[J-17-2012] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 28 EAP 2011
	:
Appellee	: Appeal from the Judgment of Superior
	: Court entered on 08/23/2010 at No. 1477
	: EDA 2008 affirming the Judgment of
v.	: Sentence entered on 12/12/2007 in the
	: Court of Common Pleas, Philadelphia
	: County, Criminal Division at No.
BENJAMIN WALKER,	: CP-51-CR-01201561-2005.
	:
Appellant	: ARGUED: March 7, 2012

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: May 28, 2014**

The majority overrules the long-standing prohibition of testimony that offers opinions about the reliability of specific eyewitness identification. While there are evolving studies about identification testimony, I believe the more prudent course would be to recognize such concerns through enhanced jury instructions from the court, rather than authorizing a testimonial battle of opinions from experts. Because I believe hired opinion testimony about the reliability of other witnesses will muddy the jury's efforts to determine the truth, I dissent.

The majority's assertion is that such testimony would merely "assist" the jury in understanding factors that may affect an eyewitness's credibility. However, admitting such testimony necessarily involves an "'unwarranted appearance of authority in the subject of credibility[.]'" Commonwealth v. Spence, 627 A.2d 1176, 1182 (Pa. 1993) (quoting Commonwealth v. Gallagher, 547 A.2d 355, 358 (Pa. 1988)). Indeed, if the witness is not recognized as having the appearance of authority, the witness is not

qualified to opine in the first place. The jurors will learn the witness's opinion is given to them because the court believes the witness knows more about identification than they do. Such recognized-as-authoritative testimony will necessarily and impermissibly intrude upon their role as the sole arbiter of witness credibility — testimony about "characteristics" of the identification and "explaining" how this affects other evidence tautologically invades the jury's function. See Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003) (citation omitted); Spence, at 1182 (citation omitted).

The majority suggests this will "assist the trier of fact in understanding the evidence[,]" Majority Slip Op., at 37, as if a jury has trouble understanding an eyewitness's identification. It will purportedly do so by "focus[ing] on particular characteristics of the identification at issue and explain[ing] how those characteristics call into question the reliability of the identification[,]" id., at 41-42, and my colleagues believe this can be done without expressing an opinion on the reliability of a specific eyewitness, see id., at 28. How does an expert do that — name the factors the expert believes "call into question the reliability of the identification" without expressing an opinion about it? Apparently the witness will say, "Here are some things that 'call into question the reliability of the identification' — but I'm not really giving you my opinion the testimony is wrong." The expert, by definition, is a witness called to express an opinion, see Pa.R.E. 702, and the way to "call into question" another person's testimony is by giving an opinion.

The majority minimizes the practical effect of this ruling, rejecting the suggestion that thousands of cases will be impacted. Given the number of criminal cases filed in Pennsylvania each year, "thousands" is in fact a realistic, and not insignificant, number. The majority also brushes aside the expense as the cost of doing business, which is easier to say when we are not paying the bill. But such cost is not irrelevant to the client, or the defenders and prosecutors of our local court systems, which must pay the new

experts, pay for their reports, pay for their appearance at the required Frye hearings, and pay them for their appearance at trial.

It may be true the impact of allowing such testimony has not resulted in appellate complaints around the country, but, realistically, the actual cost, in time and money, is never going to be an appealable issue litigated at the appellate level. Nor can an appellate court really appreciate the impact on a jury. It is at the trial level where this reality will exist and where the non-esoteric side of this will be evident. Indeed, the only time this Court is likely to confront the issue is on collateral review. While such issues are recognized by the majority, they are not discussed, yet in every case of identification it will of course be ineffectiveness for defense counsel to fail to call such a witness now — what reasonable strategy is advanced by failing to do so?

While acknowledging both sides may call such experts, the majority anticipates such experts will be largely one-sided, to "explain how those characteristics call into question the reliability of the identification." Majority Slip Op., at 41-42. Yet, if such testimony does not invade the province of the jury and will assist the jury in understanding matters beyond its ken (a predicate for allowing such testimony), then it will also be admissible as direct evidence, just like other forensic opinions, such as ballistics, fingerprints, DNA, or the like. The prosecution will be able to bolster its case-in-chief with an expert opining why the identification witnesses are credible. And if experts may opine about identification, why would they not be equally admissible on other peripheral matters, such as witness recollections of time, dates, places, colors, types of cars, clothes, directions, and a host of matters which any given witness is likely to confuse? There being no logical difference, likening this decision to the camel's nose under the tent is not an exaggeration.

There is a better course, in my judgment, that will not need to push aside these legitimate concerns. That course is to revise and enhance the standard jury instructions on identification evidence. If current sociological studies[1] have identified factors that may affect identification, such can be appended to existing instructions from the court. There are already comprehensive proposals that would accomplish this; in fact, there are proposed jury instructions for Pennsylvania, drafted with the participation of the very Dr. Loftus mentioned favorably by the majority and cited by Justice Brennan. This is, in my judgment, a better path, educating the jury without starting a war of hired doyens attacking each other's opinion, and more significantly, attacking the veracity of witnesses

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[1] Though the majority refers to them as "science," these studies are not, of course, "hard science." They are really sociological and psychological studies. However, let us assume arguendo the studies "strongly suggest[] that eyewitnesses are apt to erroneously identify a person as the perpetrator of a crime when certain factors are present[.]" Id., at 23. Equally scientific literature suggests it is unlikely that expert testimony "achieve[s] its objective — to reduce wrongful convictions without also increasing wrongful acquittals." Kristy Martire & Richard Kemp, Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects, 16 Legal & Criminological Psychology 24, 33 (2011).

This comprehensive, peer-reviewed article found that only three of the 24 studies looking at the effect expert witnesses have on jurors used the appropriate methodology to determine whether such testimony achieves this objective. Id.; see also id., at 27-32 (describing different methodologies and advantages and disadvantages of each). Of these three studies, "two were subject to the peer review process, and neither of these provided evidence that the testimony of an eyewitness expert significantly improved juror ability to discriminate accurate from inaccurate identifications." Id., at 33 (internal citations omitted). While the majority believes the authors' recommendation for further studies "does not ipso facto mandate the continued … ban on expert testimony in this area," Majority Slip Op., at 30 n.9, the need for additional studies equally does not ipso facto mandate overruling the long-standing precedent banning such testimony. Moreover, that studies have "conclude[d] the impact of expert evidence was not significantly different from that of focused jury instructions[,]" id., at 31 n.9 (citation omitted), is a dubious justification for permitting this testimony, especially in light of the associated costs in time and money incurred by trial courts across the Commonwealth discussed above.

and victims of crime. We have finally recognized the judicial system should not victimize these citizens again — let us not subject them to being publically discredited, their testimony given under oath torn down in view of all by specialists hired for the singular purpose of "calling into question" what the witnesses have said was true.

If the factors that affect identification are indeed appropriate, is it not better they be imparted to the jury by the impartial instruction of the court, rather than as an argumentative negative? Can we not avoid the attack on the witness by the less-than-impartial advocacy of those whose studies give them a point of view that lead to their hiring in the first place? After all, no defendant will hire someone whose opinion confirms an identification, nor will the prosecution present someone who disputes the eyewitness — and surely there will be experts willing to opine in favor of whatever side wishes to employ them.

Improved and enhanced jury instructions would accomplish the same result in a more seemly and significantly more impartial manner.[2] Properly enhanced instructions would address every concern of the majority, without invading the jury's role, without implicating extra costs for both sides, without additional Frye and related hearings that consume limited judicial time, and without inviting or mandating claims of ineffectiveness. Here is a better, less costly, less adversarial, and at least equally efficacious approach to addressing the concerns about identification testimony. As I would utilize and evaluate this approach before making cases turn on a battle of the experts, I must respectfully dissent.

Mr. Chief Justice Castille joins this dissenting opinion.

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[2] To suggest "it is difficult to understand [how] such information, coming from a judge by way of instructions, would have less of an impact on the credibility function of the jury[,]" id., at 33 n.10 (citation omitted), ignores the obvious difference between the neutrality of a judge's instructions and the partiality of a witness's testimony.