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SUMMARY OF CONNECTICUT CASE ON EYEWITNESS IDENTIFICATIONS

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You asked for a summary of the Connecticut Supreme Court decision allowing experts to testify about factors that may affect the reliability of eyewitness identifications (*State v. Guilbert*, 306 Conn. 218, 2012 WL 3629569, September 4, 2012).

SUMMARY

In *State v. Guilbert*, the Connecticut Supreme Court held that experts could testify about the fallibility of eyewitness identifications in appropriate cases. The existing rule generally prohibited its use because (1) the average juror was already familiar with the factors that affected the reliability of eyewitness identifications and (2) it impermissibly interfered with the jury's fact-finding role.

Guilbert involved a criminal defendant's claim that five eyewitnesses misidentified him. The trial court applied the existing rule and denied defense counsel's request to present scientific testimony pinpointing factors known to adversely affect the accuracy of eyewitness identifications.

On appeal, the Supreme Court considered the continuing vitality of the existing rule. It looked at the "near-perfect scientific consensus" and widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways that are unknown to the general public but can lead to mistaken identifications.

The strength of the scientific findings and bases for other courts rulings allowed the court to reach conclusions on the admissibility of evidence concerning a number of factors. The court also considered and rejected the general premise that jurors could be adequately educated by counsel's opening and closing statements, cross-examination, and the trial court's jury instructions. But it acknowledged that in appropriate cases, the education function could be adequately served by detailed jury instructions; the decision to follow this course is one that remains within the trial court's discretion.

Five of the seven *Guilbert* justices concluded that the trial judge had abused his discretion in precluding expert testimony, but only with respect to the stranger Lang's identification. They determined that the error was harmless because (1) the likelihood of misidentification by the other eyewitnesses was reduced by their prior acquaintance with the defendant, (2) other substantial evidence supported the jury's guilty verdict, and (3) the court's jury instructions were somewhat helpful in assisting the jury in its deliberations.

Justices Zarella and McLaughlan agreed with the portion of the majority opinion that did away with the existing rule. Yet they argued that the new rule is confusing to apply and impermissibly interferes with a trial judge's discretion to exclude expert testimony when the totality of the circumstances makes its introduction unnecessary.

Below, we summarize the majority opinion. This report does not address the unrelated issue the defendant raised on appeal, which was based on his claim that the state unlawfully delayed in disclosing other evidence.

FACTS AND PROCEDURAL HISTORY

Scott Lang was standing in line waiting to use the restroom in a New London bar when he was shoved against a door and witnessed a man shoot another patron in the face. A police officer reported having seen the defendant running away from the crime scene.

Several minutes later and a short distance away, a car's driver and passenger were shot in the back of their heads and killed. Two people sitting in a nearby car heard three "pops," and saw someone get out of the victims' car and leave the scene.

Ten days after the crime, Lang told the police what he had seen. He had been prompted to do so after recognizing the shooter as the person depicted in a newspaper photo alongside a story identifying Guilbert as a suspect in the shooting. Lang said he had never seen the shooter before, but was “shoulder-to-shoulder” with him when the shot was fired.

At about the same time, the two witnesses to the second shooting came forward and identified Guilbert, who they knew as “Fats,” as the person they saw getting out of the car. Both of them had been acquainted with the defendant for some time before reportedly seeing him at the crime scene.

The fifth eyewitness was the victim of the barroom shooting. He told the police shortly after the incident that Fats was the perpetrator, but recanted and testified at trial that he did not know who had shot him.

Guilbert was charged with capital murder, two counts of 1st degree murder, and one count of 1st degree assault. The trial court precluded the introduction of expert testimony after at the conclusion of a pre-trial hearing concerning its proposed subject matter. Although the basis for the ruling was not entirely clear, the Supreme Court interpreted it as being based on the judge’s conclusions that the evidence (1) did not satisfy the threshold rule for admissibility because it had not been subjected to sufficiently rigorous peer review and scientific testing and (2) was within the common knowledge of the average juror.

A jury convicted the defendant on all counts. His appeal was certified directly to the Supreme Court.

EXISTING RULE

When *Guilbert* went to trial, Connecticut courts almost universally barred experts from testifying about factors affecting the reliability of eyewitness testimony. The rationale for this rule rested on the beliefs that (1) jurors already know the factors affecting the accuracy of eyewitness identifications and (2) expert testimony on this issue is disfavored because it interferes with the jury’s role in deciding a witness’ credibility and what weight to give his or testimony (*State v. Kemp*, 199 Conn. 473 (1986); *State v. McClendon*, 248 Conn. 572 (1999)).

SCIENTIFIC RESEARCH

The Court rejected the trial court's finding that expert testimony on factors affecting the reliability of eyewitness testimony did not meet the threshold standard for admission of scientific evidence. Instead, it conducted an extensive review of studies and literature and found a "near perfect scientific consensus" that eyewitness identifications were often unreliable. It pointed to the hundreds of peer-reviewed studies, books, journal articles, and meta-analyses that "abundantly demonstrate the many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; and the influence of police interview techniques and identification procedures" (*Guilbert*, at 237, quoting *State v. Henderson*, 208 N.J. 208, 283 (2011)).

Research-Supported Factors Affecting Memory

The Court concluded that the strength of existing scientific studies supported the admissibility of competent expert testimony on eight issues.

1. Witness confidence. There is at best a weak correlation between a witness' confidence in his or her identification and its accuracy.
2. Weapon focus. The reliability of identification can be diminished by a witness' focus on a weapon.
3. Stress. High stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events.
4. Race. Cross-racial identifications are considerably less accurate than same-race identifications.
5. Memory decay. A person's memory diminishes rapidly over a period of hours, rather than weeks, after an event.
6. Simultaneous or sequential lineups. Identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure.

7. Unwarranted confidence. Witnesses are prone to develop unwarranted confidence in their identifications if they become aware of post-event or post-identification information about the event or identification.
8. Transference. The accuracy of eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is seen in another.

Jury Knowledge and Incorrect Assumptions

The Supreme Court also found that the *Kemp* and *McClendon* courts' reliance on the notion that most jurors knew about these factors was misplaced. Moreover, it credited peer-reviewed studies demonstrating that, in addition to jurors' unfamiliarity with factors proven to adversely affect the accuracy of eyewitness' identifications, they commonly formed opinions based on assumptions that were actively wrong. The majority opinion highlighted three common misconceptions:

1. the more confident an eyewitness is in an identification, the more likely the identification is to be accurate;
2. eyewitnesses held at gunpoint or otherwise put in fear are more likely to have been acutely observant and therefore more reliable in their identifications; and
3. cross-racial identifications are no less likely to be accurate than same-race identifications.

USURPING THE JURY'S FACT-FINDING FUNCTION

The Supreme Court also rejected the proposition that allowing experts to present scientific testimony about the fallibility of eyewitness identifications usurps the jury's fact-finding functions. Instead, it found expert testimony to be a highly effective safeguard against mistaken eyewitness identifications. It cautioned that experts should only be permitted to testify about factors that generally have a negative effect on the reliability of such identifications. The scope of their testimony must be further limited to factors and variables known to affect the reliability of the type of identification being challenged. The ruling expressly bars experts from giving opinions about the credibility or accuracy of eyewitness testimony presented at the specific trial in which they are testifying.

REVISED LEGAL STANDARD

The court concluded that the existing law was out of step with widely accepted scientific evidence and other jurisdictions' evidentiary rules. It overruled *Kemp* and *McClendon*, finding their holdings inconsistent with its view that the presentation of expert testimony is an effective way of educating jurors about the risks of eyewitness misidentifications.

It directed that the admissibility of evidence of this type be governed by standards applicable to the introduction of all forms of scientific evidence. This requires courts to take a general, overarching approach which may include considering:

1. a theory's general acceptance within the relevant scientific community,
2. if the methodology underlying the scientific evidence has been tested and subjected to peer review,
3. its known or potential error rate,
4. the prestige and background of the expert testifying about the evidence,
5. the extent to which the technique at issue relies on the expert's subjective judgment rather than objectively verifiable criteria,
6. if the expert can present and explain the data and underlying methodology in a manner that assists the jury in using it to draw conclusions, and
7. if the expert developed a new technique or methodology solely for the purpose of testifying in the case in which its admission is sought (*Guilbert*, at p.6, citing *State v. Porter*, 241 Conn. 57, pp. 78-80 (1997), cert. den. 523 U.S. 1058 (1988)).

Finally, the Supreme Court indicated that the new rule does not eliminate a trial judge's discretion to find expert testimony unnecessary when detailed jury instructions or other conditions present in a specific case provide an adequate substitute.

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