No. 23-5091

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,

vs.

ELGA EUGENE HARPER, Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Oklahoma
Hon. Stephen J. Murphy, III, District Judge, Presiding
D.C. No. 4:22-cr-170-SJM

APPELLANT'S OPENING BRIEF
*** ORAL ARGUMENT REQUESTED ***

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None.

JURISDICTION

The district court had jurisdiction over this federal criminal case under 18 U.S.C. § 3231. It entered written judgement on July 27, 2023. R1:605.[1] The notice of appeal was timely filed on August 9, 2023. R1:613; Fed. R. App. P. 4(b)(1)(A)(i). This Court has jurisdiction over this direct criminal appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court err in admitting a hearsay "verification letter" from the Choctaw Nation to prove Mr. Harper's Indian status when both the document itself and the testimony about it from the custodian of records establish that the letter was not a business record?

2. Did the district court err in excluding the expert testimony of Dr. Geoffrey Loftus on the issue of trauma and memory?

3. Did the district court err in permitting the government's law enforcement forensic nurse to provide extensive and unnoticed expert testimony regarding the science of trauma and memory despite acknowledging that she lacked expertise in these topics?

[1] Citations to the paper record are to the volumes on appeal in the format R[volume]:[page]. Citations to the supplemental record on appeal are in the format RSupp[volume]:[page].

4. Should the conviction for kidnapping (Count 1) be reversed because the district court failed to properly instruct the jury that kidnapping required a seizure and detention beyond that which was inherent in the commission of the other charged offenses?

STATEMENT OF THE CASE

A. E.F. is assaulted in her home, resulting in a significant head injury.

On May 4, 2022, E.F., a 72-year-old Anglican nun, called 911 and reported that she had been attacked and sexually assaulted in her home by a man she identified as "Elga Harper." Tulsa PD responded and found E.F. horribly injured. R3:124. She had a significant head wound, and her eye was swollen shut. R3:138; R2:10. She also had severe bruising through her body, including on her hands, arms, face, and leg. R3:140. Her condition was so poor that the responding officer believed there was a good chance that she might not survive. R3:124.

An ambulance transported E.F. to the hospital. R3:136. When she arrived, the emergency room physician who first encountered E.F. also feared her injuries might be life-threatening. R3:232–33. E.F. was determined to have a fractured vertebra and multiple contusions on various parts of her body, as well as an "extensive" head wound.

R3:232–33. She would later tell the doctors that the head wound resulted from her being dropped on her head during the assault. R3:235.

Elga Haper, the man E.F. identified as her attacker, was a 40-year-old man who lived in Tulsa and supported himself by doing yard work and odd jobs around the area where E.F. lived. R3:613; R3:466. E.F. had met Mr. Harper in 2021 when he approached her and asked if she needed someone to cut her grass. R3:465–66. E.F. hired Mr. Harper to cut her grass, and over the next several months, he did additional odd jobs for her, including fixing locks, repairing a screen door, and replacing blinds in a couple of rooms. R3:466–67.

As a result of the 911 call identifying "Elga Harper" as E.F.'s attacker, police immediately set off looking for Mr. Harper. They spread out around the neighborhood with a picture of Mr. Harper, knocking doors, and asking if anyone had seen him. R3:130–31. Although Mr. Harper would ultimately be charged in federal court, Tulsa PD—rather than federal officers—conducted the search because there was ambiguity surrounding Mr. Harper's Indian status. Specifically, while there were indications in his records that he might be Native American,

Mr. Harper's DMV record identified him as "Black or African-American." R1:342.

Despite identifying "Elga Harper" as the man who attacked her, E.F. failed on multiple separate occasions to identify Mr. Harper from photographs shown to her by law enforcement. R3:386–87; R3:391–92. A forensic nurse collected DNA from E.F. in the hospital immediately following the attack, including from under her fingernails. R3:400; R3:570. The government did not find any evidence linking the DNA collected from E.F.'s person to Mr. Harper.

B. Mr. Harper is arrested, interviewed, and charged.

Mr. Harper was arrested six days after the attack. R2:25. He voluntarily consented to an interview with the police the same day. R1:123–222. During the interview, Mr. Harper admitted being at E.F.'s house on the day of the assault, but he denied assaulting her. He told the police that he had gone to E.F.'s house to charge his cell phone on her back porch, which she lets him do. R1:174. He said when he arrived, the place looked like it had been ransacked. R1:176–77. He went in the house and found E.F. covered in blood. R1:178. He told the police that when he found her like that, he panicked and ran out. R1:192.

Mr. Harper was ultimately indicted in federal court for one count of Indian County kidnapping in violation of 18 U.S.C. § 1201(a)(2), one count of aggravated sex abuse by force in Indian country in violation of 18 U.S.C. § 2241(a), one count of assault with a dangerous weapon in Indian country in violation if 18 U.S.C. § 113(a)(3), and one count of assault resulting in serious bodily injury in Indian country in violation of 18 U.S.C. § 113(a)(6). R1:33–36. Each count alleged that Mr. Harper was "an Indian" under 18 U.S.C. § 1153.

C. Mr. Harper's proposed expert testimony is excluded.

Mr. Harper never denied that E.F. was the victim of a brutal attack. R3:105. He also did not deny being at her house on the day of the crime. R3:105–06. He furthermore did not dispute that E.F. sincerely believes that he was the person who attacked her. R3:108. Mr. Harper's sole defense at trial was that by the time he arrived at her house, E.F. was already injured and that those injuries, combined with his presence at the scene immediately following the attack, must have caused her to misremember him as the person who assaulted her. R3:108.

To help explain how traumatic situations can lead to misidentification, Mr. Harper provided notice of intent to call Dr. Geoffrey Loftus as an expert witness. Dr. Loftus is a psychologist and an emeritus professor at the University of Washington with expertise in memory, attention, and perception. R1:377. Mr. Harper proffered that Dr. Loftus would testify that highly stressful events, such as assaults, followed by exposure to misinformation can cause the creation of false memories. R1:316–17. Dr. Loftus would also explain how memory loss combined with supplemental post-event information, such as the presence of the defendant at a crime scene, can cause an individual to incorrectly reconstruct her memory with no realization that she had done so. R1:231. Dr. Loftus's testimony was relevant to explain how, as a matter of science, E.F. could have come sincerely—but mistakenly—to believe that Mr. Harper was the person who assaulted her. R1:316–17.

The government filed a motion in limine to exclude Dr. Loftus's proposed testimony. R1:228–242. The government did not challenge Dr. Loftus's qualifications or expertise. R1:378. Instead, it argued that the proffered opinions were not a good fit with the facts of this case, that

they were not reliable under Federal Rule of Evidence 702, and that they would invade the province of the jury. R1:235–241.

The district court excluded Dr. Loftus's testimony by written order. R1:376–380. It held that "[m]emory and perception are within an average juror's common knowledge and experience" and that the circumstances present in this case were not among the "'narrow, limited circumstances" in which the Tenth Circuit has said expert testimony on identification is appropriately admitted. R1:378–79. These circumstances, it stated, were "cross-racial identification, identification after a long delay, identification after observation under stress, and such psychological phenomena as the feedback factor and unconscious transference." R1:379. The district court acknowledged that at least two of the factors—cross-racial identification and identification after observation under stress—were present in this case but said the absence of a third factor—long delay—rendered the proposed testimony inapposite. R1:379.

The district court also held that the fact that E.F. "repeatedly and immediately" identified Mr. Harper amounted to an "evidentiary

cornucopia," that rendered testimony on memory and perception "not helpful." R1:379.

D. At trial, the government attempts to establish Indian status through a letter dated less than three weeks before the start of trial.

Mr. Harper's trial began February 6, 2023. R1:9. The government first called Tabitha Oakes, manager of the Certificate Degree of Indian Blood ("CDIB") and membership department of the Choctaw Nation of Oklahoma. R3:110–11. Ms. Oakes testified that as part of her job responsibilities, she prepares and oversees certificates of enrollment for the tribe. R3:111. She also manages the staff that issues CDIB cards for the Bureau of Indian Affairs and keeps records of those cards. R3:111; R3:112. Those records, she explained, are held in the tribe's vault. R3:112. She testified that the membership and CDIB records stored in the vault are kept in the "normal and ordinary course of business." R3:112.

The government did not, however, introduce either the membership record or the CDIB at trial. Instead, and over Mr. Harper's hearsay objection, the government introduced a one-page "verification letter" from the tribe. RSupp1:2; R3:114. The letter, dated less than

three weeks before the start of trial, was addressed "To whom it may concern." RSupp1:2. It purported "to certify that Elga Eugene Harper . . . has a Certificate of Degree of Indian Blood . . . [and] is a Tribal Member of the Choctaw Nation of Oklahoma." RSupp1:2.

Attached to the letter was a document labeled, "certificate of authenticity pursuant to 28 U.S.C. § 1746." RSupp1:3. That document appeared to consist of a preprinted form with blanks into which someone had typed information. RSupp1:3. At the bottom of the form, three lines were provided for the signatory to identify the records being certified. RSupp1:3. In those lines, someone had typed Mr. Harper's name, phone number, and the number of the membership documents that were not present or introduced at trial. RSupp1:3.

Ms. Oakes testified that she had prepared the verification letter using the CDIB and tribal enrollment records held by the tribe. R3:113. The "verification letter" was the only evidence of Mr. Harper's Indian status the government introduced at trial.

E. Over Mr. Harper's objection, the district judge allows a SANE nurse to provide unnoticed scientific testimony about the nature of memory.

As the trial continued, the government offered largely uncontested testimony about the nature and extent of E.F.'s injuries, about her 911 call, and the police response to it. R3:118–22; R3:134–42; R3:228–32; R3:238–43. The government also played Mr. Harper's post-arrest interview in its entirety, including his statements about arriving at E.F.'s house and finding her already injured. R3:271–73. Mr. Harper, deprived of his expert on memory and perception, nevertheless cross-examined witnesses who had interacted with E.F. that day and in the days after about E.F.'s "extensive" head injury, the dire nature of her physical condition, and her obvious state of distress. R3:124–25; R3:232–33; R3:235; R3:248–49.

The government called Kathryn Bell, who at the time of E.F.'s attack was an employee of the Tulsa Police department, where she served as administrator of the forensic nursing program. R3:393. Ms. Bell was not noticed as an expert witness on Sexual Assault Nurse Examinations and as a fact witness regarding the SANE exam that was performed on E.F. Her expert notice contained no mention of any

training or expertise in memory, psychology, or perception, nor of any intent to testify on these topics.

Ms. Bell testified about the DNA samples taken from E.F. in the hospital immediately after the assault as part of the exam. R3:400–12. She also testified about an interview she did with E.F. in the hospital approximately two weeks after the assault and photographs that were taken that day. R3:403–04. On cross-examination, defense counsel elicited testimony that E.F. had difficulty staying on topic while being questioned about the assault. R3:413–14. Ms. Bell also acknowledged that assault was a traumatic event, and that traumatic events can affect people's lives, including their memories. R3:413–14.

On redirect, and over repeated objection, the district court permitted Ms. Bell to testify at length about the science of memory. R3:415–20. Ms. Bell testified, "the type of memory that we see most often with trauma is going to be memory that is—is kind of coded or developed at a point in the brain called the amygdala and that's the part of the brain that is the fight and flight part of the brain. And so things like fear and emotional type of things can help you code that type of memory." R3:417. Defense counsel objected again that Ms. Bell was

not an expert on memory and that her testimony had not been sufficient to establish her as one. R3:418.

The district court responded to the objection with, "I tend to agree with that," but nevertheless followed up with a question of its own, asking "Is there anything in your description of memory that you just discussed that's relevant to the question of how [E.F.] remembered things closer to the event than she did perhaps when you interviewed her on the 17th of May?" R3:418. Ms. Bell began to respond, "I believe that would be the area of the memory that's coded by the amygdala and the memory that decoded many—" before she was cut off by another objection that she lacked "the expertise to make this testimony." R3:418–19.

Despite having previously acknowledged that Ms. Bell was not an expert, the district court appeared to reverse course. Sua sponte, it instructed the jury that "these are opinions of a witness who does have some expertise[,] study[,] background[,] and experience in these issues." R3:419. The district court then allowed Ms. Bell to finish her answer. R3:419. Ms. Bell asserted that "when all of those chemicals are released . . . with that fight and flight . . . you see things better." R3:419.

F. Mr. Harper is convicted on all counts after district judge declines to give defendant's proposed jury instruction on kidnapping.

After the close of testimony, the parties convened outside the presence of the jury to discuss jury instructions. R3:648–52. Before trial, Mr. Harper had proposed additional language to the 10th Circuit pattern jury instruction on kidnapping. R1:404. The additional language would have specified that, "[t]o qualify as a 'kidnapping,' there must be more than a transitory holding and more than a detention that occurs during and is inherent in the commission of a separate offense. To qualify as a 'kidnapping,' a detention accompanying another crime must create a significant danger to the victim independent of that posed by the separate offense." R1:404.

In support of this additional language, Mr. Harper cited Third and Ninth Circuit cases adopting a four-factor test similar to the proposed language and an unpublished decision of this Court finding "much . . . to commend" in the Third Circuit's test. R1:405. The district court, however, declined to give defendant's proposed instruction. R3:624–25; R1:572. Ultimately, the jury was told only that "[t]o kidnap a person means to unlawfully hold, keep, detain, or confine the person against

that person's will. Involuntariness or coercion in connection with the victim's detention is an essential part of the offense." R1:572.

The jury convicted Mr. Harper on all counts. R3:708–09. He was sentenced to life in prison for kidnapping and aggravated sexual abuse and 10 years for the two assault counts, with all sentences to run concurrently. R1:605–06.

This appeal follows.

SUMMARY OF ARGUMENT

Mr. Harper was convicted at trial of four separate offenses, each of which has as an element that Mr. Harper was an "Indian person." But the only evidence introduced at trial of Mr. Harper's Indian status was a letter from the tribe dated less than three weeks before trial began describing certain records in the tribe's possession that showed Mr. Harper was a member by blood of the Choctaw Nation of Oklahoma. The records referred to in the letter were never presented at trial. The letter was hearsay, and its admission over Mr. Harper's objection requires reversal of all counts.

Separately, the district court used an incorrect legal standard to exclude Mr. Harper's lone proposed witness, Dr. Geoffrey Loftus, who

would have provided expert testimony regarding how trauma and the presence of misinformation can combine to result in false eyewitness identifications. The exclusion of Dr. Loftus under an incorrect legal standard was error.

The district court compounded the error in excluding Dr. Loftus's testimony by allowing an unqualified law enforcement witness to give unnoticed expert opinions diametrically opposed to the opinions that Dr. Loftus would have expressed had he not been excluded. Specifically, and over repeated objection, the district court allowed a law enforcement forensic nurse to tell the jury that individuals undergoing trauma "see things better." The district court further compounded the error by informing the jury that the law enforcement witness was an expert on the topic even though it had previously agreed that she was not. This error, combined with the error in excluding Dr. Loftus's testimony, affected Mr. Harper's substantial rights.

Lastly, the conviction for kidnapping must be overturned because the jury was not properly instructed regarding the relevant legal standard. Specifically, it was not instructed that to find Mr. Harper guilty of kidnapping, it must find that some holding took place above

and beyond that which was inherent in the commission of the other offenses with which Mr. Harper was charged.

For these reasons, Mr. Harper's convictions should be vacated, and the case should be remanded for a new trial.

ARGUMENT

I. The district court abused its discretion in admitting the "verification letter" as evidence of Indian status.

The district court abused its discretion in admitting a "verification letter" from the Choctaw Nation of Oklahoma identifying Mr. Harper as an enrolled member of the tribe, RSupp1:2, because the letter was inadmissible hearsay. Because the letter was the only evidence of Mr. Harper's Indian status introduced at trial, the government cannot prove that the error was harmless. Mr. Harper's convictions on all counts should be reversed.

A. Standard of review.

This Court "review[s] evidentiary rulings for abuse of discretion." *United States v. Hernandez*, 333. F.3d 1168 (10th Cir. 2003).

B. The "verification letter" was inadmissible hearsay.

The letter was an out-of-court statement "offer[ed] in evidence to prove the truth of the matter asserted in the statement," *i.e.*, that

Mr. Harper was "Indian." Fed. R. Evid. 801(c). It was, therefore, hearsay. The letter was moreover not subject to any recognized exception that would have rendered it admissible.

In seeking admission of the document, the government appeared to rely on Federal Rule of Evidence 803(6), which provides an exception to the hearsay rules for business records if the records are "kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . record." Fed. R. Evid. 803(6). "To satisfy the business record exception, the proposed document must (1) have been prepared in the normal course of business; (2) have been made at or near the time of the events recorded; (3) be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) indicate the sources, methods and circumstances by which the record was made trustworthy." *United States v. Rogers*, 556 F.3d 1130, 1136 (10th Cir. 2009) (citing *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008) (internal quotation marks omitted). "The proponent of the document must . . . lay this foundation for its admission." *Ary*, 518 F.3d at 786.

The letter itself makes clear that the business records exception does not apply. It is dated less than three weeks before trial and addressed to "To Whom It May Concern." RSupp1:2. It was not made "at or near the time of the events recorded." *Rogers*, 556 F.3d at 1136. In fact, it was prepared decades after the records described in the letter—a Certificate Degree of Indian Blood issued in 2002 and an enrollment record issued in 2011. RSupp1:2. The letter is signed by "Terry Stephens," who the letter identifies as the "director, CDIB/Membership," but it contains no information suggesting or asserting that Mr. Stephens has personal knowledge of or a business duty to transmit any information. RSupp1:2. In fact, other than his name in the signature block it does not mention Mr. Stephens at all. It furthermore gives no indication who recorded the information described in the letter, much less whether that person had "personal knowledge" or "a business duty to transmit the information." *Rogers*, 556 F.3d at 1136.

Nor did the testimony of Tabitha Oakes, custodian of records for the Choctaw Nation, establish that the "verification letter" was a business record of the Choctaw Nation. R3:110–15. Indeed, her

testimony confirmed that it was not. Ms. Oakes never asserted that the "verification letter" was itself kept in the ordinary course of business. Instead, she testified that that the "enrollment records for the Choctaw Nation of Oklahoma," are "kept in the ordinary course of business." R3:112. She then confirmed that she "prepare[d] the letter . . . using the information and resources [she had] described." R3:113. Those "information and resources" included "CDIB records [that] are . . . held in [the tribe's] vault" and an application for membership that includes a "birth certificate, social security card, and sometimes an ID." R3:111, R3:112. These other records were never produced at trial.

The date on the verification letter further establishes that it was not "prepared in the ordinary course of business." *Rogers*, 556 F.3d at 1136. "It is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business." *Echo Acceptance Corp. v. Household Retail Services, Inc.*, 267 F.3d 1068, 1091 (10th Cir. 2001) (quoting *Timberlake Const. Co. v. U.S. Fidelity & Guar. Co.,* 71 F.3d 335, 342 (10th Cir. 1995)). The letter was dated more than seven months after Mr. Harper was indicted and 19 days before trial began. RSupp1:2. It states that it was produced for purposes of

"certify[ing]" that Mr. Harper was a member, apparently for use in his criminal prosecution. This alone is sufficient to support a finding that the document was not "prepared in the ordinary course of business." *Rogers*, 556 F.3d at 1136.

Moreover, while the letter is accompanied by a document titled "Certificate of Authenticity Pursuant to 28 U.S.C. § 1746," which asserts, "This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902(11)," that certificate, too, makes clear that the "verification letter" is itself not a business record. RSupp1:3. The Certificate of Authenticity appears to have been prepared from a template with blanks available for the declarant to customize. Among the pre-printed information is a line asserting, "The records attached to this certificate were made at or near the time of the occurrence of the matters set forth." RSupp1:3. But this assertion is self-evidently incorrect because, as noted above, the "matters set forth" in the letter occurred decades before the "verification letter" was created.

In addition, when prompted by the last blank space on the form to identify the records being "certified," the Certificate of Authenticity

does not identify the "verification letter" attached to the certification. Instead, it provides Mr. Harper's name, a phone number of unclear relevance, and a separate membership document number CN115405 that is described in—but not attached to—the verification letter. RSupp1:3.

In sum, what the letter appears to be is not a business record itself but rather a hearsay description of the contents of other records—namely a CDIB and enrollment record—that were neither present nor introduced into evidence at trial.

The policy rationale underpinning the business records exception also weighs against a finding that the "verification letter" is a business record. This Court has explained that the rationale behind the exception is that business records "have a high degree of reliability because businesses have incentives to keep accurate records." *United States v. Gwathney*, 465 F.3d 1133, 1140 (10th Cir. 2006). "The business records exception is based on a presumption of accuracy, accorded because the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because of the accuracy demanded in the conduct of the

nation's business." *Timberlake Const. Co.*, 71 F.3d at 341 (citing *United States v. Snyder*, 787 F.2d 1429, 1433–34 (10th Cir. 1986)). "If any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails." *Id.* (citing *United States v. McIntyre*, 997 F.2d 687, 699 (10th Cir. 1993)).

Business records are exceptions to the hearsay rules because it is in the self-interest of business organizations to keep accurate records. A business that does not maintain accurate records of its business activities will quickly fail. Such records are therefore afforded a "presumption of accuracy" that does not otherwise attach to out-of-court statements. *Id.*

But the "verification letter" was not created for use by the business in conducting its own business affairs such that self-interest can reasonably be trusted to motivate accuracy. Instead, it is directed solely at external parties. It is addressed "To Whom It May Concern" and invites the recipient to "contact this office at the number listed above" "if you have any questions." RSupp1:2. There is no identifiable business interest at stake in production of a "verification letter" that is created not for use by the business itself but instead for use by a third

party (here, the United States) in a criminal prosecution of a different third party.

For these reasons, the "verification letter" is hearsay not subject to any exception. Its admission over Mr. Harper's hearsay objection was an abuse of discretion.

C. The government cannot prove that the error in admitting the verification letter was harmless.

"In conducting a harmless error review, [this Court] review[s] the record *de novo*." *United States v. Flanagan*, 34 F.3d 949, 955 (10th Cir. 1994). Where, as here, the erroneous admission of hearsay testimony is a nonconstitutional error, the "inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error," but rather "whether the jury's verdict was 'substantially swayed by the error'." *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). "[T]he government bears the burden of demonstrating, by a preponderance of the evidence, that the substantial rights of the defendant were not affected." *United States v. Glover*, 413 F.3d 1206, 1210 (10th Cir. 2005).

Here, there can be no doubt that the jury was "substantially swayed" by the error in admitting the verification letter. *Tome*, 61 F.3d at 1455. Each count of conviction charged a violation of the Major Crimes Act, 18 U.S.C. § 1153, which governs offenses committed in Indian Country by an "Indian . . . against the person or property of another Indian or other person." 18 U.S.C. § 1153(a); R1:33–36. With respect to related statute 18 U.S.C. § 1152 (governing crimes committed in Indian country in which the defendant and victim have differing Indian statuses), this Court has held that the requisite Indian status is an "essential element[ ] of the offense." *United States v. Prentiss*, 273 F.3d 1277, 1278 (10th Cir. 2001); *see also United States v. Bruce*, 394 F.3d 1215, 1229 (9th Cir. 2005) (en banc) ("[T]he defendant's Indian status is an essential element of a § 1153 offense which the government must allege in the indictment and prove beyond a reasonable doubt.") (internal citations omitted).

Indian status is not a mere "technicality." *United States v. Langford*, 641 F.3d 1195, 1200 (10th Cir. 2011). "To find that a person is an Indian the jury must . . . make factual findings that the person has some Indian blood and . . . that the person is recognized as an Indian by

the tribe or by the federal government." *United States v. Walker*, 85 F.4th 973, 982 (10th Cir. 2023) (alternation and quotation marks omitted). The government must prove—and the jury has an "obligation to determine"—the Indian status of the relevant parties. *Prentiss*, 273 F.3d at 1279, 1283 & n.6.

Here, the jury was instructed that it could convict Mr. Harper only if it determined that he was "an Indian person." R1:572, 573, 574, 575. It was then instructed regarding the requirements for determining whether he was "Indian." Specifically, the jury was told that to determine that Mr. Harper was Indian, it must find "(a) the defendant has some Indian blood; and (b) the defendant was, at the time of the offense, recognized as an Indian by a federally recognized tribe or by the federal government." R1:576.

But absent the improperly admitted "verification letter," the jury had no evidence at all that Mr. Harper had any Indian blood or that he was recognized as an Indian by the Choctaw Nation of Oklahoma or any other federally recognized tribe, much less proof beyond a reasonable doubt. The government conceded as much in closing: "[F]or each of the crimes you're going to be asked to decide whether the defendant is

Indian . . . Essentially, is he recognized by a tribe with some—and does he have some Indian blood. Yes. Government's Exhibit 1. You saw his enrollment, you heard from Tabitha Oakes, he has a certificate of degree of Indian blood and he is an enrolled member of the Choctaw Nation." R3:655.

The district court also understood that the government was relying solely on the letter to establish Indian status. In resolving a dispute over the Indian status jury instruction, the district court stated that disputed language was "not a big issue in my view because we have proof in from our first witness [Tabitha Oakes, the custodian of records for the Choctaw Nation] that this young man, Mr. Harper, was—was indeed—his status was as Indian."[2] R3:631.

Because the jury lacked any evidence at all that Mr. Harper had some quantum of Indian blood or was an enrolled member of a tribe apart from the improperly admitted letter, there can be no doubt that the verdict was "substantially swayed" by the error. *Tome*, 61 F.3d at 1455. Mr. Harper's conviction on each count must therefore be reversed.

[2] The district court resolved the dispute in Mr. Harper's favor, and Mr. Harper is not raising any issues with respect to the definition of "Indian status" used in the jury instructions.

II. The district court erred in excluding Mr. Harper's expert witness.

Mr. Harper's sole defense was that the trauma E.F. suffered on the day of her assault, combined with his presence at her house immediately following the assault, led E.F. to falsely remember him as the person who attacked her. The district court, however, excluded Mr. Harper's expert witness who would have explained to the jury how false memories can and do occur in situations of trauma. It did so using an incorrect legal standard. The exclusion was error, and Mr. Harper's conviction should be reversed.

A. Standard of review.

This Court "review[s] de novo the question of whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance." *Frederick v. Swift Transp. Co.*, 616 F.3d 1074, 1082 (10th Cir. 2010). It "then review[s] the trial court's actual application of the standard in deciding whether to admit or exclude and expert's testimony for abuse of discretion." *Id.*

B. The district court used an incorrect legal standard in excluding Mr. Harper's expert witness.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400,

408 (1988). Yet, this is precisely what the district court denied to Mr. Harper in precluding his expert witness from testifying that a "highly stressful event, such as a physical or sexual assault, followed by exposure to possible misinformation . . . can cause the formation of a false memory." R1:316–17. It did so, moreover, based on an incorrect legal standard borne out of a misreading of this Court's decision in *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006).

In *Rodriguez-Felix*, this Court discussed the admissibility of expert testimony on the then-emerging science of eyewitness identification. *Id.* at 1122–27. *Rodriguez-Felix* provided general guidance to district courts confronting this new field of testimony about when such testimony is likely to assist the trier of fact. *Id.* at 1123–24.

The district court correctly cited *Rodriguez-Felix* for the proposition that testimony regarding mistaken identification is helpful only in "limited circumstances." *Id.* at 1124. And it correctly identified the circumstances in which this Court suggested that such testimony might be appropriate, namely in cases with "problems such as cross-racial identification, identification after a long delay, identification after

observation under stress, and such psychological phenomenon as the feedback factor and unconscious transference." *Id.*

However, the district court appeared to misread this Court as saying that testimony regarding mistaken identification was only admissible where *all* these circumstances are present, rather than in circumstances where any one of them is present. The district court stated, "[w]hile Defendant does describe a situation implicating cross-racial identification and identification after observation under stress, the identifications in this case were not made after a long delay." R1:379. It went on to explain that because E.F. identified Mr. Harper "immediately and repeatedly," this case fell outside the circumstances in which this Court permits such testimony to be introduced.

This misreads *Rodriguez-Felix*. The list of "limited circumstances" identified in *Rodriguez-Felix* where mistaken identification testimony may be admitted is introduced with the phrase "such problems as," which clearly communicates that the list is a non-exhaustive list of exemplars rather than a multifactor test in which each element is obligatory. *Id.* By treating each exemplar as mandatory, the district court applied an incorrect legal standard to its consideration of whether

Dr. Loftus's testimony was admissible in this case. Using this incorrect legal standard, it then arrived at the incorrect conclusion that this Court's precedent barred the proposed testimony in cases such as this one.

The district court additionally erred by reading *Rodrigez-Felix* as holding that "expert testimony on memory and perception is not helpful" where an "'evidentiary cornucopia' of identification" exists. The district court held, "This situation is more akin to an 'evidentiary cornucopia' of identification where expert testimony on memory and perception is not helpful." R1:379. But *Rodrigez-Felix* uses the term "evidentiary cornucopia" only in explanation of why any error in excluding the proposed expert testimony on eyewitness error would have been harmless under the facts of that case. *Id.* ("In short, because each eyewitness's identification of Rodriguez-Felix was corroborated by an 'evidentiary cornucopia,' any error would have been harmless.")

"Harmless error," is a legal doctrine by which a courts of appeals disregard "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. It is not a mechanism for trial courts, tasked with deciding evidentiary issues in the first instance, to limit the

ability of a criminal defendant to introduce evidence based on the district court's belief that the evidence against the defendant is abundant. In relying on the "evidentiary cornucopia" language in *Rodriguez-Felix* as a basis for excluding Dr. Loftus's testimony, the district court again applied an incorrect legal standard. Using this incorrect legal standard was error.

C. The government cannot prove that the error was harmless.

The government cannot show that the exclusion of Dr. Loftus did not affect Mr. Harper's substantial rights. *Glover*, 413 F.3d at 1210. The only issue before the jury was whether E.F.'s sincere belief that Mr. Harper had attacked her was correct. R3:108. Without Dr. Loftus, Mr. Harper lacked an effective mechanism for explaining to the jury how, as a matter of science, "certain factors, falling outside a typical juror's experience, may affect an eyewitness's identification." *Rodriguez-Felix*, 450 F.3d at 1125.

Stripped of his expert, Mr. Harper was limited to arguing broadly that trauma and head injuries can affect a person's memory. R3:668. While undoubtedly true, this argument by counsel lacked the persuasive force of an expert who could have explained to the jury

how—contrary to many people's intuition—eyewitness mistakes can and do happen.

The government seized on this gap in Mr. Harper's evidence in its rebuttal closing, asking "She forgot the man that attacked her and replaced her attacker with a whole different person from a four-hour attack? Replaced the whole four hours, supplanted Mr. Harper instead. How does that make sense?" R3:685. The answer to that question lay in the excluded testimony of Dr. Loftus, which is why the exclusion of the testimony was not harmless.

III. The district court erred in permitting the government's law enforcement nurse to provide unnoticed and unqualified expert opinions regarding the nature of memory.

The district court further erred in allowing a law enforcement witness to give unnoticed expert opinions that directly contradicted the testimony Dr. Loftus would have given had he not been excluded. Over repeated objections, the law enforcement witness was allowed to give unnoticed and unqualified testimony that hormones released during traumatic events allow people to "see things better." R3:419. Permitting this testimony was error.

A. Standard of review.

This Court "review[s] de novo whether the district court properly performed its role as 'gatekeeper' in admitting or excluding expert testimony." *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2005). A district court's decision to admit expert or lay testimony is reviewed for abuse of discretion. *United States v. Brooks*, 736 F.3d 921, 929 (10th Cir. 2013). Failing to perform the "gatekeeper function" constitutes an abuse of discretion. *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) (the district court has "no discretion to avoid performing the gatekeeper function").

B. The district court erred in permitting the testimony.

The district court compounded its error in excluding the testimony of Mr. Harper's expert by improperly allowing a law enforcement witness to provide unnoticed expert testimony that expressly contradicted the testimony that Dr. Loftus would have provided. The government called Tulsa police department forensic nurse Kathryn Bell as an expert on SANE exams and as a fact witness on certain of the evidence that was gathered in this case. She was not noticed as an expert on memory, psychology, brain chemistry, or perception. Yet, over repeated objection, she was permitted to testify at length about the

nature of memory and how memories were formed in various parts of the brain. R3:415–20. She was also permitted to offer the unnoticed and unqualified scientific opinion that people undergoing trauma "see things better." R3:419.

The law clearly distinguishes between opinion testimony based on a law enforcement officer's investigation of the case and opinion testimony based on prior training or professional experience. The former is admissible under Federal Rule of Evidence 701, as lay opinion testimony. But the latter is admissible, if at all, only as expert opinion testimony. And it is admissible only if all the requirements of Federal Rule of Evidence 702 and Federal Rule of Criminal Procedure 16(a)(1)(G) are followed.

Here, the government never met the requirements of Rule 16(a)(1)(G) or Rule 702 with respect to Ms. Bell's testimony about memory. And the district judge expressly agreed that Ms. Bell was *not* an expert on the topic. R3:418. Yet, the court permitted the government to elicit extensive testimony from Ms. Bell about the scientific basis for and brain chemistry behind the formation of memory based on what she

claimed she had learned by attending conferences and trainings at which the topic was discussed. R3:416–19.

This Court has noted that expert testimony admissible under Rule 702 is "by definition outside of Rule 701." *James River Ins. Co. v. Rapid Funding LLC*, 658 F.3d 1207, 1215 (10th Cir. 2011) (internal quotation marks omitted. Thus, opinion testimony can be lay opinion testimony, or it can be expert opinion testimony, but it cannot be both.

And it is not simply a matter of properly classifying the evidence. Rather, Federal Rule of Criminal Procedure 16(a)(1)(G) and Federal Rule of Evidence 702 require significant work on the part of the party offering expert testimony and by the court before such testimony is admissible. These requirements include disclosure of the witnesses, their qualifications, and a "written summary of any testimony that the government intends to use." Fed. R. Crim. P. 16(a)(1)(G). And they include a determination by the court that the specialized knowledge will help the jury; that the testimony is based on sufficient facts or data; and that the expert has reliably applied reliable principle and methods to the facts of the case. Fed. R. Evid. 702. None of the Rule 16(a)(1)(G) or Rule 702 requirements was met in this case.

Having failed to comply with the prerequisites for admission of expert testimony on the topic of memory, the government purported to justify its decision to elicit such testimony by arguing that the defense had opened the door by asking Ms. Bell questions about memory on cross-examination. R3:415. But this argument fails for at least two independent reasons. First, the lone question about memory posed by defense—"[Traumatic events] can have an effect on [someone's] memory?"—was simply the sort of general inquiry that the district court had already ruled was "within an average juror's common knowledge and experience" when it excluded Mr. Harper's expert. R1:378–79. In other words, it was proper lay opinion testimony. *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) ("[A] person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person.")

Second, to the extent the government believed that defense counsel's question to Ms. Bell was a solicitation of improper expert opinion, its remedy was to object. *See United States v. Cristerna-Gonzalez*, 962 F.3d 1253, 1260 (10th Cir. 2020) ("[W]e question whether

there is any error in admitting expert-opinion testimony without a judicial ruling on the witness's qualification when no objection has been raised to the testimony."). Unlike Mr. Harper, who objected repeatedly to Ms. Bell's unqualified and detailed scientific opinions, R3:415, R3:418, R3:419, the government sat silent when Mr. Harper asked Ms. Bell whether trauma can affect memory.

Ms. Bell's opinions themselves were plainly inadmissible as lay testimony under this Court's case law. "Rule 701 does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *James River*, 658 F.3d at 1214 (internal quotation marks omitted). That is exactly what Ms. Bell did here.

She testified that there are "basically four different kinds of [ways memories are formed]." R3:417. She elaborated that "the type of memory that we see most often with trauma is going to be memory that is—is kind of coded or developed at a point in the brain called the amygdala and that's the part of the brain that is the fight and flight part of the brain." R3:417. She continued, "things like fear and

emotional type of things can help you code that kind of memory." R3:417.

She further opined that "the hippocampus . . . codes the—maybe the sequence, or maybe not necessarily sequence of events, but the events that happen, the whos, the whats, kind of the whens part of that." R3:417–18. When defense counsel interrupted to object yet again to the unqualified expert testimony, the district court agreed that Ms. Bell was not an expert. Nevertheless, it followed up by asking, "Is there anything in your description of memory that you just discussed that's relevant to the question of how [E.F.] remembered things closer to the event than she did perhaps when you interviewed her on the 17th of May?" R3:418.

In response to the district court's query, Ms. Bell continued by offering even more unqualified expert testimony: "I believe that would be the area of the memory that's coded by the amygdala and the memory that decoded many—". R3:418–19. Defense counsel objected again. R3:419. In responding to the objection, the district court not only failed to prevent the testimony but compounded its error by instructing the jury that "[Ms. Bell's opinions] are opinions of a witness who does

have some expertise[,] study[,] background[,] and experience in these issues." R3:419. In other words, the district court told the jury that Ms. Bell was an "expert" even though she was not.

The district court then allowed Ms. Bell to finish her answer, which she did by opining that "when all of those chemicals are released, then that is—with that fight and flight that's where your—you know, you see things better." R3:419.

This Court has held that a district court abuses its discretion when it "[does] not perform its gatekeeper function" and "[does] not make adequate findings on the record to assure that the expert testimony offered was both relevant and reliable, and that the particular opinions were based on valid reasoning and reliable methodology." *Dodge*, 328 F.3d at 1225; *see also United States v. Velarde*, 214 F.3d 1204, 1211 (10th Cir. 2000) (A district court abuses its discretion by admitting expert testimony without a reliability determination.)

Here, the district court failed to exercise any gatekeeping functions whatsoever by permitting Ms. Bell to testify that "the

chemicals released" in the "amygdala" help a person "see things better." The district court therefore abused its discretion.

C. The government cannot show that the error was harmless.

The error in admitting the objected-to testimony was not harmless, particularly in light of the court's decision to exclude the expert testimony of Dr. Loftus, which would have directly contradicted the improperly admitted testimony. As noted above, Section III.C., *supra*, the only issue before the jury was whether E.F.'s memory of Mr. Harper as her attacker was mistaken.

In excluding Dr. Loftus, the district court ruled that the topic of memory was "within [the] average juror's common knowledge and experience" such that Dr. Loftus's testimony would not be helpful in deciding the case. R1:378. This ruling—that jurors did not need further information about how stress can affect memory—was severely undercut by the court's decision to allow the government's law enforcement witness to offer unqualified expert testimony that stress *helps* rather than *impedes* identification. It was further undercut by the court's instructing the jury that Ms. Bell was an "expert" in these issues although she clearly was not. The Supreme Court has long recognized

that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty [jurors have] in evaluating it." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 595 (1993).

The accuracy of E.F.'s memory was the only issue the jury was asked to decide. Ms. Bell's unqualified opinion testimony went directly to this lone contested issue, stamped by the district court with the false imprimatur of "expertise." The testimony, moreover, came after Mr. Harper's undisputedly qualified expert was barred from providing contrary opinion testimony on the same issue. Under these circumstances, the government cannot show that the admission of the expert testimony did not affect Mr. Harper's substantial rights. *Glover*, 413 F.3d at 1210.

IV. The kidnapping jury instructions were erroneous.

This Court must reverse Mr. Harper's conviction under 18 U.S.C. § 1201(a)(2) because the jury was not properly instructed regarding the relevant legal standard for kidnapping.

A. Standard of review.

This Court "reviews the jury instructions de novo in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant

legal standards and factual issues in the case." *United States v. Jean-Pierre*, 1 F.4th 836, 846 (10th Cir. 2021).

B. The kidnapping instruction did not accurately state the governing law or provide the jury with an accurate understanding of the relevant legal standards and factual issues.

Kidnapping under 18 U.S.C. § 1201(a)(2) provides: "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away for ransom or reward or otherwise any person . . . within the special maritime and territorial jurisdiction of the United States shall be punished by imprisonment for any term of years or for life." 18 U.S.C. § 1201(a)(2).

The Supreme Court long ago cautioned that "the broadness of the statutory language [defining kidnapping] does not permit [a court] to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking . . . the very essence of the crime of kidnapping." *Chatwin v. United States*, 326 U.S. 455, 464 (1946). The Court explained that "the [kidnapping] statute was drawn in 1932 against a background of organized violence" in which kidnapping "had become an epidemic in the United States." *Id.* at 462. "Victims were selected from among the wealthy with great care and

study . . . . The procedure was simple—a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority" in the receiving state(s). *Id.* at 463. For this reason, a federal statute was deemed necessary to address the then-emerging public safety epidemic. *Id.*

The Court expressly recognized that proper interpretation of the statute requires an understanding of this "background and setting of the Act" to avoid a situations in which the otherwise broad language of the statute caused "the boundaries of potential liability [to] be lost in infinity." *Id.* at 464.

Consistent with this admonition from the Supreme Court, a majority of courts of appeals to have considered the question have adopted a four-factor test designed to distinguish "true" kidnappings from cases in which an alleged seizure and holding was merely incidental to or inherent in the commission of a separately charged crime. *Government of the Virgin Islands v. Berry*, 604 F.2d 221, 227 (3d Cir. 1979); *United States v. Jackson*, 24 F.4th 1308, 1314 (9th Cir. 2022); *United States v. Howard*, 918 F.2d 1529, 1535–37 (11th Cir.

1990); *see also United States v. Corralez*, 61 M.J. 737, 748–49 (A.F. Ct. Crim. App. 2005) (noting that failing to impose such limitations "reflects precisely the 'careless concept of the crime' of kidnapping that has long been condemned as a misuse of the offense") (quoting *Chatwin*, 326 U.S. at 464).

> The four factors, known as the "*Berry* factors," are:
>
> (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

Berry, 604 F.2d at 227. When the Ninth Circuit adopted the *Berry* test, it explained that the *Berry* factors "give meaning to the phrase 'and holds' beyond the conduct already denoted by 'seizes' and 'confines,' . . . prevent kidnapping from broadening into a secondary charge whenever there is a detention accompanying another crime[,] [and] provide[ ] a workable framework to ensure that the 'boundaries of potential liability' do not become 'lost in infinity.'" *Jackson*, 24 F.4th at 1313 (quoting *Chatwin*, 326 U.S. at 464) (internal citations and quotations omitted).

This Court, while stopping short of formally adopting the *Berry* test, has nevertheless found "much in the *Berry* test to commend its use in a § 1201(a)(2) situation." *United States v. Gabaldon*, 389 F.3d 1090, 1097 (10th Cir. 2004). In *United States v. Gabaldon*, this Court considered the case of a defendant convicted of second-degree murder and kidnapping resulting in death. *Id.* at 1094. The defendant in that case was alleged to have beaten a 16-year-old girl unconscious inside a moving car. *Id.* at 1093. Eventually, the unconscious girl was removed from and then placed back into the car and before being driven to a remote spot on the Navajo Indian Reservation. *Id.* The apparent goal of this second transportation was to avoid having her body found. *Id.* En route to the more secluded spot, a second individual killed the girl at the behest of and with the assistance of the defendant. *Id.*

On appeal, the defendant argued that the evidence at trial was insufficient to prove kidnapping because it did not show the confinement was anything more than a merely incidental part of the murder. *Id.* at 1096. This Court discussed the *Berry* factors and ultimately determined there was "much in the *Berry* test to commend its use" but declined to decide whether to formally adopt it. *Id.* at 1097.

It held it was not necessary to decide the issue because the evidence in the case—namely, the fact that the defendant drove the victim around to avoid prosecution for assault—"clearly established kidnapping as a separate crime even if we were to adopt the *Berry* test." *Id.*

In this case, unlike in *Gabaldon*, there was no uncontested seizure of the victim separate and apart from the underlying criminal offenses. There was no asportation. In line with *Chatwin* and *Berry*, Mr. Harper requested a jury instruction that would have informed the jury:

> "To qualify as a 'kidnapping,' there must be more than a transitory holding and more than a detention that occurs during and is inherent in the commission of a separate offense. To qualify as a 'kidnapping,' a detention accompanying another crime must create a significant danger to the victim independent of that posed by the separate offense."

R1:404. The addition of this language, which closely mirrors the *Berry* test, would have ensured that the jury did not convict Mr. Harper of assault merely by virtue of the detention and seizure that was inherent in the assault and aggravated sex abuse with which he was separately charged. In other words, it would have ensured that the jury convicted Mr. Harper of a "true kidnapping" as opposed to convicting him of

general "immoral[ity] . . . lacking . . . the very essence of the crime of kidnapping." *Chatwin*, 326 U.S. at 464.

The district court declined to give Mr. Harper's instruction. R3:624–25. Instead, the jury was told only that "[t]o kidnap a person means to unlawfully hold, keep, detain, and confine the person against that person's will" and that "[i]nvoluntariness or coercion in connection with the victim's detention is an essential part of the offense." R1:572. The use of this broader definition permitted the jury to convict Mr. Harper solely on the basis of his conviction for the three other offenses in which some degree of "unlawful holding" "against [a] person's will" was necessarily inherent in the offense.

By not making clear that that the jury must find some unlawful holding above and beyond that which was inherent in the other offenses with which Mr. Harper was charged, the instruction failed to "accurately state the governing law" and failed to "provide the jury with an accurate understanding of the relevant legal standards and factual issues." *Jean-Pierre*, 1 F.4th at 846. The conviction for kidnapping must therefore be reversed.

CONCLUSION

For the foregoing reasons, this Court should vacate Mr. Harper's conviction and remand for a new trial.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Harper requests oral argument because he believes it will substantially assist the Court in the resolution of his appeal.

Respectfully submitted: January 5, 2024.

JON M. SANDS
Federal Public Defender

s/ Jami Johnson

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Assistant Federal Public Defender
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Attorneys for Mr. Harper

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 9,313 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses monospaced typeface and contains [_____] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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IN THE UNITED STATES COURT
OF APPEAL FOR THE TENTH CIRCUIT

United States of America v. Elga Eugene Harper

Case No. 23-5091

Attachment A
Judgment (R1:605–12)

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.
ELGA EUGENE HARPER

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22CR00170–1

USM Number: 00955-510

Susan E. Anderson and Jane L. McClellan
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(s) Counts One through Four 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. §§ 1151, 1153, and 1201	Kidnapping in Indian CountryAssault Resulting in Serious Bodily Injury in Indian Country	5/4/22	1
18 U.S.C. §§ 1151, 1153, 2241(a), and 2246(2)	Aggravated Sexual Abuse by Force and Threat in Indian Country	5/4/22	2
18 U.S.C. §§ 1151, 1153, and 113(a)(3)	Assault with a Dangerous Weapon with Intent to do Bodily Harm in Indian Country	5/4/22	3
18 U.S.C. §§ 1151, 1153, and 113(a)(6)	Assault with a Dangerous Weapon with Intent to do Bodily Harm in Indian Country	5/4/22	4

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(s) _____

☐ 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.

July 27, 2023
Date of Imposition of Judgment

s/ Stephen J. Murphy, III
Signature of Judge

Stephen J. Murphy, United States District Judge
Name and Title of Judge

7/31/2023
Date

Attachment A-1

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

DEFENDANT: Elga Eugene Harper
CASE NUMBER: 4:22CR00170-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Life. Said sentence shall consist of life as to each of Counts One and Two, and Ten years as to each of Counts Three and Four. Said counts shall run concurrently, each with the other.

☒ The Court makes the following recommendations to the Bureau of Prisons:
The Court recommends defendant be placed in a facility located in Butner, North Carolina.

☒ 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

Attachment A-2

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

DEFENDANT: Elga Eugene Harper
CASE NUMBER: 4:22CR00170-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: Five years. Said terms shall consist of Five years as to each of Counts One and Two, and Three years as to each of Counts Three and Four. Said terms shall run concurrently, each with the other.

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.

Attachment A-3

DEFENDANT: Elga Eugene Harper
CASE NUMBER: 4:22CR00170-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervision, 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, after obtaining Court approval, notify the person about the risk or 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: Elga Eugene Harper
CASE NUMBER: 4:22CR00170-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abide by the "Special Sex Offender Conditions" previously adopted by the Court, as follows:

1. The defendant shall register pursuant to the provisions of the Sex Offender Registration Notification Act (SORNA) (Public Law 109-248) and any applicable state registration law.
2. The defendant shall participate in and successfully complete sex offender treatment, to include a risk assessment and physiological testing, at a program or by a therapist and on a schedule approved by the probation officer. The defendant shall abide by the rules, requirements, conditions, policies and procedures of the program to include specific directions to undergo periodic polygraph examinations or other types of testing as a means to ensure that the defendant is in compliance with the requirements of his/her supervision or treatment program. The defendant shall waive any right of confidentiality in any treatment or assessment records to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant may be required to contribute to the cost of services rendered (co-payment) in an amount to be determined by the probation office, based on the defendant's ability to pay.
3. Except for immediate family members,[1] the defendant shall have no contact with persons under the age of 18 unless approved by the probation officer. The defendant will immediately report any unauthorized contact with persons under the age of 18 to the probation officer. The defendant will not enter or loiter within 100 feet of schools, parks, playgrounds, arcades, or other places frequented by persons under the age of 18.
5. The defendant shall submit his/her person, property, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), electronic communication devices, data storage devices, or media, to a search, conducted by the probation officer at a reasonable time and in a reasonable manner, based on a reasonable suspicion of contraband or evidence of a violation of a condition of release (except as set forth in the Computer and Internet Restriction Condition (Paragraph 7(b)), if imposed). Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall abide by the following computer restrictions and monitoring conditions:
    a. The defendant shall disclose all electronic communications devices, data storage devices, e-mail accounts, internet connections and internet connection devices, including screen names, user identifications, and passwords, to the probation officer; and shall immediately advise the probation officer of any changes in his/her email accounts, connections, devices, or passwords.
    b. The defendant shall allow the probation officer to install computer monitoring software on any computer, as defined by 18 U.S.C. § 1030(e)(1), that the defendant owns, utilizes or has the ability to access. The cost of remote monitoring software shall be paid by the defendant. To ensure compliance with the computer monitoring condition, the defendant shall allow the probation officer to conduct periodic, unannounced searches of any computer subject to computer monitoring. These searches shall be conducted for the purposes of determining whether the computer contains any prohibited data prior to installation of the monitoring software; to determine whether the monitoring software is functioning effectively after its installation; and to determine whether there have been attempts to circumvent the monitoring software after its installation. Additionally, the defendant shall warn other people who use these computers that the computers may be subject to searches pursuant to this condition.
    c. The defendant shall not access any on-line service using an alias, or access any on-line service using the internet account, name, or designation of another person or entity; and shall report immediately to the probation officer access to any internet site containing prohibited material.
    d. The defendant is prohibited from using any form of encryption, cryptography, stenography, compression, password protected files or other methods that limit access to, or change the appearance of, data and/or images.
    e. The defendant is prohibited from altering or destroying records of computer use, including the use of software or functions designed to alter, clean or "wipe" computer media, block monitoring software, or restore a computer to a previous state.

[1] "Immediate family member" is defined as siblings, children, grandchildren, persons to whom the offender stands in *loco parentis,* and persons living in the offender's household and related by blood or marriage.

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

DEFENDANT: Elga Eugene Harper
CASE NUMBER: 4:22CR00170-1

SPECIAL CONDITIONS OF SUPERVISION

2. 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 cost of the program or assist (co-payment) in payment of the costs of the program if financially able.

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 Judgment 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: Elga Eugene Harper
CASE NUMBER: 4:22CR00170-1

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$400	Not Ascertainable	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 any fine or restitution 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:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** 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.

Attachment A-7

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

DEFENDANT: Elga Eugene Harper
CASE NUMBER: 4:22CR00170-1

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 $ 400 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Attachment A-8

IN THE UNITED STATES COURT
OF APPEAL FOR THE TENTH CIRCUIT

United States of America v. Elga Eugene Harper

Case No. 23-5091

Attachment B

Order granting motion to exclude testimony of Dr. Geoffrey Loftus
(R1:376–80)

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

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **ELGA EUGENE HARPER,** **Defendant.**	**Case No. 22-CR-170-JFH**

OPINION AND ORDER

Before the Court is a motion to exclude or limit expert testimony ("Motion") filed by the United States of America ("Government"). Dkt. No. 49. Defendant Elga Eugene Harper ("Defendant") plans to offer expert testimony from Geoffrey Loftus, Ph.D. ("Dr. Loftus"), at trial. The Government seeks to limit or exclude Dr. Loftus' testimony. *Id.* Defendant objects to the Motion. Dkt. No. 56. The Court held a hearing on January 12, 2023. For the reasons stated, the Government's Motion is GRANTED. Dr. Loftus' testimony is INADMISSIBLE.

BACKGROUND

In May 2022, elderly female E.F. was physically and sexually abused, resulting in numerous serious injuries. Dkt. No. 49 at 1-4; Dkt. No. 56 at 2. The dispute between the parties involves the identity of her assailant. *Id.* The Government charged Defendant with four crimes relating to the assault perpetrated on E.F.: kidnapping, aggravated sexual abuse by force and threat, assault with a dangerous weapon with intent to do bodily harm, and assault resulting in serious bodily injury. Dkt. No. 13. Defendant claims the case is an example of mistaken identity.

The Government plans to present evidence at trial that Defendant was the assailant. It describes in the Motion that E.F. was previously acquainted with Defendant because he had worked odd jobs for her and had sought counseling services from her; that E.F. had multiple

opportunities to see and talk to the individual who assaulted her throughout an approximate four-hour timeframe where she was attacked; that, immediately following the attack, E.F. called 911 to request help and reported that Defendant was the individual who assaulted her; that E.F. told first responders at the scene that Defendant was the individual who assaulted her; and that E.F. consistently told police, medical professionals, FBI agents, and sexual assault nurse examiners that Defendant was the individual who assaulted her. *See generally* Dkt. No. 49.

Defendant claims he visited E.F.'s residence on the day of the charged conduct and found her after she had already been assaulted. Dkt. No. 56. During an interview with law enforcement shortly after his arrest, Defendant "vehemently denied hurting E.F.," "told detectives E.F. knew his name because he worked with her," and "suggested that 'there's multiple gentlemen in the area that may or may not be of my size, of my color, of my race.'" Dkt. No. 49 at 4. He intends to introduce expert testimony from Dr. Loftus—a psychologist and an emeritus professor at the University of Washington with expertise in memory, attention, and perception—"that a highly stressful event, such as a physical or sexual assault, followed by exposure to possible misinformation (the presence of the Defendant) can cause the formation of a false memory – that Defendant was the person who assaulted [E.F.]." Dkt. No. 56 at 1, 3-4.

AUTHORITY AND ANALYSIS

Admissibility of expert witness testimony is evaluated under Federal Rule of Evidence 702, which permits a qualified expert witness to testify and render an opinion when:

> 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;
>
> The testimony is based on sufficient facts or data;
>
> The testimony is the product of reliable principles and methods; and

> The expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. "When an objection to an expert's testimony is raised, the court must perform *Daubert* gatekeeper duties before the jury is permitted to hear the evidence." *Bright v. Ohio Nat'l Life Assur. Corp.*, 11-CV-475, 2013 WL 12327512, at *1 (N.D. Okla. Jan. 9, 2013) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 149 (1999)). "First, the Court determines whether the expert is qualified by knowledge, skill, experience, training or education to render the opinion." *Lippe v. Howard*. 287 F. Supp. 3d 1271, 1277-78 (W.D. Okla. 2018). "If so qualified, the Court must then determine whether the expert's opinion is reliable and relevant under the principles set forth in *Daubert* and *Kumho Tire*, in that it will assist the trier of fact." *Id.* at 1278.

The Government does not challenge Dr. Loftus' qualifications, and so the Court assumes without deciding that he is qualified to render the anticipated opinions. It focuses instead on the "touchstone" of admissibility of expert testimony: its helpfulness to the trier of fact. *See Wilson v. Muckala*, 303 F.3d 1207, 1219 (10th Cir. 2002).

"No one disputes that an eyewitness's [sic] identification of a defendant can create a significant impact at trial." *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006). However, generally, "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." *Id.* at 1125. Memory and perception are within an average juror's common knowledge and experience, and "[a]n average juror understands that memory, perception, and recall can be affected by high-stress circumstances." *United States v. Maryboy*, --- F. Supp. 3d ---, 2022 WL 4235142, at *5-6 (D. Utah 2022).

The Tenth Circuit instructs that psychological expert witness testimony on identification is appropriately admitted only in "narrow" and "limited circumstances," such as "cross-racial identification, identification after a long delay, identification after observation under stress, and such psychological phenomena as the feedback factor and unconscious transference." *Rodriguez-Felix*, 450 F.3d at 1124 (quotation and citation omitted). The Court does not find that such narrow, limited circumstances exist here. While Defendant does describe a situation implicating cross-racial identification and identification after observation under stress, the identifications in this case were not made after a long delay. Instead, E.F. made them repeatedly and immediately after the assault she endured. There is a recorded 911 call of her identification along with multiple reports to first responders, medical professionals, and investigators. This situation is more akin to an "evidentiary cornucopia" of identification where expert testimony on memory and perception is not helpful, *see Rodriguez-Felix*, 450 F.3d at 1126, than it is to recent cases where similar testimony has been found to be helpful in situations with evidence of long delay and outside influence, *see United States v. Maxwell*, Case No. 20-CR-330, Dkt. No. 516 (S.D.N.Y. Nov. 21, 2021).[1]

CONCLUSION

IT IS THEREFORE ORDERED that the Government's motion to exclude or limit expert testimony [Dkt. No. 49] is GRANTED. The Court EXCLUDES the testimony of Dr. Loftus.

[1] Relatedly, this case is not analogous to the situation put forth by Defendant in his response to the Government's Motion. Dkt. No. 56-2. As the Government described at hearing, the study Defendant offered describes an assault of less than an hour performed by an individual whom the victim did not know, followed by a gap of more than 24 hours before suggestive questioning which led to misidentification of peripheral details. Here, E.F. was allegedly assaulted for approximately four hours and immediately thereafter spontaneously and repeatedly identified Defendant, whom she had repeated previous acquaintance with, as the individual who assaulted her.

Dated this 18th day of January 2023.

JOHN F. HEIL, III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT
OF APPEAL FOR THE TENTH CIRCUIT

United States of America v. Elga Eugene Harper

Case No. 23-5091

Attachment C

District court rulings on objections to testimony of
Kathryn Bell (R3:415–19)

crying in pain; is that right?
A. Yes.
Q. And she had to be given Dilaudid which is a pain reliever?
A. Yes.
MS. McCLELLAN: Just one moment.
That's all I have. Thank you very much.
THE COURT: All right. Anything else?
MS. NELSON: I have a few, Your Honor.

REDIRECT EXAMINATION

BY MS. NELSON:
Q. Now, you were just asked on cross-examination about the effect that trauma can have on the brain.
A. Yes.
Q. In your experience and in your education are there two kinds of memories that a person has of events?
MS. McCLELLAN: Objection; foundation for the memory testimony.
MS. NELSON: Your Honor, they just asked her opinion about memory.
THE COURT: Yeah, but you're getting into -- see I think the problem here is that you're asking leading questions. If you let the witness testify to these facts, she would probably give a foundation on which she can offer her opinion so that's what I would recommend you do.

Go right ahead.

MS. NELSON: All right, Your Honor. Thank you.

THE COURT: Yes.

Q. (BY MS. NELSON) Do you have any experience or education in the area of memories?

A. Yes.

Q. And what is that?

A. My basic training, conferences that I've been to, reading that I've done. Those are going to be primarily my education and then being able to apply that to the patients that I've seen.

Q. Can you explain to us about what your education and training has been about memories?

A. Well, it's going to -- like I said, it's going to be different conferences that I've attend where I've gone to specific sessions that have talked about memories and how memories are formed and how memories are formed after a traumatic event.

And to list them specifically I can't do that but I know that there have been, especially with the conference called Violence Against Women International, that that's a conference that regularly has education specifically about the --

THE COURT: Okay. So you know a few things about memories.

What's your next question, Ms. Nelson?

MS. NELSON: Yes.

Q. (BY MS. NELSON) So can you explain to us, what do you know about memories after a trauma?

A. That trauma -- that they can impact memories and that there are different ways memories are made and that there are different types of memories.

The basically four different kind of areas that I'm aware of is that there's the memory that you have that if you see a picture of a zebra, you know that's a picture of a zebra. That's one type of memory.

Another type of memory is that if you have learned how to ride a bicycle, that you may not ride a bicycle for quite some time but you go back and get on that bicycle and you're able to ride that bicycle. So that's another type of memory.

And then the two areas and the type of memory that we see most often with trauma is going to be memory that is -- is kind of coded or developed at a point in the brain called the amygdala and that's the part of the brain that is the fight and flight part of the brain. And so things like fear and emotional type of things can help you code that type of memory.

And then the other type of memory is the memory that's coded by a part of the brain called the hippocampus, and the hippocampus is the area that kind of codes the -- maybe the sequence, or maybe not necessarily sequence of events, but the

events that happen, the whos, the whats, kind of the whens part of that.

And both of those areas, the amygdala and the hype -- hypo -- hippocampus are when a trauma happens, there are huge amount of chemicals that are released.

MS. McCLELLAN: Your Honor, we would object as this is --

THE COURT: It's a narrative.

MS. McCLELLAN: Yes.

THE COURT: You've explained the two types of memories.

And, Ms. Nelson, if you would like to tie those to the facts here, we can wrap up and Ms. McClellan can take issue or attack that testimony if she desires. Go right ahead.

Q. (BY MS. NELSON) What is a core memory?

MS. McCLELLAN: Your Honor, we object. She's not established as an expert on the area of memory and that the testimony was not sufficient to qualify her as an expert.

THE COURT: I tend to agree with that.

Is there anything in your description of memory that you just discussed that's relevant to the question of how Finlay remembered things closer to the event than she did perhaps when you interviewed her on the 17th of May?

THE WITNESS: I believe that would be the area of the memory that's coded by the amygdala and the memory that

decoded many --

MS. McCLELLAN: Object, Your Honor.

THE COURT: Yes.

MS. McCLELLAN: She does not have the expertise to make this testimony.

THE COURT: Okay. I'll let her finish her answer and you can take that up on cross exam.

And I remind the jury that these are opinions of a witness who does have some expertise study background and experience in these issues but you'll weigh her testimony as you do within the instructions I give you.

So go ahead and finish up if you would, please, witness.

THE WITNESS: So when all of those chemicals are released, then that is -- with that fight and flight that's where your -- your, you know, you see things better, your heart rate goes up. You know, you have this whole physiologic response to the trauma that's happening.

And then over the period of time the same things, those same chemicals are impacting that other part of the brain, the hippocampus part, but things within there as that --

THE COURT: I think that's -- I think that's --

THE WITNESS: -- stimulus keeps going.

THE COURT: Hold on. I think that answered the question.

IN THE UNITED STATES COURT
OF APPEAL FOR THE TENTH CIRCUIT

United States of America v. Elga Eugene Harper

Case No. 23-5091

Attachment D

Jury instruction on kidnapping (R1:572)

The defendant is charged with a violation of 18 U.S.C. §§ 1151, 1153, 1201(a)(2).

This law makes it a crime for an Indian person, within Indian country, to unlawfully kidnap another person.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

> **First**: The defendant, knowingly acting contrary to law, kidnapped E.F. by seizing and confining her as charged in the Indictment;
>
> **Second**: The defendant kidnapped E.F. and held her for ransom, reward, or some other purpose or benefit;
>
> **Third**: The defendant is an Indian person; and
>
> **Fourth**: The defendant kidnapped E.F. within Indian Country within the Northern District of Oklahoma.

To "kidnap" a person means to unlawfully hold, keep, detain, or confine the person against that person's will. Involuntariness or coercion in connection with the victim's detention is an essential part of the offense.