IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PABLO ISAAC HERNANDEZ,
Appellant.

No. 2 CA-CR 2018-0042
Filed January 21, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20161916001
The Honorable Michael J. Butler, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Judge Brearcliffe specially concurred, and Judge Eckerstrom concurred in part and dissented in part.

S T A R I N G, Vice Chief Judge:

¶1 This case comes to us on remand from our supreme court. *State v. Hernandez*, 250 Ariz. 28, ¶ 25 (2020), *vacating State v. Hernandez*, 246 Ariz. 543 (App. 2019). The only issue before us is whether the trial court erroneously precluded testimony about eyewitness identification procedure. *See id.* We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Hernandez. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). On March 31, 2016, Pima County Sheriff's Deputy Michael Turner was driving a marked unit when a car ran a stop sign, entered his lane, and caused him to swerve to avoid a collision. At this time, Turner "locked eyes" with the car's driver for "a second to two seconds." He later testified the driver's face was "a face that [he] would never forget."

¶3 Deputy Turner attempted a traffic stop. The car did not stop, however, resulting in a pursuit that eventually ended at an apartment complex, where the driver and two other occupants of the car fled on foot. Turner saw the driver's profile as he fled and within minutes identified the driver as Hernandez based on a photograph bearing his name. Using the computer in his patrol unit to view another photograph of Hernandez, Turner again confirmed the driver was Hernandez.

¶4 Before trial, Hernandez filed a motion to suppress evidence of Deputy Turner's pretrial identification, arguing the identification procedure had been unduly suggestive and the identification, if admitted, would be more prejudicial than probative under Rule 403, Ariz. R. Evid. He also moved to preclude Turner from making an identification at trial. The trial court denied the motions, finding the pretrial identification

reliable. Hernandez also requested a *Willits* instruction[1] based on the state's failure to collect DNA and fingerprint evidence from the car before releasing it to the registered owner. The court denied the motion, finding no loss or destruction of evidence, and also finding that, even had such evidence been discovered and preserved, it would have been "neutral" in terms of its capacity to exculpate or inculpate Hernandez.

¶5 At trial, the state moved in limine to preclude Hernandez from calling a detective "to testify that it is his personal opinion that photo identification should always involve a six-pack line-up of photographs" and that "fingerprint[s] and DNA should always be collected."[2] The trial court granted the motion as to testimony regarding eyewitness identification procedure, reasoning that "it would have been impossible to have a six-person lineup." The court denied the motion as to the fingerprint and DNA evidence, allowing the detective's testimony.

¶6 Hernandez was convicted of fleeing from law enforcement and sentenced to three years' imprisonment. On appeal, he challenged his conviction and sentence, arguing the trial court had erred in denying his motion to suppress and request for a *Willits* instruction, as well as in precluding the testimony on eyewitness identification procedure. We affirmed the court's ruling that the pretrial identification was reliable but ultimately reversed and remanded the case for a new trial based on our conclusion that Hernandez "was entitled to a *Willits* instruction as to the state's failure to preserve any fingerprint and DNA evidence in the car." *Hernandez*, 246 Ariz. 543, ¶¶ 12, 21, 22. Given our disposition, we did not address Hernandez's arguments related to the state's motion in limine. *Id.* n.7.

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[1]*See generally State v. Willits*, 96 Ariz. 184, 191 (1964); *State v. Hunter*, 136 Ariz. 45, 50 (1983) (A *Willits* instruction tells the jury "that if it [finds] that the state or any agent of the state allowed material evidence to be destroyed, then it [can] infer that the evidence would be against the interests of the state.").

[2]A "six-pack photo lineup" involves showing a witness who does not otherwise know the suspect a photograph of the suspect along with "five other photographs from the same database" of individuals whose physical features "similarly match" those of the suspect. The photographs are shown to the witness one at a time.

¶7 The state subsequently petitioned our supreme court for review. The court granted the petition and addressed only the *Willits* issue. *Hernandez*, 250 Ariz. 28, ¶ 1. Concluding "the trial court did not abuse its discretion in denying Hernandez's request for a *Willits* instruction," the court vacated our decision and remanded the case to this court, instructing us to consider the issue of "whether Hernandez is entitled to relief based on his argument that the trial court erroneously precluded evidence," which we had previously declined to address. *Id.* ¶ 25.

Discussion

¶8 Hernandez argues "the trial court erred when it precluded [the detective] from testifying based on his training and experience that presenting a 'six pack' of photographs to a witness is better procedure [and] less likely to produce inaccurate identification . . . than using a single picture." "We review a trial court's ruling on a motion in limine for an abuse of discretion . . . ." *State v. Gamez*, 227 Ariz. 445, ¶ 25 (App. 2011).

¶9 If an objection to an alleged error was properly preserved, we consider it under the harmless error standard; otherwise, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18-19 (2005). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* ¶ 18. On the other hand, "[a] defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Fundamental error under the first or second prong requires the defendant to demonstrate prejudice, meaning that "without the fundamental error, 'a reasonable jury . . . *could have* reached a different [verdict].'" *State v. Murray*, 250 Ariz. 543, ¶ 14 (2021) (quoting *Escalante*, 245 Ariz. 135, ¶ 29).

¶10 Evidence presented at trial is generally limited to that which is relevant, meaning it has *any* tendency to make a fact of consequence more or less probable. Ariz. R. Evid. 401, 402; *see State v. Togar*, 248 Ariz. 567, ¶ 13 (App. 2020) ("Th[e] standard of relevance is not particularly high." (quoting *State v. Oliver*, 158 Ariz. 22, 28 (1988))). Further, Rule 701, Ariz. R. Evid., limits opinion testimony of non-experts to that which is "rationally based on the witness's perception[,] . . . helpful to clearly understanding the witness's testimony or to determining a fact in issue[,] and . . . not based on scientific, technical, or other specialized knowledge." Rule 702, Ariz. R. Evid., on the other hand, allows individuals qualified as experts to "testify

in the form of an opinion" if the testimony meets certain requirements, including that it "will help the trier of fact to understand the evidence or to determine a fact in issue." These requirements are meant to "ensure that a fact-finder is presented with reliable and relevant evidence." *State v. Bernstein*, 237 Ariz. 226, ¶ 14 (2015) (quoting *State v. Langill*, 945 A.2d 1, 10 (N.H. 2008)).

¶11 Before trial, Hernandez filed "additional" disclosure pursuant to Rule 15, Ariz. R. Crim. P., listing Tucson Police Department Detective Daniel Deloria as a witness.[3] During trial, the state filed its motion in limine, claiming Deloria had stated in his interview that "he was not involved in the investigation regarding this case" and Hernandez sought "to call [him] to testify that it is his personal opinion that photo identification should always involve a six-pack line-up of photographs." The state went on to argue that because the trial court had already determined the identification was not unduly suggestive, Deloria's testimony would have been irrelevant and, in any event, "unnecessarily cumulative" given Hernandez's cross-examination of Turner related to the identification.

¶12 Hernandez argued that the motion in limine was "untimely" and that the proposed testimony would have been relevant for the jury "to comprehend and know what could have been done in a different situation."[4] The trial court ultimately ruled:

> I am going to allow the motion but I'm going to—I think any questions regarding the lineup, I think that's dealt with in my previous motion. Whether or not it's a suggestive lineup, then I think you are talking about policies. I think I

[3]Hernandez did not designate Deloria as an expert. However, when arguing against the motion in limine, he characterized Deloria's testimony as "more of an expert opinion as to what was conducted, what his field is, [and] what he knows as to how things go."

[4]After trial, Hernandez filed a motion for reconsideration of the trial court's ruling, again claiming the state's motion was untimely and the testimony would have been relevant, and further asserting he was "prevented . . . from presenting a complete defense." The court concluded such testimony was "irrelevant" and denied the motion. Hernandez does not argue on appeal that the court erred in denying this motion.

> ruled under the circumstances it would have been impossible to have a six-person lineup, and I think a lineup as it relates to an officer is a different circumstance. So I'm going to grant the motion as to that . . . .

The court further explained: "I think it gets too confusing for the jury when you are talking about whether or not it's a suggestive lineup."

¶13 On appeal, Hernandez first argues the proposed testimony would have been admissible as "contrary evidence" to the pretrial identification, relying on *State v. Rojo-Valenzuela*, 237 Ariz. 448, ¶ 11 (2015) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993)). He also claims Detective Deloria was qualified under Rule 702, and thus, he was permitted to testify as a "cold expert." Hernandez further asserts the alleged error in granting the motion in limine was not harmless given the questionable reliability of the pretrial identification. Finally, Hernandez claims the testimony's preclusion violated "his Constitutional right to present a complete defense," resulting in fundamental error.

¶14 The state primarily contends Detective Deloria's testimony was not admissible under Rule 702 because "the jury was capable of comprehending the facts of the eyewitness identification and drawing conclusions from them without further explanation from . . . Deloria." The state further argues that, for this reason, as well as Hernandez's opportunity to conduct cross-examination of Deputy Turner and closing argument related to the identification, any error here would have been harmless. Finally, the state asserts Hernandez has not established error with respect to the alleged denial of his right to present a complete defense, and in any event, such error would not rise to the level of fundamental error.

¶15 Foremost, Detective Deloria's testimony would not have been irrelevant and "unnecessarily cumulative." In a case that turned wholly on identification, and given the low standard for relevance, a detective's testimony that there was a more reliable method of identification would have had at least *some* tendency to make a finding that Hernandez was the person identified less likely. *See* Ariz. R. Evid. 401. This is so notwithstanding the trial court's ruling on the identification's admissibility. Moreover, Hernandez's cross-examination of Deputy Turner related to his identification would not have rendered Deloria's separate testimony on supposedly preferable identification procedures a needless presentation of cumulative evidence. *See* Ariz. R. Evid. 403.

¶16 Further, assuming Detective Deloria was an expert subject to Rule 702, his testimony was admissible because it would have been helpful to the jury. Expert opinion evidence is generally admissible when it involves matters "sufficiently beyond common experience." *State v. Salazar*, 27 Ariz. App. 620, 625 (1976). In his pretrial interview, Deloria explained that using a six-pack identification procedure is important because "it takes away any prejudicial identification." He elaborated that showing distinct photos one at a time requires the subject to "actually look at the . . . face in front of [him or her] and say whether or not [they are] identifying." Further, Deloria explained that because the photos in a six pack are in a random order, it is less likely for the presenter to give any sort of "cue" when the suspect's photo is being examined. We conclude the efficacy of such identification procedures is "sufficiently beyond [the] common experience" of most jurors. *Id*.

¶17 Nor is the trial court's reasoning behind its grant of the motion in limine persuasive. First, as noted above, the fact that it had already ruled on the identification's admissibility did not affect the admissibility of separate evidence attacking the identification. *See State v. Piatt*, 132 Ariz. 145, 151-52 (1981) ("[T]he jury has the discretion to determine the credibility of witnesses and to evaluate the weight and sufficiency of the evidence presented."). Similarly, whether Detective Deloria's testimony involved law enforcement policies was immaterial. And, even accepting it would have been "impossible to have a six-person lineup" under the circumstances, Deloria's testimony would have nonetheless been relevant as it still had the potential to cast doubt on the reliability of the identification procedure actually used in this case. Lastly, the court's assertion that evaluating whether the identification was suggestive would be "too confusing" for the jury is unconvincing; as referenced above, it was the jury's duty to determine the weight and sufficiency of the identification evidence. *See id.*

¶18 The trial court abused its discretion in precluding Detective Deloria's testimony. *See State v. Riley*, 248 Ariz. 154, ¶ 7 (2020) ("An abuse of discretion occurs when 'the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice.'" (quoting *State v. Chapple*, 135 Ariz. 281, n.18 (1983))). *But see State v. Moreno*, 236 Ariz. 347, ¶ 5 (App. 2014) ("We will uphold the court's ruling if legally correct for any reason supported by the record.").

¶19 Nonetheless, the trial court's preclusion of Detective Deloria's testimony was harmless error. Notably, the following exchange occurred during Hernandez's cross-examination of Deputy Turner:

> Q. The first time that you identified Pablo Hernandez as the driver was after you had been shown a photograph of Pablo Hernandez and told that's who it was?
>
> A. Yeah.
>
> Q. And you weren't shown any other photos of anyone else?
>
> A. I was not.
>
> . . . .
>
> Q. But nobody else from your department who [was] involved in this case identified Pablo as the driver?
>
> A. No.

¶20 Further, during closing argument, Hernandez stated, "Now, it's important to note that when Deputy Turner made his identification he was only shown one single photograph. He wasn't shown multiple photographs. He didn't pick somebody out of a lineup. He was shown one photograph and it was suggested to him this must be the driver." Thus, the jury was given ample opportunity to evaluate the reliability of Turner's identification in light of the absence of multiple photographs or a "six pack."

¶21 And, in any event, the evidence showed that Deputy Turner's identification followed his opportunity to see Hernandez's face and lock eyes with him, as well as his observation of Hernandez's profile as he fled from the car. Turner, a trained law enforcement officer, made the identification minutes after Hernandez fled, and he made another identification on his computer shortly thereafter. Thus, beyond a reasonable doubt, the error here did not contribute to the jury's verdict. *See Henderson*, 210 Ariz. 561, ¶ 18.

¶22 As to Hernandez's argument that he was denied his constitutional right to present a complete defense, we agree with the state

that this claim is subject to fundamental error review. *See State v. Mendoza*, 181 Ariz. 472, 474 (App. 1995) (issue first raised in post-trial motion not properly preserved). Based on the foregoing discussion, Hernandez has not demonstrated that, with the addition of Detective Deloria's testimony, a reasonable jury could have acquitted him. *See Escalante*, 245 Ariz. 135, ¶ 21; *Murray*, 250 Ariz. 543, ¶ 14. Moreover, the preclusion of testimony indicating a preference for a six-pack lineup of photos was not "so egregious" as to deprive Hernandez of a fair trial. *Escalante*, 245 Ariz. 135, ¶ 21. Thus, Hernandez's argument fails.

Disposition

¶23 Hernandez's conviction and sentence are affirmed.

B R E A R C L I F F E, Judge, specially concurring:

¶24 I fully concur in the result and that Hernandez suffered no prejudice from the exclusion of Detective Deloria and his opinions. I cannot, however, conclude that the trial court erred in the first place.

¶25 In determining the relevancy of evidence, we are bound by what the party claims it is offering it for. *Gaston v. Hunter*, 121 Ariz. 33, 41 (App. 1978). It is neither for us nor the trial court to read between the lines of a proffer of evidence or come up with a better purpose for the evidence. *See id.* Here, when attempting to persuade the court to allow Detective Deloria's opinion on six pack line-ups, Hernandez offered it to show "what could have been done in a different situation." The jury in this case, however, was asked to determine what, if anything, should have been done differently in *this* situation. Had Hernandez intended Deloria's opinion to be that, in the middle of their hot pursuit, federal marshals should have carried five similar photographs with them and lay them down before Deputy Turner to ensure a more reliable identification, he should have said so.

¶26 Even though it would be patently absurd to require a law enforcement agency to be prepared to do a photographic line-up while chasing a suspect, an expert opinion suggesting such a thing would be the only relevant opinion that could be offered here. But Hernandez never offered Detective Deloria's opinion for this purpose. Because the trial court was only asked to determine whether an opinion on the advisability of a six-pack line-up "in a different situation" should come in, the court was correct to bar it as irrelevant.

E C K E R S T R O M, Judge, concurring in part and dissenting in part:

¶27 I concur with my colleague's conclusion that the trial court erred when it precluded expert testimony regarding a routine police procedure employed to establish the accuracy of eyewitness identifications. That testimony, which would have been elicited from an experienced police detective, was relevant evidence that bore squarely on the sole issue in a close case. Such testimony would have provided the jury a context by which to assess the accuracy—and potential suggestibility—of Deputy Turner's identification of Hernandez. That identification occurred based on a lone photograph presented to a rookie officer who, by his own admission, was motivated to make his first significant arrest. I write separately because I cannot agree that the erroneous preclusion of the detective's testimony was harmless beyond a reasonable doubt.

¶28 To assess that question, we must correctly evaluate the scope and potential exculpatory impact of the precluded testimony. My concurring colleague offers a narrow reading of the proffered relevance of that testimony.[5] But, as with all mid-trial disputes about the admissibility of evidence, we may assume the trial court considered that question in the context of the evidence and arguments that had already been presented. Defense counsel had clarified in his opening statement the relevance of the later-precluded evidence: "[Detective Deloria] will tell you what is proper procedure when somebody is trying to identify somebody else, how you

[5]In concluding that the precluded testimony was offered only to show "what could have been done in a different situation," Judge Brearcliffe overlooks the specific context of that comment by defense counsel. Counsel was responding to an eleventh-hour motion in limine, filed with no time to respond in writing. The prosecution had asserted that the detective's testimony was irrelevant because the detective "had absolutely nothing whatsoever to do with the investigation in this particular case." Defense counsel countered: "for [the jury] to understand what a six-line photo lineup is it's relevant for them to comprehend and know what could have been done in a different situation." In the context of the case that had been presented, which focused entirely on the accuracy of Turner's identification, counsel was contending a jury might believe that an identification conducted without a photo array would have had fewer guarantees of reliability. Contrary to my colleague's suggestion, the relevance of that inference did not depend on whether a photo array may or may not have been feasible in the instant case.

are supposed to show six pictures of people that match a description." Counsel then emphasized that Deloria would testify that, even for a police officer who was the eyewitness, the "procedure should have been the same." This leaves little mystery as to how defense counsel intended to marshal such evidence if it had been admitted: Hernandez would have argued that a "one-person" identification procedure (the method Turner used to identify Hernandez) did not conform to law enforcement's own best practice in assuring the accuracy of eyewitness identification testimony.

¶29 In context, then, defense counsel was not contending, as my concurring colleague suggests, that it was feasible to conduct a six-person photo line-up in this case. Rather, counsel sought to establish two inferences: (1) that identifications made from a lone photo might be less reliable; and (2) that experienced police detectives, who must routinely assess the weight of such evidence when investigating a case or making an arrest, find it important to test eyewitness identifications with a non-suggestive photo array. This, in turn, would have suggested to the jury that the difference in reliability might not have been a trivial one.

¶30 We must also be mindful, as the trial court undoubtedly was, of the predictable scope of the precluded testimony. Deloria would logically have been asked not only whether he routinely employed six-person photo arrays but also *why* he did so. He would predictably have been asked the mechanics of how he assembled the line-ups and why he assembled them that way. The answers to all of these questions would have addressed logical law enforcement concerns both about threshold accuracy and avoiding suggestion. The answers would have provided the jury an analytical framework, endorsed by an experienced law enforcement officer, to assess the comparative accuracy and risk of suggestion arising from the one-person line-up conducted here.

¶31 The erroneous preclusion of relevant, exculpatory evidence can be harmless if the state has otherwise presented overwhelming evidence of guilt. *E.g.*, *State v. Lopez*, 174 Ariz. 131, 139 (1992). Here, however, the driver of the fleeing car was not apprehended after he fled on foot, and no items in the car demonstrated that Hernandez had ever driven it. The state declined to dust the steering wheel or other parts of the car for fingerprints. Nor did it secure any DNA samples from items or surfaces in the vehicle.

¶32 Therefore, Hernandez's guilt or innocence turned entirely on the accuracy of Deputy Turner's identification of the driver of a car that ran a stop sign and nearly collided head-on with Turner's marked patrol unit.

Turner's primary opportunity to see the driver was a momentary glance. That glance occurred as an undoubtedly startled Turner multi-tasked an evasive maneuver at thirty-five miles per hour to avoid a collision with a car that was itself proceeding at some speed in the opposite direction. Turner conceded that his other observation at that moment—that there were only two persons in the oncoming vehicle—was not accurate. And, he acknowledged that his view of the driver occurred through a tinted window that had been only partially rolled down.

¶33 Turner testified that he had been a new patrol officer at the time of the incident, still in training, and that this pursuit was his "first big life event as a patrol officer or a deputy," indicating that he was highly motivated to make an identification.[6] Shortly after the pursuit, Turner identified the driver as Hernandez from a lone photo. That photo was not placed among an array of photos that would have required Turner to distinguish the perpetrator among a group of similar-looking persons.

¶34 Certainly, the state presented ample evidence to convict Hernandez. *See State v. Rodriguez*, 251 Ariz. 90, ¶ 16 (App. 2021) (evidence insufficient "only where there is no substantial evidence to support a conviction"). Turner testified that he locked eyes with the perpetrator for "a second to two seconds" as they nearly collided, and later saw the side of the driver's face from no more than ten feet away as the driver exited the car to flee on foot. The state also emphasized the certainty with which Turner identified Hernandez and the brevity of time between when Turner saw the perpetrator and when he identified Hernandez from the photo.

¶35 Hernandez was nonetheless entitled to an acquittal if the jury harbored any reasonable doubt about the accuracy of that identification. The defense presented considerable evidence which might have caused a jury to do so. It emphasized the brevity of Turner's opportunity to see the driver and, during cross-examination, Turner conceded that his opportunity to see the driver was "a pretty quick moment in time." The defense also presented evidence demonstrating that the brief opportunity occurred while a startled Turner was multi-tasking an evasive maneuver at thirty-five miles per hour. Given that multi-tasking—and the speed of the two cars that were proceeding in opposite directions—a jury could have

[6] Turner maintained that this high motivation rendered his identification more reliable. The defense countered that it made him too eager to identify a perpetrator and therefore more psychologically suggestible.

questioned the accuracy of Turner's testimony that he locked eyes for as much as two seconds. The defense also emphasized evidence that Turner was highly motivated, as a new and inexperienced officer, to make an identification in his first big case. From this, a reasonable jury could have inferred that Turner was both especially suggestible and motivated to believe that the known person in the photo was the perpetrator. The defense also argued that Turner was concededly inaccurate in describing the number of persons in the fleeing car and that the opportunity for identification occurred through a partially opened, tinted window. And, it elicited Turner's concession that he did not get a good look at the perpetrator as he was fleeing on foot and that the accuracy of his identification was truly based on his initial opportunity as the vehicles passed. Lastly, the defense emphasized the failure of the state to conduct a more thorough investigation of the car: an investigation that could have definitively confirmed or excluded Hernandez as the perpetrator.

¶36 In short, this was a close case. On the above facts, a reasonable jury could have convicted Hernandez—and did. But, a reasonable jury could also have found that the circumstances of the identification raised a reasonable possibility that Deputy Turner's identification was not as reliable as he believed. The ultimate conviction necessarily turned on the jury's high level of confidence in Turner's claim of accuracy when comparing a lone photo of Hernandez to his recent memory.[7]

¶37 In my view, that high level of confidence may have been reduced by the precluded testimony. Had it been admitted, the jury would have heard that veteran detectives establish the accuracy of identifications by requiring a witness to distinguish among similar-looking persons. It would have heard that photo line-ups avoid the risk of suggestion by placing the suspect's photo randomly among five others. This would have allowed the defense to argue that the identification procedure here did not conform to the standards law enforcement generally uses to build their own investigations and inform their decisions to arrest a suspect.

¶38 The majority posits that such evidence would have been cumulative. Specifically, it observes that defense counsel did establish that Turner identified Hernandez from a lone photo and then commented in summation that no photo line-up had occurred. But without Deloria's testimony, the defense could not argue that photo arrays to test accuracy are routine law enforcement practice. Nor could Hernandez develop,

[7]We must assume they were confident "beyond a reasonable doubt."

through the detective's testimony, the implicit reasons that practice is needed: because eyewitness accuracy can be unreliable in emergent situations and because single-photo identification procedures pose risks of distorting memories through suggestion.[8] And without such testimony,

[8] Extensive literature, scientific and otherwise, documents the hazards of convictions based exclusively on eyewitness testimony and the undue weight unsophisticated jurors tend to place on such testimony. *See, e.g.*, Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 3-4 (2007) ("decades of research" have "consistently found that mistaken identification is the leading cause of wrongful convictions" because, although "studies have repeatedly shown a roughly forty percent rate of mistaken identifications," eyewitness identification powerfully impacts juries); Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 808 (2012) (research has "clearly documented" that: (a) both eyewitness identifications and observer judgments of eyewitness accuracy are "subject to substantial error"; (b) human ability to match faces to photographs is "poor and peaks at levels far below what might be considered reasonable doubt"; (c) eyewitness accuracy is often "further degraded" by such factors as angle of view and witness distress; (d) "memory is subject to distortion" both before and during identification procedures; and (e) "the ability of those who must assess the accuracy of eyewitness testimony is poor for a variety of reasons"); George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 98, 107 (2011) ("Developments in forensic testing have established beyond any doubt that eyewitness testimony has the potential to be dangerously unreliable, and eyewitness misidentification remains the leading cause of false convictions in the United States." However, "[d]espite the considerable body of literature that has arisen over the past several decades, the general population is still unjustifiably trusting of eyewitness testimony."); Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 808-12, 869 (2007) (reviewing over thirty years of empirical studies demonstrating contribution of eyewitness errors to wrongful convictions, difficulties eyewitnesses face in accurately identifying perpetrators, dangers of suggestive identification procedures, and powerful impact eyewitness testimony has on juries). Of course, Deloria could have testified to this body of literature only if he was familiar with it. I do not contend he would have done so.

the jury had no standard by which to measure the import of any deficiencies in Turner's identification compared to best practices.

¶39 Although none of the precluded testimony would have necessarily changed the outcome, it was surely non-trivial evidence targeted on the sole question in an otherwise close case and without which the jury lacked an expert context for its conclusion. For that reason, I cannot agree that its erroneous preclusion was harmless beyond a reasonable doubt. I would therefore reverse Hernandez's conviction.