No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA WOFFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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May 17, 2019

QUESTION PRESENTED FOR REVIEW

Whether the federal court of appeals, while determining whether potential constitutional error was harmless beyond a reasonable doubt pursuant to the standard in *Chapman v. California*, 386 U.S. 18 (1967), failed to effectively apply the standard by construing the evidence in the light most favorable to the prosecution.

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TABLE OF AUTHORITIES

PREVIOUS OPINIONS AND ORDERS

In *United States v. Wofford*, No. 18-5029, ___ F. App'x ___, 2019 U.S. App. LEXIS 6604 (10th Cir. Mar. 5, 2019) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order and Judgment wherein Joshua Wofford, the Petitioner herein, was the Appellant/Defendant. *See* Attachment 1 (attached hereto). This Petition seeks a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Order and Judgment.

The Order and Judgment denied Mr. Wofford's appeal of a Judgment in a Criminal Case that was filed in the United States District Court for the Northern District of Oklahoma, in United States v. Joshua Wofford, Case No. 17-CR-85-JED. *See* Attachment 2 (attached hereto).

JURISDICTION

The Tenth Circuit reviewed the Judgment in a Criminal Case under the authority of 28 U.S.C. §1291. On March 5, 2019, the Tenth Circuit filed the Order and Judgment now presented for review. *See* Attachment 1. Neither party filed a motion for rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. §1254(1), which permits a writ of certiorari to be "granted upon the petition of

any party to any civil or criminal case, before or after rendition of judgment or decree." Mr. Wofford was the Appellant in the case now submitted for review.

STATEMENT OF THE CASE

1. District Court Proceedings

An Indictment filed in the Northern District of Oklahoma alleged that Joshua Wofford committed the crimes of carjacking (Count One) and using and carrying a firearm during and in relation to a crime of violence (Count Two). After pleading not guilty, he filed a Motion to Suppress in Court Identifications, which contended that identification procedures conducted by police officers were impermissibly suggestive, in violation of due process.

In a pretrial motion hearing the parties presented evidence to the district court. The ruling was rendered as a filed Opinion and Order, which partially granted and partially denied the suppression motion. Attachment 3 (attached hereto). At trial, Mr. Wofford reurged the same request for suppression several times, continuing to urge that identification of Mr. Wofford by a witness named Daniel Harris was tainted by suggestive police practices.

A jury trial was held which resulted in conviction in Count One and acquittal in Count Two. Mr. Wofford was sentenced to 162 months in custody,

followed by three years of supervised release. As of the filing of this brief, he is serving the sentence in a federal penitentiary.

A. Pretrial Motion to Suppress In-Court Identification

The Motion to Suppress argued that a six-photograph lineup that police officers showed to Daniel Harris was impermissibly suggestive. Daniel Harris was a passenger in a vehicle that was parked outside a convenience store while a truck parked on his right was carjacked. Two days after the incident, a police officer showed him the photo lineup, and he identified Mr. Wofford. In the suppression motion, Mr. Wofford specified multiple reasons for concluding that the lineup was suggestive. He pointed out that one photograph was so dark as to effectively reduce the number of photographs to five, and that only Mr. Wofford was wearing prison orange. Mr. Harris reported to police that the suspect had a scar on his face. Only one of the photographs featured a distinguishing mark on the face--Mr. Wofford's, which displayed a shamrock tattoo near his eye. The motion also noted that Mr. Wofford's head was tilted to the left, which emphasized the tattoo. Additionally, the motion discussed possible factors that might demonstrate that the identification was reliable independent of the suggestive procedure, and submitted that the identification was not reliable. In

response, the government addressed all of Mr. Wofford's arguments and requested denial of the motion to suppress.

After holding an evidentiary hearing the district court issued an Opinion and Order which declined to suppress Mr. Harris' identification of Mr. Wofford. *See* Attachment 3. As the court explained, it found that the photo array was not impermissibly suggestive and did not create a substantial likelihood of misidentification:

> Detective Gatwood fully described the process by which he utilized the Q-Mug program within TRACIS to locate 50 to 60 photos of men with characteristics that match Mr. Wofford's race, age, height, weight, hair and eye color. The Court is unpersuaded by the defendant's argument that Wofford's photo is too prominently displayed because it is on the top middle of six photographs that were presented in two rows of three photographs on each row. In addition, Gatwood adequately explained his reasons for using a recent photo of Mr. Wofford, rather than the photo taken most recently after Wofford's arrest the night of the carjacking, which showed him with bloody marks on his face. The small portion of orange shirt that is showing in the array photo of Mr. Wofford does not appear to the Court to be impermissibly suggestive; it is not obvious that the orange shirt is prison or jail-issued clothing.
>
> Mr. Wofford has a small tattoo on his face, on the right side upper cheek, near his eye, and he is the only photo subject in the array with a visible facial tattoo. (See PX 1). That tattoo is not especially prominent and does not itself make Mr. Wofford's photo stand out to an eyewitness as the culprit. *See Sanchez*, 24 F.3d at 1262-63 (array was not impermissibly suggestive where defendant was the only of six individuals depicted with his eyes closed); *United States v. Jones*, 652 F. Supp. 1561 (S.D.N.Y. 1986) (photo array was constitutional despite the fact that defendant was the

> only person whose face was pock-marked). The size of the photo array – six photos – is not per se unconstitutional and merely affects the weight given to other alleged problems in the array. See *Sanchez*, 24 F.3d at 1262. Overall, the six men pictured in the array are similar in their physical appearance.
>
> Moreover, there is no evidence that Detective Gatwood's presentation of the photo array to Mr. Harris was conducted in a suggestive manner. Gatwood instructed Mr. Harris to take his time, look at each photo carefully, and to feel no pressure. Having determined that the photo array is not unduly suggestive, the Court need not reach the second prong.

See Attachment 3 hereto at 11.

The Opinion and Order also addressed Mr. Harris' testimony that he viewed Mr. Wofford's photo on the jail website, and concluded that no due process violation occurred because the viewing did not involve any action by law enforcement. *Id.* at 11-12. During the suppression hearing, neither Mr. Harris nor Detective Gatwood said that Mr. Harris told Detective Gatwood about seeing Mr. Wofford's photo on the jail website. At trial, it was revealed that before the photo lineup was displayed, Mr. Harris did tell the officer about seeing Mr. Wofford's picture on the jail website.

B. Evidence Presented at Trial

According to witnesses who testified for the government at trial, at approximately 10:30 p.m. on June 4, 2017, a family stopped their pickup truck in front of a Quik Trip convenience store in Tulsa, Oklahoma. Jose Cruz-

Gonzalez--the father and driver--went inside the store. While he was inside the store, a man who had been standing outside the store approached the driver's side door of the truck and opened it. He pointed a gun at Heidi Arumendo, who was the front seat passenger, and ordered her to get out. The man entered the truck and sat in the driver's seat. Heidi got her three children, who were in the back seat, to exit the truck. She and her children ran into the store as the truck was backed away and driven off. Neither she nor her children identified Mr. Wofford at trial. While her family was inside the store, she heard a gunshot. The next day, her husband found a casing of a 9mm bullet in the recovered truck.

Later on the night of the incident, Tulsa Police Officer Garrett Higgins engaged in pursuit of a truck that matched the description of the stolen truck. During the pursuit, both vehicles were travelling north on a street that ended in a cul-de-sac. The truck traveled in a U-turn and continued southbound, passing the officer as he continued northbound toward the cul-de-sac. The vehicles passed each other "door-to-door" like on a "normal city street." Officer Higgins was traveling "approximately 30 miles an hour." He could not estimate the truck's speed. He had his headlights and "vehicle lights" on, but could not recall if there were street lights. It was raining, and the windows were up on the officer's vehicle. As the vehicles passed each other, the officer could see the

side of the driver's face. He noted that the driver was a bald white male wearing a white T-shirt, which matched the suspect description that he had heard on the police radio. He recognized the driver as someone he had had contact with in the past. He did not provide any details about the past event.

While Officer Higgins was making the turn in the cul-de-sac, the truck was "going fast" as it accelerated away. After he turned around and continued the pursuit, he allowed the truck to get ahead because it was going the wrong way. The truck was driven into a ditch, where it was abandoned. A white T-shirt was found ten-to-twenty yards from the truck. Officers searched the area for over an hour with a dog that was capable of locating a person. They also used a helicopter. When a second dog made an "area search" (as opposed to a "tracking search"), other officers found Mr. Wofford in a wooded area, close to two hours after the search began. Officer Higgins identified Mr. Wofford at the scene as the driver of the truck. He also identified Mr. Wofford at trial as the driver. No DNA was found on the T-shirt. Mr. Wofford was wearing a black T-shirt with a red logo or design when he was arrested. No gun or other item was found at his location.

Daniel Harris testified that he was in the front passenger seat of a car while he waited for his wife, who was inside the Quik Trip. He saw a man, who

had been leaning against a wall, approach the driver's side of a truck parked immediately to his right. Through his partially opened car door, Mr. Harris asked the man what he was doing. The man said "I'm taking this truck." Mr. Harris said "No, you're not." The man responded that he had a gun. Mr. Harris didn't see a gun, but assumed the man had one and stayed in his car. After the man opened the door of the truck, Mr. Harris "looked out of the corner" of his eye and saw the man sitting in the driver's seat. The man pointed a gun at the head of a lady who was seated in the front. She said something about her kids, to which the man responded "Get ‘em out." The man also pointed the gun at Mr. Harris. After the man backed away in the truck, Mr. Harris exited his vehicle and approached the store. When the truck was at the "other end of the store", about to exit the lot, Mr. Harris saw the man extend a hand holding a gun out of the window. He heard a "bang" and ran into the store. He did not see where the gun was aimed. Mr. Harris could not remember what the man was wearing. In a signed statement, he described the perpetrator as a white male with a scar on the right side of his face.

After Mr. Harris returned home that night, an officer came to take his statement, and informed him that someone had been caught. On the next morning, Mr. Harris and his wife looked on the internet to see who had been

arrested. Mr. Harris determined that the person was Mr. Wofford, and saw his photo. He testified that he selected Mr. Wofford's photo from the lineup, but before doing so, he told the officer that he had seen Mr. Wofford's photo on the internet. At this juncture, defense counsel unsuccessfully renewed his pretrial motion to suppress the identification based on unnecessary suggestiveness. In his testimony, Mr. Harris identified Mr. Wofford as the person who stole the truck, over the defense's objection.

2. Direct Appeal

Mr. Wofford timely appealed to the Tenth Circuit. He argued, as he did in district court, that Mr. Harris' identification of Mr. Wofford was inadmissible at trial due to improper suggestiveness. The judgment of conviction was affirmed. *See United States v. Wofford*, No. 18-5029, ___ F. App'x ___, 2019 U.S. App. LEXIS 6604 (10th Cir. Mar. 5, 2019) (unpublished).

In its analysis the Tenth Circuit did not address the issue of whether the disputed evidence was admissible. The court held that assuming the evidence was inadmissible, any error in admitting it was harmless beyond a reasonable doubt. *Id.* at *7-8, citing *Biggers v. Tennessee*, 390 U.S. 404, 408-09, (1968), *Chapman v. California*, 386 U.S. 18, 24 (1967), and *United States v. Ciak*, 102 F.3d 38, 42 (2d Cir. 1996).

In finding harmless error, the court relied on two aspects of the evidence. First, it cited Officer Higgins' identification of Mr. Wofford at trial. In the court's view, Officer Higgins testified that he saw "Wofford in the driver's seat—at close range and a relatively slow speed —when Wofford turned around on a dead-end street." *Wofford*, 2019 U.S. App. LEXIS 6604, *8.

Discussion of Mr. Wofford's argument on appeal consisted of the following:

> On appeal, Wofford attempts to undermine the credibility of Higgins's identification. He points out that Higgins saw the driver of the carjacked vehicle on a rainy night, through a window, while driving between 15 and 30 miles per hour. As such, he contends that Higgins had "only a fleeting opportunity to view the driver" of the carjacked vehicle. Aplt. Br. 29. But Wofford didn't object to Higgins's identification below. And the circumstances of Higgins's identification aren't so unlikely as to be unbelievable. The vehicles slowed down to turn around on the dead-end street, and Higgins said he got "a good look" at the driver while they were "door to door." R. vol. 3, 139-40. As such, the existence of Higgins's identification strongly indicates that any error in allowing Harris to identify Wofford at trial was harmless beyond a reasonable doubt.

Wofford, 2019 U.S. App. LEXIS 6604, *8-9.

As a second ground for finding harmlessness, the court described "strong circumstantial evidence that Wofford committed the carjacking." *Id.* at 9. The court explained:

> For instance, the officers discovered Wofford in the woods about 150 yards away from the vehicle that had been carjacked. Further, the surveillance video shows that the individual who committed the carjacking wore a white, V-neck T-shirt over a black shirt with a red logo or design on it. That outfit aligns with the clothing either worn by Wofford at the time of his arrest or found nearby. Specifically, when the officers found Wofford, he was wearing a black T-shirt with a red logo, and officers found a discarded white, V-neck T-shirt about 10 to 20 yards from the carjacked vehicle.

Id. at 9-10.

Next, the court turned to Mr. Wofford's arguments that the evidence was weak, beginning with the failure of police to find a gun, and his acquittal in Count Two, which charged use of a firearm in relation to a crime of violence. The court responded: "Indeed, the absence of proof of a firearm likely explains why the jury acquitted Wofford of the firearm charge, but it doesn't have much to do with whether Wofford in fact committed the carjacking." *Id.* at 10. Mr. Wofford's argument on appeal also pointed out that his DNA was not found on the T-shirt, referencing a police officer's testimony that no DNA evidence was found on the shirt. The court answered:

> As for the white T-shirt, the testimony at trial was that "there were *no* DNA samples that could be retrieved from the white T-shirt," not that Wofford's DNA wasn't found on the shirt. R. vol. 3, 330 (emphasis added). Moreover, the lack of Wofford's DNA on the white T-shirt doesn't undo the strong inference that Wofford—wearing a white V-neck, T-shirt over a black T-shirt with a red logo or design on it—committed the carjacking and then shed the white T-shirt after abandoning the carjacked vehicle.

Id. at 10-11.

Ultimately the court ruled that "because of the other witness identification and the strong circumstantial evidence against Wofford, we are convinced that the jury would have rendered a guilty verdict in the absence of Harris's identification. Thus, any error in admitting Harris's identification was harmless beyond a reasonable doubt." *Id.* at 11-12.

REASON FOR GRANTING A WRIT

Certiorari is appropriate when "a... United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). The decision submitted for review conflicts with this Court's precedent in *Chapman v. California*, 386 U.S. 18 (1967). *Chapman* established that a constitutional error can be held harmless only if the reviewing court determines that any error was harmless beyond a reasonable doubt. *Id.* at 24. While the decision affirming Mr. Wofford's conviction cited the *Chapman* standard, the standard was not effectively or actually applied. The decision construed the evidence in the light most favorable to the prosecution, which is incompatible with the *Chapman* standard.

Regarding the Tenth Circuit's reliance on identification of Mr. Wofford by a police officer, the orientation of review emphasized circumstances that supported the government's case, and discounted circumstances that supported Mr. Wofford's defense. The court described Officer Higgins as testifying that he saw "Wofford in the driver's seat—at close range and a relatively slow speed —when Wofford turned around on a dead-end street." *Wofford*, 2019 U.S. App. LEXIS 6604, *8. However, the witness never used the words "close range" or "relatively slow speed", or similar terms. The Tenth Circuit's depiction of the evidence was skewed in the prosecution's favor. As described in part 1.B above, the officer testified that he saw the driver *after* the driver had turned around. This does not enable a reviewing court to say that the identification occurred *when* the driver turned around. The court's depiction is plainly incorrect by saying that the officer saw Mr. Wofford at a relatively slow speed. Officer Higgins said he was travelling about 30 miles per hour. He did not have a numerical estimate of Mr. Wofford's speed at the moment of viewing, but described Mr. Wofford as driving away. When the speed of both vehicles is combined, it is obvious that Officer Higgins saw the driver at a relatively fast speed, and it is unreasonably incorrect to describe the speed as relatively slow. The two discrepancies in the depiction of Officer Higgins' testimony share a

theme in that they bolster the reliability of the officer's identification of Mr. Wofford.

This generous view of the government's evidence continued as the court rejected Mr. Wofford's claim that the officer had a fleeting opportunity to view the driver while the officer was travelling up to 30 miles per hour and looking through a window on a rainy night. The court said: "Wofford didn't object to Higgins's identification below." *Id.* at 8. This response was a complete red herring, having nothing to do with the harmless error standard or anything that Mr. Wofford argued on appeal. The court continued by saying: "And the circumstances of Higgins's identification aren't so unlikely as to be unbelievable. The vehicles slowed down to turn around on the dead-end street, and Higgins said he got 'a good look' at the driver while they were 'door to door.'" *Id.* By focusing only on three facts--slowing down to turn around, a "good look," and being door-to-door, the analysis construed the facts out of context, while ignoring the totality of facts that undermined the identification. The analysis intentionally refused to consider the fleeting opportunity that was afforded as a result of the combined speed of both vehicles, the fact that the viewing occurred at night, through a rainy window, and the fact that the officer only saw the side of the driver's face.

As for the circumstances surrounding the search for a suspect, the decision manifestly viewed the evidence in a light most favorable to the prosecution. The analysis pointed out that Mr. Wofford was found about 150 feet away from the stolen truck, and that a white T-shirt was found 10-20 yards from the truck and Mr. Wofford was wearing a black shirt with a red logo or design, which "align[ed]" with the clothing worn by the carjacker--a white T-shirt over a black shirt with a red log or design. *Id.* at 10-11. The court saw a "strong inference" that Mr. Wofford committed the carjacking and took off the T-shirt after abandoning the vehicle. *Id.* at 11. This analysis failed to take into account that Mr. Wofford was found nearly two hours after the search began, which supported an inference that he arrived at the location after the carjacker had departed. It failed to take into account that no evidence linked Mr. Wofford to the T-shirt, as was underscored by the absence of any evidence of his DNA on the shirt, which tested negative for the presence of anyone's DNA. It also failed to take into account that no gun was found. As for the black shirt with a red design, the decision did not conclude that the design was the same as what appeared on the shirt worn by the carjacker. Black shirts with red on the front are not uncommon. An inference could made that Mr. Wofford's black and red

shirt was merely a coincidence, but the reviewing court solely focused on the inference that supported guilt.

By construing the evidence heavily in favor of a conclusion of guilt, while avoiding evidence, and inferences therefrom, that supported a conclusion of innocence, the standard of review utilized in Mr. Wofford's appeal viewed the evidence in the light most favorable to the government. But this standard is not in *Chapman*. It is not in any Supreme Court decision that has applied the *Chapman* standard. For example, in *Neder v. United States*, 527 U.S. 1 (1999), this Court looked into whether omission of an element of the charged offense from an elements instruction to the jury was harmless beyond a reasonable doubt. The opinion concluded: "[i]n this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* at 17. This rendition of the harmlessness standard, especially the part concerning whether the evidence is overwhelming, leaves no room for viewing the evidence solely in the prosecution's favor. Construing the evidence in the light most favorable to a guilty verdict, expecially when it is robustly used to ignore evidence and inferences that are contrary to guilt (as was done in

this case), bears a strong inherent tendency to lead to a finding of harmlessness when the evidence of guilt is *underwhelming*.

In the context of criminal law, the "light most favorable" orientation used in this case seems to be derived from the standard used to determine if evidence at trial is sufficient to support a verdict of guilt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Insufficiency of the evidence to satisfy the burden of proof required by due process has no jurisprudential or analytical relationship to the issue of whether constitutional error is harmless beyond a reasonable doubt.

Moreover, the skewed view of the evidence deployed in the present case countervails the *Chapman* standard. The Ninth Circuit said it best in *Al-Qaadir v. Gallegos*, No. 94-15673, 1995 U.S. App. LEXIS 13607, *10, n. 5 (9th Cir. June 2, 1995) (unpublished): "[i]t is impossible to determine whether an error was harmless beyond a reasonable doubt by construing evidence in the light most favorable to the prosecution. Such construction gives the benefit of the doubt to the prosecution. The two standards are mutually exclusive." To state the problem another way: the Tenth Circuit's analysis of this case, by design, failed to lead to an accurate or reliable determination of whether any error was harmless beyond a reasonable doubt. *See Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) ("[T]he true strength of the prosecution's proof cannot be

assessed without considering challenges to the reliability of the prosecution's evidence.").

Accordingly, by construing the evidence in the light most favorable to a verdict of guilt, the deciding panel did not effectively apply the standard in *Chapman*, which required the government to show that any error was harmless beyond a reasonable doubt. The Tenth Circuit's error warrants remand with instructions to redetermine harmlessness by applying the undiluted standard in *Chapman*.

CONCLUSION

Mr. Wofford requests this Court to grant this petition for certiorari, vacate the Order and Judgment, and remand to the Tenth Circuit with instructions to re-examine the harmlessness issue while correctly applying the law in *Chapman*.

Respectfully submitted,

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ATTACHMENT 1:

United States v. Wofford, No. 18-5029, ___ F. App'x ___, 2019 U.S. App. LEXIS 6604 (10th Cir. Mar. 5, 2019) (unpublished)

United States v. Wofford

United States Court of Appeals for the Tenth Circuit

March 5, 2019, Filed

No. 18-5029

Reporter
2019 U.S. App. LEXIS 6604 *; __ Fed. Appx. __; 2019 WL 1040877

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOSHUA WOFFORD, Defendant - Appellant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] (D.C. No. 4:17-CR-00085-JED-1). (N.D. Okla.).

United States v. Wofford, 2017 U.S. Dist. LEXIS 190965 (N.D. Okla., Nov. 17, 2017)

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Leena Alam, Office of the United States Attorney, Northern District of Oklahoma, Tulsa, OK.

For JOSHUA WOFFORD, Defendant - Appellant: Barry L. Derryberry, Office of the Federal Public Defender, Northern and Eastern Districts of Oklahoma, Tulsa, OK; Robert Allen Ridenour, Office of the Federal Public Defender, Northern and Eastern Districts of Oklahoma, Muskogee, OK.

Judges: Before LUCERO, MORITZ, and EID, Circuit Judges.

Opinion by: Nancy L. Moritz

Opinion

ORDER AND JUDGMENT*

Joshua Wofford appeals from his jury conviction for carjacking. *See* 18 U.S.C. § 2119. He argues that (1) the district court erred in admitting eyewitness-identification evidence that he claims was unreliable and based on an unduly suggestive photo lineup; and (2) the district court abused its discretion in excluding his proffered expert testimony about eyewitness-identification evidence. Finding no reversible error on either point, we affirm.

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* This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

Background

One evening in June 2017, Daisy Ellis and Daniel Harris pulled into the parking lot of a Quik Trip convenience store in Tulsa, Oklahoma. Ellis was driving, and her husband Harris sat in the front passenger seat. As **[*2]** they entered the lot, Ellis and Harris "noticed a man standing with his leg propped up against the wall to the side of the Quik[ ]Trip." R. vol. 1, 188. Harris testified that Ellis told him the man looked like he was "up to no good." R. vol. 3, 96. Ellis went inside the store, but Harris stayed in the car and kept an eye on the man.

Minutes later, Jose Cruz-Gonzalez pulled his truck into the parking lot and parked immediately to the right of Harris's car. Cruz-Gonzalez went inside the store while his wife, Heidi Argumedo, remained in the truck with their three children. The man who had been leaning against the side of the store then approached the driver's side of Cruz-Gonzalez's truck and stood between Harris's car and the truck. Harris asked the man what he was doing, and he replied, "I'm taking this truck." *Id.* at 98. Harris responded, "No, you're not," and began to open his door. *Id.* But when the man said he had a gun, Harris decided to stay in his car.

The man opened the door of Cruz-Gonzalez's truck, pointed a gun at Argumedo's head, and told her to get out of the truck. She and her children exited the truck, went inside the store, and asked the clerk to call the police. The man then got **[*3]** in the truck and drove away. Video surveillance didn't capture a clear image of the carjacker's face, but it did capture an image of a white male wearing black pants, black shoes, and a white, V-neck T-shirt over a black T-shirt with a red logo or design on it. The top of the black T-shirt and a small portion of the red logo or design were visible above the collar of the V-neck of the white T-shirt.

Soon thereafter, Tulsa Police Officer Garrett Higgins saw a truck matching the description of the stolen vehicle and began pursuing it. During the pursuit, the man driving the truck turned onto a dead-end street, requiring him to turn around. As Higgins navigated past the truck on the dead-end street, he "came door to door" with it. *Id.* at 139. Higgins testified that he was traveling between 15 and 30 miles per hour at the time and that he "got a good look" at the driver. *Id.* at 140. Higgins observed that the driver, a "bald white male wearing a white T-shirt," matched the radio description of the carjacking suspect. *Id.* at 281. Higgins also recognized the driver from a prior arrest, though he didn't recall his name.

Ultimately, the driver abandoned the truck in a ditch. Law enforcement quickly found the truck, set up **[*4]** a perimeter, and began searching the area. Higgins found a white, V-neck T-shirt on the ground about 10 to 20 yards away from the truck. After about two hours, K-9 officers discovered Wofford in a wooded area not far from the abandoned

truck. Wofford was wearing a black shirt with a red logo or design on it, black shorts, and no shoes. Higgins identified Wofford as the man he saw driving the truck during the earlier pursuit.

A few hours later, law enforcement interviewed Harris. Harris reported that the man he saw take the truck was a white male with a scar on the right side of his face, wearing a white shirt, black jeans, and black shoes. At that point, law enforcement informed Harris that they had arrested a suspect. Later, Harris searched the internet to see who had been arrested and saw Wofford's photo on a jail website.

After Wofford's arrest, Tulsa Police Detective Jeffrey Gatwood assembled a photo lineup to show to Harris. Gatwood chose not to use the mugshot taken after Wofford's arrest for carjacking because in that photo, Wofford had blood on his face. Gatwood instead used Wofford's next-most-recent mugshot, which included a visible tattoo underneath Wofford's right eye. Gatwood **[*5]** then used a database system to select five other photos of men who matched Wofford's age, race, height, weight, hair color, and eye color. However, amidst the matching photo options, Gatwood was unable to locate any photos of men with similar facial tattoos. As such, although the six photos depicted men with similar facial characteristics and coloring, only Wofford's photo showed a facial tattoo.

Two days after the carjacking, Gatwood showed Harris the lineup and asked him "to look at each photo carefully, to take his time, and to not feel like he was being pressured." R. vol. 1, 192. Additionally, he instructed Harris to let him know if the carjacker wasn't in the photo lineup. Harris identified the photo of Wofford as the man he saw commit the carjacking.

The government charged Wofford with carjacking and using a firearm during and in relation to a crime of violence. Wofford filed a motion to suppress, seeking to prevent Harris from identifying him at trial. Wofford argued that the photo lineup Gatwood showed to Harris was unduly suggestive and that Harris's identification was unreliable. At the hearing on the motion, Harris, Higgins, and Gatwood testified about the facts described **[*6]** above. Additionally, Wofford presented expert testimony about eyewitnesses from Scott Gronlund, a professor of psychology at the University of Oklahoma. Gronlund opined that because Harris viewed Wofford's photo on the internet before Gatwood showed him the lineup, Harris's lineup identification was unreliable. Specifically, Gronlund said that "it's at least possible that [Harris's] memory [wa]s created or at least updated and modified by seeing [Wofford's] face" on the internet. R. vol. 3, 179. Additionally, Gronlund testified that the composition of the lineup affected the reliability of the identification because the tattoo on Wofford's face makes his photo "stand[] out from the others." *Id.* at 180.

The district court concluded that the lineup wasn't unduly suggestive and accordingly denied Wofford's motion to suppress. Further, it granted the government's motion—made orally during the suppression hearing—to exclude Gronlund's testimony from trial. It concluded that the testimony (1) wouldn't be helpful to the jury, (2) was "devoid of the application of a reliable methodology to the evidence of this case," and (3) would risk "confusing the jury and invading the jurors' province to determine **[*7]** witness credibility." R. vol. 1, 201-02.

After the trial, the jury found Wofford guilty of carjacking.[1] The district court sentenced him to 162 months in prison and three years' supervised release. Wofford appeals.

Analysis

I. The Photo Lineup

Wofford argues that the district court should have suppressed Harris's in-court identification of him because the photo lineup from which Harris initially identified Wofford was unduly suggestive and the identification overall was unreliable. *See United States v. Kamahele*, 748 F.3d 984, 1019 (10th Cir. 2014) (noting that in challenge to photo lineup, we first ask whether lineup was "unduly suggestive" and then ask "whether the identification[] w[as] still reliable in view of the totality of the circumstances"). The government argues to the contrary, contending that the photo lineup wasn't unduly suggestive and that Harris's identification was reliable.

We need not resolve this dispute. That's because we agree with the government that even assuming the photo lineup was unduly suggestive and Harris's identification was unreliable, any error in admitting Harris's identification evidence was harmless beyond a reasonable doubt.[2] *See Biggers v. Tennessee*, 390 U.S. 404, 408-09, 88 S. Ct. 979, 19 L. Ed. 2d 1267 (1968) (noting that admission of unreliable identification evidence based on unduly suggestive **[*8]** lineup violates defendant's due-process rights and thus must satisfy constitutional harmless-error standard); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable

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[1] The jury acquitted him of using and carrying a firearm during and in relation to a crime of violence. *See* 18 U.S.C. § 924(c)(1)(A)(iii).

[2] Wofford failed to explicitly address harmlessness in his opening brief, and he didn't file a reply brief. Accordingly, we could find that Wofford waived any argument against finding this error harmless. *See United States v. Montgomery*, 550 F.3d 1229, 1231 n.1 (10th Cir. 2008) (noting that failure to make argument on appeal results in waiver). Nevertheless, at oral argument, Wofford's counsel responded to questions from the panel regarding harmlessness. Additionally, we discern in Wofford's opening brief some implicit rebuttals to the government's harmless-error argument. In the interest of a complete harmless-error analysis, we exercise our discretion to overlook Wofford's waiver.

doubt."); *United States v. Ciak*, 102 F.3d 38, 42 (2d Cir. 1996) (assuming error and moving straight to constitutional harmlessness).

The government first asserts that this error was harmless because Harris wasn't the only witness who identified Wofford at trial; Officer Higgins also identified him. Recall that Higgins testified about pursuing the carjacked vehicle and seeing Wofford in the driver's seat—at close range and a relatively slow speed—when Wofford turned around on a dead-end street. After other officers apprehended Wofford, Higgins identified him as the individual he saw driving the carjacked vehicle. He likewise identified Wofford at trial.

On appeal, Wofford attempts to undermine the credibility of Higgins's identification. He points out that Higgins saw the driver of the carjacked vehicle on a rainy night, through a window, while driving between 15 and 30 miles per hour. As such, he contends that Higgins had "only a fleeting opportunity to view the driver" of the **[*9]** carjacked vehicle. Aplt. Br. 29. But Wofford didn't object to Higgins's identification below. And the circumstances of Higgins's identification aren't so unlikely as to be unbelievable. The vehicles slowed down to turn around on the dead-end street, and Higgins said he got "a good look" at the driver while they were "door to door." R. vol. 3, 139-40. As such, the existence of Higgins's identification strongly indicates that any error in allowing Harris to identify Wofford at trial was harmless beyond a reasonable doubt. *See United States v. Hill*, 604 F. App'x 759, 787-88 (10th Cir. 2015) (finding error harmless beyond reasonable doubt because two other eyewitnesses also identified defendant and defendant failed to object to those identifications); *Ciak*, 102 F.3d at 42-43 (finding harmless error in part because another witness identified defendant at trial); *cf. Biggers*, 390 U.S. at 409 (finding error wasn't harmless because it "was the only evidence of identification").

As additional support for its harmless-error argument, the government points to the strong circumstantial evidence that Wofford committed the carjacking. For instance, the officers discovered Wofford in the woods about 150 yards away from the vehicle that had been carjacked. Further, the surveillance video shows that the individual **[*10]** who committed the carjacking wore a white, V-neck T-shirt over a black shirt with a red logo or design on it. That outfit aligns with the clothing either worn by Wofford at the time of his arrest or found nearby. Specifically, when the officers found Wofford, he was wearing a black T-shirt with a red logo, and officers found a discarded white, V-neck T-shirt about 10 to 20 yards from the carjacked vehicle.

Wofford, for his part, insists that the evidence against him was weak. In support, he points out that law enforcement (1) never located the gun allegedly used during the carjacking and (2) didn't identify Wofford's DNA on the white T-shirt discovered outside the truck. He also points to his acquittal on the firearm charge, stating that it "dispels any conclusion that the government's evidence was overwhelming, or even strong." Aplt. Br. 29.

We disagree that these evidentiary absences undermine the strong circumstantial evidence that Wofford committed the carjacking. Indeed, the absence of proof of a firearm likely explains why the jury acquitted Wofford of the firearm charge, but it doesn't have much to do with whether Wofford in fact committed the carjacking. As for the white T-shirt, **[*11]** the testimony at trial was that "there were *no* DNA samples that could be retrieved from the white T-shirt," not that Wofford's DNA wasn't found on the shirt. R. vol. 3, 330 (emphasis added). Moreover, the lack of Wofford's DNA on the white T-shirt doesn't undo the strong inference that Wofford—wearing a white V-neck, T-shirt over a black T-shirt with a red logo or design on it—committed the carjacking and then shed the white T-shirt after abandoning the carjacked vehicle. This strong circumstantial evidence is further reason to find any error in admitting Harris's identification harmless beyond a reasonable doubt. *See United States v. Rogers*, 126 F.3d 655, 660 (5th Cir. 1997) (finding harmlessness in part because other evidence of guilt was overwhelming, including clothing from surveillance video found in defendant's home and car); *Ciak*, 102 F.3d at 42-43 (finding harmlessness because of strong circumstantial evidence of guilt, including that defendant matched detailed suspect description).

In sum, because of the other witness identification and the strong circumstantial evidence against Wofford, we are convinced that the jury would have rendered a guilty verdict in the absence of Harris's identification. Thus, any error in admitting Harris's identification was **[*12]** harmless beyond a reasonable doubt.

II. The Expert Testimony

Wofford next challenges the district court's decision to exclude Gronlund's testimony from trial. We review that decision for an abuse of discretion. *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006). Federal Rule of Evidence 702 requires a district court to "satisfy itself that the proposed expert testimony is both reliable and relevant . . . before permitting a jury to assess such testimony." *Id.* Reliability is about "the reasoning and methodology underlying the expert's opinion." *Id.* at 1123 (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1221 (10th Cir. 2003)); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (setting out nonexclusive factors for district court's "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue"). Relevance is about whether the expert testimony "will assist the trier of fact" or whether it instead falls "within the juror's common knowledge and experience" and "will usurp the juror's role of evaluating a witness's credibility." *Rodriguez-Felix*, 450 F.3d at 1123.

Here, the district court concluded that Gronlund's testimony was neither reliable nor relevant. First, it found that Gronlund's "very generalized descriptions of studies and his overall experience" didn't "present **[*13]** a reliable methodology or explain how any such methodology can be reliably applied to the evidence." R. vol. 1, 201. As such, the district court reasoned, Gronlund's testimony was "devoid of the application of a reliable methodology to the evidence of this case." *Id.* Second, the district court determined that the evidence would "not help the jury to understand the evidence or to determine a fact in issue in this case." *Id.* On the contrary, the district court concluded that Gronlund's ultimate conclusion—that "[t]he eyewitness evidence in this case is weak and problematic," Supp. R. vol. 1, 8—would "present a serious risk of confusing the jury and invading the jurors' province to determine witness credibility," R. vol. 1, 202.

On appeal, Wofford first argues that Gronlund's testimony was reliable because "he relied on his findings and the findings of other experts in his field." Aplt. Br. 31. Specifically, Wofford points out that Gronlund "reviewed numerous field studies on identification issues and had published numerous reports on his own studies." *Id.* But beyond these conclusory statements, Wofford doesn't challenge the district court's conclusion that Gronlund's "experiments with **[*14]** students outside of real-world circumstances and his review of research into other potential problems with eyewitness identification issues is unhelpful to the specific evidence in this case." R. vol. 1, 201. Indeed, Wofford fails to explain how Gronlund's general expertise in this area relates to the specific evidence in this case. As such, we discern no abuse of discretion in the district court's reliability finding. *See Rodriguez-Felix*, 450 F.3d at 1126 (finding no abuse of discretion in exclusion of expert testimony where expert relied primarily on "generalized assertions regarding the factors which can affect an eyewitness's identification").

Wofford next attacks the district court's relevance finding. He asserts that Gronlund's testimony would not have addressed "whether a particular witness [wa]s lying," but rather "would have educated the jurors to provide them tools by which they could assess the witness'[s] credibility or reliability." Aplt. Br. 33. But this argument merely suggests that Gronlund's expert testimony would provide the jury with the same information as "skillful cross-examination." *Rodriguez-Felix*, 450 F.3d at 1125. Indeed, when cross-examining Harris, defense counsel highlighted various issues with the reliability of Harris's **[*15]** identification of Wofford, including (1) inconsistencies between what Harris testified to at trial and the description he gave on the night of the event and (2) Harris's inability to recall what the carjacker was wearing. Defense counsel also elicited the fact that Harris looked up Wofford's photo on the internet before selecting Wofford's photo from the lineup. Further, defense counsel inquired whether the stress of having a gun pointed at him affected Harris's memory of the carjacking. He also asked whether Harris's brain injury impacted Harris's ability to recall events. Wofford points to nothing in Gronlund's testimony that would have helped the jury assess the reliability of Harris's identification

more than or differently than this cross-examination. *See id.* at 1126 (finding no abuse of discretion in district court's lack-of-relevance finding because "cross-examination amply exposed the common-sense deficiencies in the prosecution's identification case"). Thus, the district court didn't abuse its discretion in concluding Gronlund's opinion wasn't relevant.

Finding no abuse of discretion in any of the district court's reasoning, we affirm its order excluding Gronlund's testimony from trial. **[*16]**

Conclusion

We assume that the photo lineup was unduly suggestive and that Harris's identification was unreliable. But we conclude that any error in admitting Harris's identification at trial was harmless beyond a reasonable doubt because another witness also identified Wofford at trial and strong circumstantial evidence tied Wofford to the carjacking. Additionally, we hold that the district court's decision to exclude Gronlund's expert testimony wasn't an abuse of discretion. Accordingly, we affirm Wofford's conviction.

Entered for the Court

Nancy L. Moritz

Circuit Judge

ATTACHMENT 2:

Judgment in a Criminal Case

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Oklahoma

UNITED STATES OF AMERICA
v.
JOSHUA WOFFORD

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:17CR00085–1

USM Number: 15223-062

Robert Allen Ridenour and Whitney R. Mauldin
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the Court.

☒ was found guilty on count One of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2119	Carjacking	6/4/17	1

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count Two of the Indictment (See Dkt. # 47)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

March 13, 2018
Date of Imposition of Judgment

Signature of Judge

John E. Dowdell, United States District Court Judge
Name and Title of Judge

March 13, 2018
Date

AO 245B (Rev. 10/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Joshua Wofford
CASE NUMBER: 4:17CR00085-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 162 months.

☒ The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be placed in a facility that will allow him the opportunity to participate in the Bureau of Prisons' Residential Drug Abuse Program or the most comprehensive substance abuse treatment and mental health treatment available.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____

_____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Joshua Wofford
CASE NUMBER: 4:17CR00085-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: Three years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: Joshua Wofford
CASE NUMBER: 4:17CR00085-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: Joshua Wofford
CASE NUMBER: 4:17CR00085-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, residence, office or vehicle to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. The defendant shall successfully participate in a program of testing and treatment, to include inpatient treatment, for drug and alcohol abuse, at a treatment facility and on a schedule determined by the probation officer. The defendant shall abide by the policies and procedures of the testing and treatment program to include directions that the defendant undergo urinalysis or other types of drug testing consisting of no more than eight tests per month if contemplated as part of the testing and treatment program. The defendant shall waive any right of confidentiality in any records for drug and alcohol treatment to allow the probation officer to review the course of testing and treatment and progress with the treatment provider.

3. The defendant shall successfully participate in a program of mental health treatment and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will determine the treatment modality, location, and treatment schedule. The defendant shall waive any right of confidentiality in any records for mental health treatment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant must pay the costs of the program or assist (co-payment) in payment of the costs of the program if financially able.

4. The defendant shall participate in workforce development programs and services for occupational and career development, to include but not limited to assessment and testing, educational instruction, training classes, career guidance, counseling, and job search and retention services, at a program and on a schedule as determined by the probation officer.

U.S. Probation Officer Use Only

A U.S Probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this Judgement containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Joshua Wofford
CASE NUMBER: 4:17CR00085-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100	N/A	N/A	N/A

☐ The determination of restitution is deferred until
An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to Plea Agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Joshua Wofford
CASE NUMBER: 4:17CR00085-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 100 due immediately, balance due

☐ not later than _____ , or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this Judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 90 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Any monetary payment is due in full immediately, but payable on a schedule to be determined pursuant to the policy provision of the Federal Bureau of Prisons' Inmate Financial Responsibility Program if the defendant voluntarily participates in this program. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of $50 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessments, (8) penalties, and (9) costs, including cost of prosecution and court costs.

ATTACHMENT 3:

Opinion and Order (of district court)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 17-CR-85-JED
	)	
JOSHUA WOFFORD,	)	
	)	
Defendant.	)	

OPINION AND ORDER

Before the Court is defendant Joshua Wofford's Motion to Suppress In-Court Identifications (Doc. 23). Mr. Wofford also submitted a thumb drive of videos (Doc. 24), which the Court has reviewed. The United States filed a response (Doc. 27), and Mr. Wofford filed a reply (Doc. 29). The Court conducted an evidentiary hearing on the motion and admitted Plaintiff's Exhibits (PX) 1 and 2 (a copy and the original of a photo lineup) and Defendant's Exhibits (DX) 1, 3, 4, 5, 6, 8, 9, and 10. The videos on the thumb-drive (Doc. 24) were identified and admitted during the hearing as DX 5 and 6. The Court also heard testimony of the following: JLG, who is 14 years old and will be referred to by initials; Heidi Argumedo; Jose Cruz-Gonzalez; Tulsa Police Department (TPD) Officer Cleon Burrell, Daniel Harris, TPD Officer Jeff Gatwood, TPD Officer Garrett Higgins, and Scott D. Gronlund, Ph.D. During the course of the hearing, the United States presented an oral motion to exclude Dr. Gronlund's testimony (Doc. 36), to which the defendant has now filed a written response (Doc. 37), and that motion will also be addressed in this order.

I. Suppression Proceedings

A motion to suppress is recognized and governed by Rule 12. *See* Fed. R. Crim. P. 12(b)(3)(C). Pursuant to Rule 12(d), "[w]hen factual issues are involved in deciding a motion, the

court must state its essential findings on the record." The purpose of a suppression hearing is to "determine preliminarily the admissibility of certain evidence allegedly obtained in violation of defendant's rights under the [Constitution]." *United States v. Merritt*, 695 F.2d 1263, 1269 (10th Cir. 1982). When making a preliminary determination of the admissibility of evidence, "the court is not bound by evidence rules, except those on privilege." Fed. R. Evid. 104(a); *see also Merritt*, 695 F.2d. at 1269-70.

II. Background Facts

A. The Carjacking

On June 4, 2017, at approximately 10:39 p.m., a Toyota Sequoia pulled into a parking slot in front of a QuikTrip on North Harvard in Tulsa, Oklahoma. Daisy Ellis was driving the Sequoia, and her husband, Daniel Harris, was sitting in the front passenger seat. As they entered the parking lot, Ellis and Harris noticed a man standing with his leg propped up against the wall to the side of the QuikTrip. Ms. Ellis entered the store, while Daniel Harris remained in the front passenger seat of the vehicle.

At 10:41 p.m., Jose Cruz-Gonzalez drove his 1999 Chevy truck into the QuikTrip parking lot and parked immediately to the right of the passenger side of the Toyota Sequoia where Mr. Harris was sitting. Mr. Cruz-Gonzalez entered the QuikTrip, while his wife (Heidi Argumedo) and three children, including JLG, remained in the truck. Soon thereafter, a man walked from where he had been leaning against the outside wall of the QuikTrip, down the sidewalk in front of the store's entryway, passing in front of the Chevy truck, and around to the driver side of the truck. The man stood in between the vehicle occupied by Daniel Harris and the vehicle occupied by Mr. Cruz-Gonzalez's family. Noticing the man he had previously seen on the side of the building

approach the driver side of the family's truck, Mr. Harris spoke to him, and the man indicated that he was taking the truck and that he had a gun.

The man then opened the door of the pickup truck, pointed a gun at Ms. Argumedo, and said "get out of the car right now." At some point, the man pointed the gun at Mr. Harris. Ms. Argumedo and her children exited the truck and entered the QuikTrip, and she asked the clerk to call police. Mr. Harris also entered the store to make sure that all of Ms. Argumedo's children had exited the truck. As the carjacker drove away in the family's stolen truck, Mr. Harris and Mr. Cruz-Gonzalez saw the carjacker put his arm out of the truck and they heard a gunshot. Mr. Harris provided a description of the weapon, which has apparently not been found, and he described the man as a white man with a scar on the right side of his face, wearing black jeans, black shoes, and a white shirt. Ms. Argumedo testified that the carjacker had a scar on his face around the cheek area close to his eye.

B. The Police Pursuit and Search

Soon after the carjacking was reported, TPD Officer Garrett Higgins saw the stolen truck, and he began to pursue the vehicle. At one point during the pursuit, the suspect drove to a dead-end street and had to slow the stolen vehicle to turn around. As the suspect turned and passed Officer Higgins's police vehicle, the driver sides of two vehicles were "door-to-door," within five to six feet of one another, and Officer Higgins testified that he "got a good look" at the suspect as they passed. Higgins had seen the suspect before, because he had previously been involved as a backing officer on that suspect's arrest on another occasion.[1] The pursuit continued with the

[1] Officer Higgins did not indicate that fact on his police radio at the time. He testified that, when he was writing his report that night, he looked up the defendant's name and recalled the prior arrest.

suspect driving the wrong direction, into oncoming traffic, on Harvard, at times above the speed limit.

The suspect ultimately drove into a ditch at 3800 N. Harvard and fled on foot. The truck was quickly found, and police commenced a search of the area. Officers set up a perimeter, and K-9 officers arrived and located the defendant in a wooded area near 3800 N. Harvard, approximately two hours after they commenced the search. Officer Higgins came to the location and identified Mr. Wofford as the man he had seen driving the stolen truck during the earlier police pursuit. Higgins found a white t-shirt about 10 to 15 yards from where the stolen truck was recovered.

C. The Show-Up Identifications

Before Mr. Wofford was located and detained by the K-9 officers, other TPD officers drove Mr. Cruz-Gonzalez, Ms. Argumedo, and their children to the search area.[2] JLG testified that they waited in the police cars for a long time and then police informed them that they "had caught the guy."[3] After Mr. Wofford was discovered by the K-9 unit, a show-up identification procedure was conducted. The family members were driven in police cars to the nearby location where Mr. Wofford was being held by police. Mr. Wofford was then then taken out of another police car, with officers holding onto Wofford by his arms, several yards in front of the police cars in which the family members were seated. Police vehicle headlights and a spotlight were shined on

[2] Ms. Argumedo and one of her daughters were transported in Officer Burrell's vehicle, while Mr. Cruz-Gonzalez, JLG, and the youngest child rode with another officer to the scene where the truck was recovered.

[3] In the police car occupied by Ms. Argumedo and her eldest daughter, similar language was used to describe Mr. Wofford before the show-up. Specifically, Officer Burrell testified that he informed Ms. Argumedo that "they got the guy so we're going to take a look and see if you can identify him." Ms. Argumedo testified that she remembers hearing a call to Officer Burrell in the police car that "we got him," and she asked "did they find the guy and he said yes."

Wofford, and an officer asked JLG "if it was him or not." JLG responded, "yes, that's him." JLG then translated for his father, and his father answer yes to the question of whether the man in the lights "was him."

According to Officer Burrell, Ms. Argumedo did not identify Mr. Wofford as the assailant during the show-up. Ms. Argumedo testified at the hearing that she initially did not identify Wofford because he was wearing different clothes than the carjacker had been wearing, but that she looked at him more and then reported that it was him, but that he was wearing different clothes. She further testified that her identification of Mr. Wofford was solidified after she spoke to her husband and son about the man wearing a bandana. She acknowledged that it is possible that she thought Wofford was the carjacker only later, as opposed to positively identifying him to Officer Burrell during the show-up.

D. The Photo Array Identification

TPD Robbery Detective Jeff Gatwood was the detective assigned to lead the investigation into the carjacking. Following Mr. Wofford's arrest, Detective Gatwood compiled a photo lineup. (PX 1). To do so, he located the most recent photo of Mr. Wofford that was available to the TPD, with the exception of the mugshot taken following Mr. Wofford's arrest on June 4. Gatwood explained that he thought using the photograph taken following the June 4 arrest would have been problematic because Mr. Wofford had bloody marks on his face in that photo. To select other photos for the lineup, he utilized the TRACIS data system's Q-Mug program. He entered into the system Mr. Wofford's age, race, height, weight, hair and eye color and he requested 50 or 60 photos, in order to select photographs of men with similar characteristics. From those results, Detective Gatwood selected photographs of five other men to use along with Mr. Wofford's in the photo array.

The photo array includes six photos of white men with very short hair, and they all appear to be of a similar age to Mr. Wofford. (PX 1, 2). Mr. Wofford's photo was placed in the number 2 position, at the top middle of six photographs arranged with three photographs on each of two rows. In Mr. Wofford's array photo, the top of what appears to be an orange shirt is visible. After compiling the array, Detective Gatwood showed it to two other detectives and asked them to determine if any of the six men in the photo array stood out more than any others, and each of the detectives selected photos other than Wofford's as appearing more prominent to those detectives' eyes.

On June 6, 2017, Detective Gatwood drove to Mr. Harris's home and asked him to look at the photo array. Gatwood asked Mr. Harris to look at each photo carefully, to take his time, and to not feel like he was being pressured. At 12:33 p.m. on June 6, 2017, Mr. Harris identified the photo of Mr. Wofford as a photo of the man he saw commit the carjacking, and he circled Mr. Wofford's photo, then wrote the date and time, and signed it. (PX 1).

Before the photo array was presented to him by Detective Gatwood on June 6, another officer had gone to the Harris home and taken a witness statement on June 5. (*See* Mr. Harris's Witness Statement, DX 10). At some point during the June 5-6 timeframe, Mr. Harris and his wife searched the Internet and found a photo of Mr. Wofford on a jail website. The precise timeframe of that research was unclear from Mr. Harris's testimony. On direct examination at the hearing, Mr. Harris testified that his computer research was conducted "after" he identified Mr. Wofford from the photo array, while on cross-examination, he indicated that he found Mr. Wofford on a jail screen and "then later" picked out Wofford from a photo lineup.

E. The Indictment and Suppression Motion

Mr. Wofford was subsequently indicted in a two count Indictment. Count One charges him of carjacking in violation of 18 U.S.C. § 2119, and Count Two charges that Mr. Wofford used and carried a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii).

In his motion to suppress, Mr. Wofford requests that the Court suppress the photo array identification by Mr. Harris, as well as the show-up identification made by Mr. Cruz-Gonzalez. (*See* Doc. 23). In reply briefing and at the hearing, defense counsel was critical of the entire show-up procedure that resulted in identifications by both Mr. Cruz-Gonzalez and his son, JLG.[4]

F. Dr. Gronlund's Testimony

At the suppression hearing, Mr. Wofford presented Dr. Gronlund, a Professor of Psychology at the University of Oklahoma, as an expert in the field of "cognition, memory, and eyewitness identification." (*See* Gronlund Declaration, DX 1). Dr. Gronlund testified that, in the last 10 to 15 years, he has conducted research and has published in the area of identification and eyewitness issues, including evaluation of how lineups are conducted in the criminal justice system. He also conducts mock crime videos which are shown to freshmen students who "pretend to be eyewitnesses and make judgments about what they remember."

Dr. Gronlund has reviewed the evidence available in the case. Among other things, he has opined that "[t]here are potential problems with [Mr. Cruz-Gonzalez's] showup identification that raise questions about its validity." (DX 1 at 2). He also opines that "[t]here are also problems with the [photo array] involving Daniel Harris," including that "[t]he lineup itself might have been

[4] In briefing, the government indicated that it did not intend to present testimony from Mr. Cruz-Gonzalez of his show-up identification, and will not present his in-court identification. (Doc. 27 at 1).

unfair," "Wofford's photo (#2) stands out from the others . . . [h]is head is tilted, . . . [h]e also is the only person who might be wearing an orange prison uniform . . . [b]ut most importantly, Wofford is the only one with a tattoo on his face." (*See id.* at 3-4). His ultimate conclusion is that "[t]he eyewitness testimony in this case is weak and problematic." (*Id.* at 5).

III. Analysis

A. General Due Process Requirements Applicable to Eyewitness Identifications

To succeed on a due process challenge to an eyewitness identification, the defendant must first demonstrate that the identification was "procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire,* 565 U.S. 228, 248 (2012); *see also Manson v. Brathwaite,* 432 U.S. 98, 112–16 (1977); *Neil v. Biggers,* 409 U.S. 188, 198 (1972). Courts conduct a "due process check on the admission of eyewitness identification . . . when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." *Perry,* 565 U.S. at 232. "An identification infected by improper police influence . . . is not automatically excluded." *Id.* "Instead, the trial judge must screen the evidence for reliability pretrial. If there is 'a very substantial likelihood of irreparable misidentification . . .' the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Id.*

B. The Show-Up Identifications

In this case, the hearing testimony regarding the show-up identifications established that the police utilized an unnecessarily suggestive show-up identification process that posed a significant risk of unreliable identifications. The family was brought to the area where their stolen

truck was recovered, they were in two police cars, and they waited for a long time, up to two hours, for a suspect to be located. They were then driven a short distance to an area where Mr. Wofford was removed from another police car, held by the arms by police officers, placed in front of the police cars in which the family members were seated, lights were shined on Wofford at some unknown distance of at least several yards, and the family members were then asked whether the one and only person being held by officers was the carjacker. All of that happened shortly after police officers informed the family members that the police had "caught the guy" or "got the guy." Those circumstances were unnecessarily suggestive.

While JLG and Mr. Cruz-Gonzalez identified Wofford as the carjacker, Ms. Argumedo – at least initially – did not identify him as the carjacker. As a result, there are not strong enough "indicia of reliability" of the identifications to "outweigh the corrupting effect of the police-arranged suggestive circumstances." *See Perry*, 565 U.S. at 232. The Court thus concludes that evidence of the identifications that resulted from the show-up should not be admitted at trial. Accordingly, the defendant's motion to suppress is **granted** as to the show-up identifications, and evidence of those out-of-court identifications during the show-up will not be admitted.[5]

C. The Photo Array Identification

Consistent with the Supreme Court's general pronouncements of due process standards applicable to pretrial eyewitness identifications in *Perry*, when a pretrial photo array identification is challenged, a two-pronged due process inquiry is mandated: "first, the court must determine whether the photo array was impermissibly suggestive, and if it is found to be so, then the court

[5] Admission of in-court identification testimony also violates due process "when, under the totality of the circumstances, it was tainted by unnecessarily suggestive pretrial identification procedures creating a 'very substantial likelihood of misidentification." *United States v. Brown*, 200 F.3d 700, 707 (10th Cir. 1999).

must decide whether the identifications were nevertheless reliable in view of the totality of the circumstances." *United States v. Sanchez*, 24 F.3d 1259, 1261-62 (10th Cir. 1994) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The second prong is only analyzed if the array is found to be impermissibly suggestive. *Sanchez,* 24 F.3d at 1262.

Under the first *Simmons* prong, the Court looks at "the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves." *Id*. The number of photos in the array is not considered a dispositive factor and is instead used as a guidepost for analyzing the other two factors. *Id*. at 1263. "The lower the number of photographs used by officers in a photo array, the closer the array must be scrutinized for suggestive irregularities." *Id*. "Ultimately, [the court] must determine whether the unduly suggestive array created a 'substantial likelihood of misidentification.'" *United States v. Kamahele*, 748 F.3d 984, 1019 (10th Cir. 2014).

The evidence does not indicate that the photo array was impermissibly suggestive or created a "substantial likelihood of misidentification." Detective Gatwood fully described the process by which he utilized the Q-Mug program within TRACIS to locate 50 to 60 photos of men with characteristics that match Mr. Wofford's race, age, height, weight, hair and eye color. The Court is unpersuaded by the defendant's argument that Wofford's photo is too prominently displayed because it is on the top middle of six photographs that were presented in two rows of three photographs on each row. In addition, Gatwood adequately explained his reasons for using a recent photo of Mr. Wofford, rather than the photo taken most recently after Wofford's arrest the night of the carjacking, which showed him with bloody marks on his face. The small portion of orange shirt that is showing in the array photo of Mr. Wofford does not appear to the Court to be impermissibly suggestive; it is not obvious that the orange shirt is prison or jail-issued clothing.

Mr. Wofford has a small tattoo on his face, on the right side upper cheek, near his eye, and he is the only photo subject in the array with a visible facial tattoo. (*See* PX 1). That tattoo is not especially prominent and does not itself make Mr. Wofford's photo stand out to an eyewitness as the culprit. *See Sanchez*, 24 F.3d at 1262-63 (array was not impermissibly suggestive where defendant was the only of six individuals depicted with his eyes closed); *United States v. Jones*, 652 F. Supp. 1561 (S.D.N.Y. 1986) (photo array was constitutional despite the fact that defendant was the only person whose face was pock-marked). The size of the photo array – six photos – is not per se unconstitutional and merely affects the weight given to other alleged problems in the array. *See Sanchez*, 24 F.3d at 1262. Overall, the six men pictured in the array are similar in their physical appearance.

Moreover, there is no evidence that Detective Gatwood's presentation of the photo array to Mr. Harris was conducted in a suggestive manner. Gatwood instructed Mr. Harris to take his time, look at each photo carefully, and to feel no pressure. Having determined that the photo array is not unduly suggestive, the Court need not reach the second prong.

The defendant also argues that the photo array was unreasonably suggestive because Mr. Harris and his wife may have looked at a jail photo of Mr. Wofford after the carjacking but before Detective Gatwood came to Mr. Harris's home to present the photo array. While that may present fodder for cross-examination as to Mr. Wofford's memory or identification, it does not present a due process concern that requires exclusion of Mr. Harris's identification. As the Supreme Court in *Perry* explained:

> We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement

> activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Perry, 565 U.S. at 232–33. If Mr. Harris's viewing of a photo of Mr. Wofford on the Internet occurred before the photo array, it did not involve any state action or any impermissibly suggestive action by law enforcement, and thus it does not present a due process concern that requires exclusion of Mr. Harris's identification.

The defendant's motion to suppress is thus **denied** as to Mr. Harris's identification of Mr. Wofford.

D. Admissibility of Dr. Gronlund's Testimony

During the hearing, the United States moved to exclude Dr. Gronlund's testimony. The defendant filed a written response asserting that Gronlund's testimony satisfies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and should be admitted at trial to assist the jury in evaluating the reliability of eyewitness identifications. Pursuant to Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Daubert suggested non-exhaustive factors to guide "trial courts in determining whether proposed expert testimony is based on reliable methods and principles: (1) whether the particular theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has achieved general acceptance in the relevant scientific or expert community." *United States v. Baines*, 573 F.3d 979, 985 (10th Cir. 2009) (citing *Daubert*, 509 U.S. at 593-94). The inquiry is "flexible," "do not constitute a 'definitive checklist or test,'" and the district court does not need to consider every factor. *Id.* at 989–90; *see Bitler v. A.O. Smith. Corp.*, 400 F.3d 1227, 1233 (10th Cir. 2004) (The "list is neither definitive nor exhaustive and . . . a trial judge has wide discretion both in deciding how to assess an expert's reliability and in making a determination of that reliability.").

The court should make a preliminary finding whether the expert is qualified, by determining "if the expert's proffered testimony . . . has 'a reliable basis in the knowledge and experience of his discipline.'" *Bitler*, 400 F.3d at 1232-33 (quoting *Daubert*, 509 U.S. at 592). The proponent of expert testimony must establish that the expert used reliable methods to reach his conclusion and that the expert's opinion is based on a relevant factual basis. *See id.* at 1233. "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702, advisory committee note.

As an initial matter, the Court notes that much of Dr. Gronlund's Declaration and hearing testimony were directed to the show-up identifications (*see* DX 1), which the Court has already determined will be excluded from trial. Indeed, the Court did not need Dr. Gronlund's testimony

to determine the legal question of whether the show-up procedure was unnecessarily suggestive or, if so, whether there were sufficiently strong indicia of reliability to outweigh the suggestiveness of the police procedure.

In an effort to meet his burden to establish that Dr. Gronlund's testimony is admissible under *Daubert* standards, the defendant submitted a transcript from a state court hearing in Cleveland County, Oklahoma, in which a judge concluded that Dr. Gronlund would be permitted to provide expert testimony regarding potential issues with eyewitness testimony. (*See* Doc. 37-1). Dr. Gronlund has never testified at any jury trial, and he has been notified by defense attorneys about five or six other times that judges in other cases would not allow his testimony. In any event, the fact that an expert has been permitted to testify in another case does not satisfy the specific question here. *See United States v. Nacchio*, 555 F.3d 1234, 1258 (10th Cir. 2009) (although expert had been permitted to testify in the past, "'the question before the trial court [i]s specific, not general,' [and] the [trial] court ha[s] an obligation to assess the methodology that [the expert] had employed in the case at hand. . . . [The defendant] could not assume that his expert's testimony would be admitted because other courts had allowed it in; he had to carry his burden of demonstrating the admissibility of [the expert's] testimony in this particular case."). Thus, the Court must still consider the proffered testimony in relation to *this case*. *See id.*

In this Circuit, there is not a per se rule excluding expert testimony regarding the reliability of eyewitness testimony. *See United States v. Rodriguez-Felix*, 450 F.3d 1117, 1124 (10th Cir. 2006). Where such testimony has been permitted, it has been admitted in "narrow" circumstances, such as problems with "cross-racial identification, identification after a long delay, identification after observation under stress, and [such] psychological phenomena as the feedback factor and unconscious transference." *See id.* at 1124. "In short, subject to the trial court's careful

supervision, properly conceived expert testimony may be admissible to challenge or support eyewitness evidence." *Id.* "But outside these specialized circumstances, expert psychological testimony is unlikely to assist the jury-skillful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial. Jurors, assisted by skillful cross-examination, are quite capable of using their common-sense and faculties of observation to make this reliability determination. Nonetheless, we remain cognizant that while cross-examination is often effective, expert testimony, when directed at complex issues, may provide a more effective tool for rebutting an eyewitness's testimony." *Id.* at 1125 (internal citations omitted).

Dr. Gronlund's opinions with respect to Mr. Harris's photo array identification (and any other identifications) will not help the jury to understand the evidence or to determine a fact in issue in this case, as is required for admissibility of such testimony. *See* Fed. R. Evid. 702. While the Court is aware, in general, of "potential problems" or "potential shortcomings" (as Dr. Gronlund puts it) with eyewitness identifications (*see* DX 1 at 2, 5), Dr. Gronlund's testimony did not advance this Court's consideration of the evidence regarding Mr. Harris's identification. In the Court's view, Dr. Gronlund's opinion is devoid of the application of a reliable methodology to the evidence of this case. While he offers certain general criticisms of police procedure in the photo array, based upon very generalized descriptions of studies and his overall experience (*see* DX 1 at 3-4), that does not satisfy *Daubert*. His testimony is essentially that his opinions are based on his experience and body of knowledge of identification and memory issues. That does not present a reliable methodology or explain how any such methodology can be reliably applied to the evidence of this case. His experience conducting mock crime video experiments with students outside of real-world circumstances and his review of research into other potential problems with eyewitness identification issues is unhelpful to the specific evidence in this case. Finally, his

ultimate conclusion that "[t]he eyewitness testimony in this case is weak and problematic" (DX 1 at 5) would present a serious risk of confusing the jury and invading the jurors' province to determine witness credibility.

The motion to exclude Dr. Gronlund's testimony from trial (Doc. 36) is **granted**, and his testimony will not be admitted at trial.

SO ORDERED this 17th day of November, 2017.

JOHN E. DOWDELL
UNITED STATES DISTRICT JUDGE