

STATE OF MAINE
KENNEBEC, ss.

RECEIVED AND FILED
KENNEBEC SUPERIOR COURT

2008 JUN -4 A 11:14

HELEN J. GARDNER
CLERK OF COURTS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CR-07-743

STATE OF MAINE

v.

DECISION AND ORDER

CHAD GRAY,
Defendant

DONALD L. GARBRECHT
LAW LIBRARY
JUL 18 2008

In front of the court is Defendant's proffer of expert testimony for trial and suppression motion.

Factual & Procedural Background:

Defendant is charged with aggravated assault. The State's evidence is based greatly on eye-witness identifications of the defendant as the person who stabbed the victim.

Defendant seeks suppression of the evidence on the theory that the identification procedure was unnecessarily suggestive.

Defendant seeks funds to admit expert testimony of Bates College Associate Professor of Psychology, Amy Bradfield Douglass pertaining to the lack of reliability of eye-witnesses particularly defendant seeks Douglass's testimony regarding: 1) cross-racial or own race bias which impairs the ability of a witness of one race to make correct identifications of persons of a different race; 2) the fact that the confidence of a witness does not necessarily imply correctness of a witness' identifications; 3) the phenomenon of weapons focus; 4) that high levels of stress negatively affect accuracy of eyewitness recall; 5) that consumption of alcohol by a witness can diminish the accuracy of

eyewitness identification and increase possibilities of susceptibility to suggestiveness; and 6) the presence of multiple witnesses identifying the suspect creates influence by one witness upon the others.

Standard of Review:

The admissibility of expert evidence is set forth in M.R. Evid. 702: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” In *State v. Williams*, 388 A.2d 500, 504, we stated:

The controlling criteria regarding the admissibility of expert testimony, so long as the proffered expert is qualified and probative value is not substantially outweighed by the factors mentioned in Rule 403, are whether the sound judgment of the presiding Justice the testimony to be given is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue.

State v. Irving, 2003 ME 31, ¶ 11, 818 A.2d 204, 207.

Discussion:

I. Motion to Suppress

After extensive hearings at which four officers and four eyewitnesses testified, this court finds that there was no evidence adduced showing that procedures used were likely to increase the risk of misidentification, thus the defendant has failed to carry his burden of proof to show by a preponderance of the evidence that the identification procedure was unnecessarily suggestive. *State v. True*, 463 A.2d 946, 950 (Me. 1983); *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

II. Admission of Expert Testimony

Defendant notes from the outset that there is not precedent in Maine supporting the contention that failure to allow this expert testimony would create reversible error. In fact to the contrary, defendant points to three cases in which the Law Court found

that exclusion of such testimony was not in error. See *State v. Lewisohn*, 379 A.2d 1192, 1203 (“Absent a ‘medical’ condition affecting the ability of the witness to tell the truth, evidence may not be received to discredit the testimony of a witness in the nature of an expert’s opinion that the events were such as to have so affected the mental capacity of such witness that his ability to make an accurate observation of the facts and to retain a true recollection thereof has been impaired and that his assertions respecting the details of the occurrence will necessarily or most probably be a distortion.”); *State v. Fernald*, 397 A.2d 194, 197 (holding that trial court’s exclusion of expert testimony regarding the effects of stress on eyewitnesses was not error.); and *State v. Rich*, 549 A.2d 742, 743 (holding that exclusion of expert testimony on 1) effects of stress; 2) effects of alcohol; 3) effects of post-incident confusion; 4) effects of identification by other witnesses; 5) lack of relationship between certainty and accuracy in identification, was not in error).

Nonetheless, defendant argues that the trend of admitting this expert testimony reveals a change from when these cases were decided. He cites a number of out of jurisdiction cases to reveal this trend of reversing trial court exclusion of defense expert testimony on eyewitness identification. See e.g. *U.S. v. Brownlee*, 454 F.3d 131 (3rd Cir. 2006); *U.S. v. Smithers*, 212 F.3d 306 (6th Cir. 2000).

The First Circuit has been “unwilling to adopt a blanket rule that qualified expert testimony on eyewitness identification must be routinely admitted or excluded.” *U.S. v. Stokes*, 388 F.3d 21, 26 (1st Cir. 2004) (quoting *U.S. v. Brien*, 59 F.3d 274, 276 (1st Cir. 1995)). The proper course instead is to “examine each case one by one, taking into account such concerns as ‘the reliability and helpfulness of the proposed expert testimony, the importance and the quality of the eyewitness evidence it addresses, and any threat of confusion, misleading the jury, or unnecessary delay.’” *Id.*

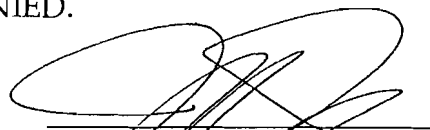
The Court is convinced that the issues of weapons focus, effects of stress, and effects of alcohol on identification are well within the ken of the normal juror, and will easily be brought out on cross-examination. Further the issue of cross-racial identification, confidence correlation and the effects of multiple witnesses do not here present a situation where expert testimony is beneficial and runs the risk of confusing the jury and creating unnecessary delay. The court is particularly convinced of this based on the strength of the testimony of Jillian Bolduc who will testify she was 3-5 feet away from the defendant, was not intoxicated, had seen the defendant weeks earlier, heard him identify himself by name, identified him at the scene as the individual who had stabbed the victim. Additionally, the court notes that Stacey Libby, the victim and Jessica Wheeler all identified the defendant not based on characteristics likely to implicate the veracity of their cross-racial identifications, but instead based on his clothing, including a red bandana or dew-rag.

The court is aware that this is not the situation in which corroborating physical evidence is present. *See State v. Kelly*, 2000 ME 107, 752 A.2d 188. While such corroborating evidence would make this an easier decision it is not a necessity to the court's finding that expert testimony would not be helpful in this case.

The entry is:

Defendant's motion to suppress is DENIED. Defendant's motion for admission of expert testimony is DENIED.

Dated: 6/4/08



Joseph M. Jabar
Justice, Superior Court

STATE OF MAINE
vs
CHAD GRAY
29 PLEASANT STREET
GARDINER ME 04345

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CR-2007-00743

DOCKET RECORD

DOB: 10/08/1982

Attorney: JAMES BILLINGS
LIPMAN & KATZ & MCKEE, PA
227 WATER STREET
PO BOX 1051
AUGUSTA ME 04332-1051
APPOINTED 08/15/2007

State's Attorney: EVERT FOWLE

Filing Document: CRIMINAL COMPLAINT
Filing Date: 08/13/2007

Major Case Type: FELONY (CLASS A,B,C)

Charge (s)

1 AGGRAVATED ASSAULT 08/10/2007 WATERVILLE
Seq 630 17-A 208(1)(B) Class B
GARDINER / WAT

Docket Events:

08/13/2007 FILING DOCUMENT - CRIMINAL COMPLAINT FILED ON 08/13/2007

08/13/2007 Charge(s): 1
HEARING - INITIAL APPEARANCE SCHEDULED FOR 08/13/2007 @ 1:00

NOTICE TO PARTIES/COUNSEL

08/14/2007 Charge(s): 1
HEARING - INITIAL APPEARANCE HELD ON 08/13/2007
NANCY MILLS , JUSTICE
Attorney: SUSAN PAGE
DA: DARRICK BANDA

08/14/2007 Charge(s): 1
PLEA - NO ANSWER ENTERED BY DEFENDANT ON 08/13/2007

08/14/2007 Charge(s): 1
HEARING - STATUS CONFERENCE SCHEDULED FOR 10/09/2007 @ 10:00

08/14/2007 BAIL BOND - \$1,000.00 CASH BAIL BOND SET BY COURT ON 08/13/2007
NANCY MILLS , JUSTICE

08/14/2007 Charge(s): 1
MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 08/13/2007

08/16/2007 Charge(s): 1
MOTION - MOTION FOR APPOINTMENT OF CNSL GRANTED ON 08/15/2007

COPY TO PARTIES/COUNSEL

08/16/2007 Party(s): CHAD GRAY
ATTORNEY - APPOINTED ORDERED ON 08/15/2007

Attorney: JAMES BILLINGS

08/16/2007 Charge(s): 1
HEARING - STATUS CONFERENCE NOTICE SENT ON 08/15/2007

08/16/2007 OTHER FILING - PRETRIAL SERVICES CONTRACT FILED ON 08/16/2007

08/16/2007 MOTION - MOTION TO AMEND BAIL FILED BY STATE ON 08/16/2007

08/16/2007 MOTION - MOTION TO AMEND BAIL GRANTED ON 08/16/2007

COPY TO PARTIES/COUNSEL

08/16/2007 BAIL BOND - PR BAIL BOND SET BY COURT ON 08/16/2007

08/16/2007 BAIL BOND - PR BAIL BOND FILED ON 08/16/2007

Date Bailed: 08/16/2007

08/31/2007 Charge(s): 1
SUPPLEMENTAL FILING - INDICTMENT FILED ON 08/31/2007

08/31/2007 Charge(s): 1
HEARING - STATUS CONFERENCE NOT HELD ON 08/31/2007

09/07/2007 Charge(s): 1
HEARING - ARRAIGNMENT SCHEDULED FOR 09/12/2007 @ 8:00

09/12/2007 Charge(s): 1
HEARING - ARRAIGNMENT HELD ON 09/12/2007
NANCY MILLS , JUSTICE
Reporter: TAMMY DROUIN
Defendant Present in Court

READING WAIVED. DEFENDANT INFORMED OF CHARGES. COPY OF INDICTMENT/INFORMATION GIVEN TO DEFENDANT. 21 DAYS TO FILE MOTIONS

09/12/2007 Charge(s): 1
PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 09/12/2007

09/12/2007 Charge(s): 1
TRIAL - DOCKET CALL SCHEDULED FOR 11/05/2007 @ 9:15

09/14/2007 MOTION - MOTION FOR FUNDS FILED BY DEFENDANT ON 09/14/2007

09/14/2007 MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 09/14/2007

09/14/2007 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 11/05/2007 @ 9:15

NOTICE TO PARTIES/COUNSEL

09/17/2007 MOTION - MOTION FOR FUNDS GRANTED ON 09/14/2007

COPY TO PARTIES/COUNSEL

09/18/2007 Charge(s): 1
MOTION - OTHER MOTION FILED BY DEFENDANT ON 09/18/2007

MOTION TO PRESERVE EVIDENCE

09/18/2007 HEARING - OTHER MOTION SCHEDULED FOR 10/04/2007 @ 8:00

MOTION TO PRESERVE EVIDENCE

09/18/2007 MOTION - OTHER MOTION FILED BY DEFENDANT ON 09/18/2007

MOTION FOR TESTING

09/18/2007 HEARING - OTHER MOTION SCHEDULED FOR 10/04/2007 @ 8:00

MOTION FOR TESTING

09/18/2007 HEARING - OTHER MOTION NOTICE SENT ON 09/18/2007

MOTION FOR TESTING

09/18/2007 HEARING - OTHER MOTION NOTICE SENT ON 09/18/2007

MOTION TO PRESERVE EVIDENCE

10/15/2007 HEARING - OTHER MOTION HELD ON 10/04/2007

NANCY MILLS , JUSTICE

MOTION FOR TESTING

10/15/2007 MOTION - OTHER MOTION GRANTED ON 10/04/2007

NANCY MILLS , JUSTICE

MOTION FOR TESTING

TO THE EXTENT
THAT IT'S SCIENTIFICALLY POSSIBLE, THE STATE IS TO FINGERPRINT ALL KNIVES FOUND AT THE
ALLEGED SIGHT ADN TO CONDUCT TESTING ON ANY BLOOD FOUND ON THE UTILITY KNOFE, CLOTHING AND
PREMISES OF THE INCIDENT.

10/15/2007 HEARING - OTHER MOTION HELD ON 10/04/2007

NANCY MILLS , JUSTICE

MOTION TO PRESERVE EVIDENCE

10/15/2007 Charge(s): 1

MOTION - OTHER MOTION GRANTED ON 10/04/2007

NANCY MILLS , JUSTICE

MOTION TO PRESERVE EVIDENCE

10/15/2007 MOTION - MOTION FOR FUNDS FILED BY DEFENDANT ON 10/03/2007

EX PARTE MOTION FOR EXPERT WITNESS FUNDS

10/15/2007 Charge(s): 1

MOTION - MOTION FOR DISCOVERY FILED BY DEFENDANT ON 10/03/2007

10/15/2007 Charge(s): 1

HEARING - MOTION FOR DISCOVERY SCHEDULED FOR 11/05/2007 @ 9:15

NOTICE TO PARTIES/COUNSEL

10/15/2007 Charge(s): 1

HEARING - MOTION FOR DISCOVERY NOTICE SENT ON 10/15/2007

10/15/2007 Charge(s): 1

MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 10/03/2007

MOTION TO SUPPRESS EYEWITNES IDENTIFICATIONS

10/15/2007 Charge(s): 1

HEARING - MOTION TO SUPPRESS SCHEDULED FOR 11/05/2007 @ 9:15

NOTICE TO PARTIES/COUNSEL

10/15/2007 Charge(s): 1

HEARING - MOTION TO SUPPRESS NOTICE SENT ON 10/15/2007

10/15/2007 Charge(s): 1
MOTION - MOTION TO COMPEL FILED BY DEFENDANT ON 10/03/2007

10/15/2007 Charge(s): 1
HEARING - MOTION TO COMPEL SCHEDULED FOR 11/05/2007 @ 9:15

NOTICE TO PARTIES/COUNSEL

10/15/2007 Charge(s): 1
HEARING - MOTION TO COMPEL NOTICE SENT ON 10/15/2007

10/16/2007 MOTION - MOTION FOR FUNDS GRANTED ON 10/15/2007
NANCY MILLS , JUSTICE
COPY TO PARTIES/COUNSEL

\$400 APPROVED
COPY TO ATTY BILLINGS

10/29/2007 Charge(s): 1
MOTION - MOTION TO CONTINUE FILED BY DEFENDANT ON 10/29/2007

10/31/2007 Charge(s): 1
MOTION - MOTION TO CONTINUE GRANTED ON 10/31/2007

COPY TO PARTIES/COUNSEL

10/31/2007 Charge(s): 1
HEARING - MOTION TO COMPEL CONTINUED ON 10/31/2007

10/31/2007 HEARING - MOTION TO COMPEL SCHEDULED FOR 12/11/2007 @ 1:00

NOTICE TO PARTIES/COUNSEL

10/31/2007 HEARING - MOTION TO COMPEL NOTICE SENT ON 10/31/2007

10/31/2007 Charge(s): 1
HEARING - MOTION TO SUPPRESS CONTINUED ON 10/31/2007

10/31/2007 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 12/11/2007 @ 1:00

NOTICE TO PARTIES/COUNSEL

10/31/2007 HEARING - MOTION TO SUPPRESS NOTICE SENT ON 10/31/2007

10/31/2007 Charge(s): 1
HEARING - MOTION FOR DISCOVERY CONTINUED ON 10/31/2007

10/31/2007 HEARING - MOTION FOR DISCOVERY SCHEDULED FOR 12/11/2007 @ 1:00

NOTICE TO PARTIES/COUNSEL

10/31/2007 HEARING - MOTION FOR DISCOVERY NOTICE SENT ON 10/31/2007

10/31/2007 HEARING - MOTION TO SUPPRESS CONTINUED ON 10/31/2007

10/31/2007 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 12/11/2007 @ 1:00

NOTICE TO PARTIES/COUNSEL

10/31/2007 HEARING - MOTION TO SUPPRESS NOTICE SENT ON 10/31/2007

10/31/2007 Charge(s): 1
TRIAL - DOCKET CALL CONTINUED ON 10/31/2007

10/31/2007 Charge(s): 1
TRIAL - DOCKET CALL SCHEDULED FOR 01/09/2008 @ 9:15

12/06/2007 MOTION - MOTION TO CONTINUE FILED BY DEFENDANT ON 12/06/2007

12/13/2007 MOTION - MOTION TO CONTINUE GRANTED ON 12/11/2007

COPY TO PARTIES/COUNSEL

12/13/2007 HEARING - MOTION TO SUPPRESS CONTINUED ON 12/11/2007

12/13/2007 HEARING - MOTION FOR DISCOVERY CONTINUED ON 12/11/2007

12/13/2007 HEARING - MOTION TO SUPPRESS CONTINUED ON 12/11/2007

12/13/2007 HEARING - MOTION TO COMPEL CONTINUED ON 12/11/2007

12/13/2007 Charge(s): 1
MOTION - MOTION FOR DISCOVERY GRANTED ON 12/11/2007
NANCY MILLS , JUSTICE
COPY TO PARTIES/COUNSEL

12/13/2007 Charge(s): 1
MOTION - MOTION TO COMPEL GRANTED ON 12/11/2007
NANCY MILLS , JUSTICE
COPY TO PARTIES/COUNSEL

INFO REQUESTED
IN PARA 5 WILL BE PROVIDED IF IT EXISTS. INFORMATION REQUESTED IN PARA'S 6 AND 7 IS NOT
ADDRESSED UNTIL FURTHER EFFORTS BY DEFENSE COUNSEL. HE MAY BRING THIS MOTION FORWARD
AGAIN IF HIS EFFORTS ARE UNSUCCESSFUL.

12/13/2007 Charge(s): 1
HEARING - MOTION TO SUPPRESS SCHEDULED FOR 02/05/2008 @ 2:00

NOTICE TO PARTIES/COUNSEL

12/13/2007 Charge(s): 1
HEARING - MOTION TO SUPPRESS SCHEDULED FOR 02/05/2008 @ 2:00

NOTICE TO PARTIES/COUNSEL

01/09/2008 MOTION - MOTION EXPERT WITNESS REPORT FILED BY STATE ON 01/03/2008

01/10/2008 OTHER FILING - OTHER DOCUMENT FILED ON 01/10/2008

DEFENSE OBJECTION TO STATE'S MOTION FOR PRODUCTION OF EXPERT REPORT

01/10/2008 HEARING - CONFERENCE SCHEDULED FOR 01/11/2008 @ 8:30
JOSEPH M JABAR , JUSTICE
NOTICE TO PARTIES/COUNSEL

01/11/2008 MOTION - MOTION TO AMEND BAIL FILED BY DEFENDANT ON 01/11/2008

02/01/2008 HEARING - CONFERENCE HELD ON 01/11/2008

02/12/2008 Charge(s): 1
HEARING - MOTION TO SUPPRESS HELD ON 02/05/2008
JOSEPH M JABAR , JUSTICE

Defendant Present in Court

HEARING NOT CONCLUDED, NEEDS SOME MORE TIME.

02/12/2008 Charge(s): 1
HEARING - MOTION TO SUPPRESS SCHEDULED FOR 02/26/2008 @ 1:00

NOTICE TO PARTIES/COUNSEL

02/21/2008 MOTION - MOTION TO CONTINUE FILED BY STATE ON 02/14/2008

02/21/2008 MOTION - MOTION TO CONTINUE GRANTED ON 02/19/2008
JOSEPH M JABAR , JUSTICE
COPY TO PARTIES/COUNSEL

02/21/2008 Charge(s): 1
HEARING - MOTION TO SUPPRESS CONTINUED ON 02/21/2008

02/22/2008 Charge(s): 1
HEARING - MOTION TO SUPPRESS HELD ON 02/05/2008
JOSEPH M JABAR , JUSTICE
Attorney: JAMES BILLINGS
DA: ALAN KELLEY Reporter: MAUREEN WHITEHOUSE
Defendant Present in Court

02/29/2008 Charge(s): 1
HEARING - MOTION TO SUPPRESS SCHEDULED FOR 04/08/2008 @ 1:00
JOSEPH M JABAR , JUSTICE
NOTICE TO PARTIES/COUNSEL

02/29/2008 Charge(s): 1
HEARING - MOTION TO SUPPRESS NOTICE SENT ON 02/29/2008

02/29/2008 MOTION - MOTION TO AMEND BAIL GRANTED ON 01/11/2008
JOSEPH M JABAR , JUSTICE
COPY TO PARTIES/COUNSEL AFTER
CONSIDERATION MOTION TO AMEND BAIL IS GRANTED. DEFENDANT'S MAINE PRETRIAL SERVICES
CONTRACT AND DEFENDANT'S BAIL CONDITIONS SHALL BE AMENDED SO THAT HE NMAY ENTER THE
MIDNIGHT BLUES NIGHT CLUB IN WATERVILLE, ON ONE OCCATSION IF ACCOMPANIED BY PRIVATE
INVESTIGATOR TOM CUMLER FOR INVESTIGATIVE PURPOSES. IT MUST BE A SATURDAY EVENING BETWEEN
THE HOURS OF 9 PM TO 11-J.

04/16/2008 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 05/05/2008 @ 1:00
JOSEPH M JABAR , JUSTICE
NOTICE TO PARTIES/COUNSEL

04/16/2008 Charge(s): 1
HEARING - MOTION TO SUPPRESS CONTINUED ON 04/08/2008

04/16/2008 Charge(s): 1
TRIAL - DOCKET CALL HELD ON 01/09/2008

Defendant Present in Court

05/05/2008 HEARING - MOTION TO SUPPRESS HELD ON 05/05/2008
JOSEPH M JABAR , JUSTICE
Attorney: JAMES BILLINGS

DA: ALAN KELLEY Reporter: JANETTE COOK
Defendant Present in Court

05/05/2008 Charge(s): 1
MOTION - MOTION TO SUPPRESS UNDER ADVISEMENT ON 05/05/2008

JOSEPH M JABAR , JUSTICE
05/05/2008 MOTION - MOTION TO SUPPRESS UNDER ADVISEMENT ON 05/05/2008
JOSEPH M JABAR , JUSTICE
05/12/2008 ORDER - TRANSCRIPT ORDER FILED ON 05/09/2008

Attorney: JAMES BILLINGS
COPY SENT TO MAUREEN BRADFORD AND JANET COOK

05/12/2008 Charge(s): 1
TRIAL - DOCKET CALL SCHEDULED FOR 06/02/2008 @ 9:15

05/21/2008 MOTION - MOTION TO REVOKE BAIL FILED BY STATE ON 05/20/2008

05/21/2008 WARRANT - VIOLATION OF BAIL REQUESTED ON 05/20/2008

05/21/2008 WARRANT - VIOLATION OF BAIL ORDERED ON 05/21/2008

05/21/2008 BAIL BOND - NO BAIL ALLOWED SET BY COURT ON 05/21/2008

05/21/2008 WARRANT - VIOLATION OF BAIL ISSUED ON 05/21/2008

06/03/2008 Charge(s): 1
TRIAL - DOCKET CALL HELD ON 06/02/2008
JOSEPH M JABAR , JUSTICE
Defendant Present in Court

TAPE #800

06/03/2008 Charge(s): 1
TRIAL - JURY TRIAL SCHEDULED FOR 06/06/2008 @ 8:30

NOTICE TO PARTIES/COUNSEL

06/04/2008 Charge(s): 1
MOTION - MOTION TO SUPPRESS DENIED ON 06/04/2008
JOSEPH M JABAR , JUSTICE
COPY TO PARTIES/COUNSEL
06/04/2008 MOTION - MOTION TO SUPPRESS DENIED ON 06/04/2008
JOSEPH M JABAR , JUSTICE
COPY TO PARTIES/COUNSEL

A TRUE COPY

ATTEST: _____
Clerk