

**Report on Identification Issues
Pertinent to Florida v. Kevin Richard Herrick**

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I have had the opportunity to study several sources of information on the Herrick trial, including portions of the trial transcript, depositions of Cheryl Hagan, Darren Scott Barfield Officer Steven McMullen, and Officer Howard Crosby, police and FDLE reports, and a lengthy synopsis of the case prepared by Mr. Herrick. Based upon these materials, it is my professional opinion that there are a number of aspects relating to the identification portion of this case for which expert testimony by an expert in the area of eyewitness identification research would have been relevant and appropriate.

The positive identification of Mr. Herrick as the assailant appears to emanate almost entirely from Mr. Barfield. While Ms. Hagan later corroborated Mr. Barfield's identification, she appears to have done so in direct response to his assurance that Mr. Herrick was the assailant, rather than on the basis of her own independent, unbiased recollection. From a scientific perspective, there are a number of factors that would make it difficult for witnesses in this situation to make an accurate identification; these include: (1) the general unreliability of eyewitness identification evidence; (2) poor opportunity to observe the assailant; (3) high stress; (4) weapon focus; (5) the possibility of "unconscious transference"; and (6) the likelihood

of "confidence hardening". I will briefly discuss each of these factors.

Regarding the first point above, eyewitness identification errors are far more common than most people realize (Brigham & Bothwell, 1983). A nationwide study of 500 wrongful felony convictions, where the convicted person was later clearly shown to be innocent, found that **almost 60% of the wrongful convictions** occurred directly as a result of erroneous eyewitness identifications (Huff, Rattner, & Sagarin, 1986). Huff and his fellow researchers speculated that each year, about 3,000 persons across the U.S. may be falsely convicted of a felony on the basis of mistaken eyewitness identification evidence. While judges and jurors may have some vague awareness that eyewitnesses can be wrong, research clearly shows that they are not aware of the **magnitude** of the problem and, further, that they are not knowledgeable about the **specific factors** that are likely to enhance or detract from the likelihood that an eyewitness is accurate (Brigham & Bothwell, 1983; Brigham & Spier, 1992).

Recognizing a human face involves three perception and memory stages: acquisition, retention, and retrieval. During the acquisition phase, a stimulus (in this case, the crime) is perceived, encoded, and stored in memory. Contrary to common stereotype, human perception does not work like a camera or video recorder. In contrast, what is perceived and stored is often

incomplete or distorted as a result of the perceiver's state of mind and/or the nature of the event observed. People's perceptions are distorted by their expectations and attitudes; research has shown that we tend to see and remember what we expect to see. The conditions under which an event is observed also affect perception and memory.

A witness's **opportunity to observe** the perpetrator is a very important factor. Research has shown that memory is better for faces seen for longer lengths of time under good observational conditions (e.g., good lighting, close distance, no disguise). In the present case Ms. Hagan had, as she testified, very poor opportunity to observe her assailant because he attacked her in total darkness. Mr. Barfield's opportunity to observe the assailant also appears to have been very limited, as the initial encounter was in darkness, Mr. Barfield suffered two stab wounds, and the ensuing chase took place at night under limited lighting conditions.

Both Mr. Barfield and Ms. Hagen were unfortunately plunged into a situation of very great **stress and arousal**. The Yerkes-Dodson Law (Yerkes & Dodson, 1908) in psychology asserts that performance of complex tasks is poorer under high levels of stress. Recognizing a face (a complex task) will be particularly difficult if the face was initially seen in a high-stress situation. The combination of terror, anger, and personal injury

such as Mr. Barfield and Ms. Hagen faced, would make it very difficult to make an accurate identification of one's assailant.

Weapon focus refers to the tendency of a person to focus his or her attention on the weapon involved, rather than paying attention to the face of the person holding it. Mr. Barfield's attention could be expected to focus on the knife/scalpel held by the attacker and/or on possible escape routes. In situations where a weapon is involved, the witness does not acquire a strong memory trace for the face, making subsequent identifications more difficult still (e.g., Loftus, 1979; Steblay, 1992).

Unconscious transference refers to situations wherein the perceiver correctly remembers seeing a face before but incorrectly remembers the situation in which the face was observed. For example, there are numerous instances of innocent bystanders at crimes being falsely identified as the criminal by other eyewitnesses, due to unconscious transference (Loftus, 1979; Ross, Ceci, Dunning, & Toglia, 1994). In the present case, Mr. Herrick had played chess with Ms. Hagan earlier on the day that she was attacked. Ms. Hagan testified that the "outline" of her attacker "reminded her" of Mr. Herrick. Given what we know about unconscious transference, it is entirely possible that someone in Ms. Hagan's position could mistakenly "transfer" the image of Mr. Herrick's face, seen earlier that day, onto the dimly-perceived figure of her assailant.

The **degree of confidence** expressed by an eyewitness is another problematical aspect. One might think that the witnesses' degree of confidence at an identification would be a good indication how likely it is that the identification was correct. However, results of over 35 staged-event studies that have examined this question show that there is only a very weak relationship between witnesses' degree of certainty and their identification accuracy (Bothwell, Deffenbacher, & Brigham, 1987). On average, a witness who is very certain of his or her identification is only slightly more likely to be accurate than is a witness who is unsure of an identification.

The situation is complicated further by the phenomena of **confidence hardening**, the tendency of witnesses to become more confident of their memory as a trial approaches (Loftus, 1979). This can result from the tendency to justify our own beliefs and verbal behaviors to ourselves ("I must be right or I wouldn't have said it") as well as from input from others -- attorneys, police, fellow witnesses, well-meaning friends -- which implies that things will be easier and go more smoothly if the witness is unwavering in her/his testimony. In the present case, the normal human tendency toward confidence hardening may have been exacerbated for Ms. Hagen and Mr. Barfield when they were told, erroneously as it later turned out, that blood stains and fingerprint evidence had clearly implicated Mr. Herrick. Thus

the two witnesses apparently had months to justify their identification decisions to themselves, buttressed by the apparent "factual evidence" (later disproved) of blood and fingerprints. In my judgment, once a person has been exposed to this pattern of events, his or her ability to accurately assess the validity of their identification decision has been fatally compromised.

It appears to me that these issues could have, and should have, been raised at trial via expert testimony from an expert researcher in the area of eyewitness identification. The expert testimony would concern issues that are **not part of the common knowledge of jury members** and are pertinent and of considerable **probative value** in this case (Brigham, 1989). In Florida the trial judge has discretion whether or not to admit such expert testimony. If the testimony were not admitted at trial, there is still the possibility that the testimony can be proffered and its admissibility used as an important issue on appeal.

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