Psychology in the Courtroom

Pennsylvania Supreme Court Considers Whether Social Science Is 'Common Sense' or a Tool to Correct Juror Misconceptions

By Thomas G. Wilkinson Jr. and Thomas M. O'Rourke


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The Pennsylvania Supreme Court recently issued two decisions regarding the use of social science experts in criminal cases. As noted by University of Pittsburgh law professor David Harris, however, the opinions appear to "come from two different worlds."[1] In one, *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), the Court held that expert testimony regarding memory and human perception could be used to educate jurors on the potential fallibility of eyewitness identifications, holding that such evidence may assist the jury in weighing the evidence presented at trial. In the other, *Commonwealth v. Alicia*, 92 A.3d 753 (Pa. 2014), the Court held that an expert was not permitted to explain the psychological factors that could result in a false confession. Unlike in *Walker*, the *Alicia* Court did not provide any discussion of the underlying scientific research. Rather, a divided Court simply held that the proposed expert testimony would infringe on the "jury's role as arbiter of credibility."

The Court's divergent approach to social science in these cases raises important questions about the current and future role of social science in the courtroom, particularly in criminal cases. These rulings may also provide important guidance regarding the admission of social science evidence under Pennsylvania Rule of Evidence 702 on the civil side.

The Limits of Eyewitness Identification

In *Commonwealth v. Walker*, the Court reversed its prior position on the use of expert testimony regarding the reliability of eyewitness identifications, holding that such evidence is no longer *per se* impermissible in Pennsylvania. In doing so, the Court followed the "unmistakable trend" in recent cases across the country and joined 44 other states and the District of Columbia in permitting expert testimony on this issue. Specifically, the Court was convinced that "advances in scientific study have strongly suggested" that eyewitnesses identifications may be inaccurate, particularly when the crime involves a weapon and the perpetrator is of a different race. In the Court's view, effective cross-examination and closing arguments may be insufficient to inform the jury of these risks.

Writing for the majority, Justice Todd explained that trial courts should have the discretion to permit an expert to "educate" the jury about the psychological factors that may impact eyewitness identifications. In so holding, the Court dismissed the commonwealth's argument that such testimony would invade the jury's role as fact-finder. The Court noted that experts would only be permitted to address general psychological principles, not the credibility of a particular witness or the accuracy of any particular identification. In the majority's view, such testimony would improve juror decision-making by opening jurors' eyes to the potential fallibility of human memory and perception in high-stress situations.

The majority's decision was based on Pennsylvania Rule of Evidence 702, which provides that "expert testimony must be beyond the knowledge possessed by a layperson and assist the trier of fact to understand the evidence or determine a fact in issue." As the majority noted, the "Comment to Rule 702 makes clear that this rule reflects our Commonwealth's adoption of the *Frye* standard which allies the 'general acceptance' test for admissibility."

In light of the "general acceptance" test, the majority took a fresh look at the developments of social science research in the field of eyewitness identification during the "20 years" since the Court first addressed the issue. Considering the advancement of social science and its broad accep-

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tance across the country, the majority accepted eyewitness misidentification as a potential cause of wrongful conviction. For the majority, it was no longer permissible to categorically shield juries from this potentially exculpatory information.

Chief Justice Castille and Justice Eakin issued dissenting opinions, with Chief Justice Castille also joining in Justice Eakin's dissent. Justice Castille criticized the majority for blindly following the trend in decisions of other states, without independently evaluating any psychological research. In refusing to "sign on to the Majority's enshrinement of this contested social research in these circumstances," Justice Castille expressed skepticism about the social science underlying eyewitness identification and questioned whether expert testimony on memory and perception would actually assist jurors. He went on to comment, "I understand the attraction of the lemmings to the sea approach, but I also try to keep in mind the cliff awaiting[.]" He also questioned whether the benefits of expert testimony, as opposed to the traditional approach of exploring flaws in eyewitness identification through effective cross-examination, "will justify the price-tag" of competing experts.

"The Phenomenon of False Confessions"

In *Commonwealth v. Alicia*, a four-justice majority took a more skeptical view of developing social science. The majority opinion was authored by Justice McCaffery, who was joined by Justice Baer. Justices Castille and Eakin issued concurring opinions, joining the majority opinion, except for a footnote discussing the *Walker* decision. Justices Saylor and Todd dissented.

In *Alicia*, a man with "low intelligence" and "mental-health issues" confessed to firing a gun that killed an innocent bystander. Of the eyewitnesses, only one pointed to the defendant — the others claimed it was one of two other men. Before trial, the defendant convinced the trial court that he should be permitted to offer an expert to explain psychological research regarding how false confessions may result from police interrogation.

The commonwealth took an interlocutory appeal from the trial court's decision, asserting that the proposed expert testimony invaded the jury's exclusive role as the arbiter of credibility. A divided panel of the Superior Court affirmed. In an opinion authored by Justice McCaffery, the Supreme Court reversed, holding that "[g]eneral expert testimony that certain interrogation techniques have the potential to induce false confessions improperly invites the jury to determine that those particular interrogation techniques were used to elicit the confession in question, and hence to conclude that it should not be considered reliable." Such issues, rather, are "best left to the jury's common sense and life experience[.]"

Unlike its decision in *Walker*, the Court offered no discussion of the scientific studies on false confessions or the prevailing position of social science on the issue. The Court also did not address whether the scientific findings on the issue of false confessions were generally accepted in the scientific community. Indeed, the Court noted that the "Commonwealth ... argued that [the expert's] methodology was not generally accepted in the relevant scientific community, and, therefore did not meet the admissibility requirements of *Frye*[.] ... However, we did not grant review of this issue and shall not address it further."

Professor David Harris of the University of Pittsburgh School of Law found "troubling" the Court's omission of any discussion of the underlying science, as the research on false confessions "is there. It's well done. It's reliable. And yet, it's not even mentioned in the *Alicia* opinion. [The Court] just ignore[s] it."[2] Instead, the *Alicia* Court simply determined that social science research on false confessions would not assist the jury. Unlike in *Walker*, the research findings were not beyond the reach of common sense, at least in its current state.

Justice McCaffery, however, did attempt to distinguish *Walker* in a footnote, reasoning that the social science at issue in *Walker* relates to the "accuracy" or "reliability" of evidence, not the honesty of a witnesses' testimony. Specifically, Justice McCaffery reasoned that a "victim or witness is often entirely and honestly convinced, and convincing to the fact-finder, that he or she has correctly identified the true perpetrator." This footnote, however, was only joined by Justice Baer. In separate concurring opinions, Justices Castille and Eakin noted that there was no need to distinguish their positions in *Walker*.

Justice Saylor issued a dissenting opinion, joined by Justice Todd, reasoning that the admissibility of social science evidence on the issue of false confession should be left to the discretion of the trial courts. Justice Saylor went on to comment that "After *Walker*, no longer will we intone that jurors' life experience and common sense will necessarily guide them to the truth when the essential inquiry encompasses understanding the complex subjects of perception and memory."

Scientific Testimony or Common Sense?

The primary distinction between the Court's treatment of social science in *Walker* and *Alicia* is the subject

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matter of the research. Although the Court has refused to endorse the body of psychological research behind false confessions, it has given defendants license to employ similar research to challenge eyewitness identifications. One possible reason for the different outcomes is that police interrogations and confessions are familiar territory for the Court, while psychological findings regarding "weapons focus" and "cross-racial identification" fall outside the Court's experience. Moreover, the admissibility and reliability of confessions are already the subject of *Miranda* and other constitutional protections that have long been a staple of criminal procedure.

Regardless of the Court's reasoning, however, it is clear that the Court will approach expert testimony in the social science area with caution. The Court clearly was reluctant to admit expert psychological or psychiatric testimony that would serve as a direct challenge to witness credibility, a matter viewed as "well within the range of common experience, knowledge, and understanding of a jury." The Court's *Walker* decision, however, may mark a significant shift in the role of social science in the courtroom.

As the *Walker* Court recognized, social science experts can educate the jury that its common sense may in fact be less than reliable in certain circumstances. Such expert assistance may improve decision-making in both civil and criminal cases. Although the research at issue in *Walker* has for the most part been applied in criminal cases, there will no doubt be situations where creative counsel will demonstrate that findings regarding limits on the reliability of eyewitness identification also apply on the civil side. For instance, high-stress eyewitness identifications may arise in civil assault-and-battery cases where, for example, a defendant is accused of using a weapon in a bar fight or during a road-rage incident. The same is true of civil cases that follow criminal prosecutions for violent crimes, such as robbery or murder, or even in dram shop cases posing the common question of whether the waiter at the establishment serving liquor actually observed the intoxicated patron.

Beyond this, *Walker* could also signal a broader acceptance of social science as a tool to correct potential juror misconceptions. The Court clearly recognized that sometimes juror common sense may benefit from a primer on well-established principles of psychology and human perception. In light of *Walker*, Pennsylvania courts may be more willing to allow experts to educate jurors about other areas of research that focus on the limits of human memory and perception in particular circumstances. This evidentiary trend may be analogized to the scientific research and clinical experience that has led to a broadening of the accepted diagnostic criteria for post-traumatic stress disorder or PTSD. So long as the social science or psychological research has progressed to the point where Rule 702 is satisfied, these recent cases suggest that even counterintuitive expert opinions may be admissible in civil cases to aid the jury in its fact-finding role.

1 PITTSBURGH POST-GAZETTE, Pennsylvania court rulings differ on expert witnesses (June 14, 2014) [hereinafter PITTSBURGH POST-GAZETTE], www.post-gazette.com/local/region/2014/06/15/Pennsylvania-court-rulings-differ-on-expert-witnesses/stories/201406150097.

2 *See* PITTSBURGH POST-GAZETTE.