

IN THE COURT OF APPEALS OF THE STATE OF OREGON
STATE OF OREGON,

Plaintiff-Respondent,

v.

TRAVIS SHAYNE DYE,

Defendant-Appellant.

KLAMATH Co. Cir. Ct.
Case No. 1202081CR

CA A155696

**REPLY BRIEF OF *AMICUS CURIAE*
OREGON INNOCENCE PROJECT
IN SUPPORT OF APPELLANT DYE**

Appeal from Judgment of the Circuit Court
for KLAMATH County

The Honorable Dan Bunch, Judge

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TABLE OF CONTENTS

| | |
|--|---|
| I. REPLY BRIEF OF <i>AMICUS</i> | 1 |
| A. Oregon law does not prohibit an expert from testifying to witness-specific information..... | 2 |
| B. Witness-specific testimony related to false memories is not a comment on credibility..... | 4 |
| C. Witness-specific testimony is helpful to the trier of fact. | 5 |
| II. CONCLUSION | 7 |

TABLE OF AUTHORITIES

Page(s)

Cases

| | |
|---|---------|
| <i>DeLong v. State</i> , No. 2-04-410-CR, 2-04-411-CR, 2006 WL 3334061, (Tex. App., Nov. 16, 2006). | 3 |
| <i>State v. Lawson</i> , 352 Or 724, 291 P3d 673 (2012) | 4, 5 |
| <i>State v. Middleton</i> , 294 Or 427, 657 P2d 1215 (1983) | 2, 4 |
| <i>State v. Remme</i> , 173 Or App 546, 23 P3d 374 (2001) | 2, 3, 4 |

Other Authorities

| | |
|---|------|
| Daniel Reisberg, <i>The Science of Perception and Memory: A Pragmatic Guide for the Justice System</i> (2014) | 6, 7 |
| ELIZABETH F. LOFTUS ET AL., <i>EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL</i> § 2-2 (4th ed. 2007). | 5 |
| National Academy of Sciences, <i>Identifying the Culprit: Assessing Eyewitness Identification</i> (2014) | 5 |

REPLY BRIEF OF *AMICUS*
OREGON INNOCENCE PROJECT

The Oregon Innocence Project (OIP) appeared as *amicus* in this case to ask the Court to adopt the rule that expert testimony on false memories is admissible, provided there is a reasonable likelihood that circumstances exist that are consistent with the general phenomenon of false memories and the expert does not offer the ultimate conclusion as to whether the memory is false.

As discussed in OIP's brief, expert testimony on false memories falls into three categories: (1) general testimony on the phenomenon of false memories; (2) whether and to what degree the factors that can create false memories exist in a particular case; and (3) the ultimate conclusion as to whether the complaining witness suffers from a false memory.

Amicus OIP argued in its brief that Categories 1 and 2 should be admissible under established Oregon law. In its answering brief, Respondent agrees that Category 1 testimony is likely admissible, but argues that Dr. Reisberg's testimony related to Category 2 constitutes improper vouching. Specifically, Respondent cites to Dr. Reisberg's testimony that the questions the mother asked the child were "miserably leading"; that the mother "was putting words in the kid's mouth" when she said she was "trying to help the child find the words to bring this forward"; and that "[i]t's perfectly possible that [the child] has it exactly right, even though the deck is stacked against it."

Respondent argues this witness-specific testimony constitutes an improper comment on the victim's credibility. Respondent has misunderstood the science upon which the expert testimony is based and the utility of the testimony.

A. Oregon law does not prohibit an expert from testifying to witness-specific information.

Respondent, citing *State v. Remme*, argues that “witness-specific questions should generally be avoided as they risk eliciting answers that cross the line into direct commentary on credibility.”¹ The Court in *Remme*, however, specifically recognized the Oregon Supreme Court's holding in *State v. Middleton*² that “approved not only *general* testimony about the phenomenon and dynamics of recantation but also testimony as to whether the *particular complainant's* conduct was consistent with that general phenomenon.”³ That is, *Remme* recognized that under *Middleton*, “[t]he expert could give an opinion as to whether the particular complainant/witness's circumstances were consistent with the general dynamics of recantation but could not explicitly state whether he or she believed that the

¹ State's Answering Brief at 12 (citing *State v. Remme*, 173 Or App 546, 563, 23 P3d 374 (2001)).

² 294 Or 427, 438, 657 P2d 1215 (1983).

³ *Remme*, 173 Or App at 558 (emphasis in original).

complainant/witness was telling the truth.”⁴ It is only that “last dot” that “must be left ‘unconnected.’”⁵

As discussed in OIP’s brief, an expert on false memories is not able to “connect the last dot” to say whether a particular memory is false.⁶ Experts agree there is currently no way to draw that ultimate conclusion, and Dr. Reisberg, here, so testified.⁷ The experts can say only that the circumstances in the case are consistent with those that can lead to false memories (Categories 1 and 2 above).⁸ Dr. Reisberg proposed to testify to useful, nonconclusive information from which inferences as to credibility may be drawn,⁹ but he did not propose to testify to the ultimate conclusion because that is a conclusion he could not draw based on the current limitations of the science.¹⁰ Although Respondent complains about this statement from Dr. Reisberg at the pre-trial hearing, the full quote explains the limits of his testimony: “I have no view and would express no view about whether

⁴ *Id.*

⁵ *Id.*

⁶ *DeLong v. State*, No. 2-04-410-CR, 2-04-411-CR, 2006 WL 3334061, at *5 (Tex. App., Nov. 16, 2006).

⁷ Tr. 355-56.

⁸ *Id.* See also *DeLong*, 2006 WL 3334061, at *5 (“Dr. Loftus testified that she could not say whether a particular person is lying or that a particular memory is a false memory—in other words, that she could not comment directly on the truthfulness of a complainant’s allegations—but she could say whether the circumstances indicated suggestion of the sort that can lead to a false memory.”).

⁹ *Remme*, 173 Or App at 562.

¹⁰ Tr. 355-56.

the child really does have it right or not. It's perfectly possible that she has it exactly right, even though the deck is stacked against it."¹¹

B. Witness-specific testimony related to false memories is not a comment on credibility.

Remme and *Middleton* both deal with recantation, which, according to the *Remme* court, is “innately a matter of truth and falsehood.”¹² The courts in those cases, therefore, cautioned experts against opining on whether the witness was being truthful.¹³ Even in those recantation cases, however, the expert may nonetheless express “an opinion as to whether the specific complainant’s account comports with more general phenomena or dynamics bearing on credibility.”¹⁴

The phenomenon of false memories, unlike recantation, is not a matter of truth and falsehood. With false memories, the victim believes her memory to be true. The expert has no way of determining whether the memory is, in fact, true or false. The Oregon Supreme Court recognized this limitation in the science in *State v. Lawson*: “We recognize that the scientific research is ‘probabilistic’—meaning that it cannot demonstrate that any specific witness is right or wrong, reliable or

¹¹ *Id.*

¹² *Remme*, 173 Or App at 562

¹³ *Id.* at 562.

¹⁴ *Id.*

unreliable, in his or her identification.”¹⁵ The expert’s testimony is only an explanation of why the victim could be testifying truthfully, but still have it wrong. The expert can identify the risks involved in a case, but it is up to the jury to decide whether and how the risk was actually realized. Testimony about false memories is not a comment on credibility at all because false memories are not about truthfulness or lying.

C. Witness-specific testimony is helpful to the trier of fact.

An expert on false memories testifies only to the risk of error. Scientists agree that the risk of memory error is always present, although the level of risk varies according to the facts of the case. There are numerous factors that can influence memory—some of which are external to the witness and some of which are internal; some of which occur during the acquisition stage of the memory construction process, and some of which occur during the retention or retrieval stages.¹⁶ There is no way to exclude every possible influence to keep the memory of an event “pure” and without risk of influence.

¹⁵ 352 Or 724, 741, 291 P3d 673 (2012).

¹⁶ See Brief of *Amicus Curiae* OIP at 17. See also National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 40-46 (2014), available at: <http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification> (last visited October 13, 2015); ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2-2, 12–13 (4th ed. 2007).

Although the risk of memory error is always present, that risk does not always rise to a level of concern.¹⁷ The court must allow expert testimony to educate jurors on how to assess the level of risk in each case. It is the witness-specific testimony that informs the jury about the level of risk.

General testimony about false memories (Category 1 above) is helpful, but of limited use because it gives an incomplete picture.¹⁸ Without the witness-specific testimony (Category 2), the jury has no way of estimating memory accuracy in a particular case. The witness-specific testimony gives the jury the information it needs to determine the level of risk that there exists a memory error (that is, whether the risk is high or low). That risk is based on the facts of the case and requires expert testimony to understand how the different factors that affect memory interact with one another. The expert must weigh the factors to which the witness was exposed against the degree in memory shift proposed.¹⁹ Scientists

¹⁷ See Daniel Reisberg, *The Science of Perception and Memory: A Pragmatic Guide for the Justice System*, 97 (2014) (“[T]he fact remains that our perception and memory are accurate more often than not. . . . [R]esearchers have offered a number of estimates of the overall accuracy level of memory for forensically relevant information.”) (citing Simon, D., *In Doubt: Psychology of the Criminal Justice System* (2012)).

¹⁸ See Daniel Reisberg, *The Science of Perception and Memory: A Pragmatic Guide for the Justice System*, 97 (2014) (“[R]esearchers have offered a number of estimates of the overall level of memory for forensically relevant information. These overall assessments, however, are of limited use. Instead, we need (and can provide) a more finely tuned estimate of memory accuracy by considering the details of a particular event and a particular witness.”).

¹⁹ *Id.* at 269 (“[L]arger memory errors, involving more complex events or more consequential events, are more difficult to produce than smaller memory errors. For this reason, large-scale errors—including memories of being touched in some

agree that when certain factors combine, they increase the risk of memory error in different ways.²⁰ The expert must be able to balance the factors present in a particular case, and the interaction between those factors, against the proposed memory shift. Without that witness specific testimony, the jury cannot accurately estimate the level of concern about memory error that may exist in that case.

As discussed in OIP's brief, science shows that, absent expert testimony, jurors are ill-equipped to understand the factors and generally underestimate the degree of risk. Expert testimony is needed to educate jurors about how to assess the risk of memory error in a particular case. The proposed rule will narrow the cases at issue to only those where there is a reasonable likelihood that circumstances exist that are consistent with those that can lead to false memories.

CONCLUSION

Amicus OIP respectfully requests the Court rule that expert testimony on false memories is admissible, provided there is a reasonable likelihood that

troubling way—will be observed only if the child is exposed to multiple influences or to relatively strong influences.”).

²⁰ *Id.* (“[W]e can easily show that various influences on a child have a cumulative effect, so that false memories are more frequent and can involve larger errors if multiple suggestive elements are in play. In one study, preschool children were exposed to repeated suggestions *and* instructions to imagine how the suggested events might have unfolded *and* selective reinforcement of responses that indicated acceptance of the suggestions. These steps continued across a series of interviews. In this set-up, a stunning 95% of the children assented to the false events (e.g., claiming they had witnessed a theft in their daycare center) by the third interview.”) (citing Bruck, M., Hembroke, H., & Ceci, S.J., *Children's Reports of Pleasant and Unpleasant Events* in D. Read & S. Lindsay (Eds.), *Recollections of Trauma: Scientific Research and Clinical Practice* 199-219 (1997)).

circumstances exist that are consistent with the general phenomenon of false memories and the expert does not offer the ultimate conclusion as to whether the memory is false.

Dated: October 13, 2015

Respectfully submitted,

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CERTIFICATE OF FILING

I certify that I electronically filed the foregoing *REPLY BRIEF OF AMICUS CURIAE* with the State Court Administrator for the Court of Appeals of the State of Oregon by using the appellate electronic filing system on October 13, 2015.

CERTIFICATE OF SERVICE

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that (1) REPLY BRIEF OF *AMICUS CURIAE* complies with the word count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief, as described in ORAP 5.05(2)(a), is 1,811 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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