of this case, the court of appeals correctly concluded that the exclusion of the proffered expert testimony was not an abuse of discretion.

The State did not challenge the inherent reliability of the scientific principles underlying Dr. Dodd's proffered testimony. Accordingly, the first *Rimmasch* requirement was satisfied. Defendant conceded that Dr. Dodd could not comment on the witness's credibility in identifying him. However, under current law, the court of appeals correctly concluded that because the testimony would be in the nature of a lecture to the jury, the trial court did not abuse its discretion in relying instead on cautionary jury instructions to educate the jury on the fallibilities of eyewitness identification. Finally, given the cautionary jury instruction, as well as the quality of the other evidence presented at trial, the proffered expert testimony was not, on balance, helpful to the jury.

ARGUMENT

A TRIAL COURT'S DISCRETION IN ADMITTING OR EXCLUDING EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION IS PROPERLY GOVERNED BY UTAH RULE OF EVIDENCE 702

Like all other expert testimony, the admissibility of expert testimony on factors that may influence the reliability of eyewitness identifications is left to the sound discretion of the trial court. *See State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (citing *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993)). That discretion, as in all other cases involving expert testimony, is properly governed by Rule 702 of the Utah Rules of Evidence. *Id.* at ¶ 69 (citing *Larsen*, 865 P.2d at 1361).

* * *

On certiorari, Defendant asks the Court to abandon it current abuse of discretion approach and "chart a different course." Pet. Brf. at 16, 21. Specifically, he invites the Court "to adopt an evidentiary presumption" that expert testimony on eyewitness identification "will assist the trier of fact" under rule 702, Utah Rules of Evidence, "[w]henever the State introduces testimony of an eyewitness" to prove a defendant's identity. Pet. Brf. at 21, 16, 27-32. Under Defendant's approach, a trial court would be required to admit such testimony "unless the State can rebut this presumption" by showing, for example, that "a long-standing relationship [existed] between the eyewitness and the perpetrator" or that "the crime scene was well lit and the eyewitness viewed the

perpetrator for a substantial period of time under circumstances where mistake is unlikely." Pet. Brf. at 16, 32.

This Court should decline Defendant's invitation. He did not seek such a departure at trial or in the court of appeals. And as acknowledged in his brief, *see* Pet. Brf. at 35, no court in this country has adopted such an approach. Nor should this Court. It is inconsistent with both this Court's long-established precedent and rule 702 of the Utah Rules of Evidence.

A. This Court has appropriately addressed the problems associated with eyewitness identifications.

1. *State v. Long*.

Prior to 1986, the decisions whether to allow expert testimony or give cautionary jury instructions on the fallibility of eyewitness identification were left to "the discretion of the trial court." *State v. Malmrose*, 649 P.2d 56, 61 (Utah 1982). But in *State v. Long*, this Court "abandon[ed its] discretionary approach to cautionary jury instructions." 721 P.2d 483, 492 (Utah 1986). After reviewing the body of research showing both the inherent weaknesses in eyewitness identification and the general lack of awareness of these weaknesses by jurors, the Court concluded "that, at a minimum, additional judicial guidance to the jury in evaluating [eyewitness] testimony is warranted." *Id.* at 488, 492. The Court thus directed that in future cases, "trial courts shall give [a cautionary]

instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." *Id.* at 492.

Long held that "a proper instruction should sensitize the jury to the factors that empirical research have shown to be of importance in determining the accuracy of eyewitness identifications, especially those that laypersons most likely would not appreciate." *Id.* The Court held that such an instruction "should include not only the externals, like the quality of the lighting and the time available for observation, but also the internal or subjective factors, such as the likelihood of accurate perception, storage and retrieval of the information by a witness." *Id.* at 492-93. The Court held that such an instruction should instruct jurors to consider, among other things, "whether [the identification] was the product of suggestion," as well as "the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly." *Id.* at 493. The Court held that "[t]his last area includes such factors as whether the event was an ordinary one . . ., and whether the race of the actor was the same as the observer's." *Id.*

The Court examined two instructions designed to address the factors affecting eyewitness identifications. *Id.* at 494. Although *Long* concluded that the instruction identified in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), would be adequate "under most circumstances," it criticized the *Telfaire*

instruction because it fails to cover several important factors and "incorporates some . . . fallacious assumptions" about eyewitness identification. *Long*, 721 P.2d at 494. The Court commended an instruction proposed in the American Journal of Criminal Law, as "[a] more complete instruction that remedies many of the problems of the *Telfaire* instruction." *Id.* at 494-95 & n.8. That instruction is now commonly referred to as the *Long* instruction. However, the Court refused to adopt it or any other instruction "as the only acceptable formulation." *Id.* at 492. The Court opted instead to permit "trial court[s] and counsel some latitude in formulating instructions" that "satisfy the concerns expressed" in its opinion and are tailored to the specific case. *Id.* at 492, 495.

2. Jurisprudence on eyewitness identification experts.

"[T]his [C]ourt 'has not extended the cautionary instruction requirement [of *Long*] to include additional expert testimony concerning eyewitness identification.'" *State v. Butterfield*, 2001 UT 59, ¶ 42, 27 P.3d 1133 (citation omitted). Rather, the Court has adhered to the traditional "abuse of discretion" standard applied in other cases involving expert testimony. The Court has thus held that "'[t]he trial court has wide discretion in determining the admissibility of expert testimony'" on eyewitness identification, and that "'such decisions are reviewed under an abuse of discretion standard.'" *Hollen*, 2002 UT 35, ¶ 66 (quoting *Larsen*, 865 P.2d at 1361); *accord State v. Hubbard*, 2002 UT 45, ¶ 14, 48

P.3d 953 ("sound discretion"); *Butterfield*, 2001 UT 59, ¶¶ 28, 43 ("considerable discretion" and "sound discretion"); *Malmrose*, 649 P.2d 56, 61 (Utah 1982) ("discretion"); *State v. Griffin*, 626 P.2d 478, 481 (Utah 1981) ("discretion").

Under this standard, the Court has held that it will not reverse a trial court's decision on the admissibility of expert testimony "absent a clear showing of abuse." *Stevenson v. Goodson*, 924 P.2d 339, 347 (Utah 1996). The Court has held that such a showing is made only if the trial court's decision "'exceeds the limits of reasonability.'" *Hollen*, 2002 UT 35, ¶ 66 (quoting *Larsen*, 865 P.2d at 1361). "'[T]he appellate court can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court.'" *State v. Brown*, 948 P.2d 337, 340 (Utah 1997) (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)); *accord Butterfield*, 2001 UT 59, at ¶ 28. This standard recognizes that a trial court's decision to admit or exclude expert testimony "'necessarily reflects the personal judgment of the court.'" *Brown*, 948 P.2d at 340 (citation omitted) (quoting *Gerrard*, 584 P.2d at 887); *accord Butterfield*, 2001 UT 59, at ¶ 28.

A trial court's decision to exclude expert testimony on eyewitness identification has been challenged in this Court in five cases: *Griffin*, *Malmrose*, *Butterfield*, *Hollen*, and *Hubbard*.[4] In affirming the trial courts' decisions to

[4] This Court addressed a trial court's exclusion of expert testimony a sixth time in *State v. Maestas*, 2002 UT 123, 63 P.3d 621. However, the fractured opinion did not garner a majority on the issue.

exclude the expert testimony, two principles have emerged: (1) expert testimony may not evaluate the reliability of a particular eyewitness; and (2) expert testimony must assist the trier of fact.

In *Griffin*, this Court concluded that the trial court did not abuse its discretion in excluding proffered expert testimony, because the proffered testimony would "evaluate the credibility of the state's witnesses in their identification of the defendants." *Griffin*, 626 P.2d at 481. In other words, it would be no more than "a lecture from a psychologist as to the credibility of evidence." *Id.* The Court held that "[t]he question of credibility of the testimony as to the identification of the defendants was for the jury to determine." *Id.* The Court expressed these same concerns in *Malmrose* and *Butterfield*. *See Malmrose*, 649 P.2d at 61; *Butterfield*, 2001 UT 59, ¶ 43. The Court in *Hubbard* distilled the principle expressed in *Griffin*, *Malmrose*, and *Butterfield* to its essence: "[I]t is the role of the jury to decide how much weight to give particular witnesses, not the role of independent experts." *Hubbard*, 2002 UT 45, ¶ 15. The Court thus held that such testimony may properly be excluded if it "will evaluate for the jury, either directly or indirectly, to what extent the percipient witness testimony should be believed." *Id.* at ¶¶ 15, 17.

The Court has also examined a trial court's decision to exclude expert testimony in terms of whether the proffered testimony would assist the jury.

For example, in *Griffin*, the Court also upheld the trial court's exclusion of the expert testimony because it "would apply to any crime or any trial" and "people of ordinary intelligence and experience" were capable of judging the credibility of an eyewitness for themselves. *Griffin*, 626 P.2d at 481. Since *Long*, the focus on helpfulness has been even greater. Although rule 702 is not always mentioned in its post-*Long* opinions, the Court's analysis has been consistent with that rule. For example, in *Butterfield*, the Court concluded that the expert testimony was not necessary, because the *Long* instruction "adequately and thoroughly explain[ed] how to evaluate eyewitness identifications presented at trial." *Butterfield*, 2001 UT 59, ¶ 44. A similar conclusion was reached in *Hubbard*. *See* 2002 UT 45, ¶¶ 18-20.

Hollen also upheld the exclusion of the proffered expert testimony on helpfulness grounds, but for a different reason. In *Hollen*, the trial court allowed expert testimony on eyewitness identification. *Hollen*, 2002 UT 35, ¶ 67. The expert "gave extensive testimony on factors that affect the reliability of identifications," and was even allowed to evaluate factors that in his opinion influenced the eyewitnesses' ability to accurately identify the perpetrator. *Id.*[5] However, the trial court did not permit the expert to "opin[e] as to the overall

[5] It appears that such testimony could have been excluded under *Hubbard* because it was "evaluat[ing] for the jury . . . to what extent the percipient witness[es] should be believed." *Hubbard*, 2002 UT 45, ¶ 15.

reliability of the process of identification" in that case. *Id.* at ¶¶ 67, 70 & n.3. Citing rule 702, Utah Rules of Evidence, this Court held that given the expert testimony already given, "the jury could form a conclusion regarding the overall reliability of the identifications without further assistance." *Id.*

B. The trial court's discretion in determining whether to admit expert testimony on eyewitness identification is governed by Rule 702, Utah Rules of Evidence.

Expert testimony on eyewitness identification primarily rests on lab-based research designed to assess the cause-and-effect relationship among variables that may affect eyewitness identification accuracy. *See* Gary L. Wells, Amina Memon, and Steven D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychological Science in the Public Interest 45, 49-51 (2007) ("Wells, Memon, & Penrod"). Such testimony thus falls squarely "within the scope of rule 702 of the Utah Rules of Evidence," even though it is not in the nature of opinion testimony. *State v. Rothlisberger*, 2006 UT 49, ¶ 20, 147 P.3d 1176. Accordingly, as suggested in *Hollen*, the admission of expert testimony on eyewitness identification is governed by Utah Rule of Evidence 702. *Hollen*, 2002 UT 35, at ¶ 69; *accord Maestas*, 2002 UT 123, ¶¶ 70-76 (opinion of Durrant, J., joined by Wilkins, J.).

Rule 702 provides:

> . . . [I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

> determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Utah R. Evid. 702(a).[6] Before expert testimony based on scientific evidence may be admitted, the proponent of the evidence must satisfy a three-prong test. *See State v. Rimmasch*, 775 P.2d 388 (Utah 1989). The proponent of the testimony must demonstrate that: (1) "the scientific principles and techniques underlying the expert's testimony are inherently reliable," (2) "the scientific principles or techniques at issue have been properly applied to the facts of the particular case by sufficiently qualified experts," and (3) the evidence is otherwise admissible under "rule 403 of the Utah Rules of Evidence." *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996). The burden of persuasion rests on the proponent of the evidence. *See Rimmasch*, 775 P.2d at 396, 407.

This Court has explained that this standard for admission of expert testimony "is necessary because science in the court is a two-edged sword. While often helpful, scientific testimony also has the potential to overawe and confuse, and even to be misused for that purpose." *Alder v. Bayer Corp.*, 2002 UT

[6] The introductory clause of rule 702(a) now reads, "Subject to the limitations in subjection (b)." However, that clause was not part of the rule at the time of trial, but was added in the November 1, 2007 amendment. The 2007 amendment also added subsections (b) and (c). Both the old and amended versions of rule 702 are included in Addendum B, as well as the Advisory Committee Note to the amended rule.

115, ¶ 56, 61 P.3d 1068. This Court's "jurisprudential history [thus] reveals a consistent attempt to ensure the reliability and helpfulness of evidence while allowing a maximum of relevant information to flow to the finder of fact." *Id.* Defendant's proposed rule creating a presumption of admissibility for expert testimony on eyewitness identification flies in the face of this jurisprudential history.

1. The proponent of the expert testimony must first demonstrate that the scientific principles underlying the proffered testimony are inherently reliable.

Under step one of the *Rimmasch* test, the proponent of expert testimony must demonstrate that "the scientific principles and techniques underlying the expert's testimony are inherently reliable." *Crosby*, 927 P.2d at 641. This may be accomplished in one of two ways: by the court taking judicial notice or through an evidentiary hearing. *Id.* Judicial notice is appropriate "if the scientific principles and techniques at issue have been generally recognized and accepted by the legal and scientific communities." *Id.* If such a showing cannot be made, inherent reliability of the principles or techniques may still be established through an evidentiary hearing. *Id.*

The body of research in the field of eyewitness identification is extensive and well-documented. Given this research, courts may be tempted to take judicial notice of its inherent reliability. Some general principles have emerged

as a result of the psychological research. For example, we know that human perception and memory is not simply a matter of the recording and replaying of events. *See* Robert Buckhout, *Eyewitness Testimony*, in Memory Observed: Remembering in Natural Contexts 214, 215 (Ulric Neisser & Ira E. Hyman, Jr. eds., 2nd ed. 1999). Rather, it is a "decision-making process[ ] affected by the totality of a person's abilities, background, attitudes, motives and beliefs, by the environment and by the way his [or her] recollection is eventually tested." *Id.* As such, it is subject to error. *Id.* at 214-15.

However, errors in eyewitness identification generally cannot be traced to a single variable. They "represent a confluence of memory and social-influence variables that interact in complex ways." Wells, Memon, & Penrod, *supra*, at 45. As researchers continue to study the effects of different variables on eyewitness identification, their original theories can be discredited, explained, or modified.

One such example is the research on the correlation between witness confidence and identification accuracy ("CA correlation"). In a 1980 survey of 25 studies (meta-analysis) dating back to the early 1900s and involving 43 assessments of the CA correlation, Kenneth A. Deffenbacher found "a significant positive [cor]relation" in 22 assessments and a "nonsignificant or reverse (negative) correlation[ ]" in 21 assessments. Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their*

Relationship?, 4 Law & Hum. Behav. 243, 245-46 (1980). The incongruent results led many to conclude that eyewitness confidence could not be a valid indicator of accuracy. *See id.*; *Long*, 721 P.2d at 490.

Subsequent research, however, has generally found a *positive* CA correlation. In a 1980 meta-analysis of 16 studies, Penrod and Cutler found an average correlation of r=.23.[7] Steven Penrod and Brian Cutler, "*Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*," 1 Psychol., Pub. Pol'y & Law 817, 823 (1995) (first reported in Steven Penrod, Elizabeth Loftus, and John Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective*, in The Psychology of the Courtroom 119, 155-56 (N. Kerr et al. eds. 1982)). In a 1987 review of 35 studies involving 3,953 participants, Bothwell, Deffenbacher, and Brigham found an average correlation of r=.25. *Id*. (first reported in Robert K. Bothwell, Kenneth A. Deffenbacher, & J.C. Brigham, *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 Journal of Applied Psychology 691-95 (1987)). And in a 1995 meta-analysis of

[7] In these studies, the CA correlation is expressed in "r" units. Penrod & Cutler, *supra*, at 823. "If [jurors] know nothing about the[ ] witnesses, then [they] would have to guess whether each witness is correct or incorrect. Simple guessing should produce 50% correct guesses and 50% incorrect guesses and a corresponding r=0 . . . . On the other hand, if [jurors] had access to some very useful information [(in this case witness confidence)] and could use that information to correctly classify 80% of the witnesses (much better than guessing), the strength or usefulness of [that] information would be captured with r=.6 . . . ." *Id*.

30 studies involving 4,036 participants, Sporer, Penrod, Read, and Cutler preported an average correlation of .29. *Id*. at 824-25 (first reported in Siegfried Ludwig Sporer, Steven Penrod, Don Read, & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychological Bulletin 315, 319 (1995) (Sporer).

We are thus left with CA correlations of .23, .25, and .29.[8] Penrod and Cutler characterized these CA correlations as "weak" to "modest." Penrod & Cutler, *supra*, at 825, 842. But Bothwell, Deffenbacher, and Brigham recognized that "even a correlation of .25 cannot be characterized as an effect of negligible size," but is "medium-size in nature." Bothwell, Deffenbacher, & Brigham, *supra*, at 693. And both Penrod and Wells have admitted the research suggests that "witnesses who are highly confident in their identifications are somewhat more likely to be correct as compared to witnesses who display little confidence." Gary L. Wells, Mark Small, Steven Penrod, R.S. Malpass, S.M. Fulero, & C.A.E. Brimacombe, *Eyewitness Identification Procedures:*

[8] In a 1984 meta-analysis of 31 studies, Wells and Murray found an estimated correlation of r = .07. Penrod & Cutler, *supra*, at 823 (originally reported in Gary Wells and D.M. Murray, *Eyewitness Confidence*, in Eyewitness Testimony: Psychological Perspectives, 155, 161-62 (Wells, et al. eds., 1984)). The CA correlation of .07 found by Wells and Murray "is relatively useless in any applied sense." Wells & Murray, *supra*, at 162; *accord* Bothwell, Deffenbacher, & Brigham, *supra*, at 691. However, the methodology used by Wells & Murray has since been discredited by other researchers. *See* Bothwell, Deffenbacher, & Brigham, *supra*, at 691-92.

Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603, 622 (1998).

Sporer's 1995 meta-analysis shed additional light on the CA correlation. Unlike the previous research, Sporer also analyzed the difference in the CA correlation between choosers—those who identify a suspect—and nonchoosers—those who make no identification. Sporer, *supra*, at 315-20. In the analysis, Sporer found that the CA correlation "was significantly higher for choosers … than for nonchoosers …." Penrod & Cutler, *supra*, at 824. For choosers, the average CA correlation was r=.41, and for nonchoosers, the CA correlation was only r=.12. Sporer, *supra*, at 319. As later explained by Penrod and Wells, "[t]he 'chooser' versus 'nonchooser' distinction is a forensically important one, because it is 'choosers' (and defendants they choose) who typically appear in courtrooms." Wells, Small, Penrod, et al., *supra*, at 622-23. Other research has shown that confidence may harden or increase as a result of confirming feedback. *See* Wells, Memon, & Penrod, *supra*, at 66.

As a result of this continuing research, "the American Psychology-Law Society's white paper on lineups [now] endorses the idea of making a clear record of the confidence of an eyewitness [at the time of identification] that triers of fact may later use." *Id.* at 65 (citing Wells, et al., *Eyewitness Identification*

Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603-47 (1998)).

The point here is not to suggest that jurors should not be cautioned against over-reliance on eyewitness confidence. *See, e.g.*, Sporer, *supra*, at 324. Rather, the point is that courts should not take judicial notice of the inherent reliability of the scientific principles upon which expert testimony is based. As explained in *Rimmasch*, "a very high level of reliability is required before judicial notice can be taken." *Rimmasch*, 775 P.2d at 398. Because what is "known" about the factors influencing eyewitness identification is ever evolving, the scientific principles derived from psychological research on eyewitness identification do not meet this burden. As a result, expert testimony on eyewitness identification should be subject to an evidentiary hearing to ensure that the scientific principles are inherently reliable in light of ongoing research.

2. The proponent of the expert testimony must next demonstrate that there is an adequate foundation for the proffered testimony.

Under step two of the *Rimmasch* test, the proponent of the expert testimony must establish "an adequate foundation for the proposed testimony." *Rimmasch*, 775 P.2d at 398 n.7; *Crosby*, 927 P.2d at 641. The Court has held that this step requires a showing that "the scientific principles or techniques have

been properly applied to the facts of the particular case by qualified persons and that the testimony is founded on that work." *Id.*

Although not referencing the second requirement of the *Rimmasch* test, this Court has rejected expert testimony on eyewitness identification in part because the expert was not familiar with the witnesses or the facts of the case and could not thereby offer an opinion as to whether the eyewitness identifications were accurate. *See Butterfield*, 2001 UT 59, ¶ 44; *Hubbard*, 2002 UT 45, ¶ 19. The Court has concluded that because such expert testimony could "'apply to any crime or any trial'" and "'would be in the nature of a lecture to the jury as to how they should judge the evidence,'" the trial court does not abuse its discretion in excluding it, but may rely on *Long* instructions. *Butterfield*, 2001 UT 59. at ¶¶ 42-44 (quoting *Griffin*, 626 P.2d at 481).

Indeed, an expert who testifies on the fallibilities of eyewitness identification is not like the expert who reaches a result or conclusion by applying accepted techniques or formulas to known factors. *See, e.g.*, *Kofford v. Flora*, 744 P.2d 1343 (Utah 1987) (discussing admissibility of HLA tests for determining paternity). Nor is he or she like the expert who renders an opinion based on a clinical evaluation of the subject. *See, e.g.*, *State v. Adams*, 2000 UT 42, ¶¶ 15-18, 5 P.3d 642 (discussing admissibility of psychologist's testimony regarding mental capacity of victim suffering from mental retardation). Indeed,

the science does not support such extrapolation. "Rather, the [eyewitness] expert serves an educational function for the jury, presenting the general factors that increase or decrease the likelihood that the *average witness* will be correct in particular situations." John C. Brigham, Adina W. Wasserman, & Christian A. Meissner, *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 Court Review 12, 22 (1999) (emphasis added).

Since Defendant's trial in this case, the law appears to have shifted somewhat with respect to the admissibility of expert testimony that "outline[s] for the jury the general principles of psychological knowledge which illuminate the problems of eyewitness performance." *Butterfield*, 2001 UT 59, ¶ 44.

In *State v. Rothlisberger*, the State argued that rule 702 did not govern "fact testimony" based on specialized knowledge, only opinion testimony. 2006 UT 49, ¶ 13, 147 P.3d 1176. The Court rejected the State's argument, holding that rule 702 applies "[w]hether the [expert] testimony . . . is in the form of fact or opinion." *Id.* at ¶ 18. Quoting the advisory committee's note to federal rule 702, the Court explained that rule 702 "'recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.'" *Id.* at ¶ 19 (quoting Fed. R. Evid 702, Advisory Comm. Note).

On November 1, 2007, rule 702 was amended, adding subsections (b) and (c). The amendment itself appears to do no more than codify the threshold requirement of inherent reliability under step one of *Rimmasch*, as well as codify the alternative ways by which the requirement may be satisfied, i.e., through an evidentiary hearing or by judicial notice. *See* Utah R. Evid. 702. However, the advisory committee note mirrors the federal note regarding expert testimony on general principles:

> It might be important in some cases for an expert to educate the factfinder about general principles, without attempting to apply these principles to the specific facts of the case. The rule recognizes that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts.

Utah R. Evid. 702, Advisory Committee Note.

In sum, in light of *Rothlisberger* and the advisory committee note to the amended rule 702, the fact that an expert's testimony on eyewitness identification would be in the nature of a lecture to the jury does not appear to be a basis for exclusion, so long as the testimony does not "attempt[ ] to apply [the articulated] principles to the facts of the case." *Id.* Application of the principles must still be left to the jury. Of course, the expert testimony must still be "founded on [the] work" established to be inherently reliable. *Rimmasch*, 775 P.2d at 398 n.7. *Id.*

3. The proponent of expert testimony on eyewitness identification must demonstrate that the proffered testimony is otherwise admissible under rule 403.

Even where the scientific principles are found to be inherently reliable under steps one and two of the *Rimmasch* test, "expert testimony based upon [those principles] is not automatically entitled to admission." *Rimmasch*, 775 P.2d at 398 n.8. The court must then determine "whether, on balance, the evidence will be helpful to the finder of fact." *Id.* As observed in *Rimmasch*, "[t]his determination requires the trial court under the guidance of rule 403 of the Utah Rules of Evidence to balance the probativeness of the proffered testimony against the dangers its admission poses." *Id.*

Rimmasch explained that "the potential for unfair prejudice, etc., posed by the admission of various types of expert scientific evidence can vary widely and must be considered in making the helpfulness determination." *Id.* The Court observed that "[a]mong the important variables are the nature of the evidence offered, the quality of the other evidence available to the finder of fact, and the centrality of the issue to which the scientific evidence is directed." *Id.*

Rimmasch explained that "if the scientific proof is based on undeniably valid scientific premises, has a high degree of power to accurately determine the existence or nonexistence of a fact in issue, and is easily replicable and its application to similar situations has been tested and validated often, then the

dangers of unfair prejudice, confusion of the issues, misleading the jury, etc., attendant to its introduction would have to be great indeed to preclude its admission." *Id.* On the other hand, "if there [are] weaknesses in the testimony on some or all of these points, then it would be relatively easier to show that the dangers of admission outweighed the probativeness of the testimony." *Id.*

Expert testimony on eyewitness identification generally falls in the latter category. Although the methodology used in the research is generally sound, it cannot reliably predict "the existence or nonexistence of a fact in issue," i.e., whether the identification of a particular witness was or was not accurate. As observed by one researcher, "no general theory of memory exists that could allow deductions of particular performance of particular witnesses in particular cases." Brian R. Clifford, *A Commentary on Ebbesen and Konecni's 'Eyewitness memory research: Probative v. prejudicial value'*, 5 Expert Evidence 140, 140 (Dec. 1997).

Rimmasch also explained that "when the principles underlying scientific evidence are easily demonstrable or are readily understood by lay persons, there is relatively less danger that the finder of fact will be confused by the presentation or unduly impressed with the apparent 'scientific' nature of the evidence." *Id.* In that case, courts may be justified in admitting "evidence with relatively less probative power." *Id.* In contrast, "'when the nature of the

technique is more esoteric, as with some statistical analyses and seriologic tests, or when the inferences from the scientific evidence sweep broadly or cut deeply into sensitive areas, a stronger showing of probative value should be required.' Such a 'sensitive area' is one central to the core of the fact-finding process—whether one witness or another is telling the truth." *Id.* (citation omitted).

Once again, expert testimony on eyewitness identification falls in this latter category. As explained by the Nebraska Supreme Court, "the knowledge of behavioral scientists, such as psychologists, is probabilistic, couched in terms of averages, standard deviations, curves, and differences between groups." *State v. Trevino*, 432 N.W.2d 503, 518 (Neb. 1988). Courts must therefore be careful to ensure that statistical probabilities not be used to predict the reliability of a particular identification. As observed by this Court in *State v. Rammel*, "courts have routinely excluded [such evidence] when [it] invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where [the] truth lies." 721 P.2d 498, 501 (Utah 1986).

Expert testimony on eyewitness identification also "cut[s] deeply into sensitive areas"—whether a witness accurately identified the perpetrator of the crime. *Rimmasch*, 775 P.2d at 398 n.8. The rules do not prohibit expert testimony that "embraces an ultimate issue to be decided by the trier of fact." Utah R.

Evid. 703. However, when expert testimony based on statistical findings is offered on such sensitive areas, *Rimmasch* requires a "stronger showing of probative value." *Rimmasch*, 775 P.2d at 398 n.8. As explained in *Rammel*, "[p]robabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts 'not susceptible to quantitative analysis,' such as whether a particular individual is telling the truth at any given time," or in this case, whether a particular individual accurately identified the perpetrator. *Rammel*, 721 P.2d at 501 (citation omitted).

This is not to say that expert testimony on eyewitness identification should necessarily be excluded. *See* Clifford, *supra*, at 140 ("the lack of theory is not, in and of itself, totally crippling"). But when admitted, courts must recognize the limitations of the science. For example, research studies on the CA correlation "do not demonstrate that every eyewitness's confidence in the accuracy of his or her testimony is misplaced." *Jones v. State*, 539 S.E.2d 143, 148 (Ga. 2000). "Instead, the studies depict 'group character' behavior, offering [to the jury] expert information 'about how groups of people perceive and react as a basis for evaluating the claims of an eyewitness in a particular case.'" *Id.* (quoting Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 Duke L.J. 461, 491, 504 (1996)).

As noted, "the quality of the other evidence available to the finder of fact" is also an important factor in determining the helpfulness of expert testimony on eyewitness identification. *Rimmasch*, 775 P.2d at 398 n.8. In cases like this, where the eyewitness identification is substantially corroborated by other evidence, *see infra*, at 40-45, the helpfulness of the testimony is greatly diminished and its potential for confusion of the issues is greatly increased. Under such circumstances, courts may appropriately rely on *Long* instructions. As observed by the California Supreme Court, expert testimony on eyewitness identification "will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter." *People v. McDonald*, 690 P.2d 709, 727 (Cal. 1984).

C. In most cases, *Long* instructions can adequately educate jurors on the factors that might affect eyewitness identifications.

Before applying the standard to the facts of this case, a final comment on the effectiveness of *Long* instructions is in order. Where expert testimony on eyewitness identification is permitted, a *Long* instruction that does no more than reiterate that testimony is unnecessary and inappropriate. However, where expert testimony is not allowed, courts should still be required to give a *Long* instruction "whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." *Long*, 721 P.2d at 492.

Defendant's claim that expert testimony should be presumptively admissible in eyewitness identification cases rests on the premise that *Long* instructions do not adequately educate jurors on the problems associated with eyewitness identifications. *See* Cert. Pet. at 20-27, 36. He argues that "[b]ecause a [cautionary] jury instruction 'points only to certain factors without explaining the relative impact those factors have on memory or identification accuracy,' an instruction is only 'minimally effective.'" Cert. Pet. at 22 (citation omitted). He claims that expert testimony is more effective than jury instructions "[b]ecause [it] will 'focus[ ] the jury's attention on those factors most likely to affect the accuracy of an eyewitness identification.'" Cert. Pet. at 22 (citation omitted). The premise of Defendant's claim is unfounded.

As noted, the Court in *Long* did not prescribe the *Long* instruction, but held that trial court and counsel should formulate instructions that reflected both the science and the facts of the particular case. *Long*, 472 P.2d at 492, 495. The Court expressed the hope that "over time, the lessons of experience" would produce instructions that more fully satisfied the concerns expressed by the Court. *Id.* at 495. Sixteen years after *Long* was decided, the Court in *Hubbard* again urged courts and counsel to formulate instructions that reflect the research and the facts of the particular case:

> If the trial court determines that the better result would be to educate the jury through a *Long* instruction, counsel are certainly

> able to present proposed *Long* instructions that explain the potential effects on certain circumstances on the powers of observation and recollection and present their positions on how the *Long* cautionary instruction should be given.

Hubbard, 2002 UT 45, ¶ 19. *Hubbard* held that such instructions may "explain[ ] the substance of the proffered expert testimony, namely the research and scientific principles underlying the limitations of eyewitness identification." *Id.*

Defendant, however, made no effort to do so and acquiesced to the giving of Instruction 35A on eyewitness identification, which was nearly identical to the standard *Long* instruction. *See* R. 647: 527-28; R. 594-96. Indeed, when asked whether there were any objections to the proposed instructions, defense counsel objected only to Instruction 45. R. 647: 527-28. He cannot now complain that the instruction was inadequate because it failed to better explain factors most likely to affect the eyewitness identification in this case. *See State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 (holding that defendant invited any error in the instruction where he affirmed on the record he had no objection to the instructions).

Defendant nevertheless contends that research shows that a cautionary instruction is only "'minimally effective,'" and that "some research demonstrates *no* beneficial effect from jury instructions." Cert. Pet. at 22 (quoting Stephen D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 Law & Contemp. Prob. 43, 52 (1989)). Specifically, he points to Penrod and Cutler's conclusion, based on a review of several

experiments, "that there is 'little evidence that judges' instructions concerning the reliability of eyewitness identification enhance juror sensitivity to eyewitness identification evidence.'" Cert. Pet. at 22-23 (quoting Brian L. Cutler & Stephen D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 255, 263 (1995)). An examination of their report, however, reveals that the findings are insufficient to support a rejection of the cautionary instructions as a means of educating juries about the factors affecting eyewitness identifications.

The Cutler, Dexter, and Penrod study in 1990 tested the *Telfaire* instruction to determine whether it influenced the manner in which jurors evaluated the eyewitness identification process. Cutler & Penrod, *supra*, at 257. The Zemba and Geiselman study in 1993 examined the *Telfaire* instruction to determine whether it was more effective if given before and after eyewitness testimony. *Id.* at 258-59. The Greene study in 1998 also examined the *Telfaire* instruction. *Id.* at 259-60. All of these studies concluded that the *Telfaire* instruction was ineffective. *See id.* at 257-60.

The Katzev & Wishart study in 1985 involved 108 subjects (comprising 30 juries) to test the effectiveness of an instruction that commented on the psychological findings regarding eyewitness identification. Cutler & Penrod, *supra*, at 257. That study revealed that the instruction produced skepticism (fewer guilty verdicts), but it could not determine whether the instruction also

increased sensitivity (greater awareness of eyewitness factors). *Id.* Greene also conducted an experiment using an instruction that was similar to the *Long* instruction or a modified *Long* instruction. Cutler & Penrod, *supra*, at 260-61. That study involved 139 subjects and found that the instruction produced increased skepticism, but reduced sensitivity. *Id.*

From these studies, Cutler and Penrod conclude that cautionary instructions "do not serve as an effective safeguard against mistaken identifications and convictions and that expert testimony is therefore more effective than judge's instructions as a safeguard." *Id.* at 264. However, a majority of these studies tested the effectiveness of the *Telfaire* instruction. Accordingly, they shed little light on the effectiveness of the standard *Long* instruction, which "remedies many of the problems of the *Telfaire* instruction," not to mention a modified *Long* instruction. *Long*, 721 P.2d at 493-94. The other two studies involving less than a total of 250 subjects can hardly be regarded as sufficient to conclude that a modified *Long* instruction is not adequate. Indeed, the author of the Greene study appears to have come to the opposite conclusion of Cutler and Penrod, concluding that the study "suggest[s] that jurors who heard the revised instruction were better able to appreciate and understand" the relevant factors affecting eyewitness identifications. Edith Greene, *Eyewitness*

Testimony and the Use of Cautionary Instructions, 8 U. Bridgeport L. Rev. 15, 18-19 (1987).

In sum, the research falls far short of supporting Defendant's premise that cautionary instructions cannot adequately educate the jury on the factors affecting eyewitness identifications.

D. The court of appeals correctly concluded that the trial court did not abuse its discretion in excluding the proffered expert testimony on eyewitness identification.

Applying the abuse of discretion standard, as governed by rule 702, the trial court did not abuse its discretion in excluding the evidence.

Step One. The State did not challenge the inherent reliability of the scientific principles underlying Dr. Dodd's testimony. Accordingly step one of the three-prong *Rimmasch* test was satisfied.

Step Two. In his statement summarizing his proposed testimony, Dr. Dodd opined that "the identification by Ms. Pantoja at the showup is based on the fact that the perpetrator was dressed in red and that the subsequent identifications might be based on previous identifications rather than a memory for a person encoded at the time of the crime." R. 263. The State objected to this proffered testimony on the ground that it was "commenting on the eyewitness's credibility." R. 639: 15. And indeed, such proffered testimony would improperly "evaluate for the jury . . . to what extent [Pantoja's] testimony

should be believed." *Hubbard*, 2002 UT 45, ¶ 15; *accord* Utah R. Evid. 702 (November 1, 2007), Committee Advisory Note (observing that expert testimony on general principles should not "attempt[ ] to apply th[o]se principles to the specific facts of the case"). Defense counsel correctly conceded the point and "withdr[e]w that particular aspect" of the proffered testimony. R. 639: 19.

The remainder of the proffered testimony would have discussed general principles regarding the effects of trauma, weapon use, cross-racial identification, and suggestive influences such as show-ups and police commentary. The court of appeals held that because the proffered testimony was in the nature of a lecture to the jury, the trial court did not abuse its discretion in relying instead on the *Long* instruction, despite any inadequacies in the instruction in this particular case. *Clopten*, 2008 UT App 205, ¶¶ 18, 21. The court's holding is consistent with this Court's precedent. *See Hubbard*, 2002 UT 45, ¶¶ 18-19 (holding that where testimony would amount to a lecture to the jury, counsel may request instructions that explain factors relevant to the case).

In light of this Court's decision in *Rothlisberger* and the Advisory Committee Note to rule 702, as amended November 1, 2007, *see supra*, at 28-29, refusal to allow expert testimony on eyewitness identification because it is in the nature of a lecture to the jury may no longer be appropriate *on that basis alone*.

The trial in this case, however, was before these developments and Defendant cannot therefore benefit from any such post-trial changes in the law.

Step Three. Finally, the expert testimony would not "on balance, . . . be helpful to the finder of fact" under the circumstances of this case. *Rimmasch*, 775 P.2d at 398 n.8. As noted, expert testimony of this nature requires "a stronger showing of probative value." *Id.* (quotation and citation omitted). In this case, the *Long* instruction directed the jury to consider "the stress or fright at the time of observation," "the presence . . . of distracting . . . activity during the observation," and whether the identification was "was completely the product of the witness's own memory." R. 594-95. It also instructed the jury that cross-racial identifications "may be less reliable" and that identifications by picking someone from a group are "generally more reliable than an identification made from the defendant being presented alone to the witness." R. 595-96. In short, the *Long* instruction discussed the factors which Dr. Dodd proposed to discuss.

As in *Hubbard*, the instructions "could have better explained the substance of the proffered expert testimony, namely the research and scientific principles underlying the limitations of eyewitness identification." *Hubbard*, 2002 UT 45, ¶ 19. Defendant had the opportunity to propose a more complete instruction, but told the court he had no issues with the instruction. R. 647: 527-28. He thus invited any error. *See Hamilton*, 2003 UT 22, ¶ 54.

In this case, however, the most relevant factor in determining the overall helpfulness of the expert testimony was "the quality of the other evidence available to the finder of fact." *Rimmasch*, 775 P.2d at 398 n.8.

As observed by the court of appeals, none of the three witnesses that identified Defendant as the gunman were complete strangers. *See Clopten*, 2008 UT App 205, ¶ 20. Shannon Pantoja and Melissa Valdez interacted, at some level, with Defendant earlier in the evening. Before the concert, Defendant was named and pointed out to Pantoja. R. 645: 35-26. Valdez spoke with Defendant before the concert. R. 646: 243-47. She then passed him moments before the shooting, asked if he got tickets, and received an affirmative response. R. 646: 246-49. Although he did not make eye contact, Valdez "looked him in his eyes." R. 646: 246. After passing him, Valdez looked over her shoulder in time to see him shoot Fuailemaa from behind. R. 646: 249-51.

The most damming aspect of these two witnesses' testimony, however, was in their description of the shooter's clothing, not in their facial identification. Even assuming Dr. Dodd's testimony would have undermined the two witnesses' facial identification of Clopten as the shooter, it would not have undermined the witnesses' account that the shooter was wearing all red. When Officer Saul Bailey responded to the scene seconds after the shooting, Pantoja pointed toward the fleeing shooter and said, "It's the guy in all red." R.

645: 46; *accord* R. 646: 195, 224-25, 236. Valdez also testified that the shooter was wearing a red hooded sweatshirt and red sweatpants, "like a matching outfit." R. 646: 246-47; R. 646: 263-64. She testified that the outfit "looked brand new" and that "[i]t was all fluffy." R. 646: 247.

As Dr. Dodd indicated in his summary of proposed testimony, the research upon which expert testimony relies has called into question the reliability of facial identification, not the ability of witnesses to identify other aspects of a perpetrator, such as what the perpetrator was wearing. To the contrary, Dr. Dodd himself explained that "[w]itnesses can quickly pick up certain particulars: this was a male of a certain size, *wearing particular clothing*, engaged in particular activities such as holding a weapon." R. 260-61 (Letter of Dr. Dodd submitted with Notice of Expert Witness) (emphasis added). Thus, even if neither witness had been able to identify the shooter's face, both testified that he was wearing all red.

After Pantoja pointed toward the fleeing shooter and said he was wearing all red, Bailey looked and saw a man wearing all red running eastbound, just beginning to round a corner midway through the block. R. 646: 195, 227. Bailey pursued the man until he fled in a Ford Explorer. R. 646: 196-202. At that point, officers in vehicles gave chase, eventually stopping the Ford Explorer at an exit ramp on I-15. R. 645: 113-21. Although Freddie White was wearing a red T-

shirt, Clopten was the only occupant wearing red sweat pants and a red sweatshirt with a hood—just as the two eyewitnesses described. R. 645: 121; R. 646: 211-14. Thus, even absent a facial identification by the two witnesses, the evidence was strong that Clopten was the shooter.

Even more probative was the testimony of one of Defendant's associates that night—Andre Hamby. He explained in detail the events leading up to the shooting. He testified that when the four men returned to their car after leaving the concert, Clopten angrily declared that he was "goin' to shoot [Fuailemaa]" and secured a 9 mm semi-automatic pistol from Freddie White. R. 633: 23, 47-48, 59. Hamby testified that Clopten then walked back toward the club, followed by Hamby, White, and Grissett. R. 633: 23, 59. Hamby testified that after he and the other two men fell back a short distance away, Clopten approached Fuailemaa and his girlfriend "and, at point-blank range, . . . shot [Fuailemaa] in the back of the head." R. 633: 23, 26-28, 50-52; SE45. This was no stranger account, but a personal account of someone who was immediately involved.

Hamby's testimony that Defendant used a 9 mm handgun and had it thrown out the window during the high speed chase was also corroborated when the gun was found and a ballistics test confirmed that the shell casings and bullet fragment came from that weapon. R. 645: 162, 169-76; R. 646: 377-80.

Finally, the case against Defendant was further corroborated by the testimony of Robert Land, an inmate at the prison who spoke with Defendant at the prison following Defendant's arrest for Fuailemaa's murder. R. 646: 341, 365. Land explained that Defendant considered Fuailemaa an enemy because he had jumped Defendant during a fight at the prison in 1997. R. 646: 347-51. He testified that after Defendant was imprisoned following his arrest, Defendant told him what had happened. Confirming the observations of police officers and Hamby, Defendant told Land that he and Fuailemaa confronted each other earlier that night at the club. R. 646: 346. Defendant said that during the confrontation, he told Fuailemaa that he "better go call his mom because that's the last time he'll talk to her." R. 646: 346. Defendant told Land that he "domed" Fuailemaa after he left the concert. R. 646: 352.[9] He also told Land that they threw the guns out the window during the high-speed chase. R. 646: 353.

In sum, expert testimony on the problems associated with facial identification was not required here, because the identification rested as much on the shooter's clothing as it did on his face, if not more so. Police pursued and apprehended the man in all red, who turned out to be Clopten. Moreover, one

[9] Land explained that to dome someone means to "[s]hoot him in the head." R. 646: 352.

of Clopten's three associates that night fingered him as the shooter, and there is no question that he was able to identify Clopten. Finally, Clopten admitted to the murder to a cellmate at the prison. Given "the quality of th[is] other evidence," *Rimmasch*, 775 P.2d at 398 n.8., the proffered expert testimony was not, on balance, particularly helpful to the jury.

Moreover, these corroborating facts render any possible error in excluding the testimony harmless, especially where the jury was given a cautionary *Long* instruction on the factors affecting eyewitness identifications. *See Steffensen v. Smith Management Corp.*, 862 P.2d 1342, 1347 (Utah 1993) (holding that any error in excluding expert testimony may be harmless).

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm the judgment of the court of appeals.

Respectfully submitted March 12, 2009.

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CERTIFICATE OF SERVICE

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A digital copy of the brief was also included: ☐ Yes ☒ No