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HEADLINE: Expert Testimony Concerning Eyewitness Identification

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BODY:

IS THE unreliability of eyewitness testimony a matter of common sense best explored on cross examination? Or expertise requiring expert testimony? While some courts have shown an increasing tolerance for expert testimony on this subject. New York State and the Second Circuit have remained hesitant to take this step.

New York State appellate decisions condemn this testimony virtually without exception, although the trial courts often admit it. The Second Circuit has held that the trial courts may exclude such expert testimony. In California, on the other hand, the state appellate courts have set out far more favorable standards. When faced with actual cases, however, the California courts have yet to find the exclusion of such testimony to be reversible error.

In federal court, admission of expert testimony concerning eyewitness identifications will become somewhat easier in the wake of the Supreme Court's ruling last term in *Daubert v. Merrell Dow Pharmaceuticals Inc.*,[1] in which the Court rejected the so-called *Frye* requirement that the subject of expert testimony be "generally accepted in the scientific community" in favor of the more liberal, flexible standards of Rule 702 of the Federal Rules of Evidence. *Daubert* will not, however, affect the approach of those federal appellate courts that have generally endorsed the reliability and relevance of such testimony, but have nonetheless recognized the broad discretion of trial courts to exclude it.

Many criminal cases turn on the often dramatic testimony of the victim or of some other witness identifying the defendant as the perpetrator. For instance, in the so-called "Reginald Denny beating" trial in Los Angeles, the state and the defense have expended considerable effort in, respectively, corroborating and attacking the testimony of the gas station attendant who was the only eyewitness on the ground to testify that he saw lead defendant Damian Williams beat Denny.[2]

In some cases, the eyewitness identification represents the entire case against the defendant. In recent years, however, studies have confirmed what trial lawyers and other students of human nature know to be true: perception and recall can be a tricky business. These studies have concluded that stress affects the accuracy of identifications, that cross-racial identifications are often unreliable, that the error rate increases when the events involve violence, and that witness certainty about the identification is not strongly correlated to accuracy.[3] As the U.S. Supreme

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[1] 113 S. Ct. 2786 (1993).

[2] Williams was identified by other witnesses who were in a helicopter or who could pick out Williams on the videotape of the beating.

[3] See, e.g., *Eyewitness Testimony Psychological Perspectives* (Wells & Loftus eds. 1984); Sobel, *Eyewitness Identifications: Legal and Practical Problems* (2d ed. 1983); Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984). The Johnson article cites studies which found that own-race/other-race recognition rates differ by thirty percent and that witnesses identifying members of a different race made four times as many errors as witnesses identifying members of their own race. Id. at 942-43. Other studies have shown that high stress at the initial encounter can reduce accuracy by as much as fifty percent. For a more complete listing of sources, see 1 *McCormick on Evidence* §206, n. 6 (4th ed. 1992).

Court noted in *U.S. v. Wade*,[4] "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification."

Doubts about the accuracy of eyewitness testimony are not new. Two New York pioneers in this field deserve mention. They are Judge Jerome Frank, who co-authored *Not Guilty*,[5] and Patrick M. Wall, who authored his own technical book on eyewitness identification.[6]

The current debate does not center on the inaccuracies themselves, but on how, and by whom, these doubts may be placed before the jury. Defense counsel argue that eyewitness unreliability is a relevant, scientific issue, properly explained to the jury by qualified experts, generally psychologists.

Prosecutors generally take the position that these issues are common sensical, are not beyond juror comprehension, and lay at the heart of the jury's traditional deliberative function. Further, they note that experts would only confuse the issue, adding little information that would assist, rather than hinder, the trier of fact.

Impact of 'Daubert'

Daubert v. Merrell Dow Pharmaceuticals[7] will force a re-examination of the admissibility of expert testimony by courts that have excluded such testimony at least in part in reliance on the so-called *Frye* standard.

In *Daubert*, the Court held that the admissibility of expert testimony concerning novel scientific theories is governed by Rule 702 of the Federal Rules of Evidence, not by whether the theory was generally accepted in the scientific community, as had been required in jurisdictions that had followed the D.C. Circuit's venerable but now defunct holding in *Frye v. United States*.[8]

The Court held in *Daubert* that general acceptance in the scientific community was a factor that the trial court could consider, but was not itself a necessary predicate for admissibility if the standards under the Federal Rules of Evidence had been met.

Daubert concerned the admissibility of scientific studies of whether the anti-nausea drug Bendectin caused birth defects. While *Daubert* did not expressly address the admissibility of expert testimony concerning the fallibility of eyewitness identifications, the Court four times cited with approval the Third Circuit's 1985 opinion in *United States v. Downing*,[9] which had vacated and remanded a district court holding that expert testimony concerning the reliability of eyewitness testimony could never meet the "helpfulness" standard of Rule 702.

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[4] 388 U.S. 218, 228 (1967).

[5] J. Frank and B. Frank, *Not Guilty* (1957) (collecting examples of unjust convictions based on, among other factors, faulty human perception and memory).

[6] P. Wall, *Eye-witness Identification in Criminal Cases* (1965).

[7] 113 S. Ct. 2786 (1993).

[8] 293 F. 1013 (D.C. Cir. 1923).

[9] 753 F2d 1224 (3d Cir. 1985).

The *Downing* opinion is perhaps the most thorough and scholarly on the issue of admissibility under Rule 702 of this type of expert testimony, and the Supreme Court in *Daubert* used much of the same analysis.

While *Daubert* removed the *Frye* bar to certain scientific testimony, it identified two ways in which courts may still exclude expert testimony.

First, it requires trial courts to conduct a "preliminary assessment" under Rule 104 of the Federal Rules of Evidence of "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts of the case."[10]

The Court listed a number of factors that the trial court should consider in the Rule 104 hearing, including: whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; the known or potential rate of error; the use of standards controlling the technique's operation; and "general acceptance" in the pertinent scientific community.[11]

Second, even if scientific testimony is sufficiently relevant and reliable to pass muster under Rule 702, it could still be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[12]

Decisions that relied on the *Frye* standard to exclude expert testimony concerning eyewitness identifications are no longer good law. The question posed by expert testimony about eyewitness reliability, however, is generally not whether it is too novel or lacking in acceptance by the scientific community, but rather just the opposite: whether it is too obvious and too accessible to the typical juror.

Second Circuit Law

The admissibility of expert testimony in federal trials is governed primarily by Rules 702 and 403 of the Federal Rules of Evidence. Rule 702 states in its entirety:

If 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.

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[10] 113 S. Ct. at 2796.

[11] The *Frye* standards has thus become one factor among many, rather than the *sine qua non*, governing admissibility.

[12] Id. at 2798; Fed. R. Evid. 403.

In most circuits, as in the Second Circuit, the trial judge generally has broad discretion when deciding whether to admit expert testimony.[13] In the one case in which it ruled directly on the issue of expert testimony concerning the reliability of eyewitness identifications, the Second Circuit held that the trial court did not abuse its discretion in excluding the testimony. The opinion's dicta makes clear the dim view the court takes of such "expertise":

The . . . [expert's] proposed testimony basically consisted of general pronouncements about the lack of reliability of eyewitness identification, particularly cross-racial identification. He also acknowledged that many of his conclusions coincided with common sense. This court is fully aware of the dangers of testimony based purely on eyewitness identification, and we have often commented on those dangers. . . . Nevertheless, we do not think that this expert's proffered testimony would have done anything other than to muddy the waters.[14]

New York State Law

New York State courts have confronted the issue more frequently than those in the Second Circuit. The state courts have started from the premise that "the potential for inaccuracy in visual identification evidence is well known to the legal community."[15]

The New York Court of Appeals faced the issue of eyewitness experts in a 1990 case, *People v. Mooney*.[16] Over a lengthy dissent by then-Judge Judith S. Kaye (joined by Judge Fritz W. Alexander), the Court issued a two-paragraph affirmance that upheld the exclusion of the expert testimony, holding that we need not decide whether the expert testimony sought to be presented was on the type that could, as a matter of law, properly be admitted. Here, the trial court based its decision to exclude the testimony in the exercise of its sound discretion to which the admission of such evidence would, if legally admissible at all, be entrusted. Our review powers are limited accordingly.[17]

Judge Kaye strongly disagreed with the majority, writing that all three of the trial court's "unelaborated reasons" for refusing to admit the testimony was erroneous. She argued that this area of psychology *has* been accepted by the scientific community, that the testimony was *not*

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[13] See *United States v. Ruggiero*, 928 F2d 1289, 1304 (2d Cir. 1991) (trial court decisions regarding expert testimony will not be disturbed unless "manifestly erroneous"); *United States v. Schatzle*, 901 F2d 252, 257 (2d Cir. 1990); *United States v. Cruz*, 797 F2d 90, 96 (2d Cir. 1986) (citing cases).

[14] *United States v. Serna*, 799 F2d 842, 850 (2nd Cir. 1986) (citation omitted), *cert. denied*, 481 U.S. 1013 (1987). For similar reasons, the Second Circuit held that it was not error to preclude expert testimony that the device on view in court -- a slot machine -- was in fact a slot machine. *United States v. Cook*, 922 F2d 1026, 1036 (2d Cir. 1991).

[15] *People v. Whalen*, 59 NY2d 273, 464 NYS2d 454, 456-57 (Ct. App. 1983). In *Whalen*, the issue of expert testimony was not before the court. Rather, it held that although a barebone charge on eyewitness identification was not an error requiring reversal, out of fairness a more detailed charge should be given, including mention of the possible unreliability of identification testimony.

[16] 560 NYS2d 115 (Ct. App. 1990).

[17] Id. at 115 (citing cases).

cumulative, and that it *was* beyond the jurors' ken and would not usurp their traditional deliberative function.[18]

The appellate divisions that have ruled on the issue have taken a skeptical view of expert testimony regarding eyewitness identification.

In 1990, the Third Department upheld the trial court's exclusion of such expert testimony, noting its agreement with the Second Department's view that "in general, expert testimony of this type is within the common knowledge and not beyond the ken of lay jurors and would tend to obfuscate rather than elucidate the issues, and therefore is not a proper subject for expert testimony."[19]

The position of the Second Department is equally unfavorable. In *People v. Wright*,[20] the court noted that "the reliability of eyewitness identification is not a proper subject for expert testimony, as it pertains to matters of common knowledge which are not beyond the ken of lay jurors."

People v. Wright was but one of several cases in which the Second Department criticized such testimony and affirmed the trial court's decision to exclude it.[21]

Despite the uniformly inhospitable reaction at the appellate level in New York to such expert testimony, several trial courts have nevertheless been willing to admit it.

In *People v. Mateo Lawson*, [22] the court noted that *Mooney* makes it clear that the issue of admissibility is still open as a matter of law, and decided on the facts before it to permit expert testimony on the subject of cross-racial identification.

Similarly, in *People v. Wong*,[23] the trial court noted the extreme disfavor that the Second Department had shown for such expert testimony, but found that deciding whether to admit such testimony was nevertheless still a matter within the discretion of the trial court.

The trial judge noted that such testimony was clearly not appropriate in the typical eyewitness case, but might well be admissible if "a showing of need based on the special facts of the

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[18] Id. at 116-18 (Kaye, J., dissenting). In an earlier case, the Court of Appeals had noted that the admission of expert testimony is within the discretion of the trial judge and that a trial court commits error if it excludes the testimony at issue based on the belief that the court has no discretion to admit it. *People v. Cronin*, 470 NYS2d 110 (Ct. App. 1983).

[19] *People v. Knighton*, 560 NYS2d 514, 516 (3d Dept. 1990).

[20] 558 NYS2d 842, 842 (2d Dept. 1990).

[21] See *also* *People v. Gibbs*, 157 AD2d 799, 550 NYS2d 400, 400 (2d Dept. 1990); *People v. Foulks*, 143 AD2d 1038, 533 NYS2d 619, 620 (2d Dept. 1988); *People v. Brown*, 136 AD2d 1, 525 NYS2d 618, 626 (2d Dept), *cert. denied*, 488 U.S. 897 (1988).

[22] *NYLJ*, at 26 (Sup. Ct. N.Y. Co. Feb. 26, 1993).

[23] 568 NYS2d 1020, 1024 (Sup. Ct. Queens Co. 1991).

situation" was made. In the case at bar, however, which involved a 20-second intra-racial identification made in a restaurant, the judge still did not permit an expert to testify.[24]

In the New York state courts, therefore, it appears that despite the higher courts' criticism of expert testimony on eyewitness reliability, the decision to admit such testimony still rests in the sound discretion of the trial judge.

The pattern of the decisions in the past few years indicates that the testimony is not likely to be admitted absent a showing of some special circumstances (such as a brief exposure of the eyewitness to a cross-racial defendant) tending to cast some doubt on the identification.

The expert testimony likely will be limited to a general discussion of the scientific work done to date; most courts will not permit the expert to testify as to the reliability of the particular identification at issue. Finally, given the appellate rulings, it seems unlikely that a trial court's decision to exclude such testimony will be deemed reversible error.

California, by contrast has taken a markedly different approach. In *People v. McDonald*,[25] the California Supreme Court held in 1984 that it is error to exclude expert testimony on factors affecting the accuracy of eyewitness identification when the identification is a key element of the prosecutor's case and is not substantially corroborated by other evidence giving it independent reliability.

The court also held, however, that trial courts retain broad discretion and that excluding such testimony may constitute harmless error. This harmless error rule is subject to criticism, because a reviewing judge has no way of knowing how much reliance a convicting jury placed on the eyewitness identification testimony.

Since *McDonald*, California state courts have consistently invoked the harmless error standard to affirm a trial court's exclusion of expert testimony. The reviewing courts have generally found that the identification was substantially corroborated by other evidence and that the defendant therefore suffered no prejudice. Thus, even where the expert was deemed qualified and the decision to exclude was deemed error, the reviewing courts have upheld the conviction.[26]

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[24] Id. at 1024. In *People v. Green*, 151 Misc.2d 194, 573 NYS2d, 113, 115 (N.Y. Sup. Ct. 1991), an expert was also allowed to testify. Experts were also permitted in several cases which predated the highly unfavorable appellate divisions. See *People v. Beckford*, 532 NYS2d 462 (N.Y. Sup. Ct. 1988) (information not within juror's ken, expert permitted to testify "within specific parameters and subject to a limited charge"); *People v. Schor*, 516 NYS2d 436 (Nassau Dist. Ct. 1987), (expert testimony admissible as a matter of law, but no in the case at bar.) Characteristically, the court noted that if the court permitted the expert to "apply his experience to the *particulars of this case* it would constitute a trespass on the jury's domain." Id. at 440 (emphasis in original). See *also People v. Lewis*, 520 NY2d 125 (Monroe Co. Ct. 1987) (admitting limited expert testimony because witness viewed assailant for under one minute in dark parking lot); *People v. Brooks*, 490 NYS2d 692 (Westchester Co. Ct. 1985) (expert permitted to testify about factors relevant in determining reliability, but not about reliability in the specific case or in general, which would invade the province of the jury.)

[25] 690 P.2d 709, 37 Cal.3d 351 (1984).

[26] *People v. Vu*, 227 Cal. App. 3d 810 (1991) (error to exclude expert was harmless); *People v. Sanders*, 51 Cal.3d 471, 503-06 (1990) (exclusion was harmless error due to independent corroboration); *People v. Walker*, 47 Cal.3d 605, 627-28 (1988) (same); *People v. Brown*, 40 Cal.3d 512, 525-57 (1985) (same); *rev'd on other grounds sub*

The Ninth Circuit has followed a pattern similar to that of the California state courts. Despite enunciating a legal standard which could support the admission of such testimony,[27] the Ninth Circuit has never required the admission of expert testimony regarding eyewitness identification.

As in the California state courts, the exclusion of such testimony by the trial court has always been upheld on appeal.[28]

Other circuits, including the Third, Fifth, Sixth, and Eighth, have expressed confidence in the reliability of expert testimony concerning eyewitness identifications, but have deferred to the broad discretion of the district court in deciding whether to admit such testimony.[29]

Conclusion

While New York and California appear at first glance to have widely disparate approaches to the admission of expert testimony concerning the reliability of eyewitness identifications, in practice, the law of the two states is not that far apart. In both states, the decision of the trial court to exclude the testimony has never been a basis for overturning a conviction. Indeed, a defendant may have a better chance in New York of convincing the trial court to exercise its discretion to admit the testimony.

In any event, in either jurisdiction it is likely that defense counsel will be able to get expert testimony about eyewitness identification before the jury only if counsel can convince the trial judge to exercise discretion in favor of admission. Such admission will be more likely if the trial court has doubts about the accuracy of the eyewitness identification, based on the circumstances of the viewing (e.g., lighting or duration), cross-racial concerns, lack of corroboration or credibility of the eyewitness.

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nom. *California v. Brown*, 479 U.S. 538 (1987); *People v. Walker*, 185 Cal. App. 3d, 155, 161-167 (1986) (error to exclude, but no evidence of reasonable probability that jury would have reached a different result absent the error); *People v. Jackson*, 164 Cal. App. 3d 224, 241-47, (abuse of discretion to exclude, but error harmless).

[27] See *United States v. Amaral*, 488 F2d 1148 (9th Cir. 1973).

[28] *United States v. George*, 975 F2d 1431 (9th Cir. 1992) (defendant must show prejudice resulting from exclusion of expert by "clear and convincing" evidence); *United States v. Christophe*, 833 F2d 1296 (9th Cir. 1987) (expert testimony does not adhere to accepted psychological theory, skillful cross examination suffices); *United States v. Poole*, 794 F2d 462 (9th Cir. 1986) (trial court has broad discretion to exclude, cross-examination is sufficient); *United States v. Brewer*, 783 F2d 841 (9th Cir. 1986) (same).

[29] See, *e.g.*, *United States v. Stevens*, 935 F2d 1380, 1397-1401 (3d Cir. 1991); *United States v. Sebetich*, 776 F2d 412, 419 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988); *United States v. Downing*, 753 F2d 1224, 1229-32 (3d Cir. 1978); *United States v. Smith*, 736 F2d 1103, 1105-07 (6th Cir.) (per curiam) *cert. denied*, 469 U.S. 868 (1984); *United States v. Moore*, 786 F2d 1308, 1311-13 (5th Cir. 1986); *United States v. Blade*, 811 F2d 451, 465 (8th Cir.), *cert. denied*, 484 U.S. 839 (1987).