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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,

Plaintiff,

V.

BRYAN C. KOHBERGER,

Defendant.

CASE NUMBER CR01-24-31665

MOTION IN LIMINE #7

**RE: WITNESS IDENTIFICATION BY
BUSHY EYEBROWS**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and pursuant to the Idaho Rules of Evidence, moves this Honorable Court for an *Order in Limine* excluding any evidence referencing “bushy eyebrows.” More specifically, the Defense asserts that Rules 403, 601, and 602 of the Idaho Rules of Evidence bar witness [REDACTED] (hereinafter “D.M.”) from using the words “bushy eyebrows” or identifying Mr. Kohberger in that manner.

INTRODUCTION

The issue of witness identification is a critical one in a trial that is the subject of much litigation. That is because the reliability of witness identification “is the linchpin in determining the admissibility of identification information.” *State v. Hoisington*, 104 Idaho 153, 162, 657 P.2d 17, 26 (1983) (citations omitted). Failure to challenge unreliable witness identification can result in finding that trial counsel’s performance was deficient and provide a basis for overturning a conviction. *Wurdeman v. State*, 161 Idaho 713, 717-718, 390 P.3d 439, 443-444 (2017). In this case, the description provided by D.M. is unreliable and should be excluded. Although she has never identified Mr. Kohberger, testimony by D.M. from the witness stand, describing bushy eyebrows while Mr. Kohberger sits as the accused at trial, will be as damning as her pointing to him and saying, “he is the man that did this.”

When considering whether identification by a witness is reliable, the Idaho Supreme Court has applied the *Manson-Biggers* balancing test which looks at: “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification.” *Wurdemann v. State*, 161 Idaho 713, 718 390 P.3d 439, 444 (2017) citing *State v. Trevino*, 132 Idaho 888, 893, 980 P.2d 552, 557 (1999). When the *Manson-Biggers* balancing test is applied to the facts of this case, the reliability of the witness identification is nonexistent. D.M. is the only person alive who is known to have seen the intruder. She only saw the intruder briefly. Her recollection or lack thereof is filled with uncertainty, fuzziness, the influence of alcohol, dreaming, and sleepiness. She did not see the intruder well enough to describe him to a composite artist. After Mr. Kohberger was arrested, she did not recognize him from a photo.

RELEVANT FACTS

A. Bushy Eyebrows

(1) Interviews on November 13, 2022. On November 13, 2022, D.M. was inside the house when the murders occurred and saw a figure dressed in black (hereinafter “intruder”) when she peeked out her bedroom door around 4:00 a.m. Shortly after seeing the intruder, she went downstairs to B.F.’s room. The two girls fell asleep. Roughly 8 hours later, a 911 call was made from B.F.’s phone at 11:56 a.m. (*Motion in Limine 7 - Exhibit 1, Nunes narrative report, p. 1.*) More than 8 hours after seeing the intruder, D.M. was interviewed by law enforcement at the scene and at the police department. It was confusing to D.M. that the intruder looked at her but did not come towards her or say anything. (*Motion in Limine 7 - Exhibit 2, Nunes bodycam transcript, p. 28, ll. 22-24.*¹) When describing the intruder to Officer Nunes at the scene, she described the height, build and clothing of the intruder. *Id.* p. 20, l. 25- p. 21, l. 7. Her description did not mention eyebrows. *Id.* When she called B.F. before going downstairs to B.F.’s room, D.M. said that she was kind of “in and out of it...I was really tired.” *Id.*, p. 30, ll.2-20. Later, when she was interviewed at the police department, Detective Mowery inquired about facial features and asked D.M. if she knew what color the intruder’s eyebrows were. (*Motion in Limine 7 - Exhibit 3 Mowery interview transcript, p. 20, l. 16-p. 21, l. 4.*²) She did not know the color of the intruder’s eyes or eyebrows. *Id.* “[E]verything was kind of blurry...[I]ike I don’t fully remember it.” *Id.* p. 17, ll. 13-17. During the Mowrey interview, D.M. again mentioned that she was “in and out of it” because she was so tired. *Id.*, p. 15, ll. 2-6; p. 21, ll. 10-16

(2) Pictures on November 13, 2022. Law enforcement took pictures of D.M.’s room on November 13, 2022 and November 19, 2022. On the walls in her room were many pictures of eyes

¹ The full transcript of the November 13, 2022, interview by officer Nunes was attached to Amended Defendant’s Memorandum in Support for a Franks Hearing as Exhibit D-8 A at pp. 270-305 (filed November 26, 2024).

²

The full transcript of the November 13, 2022, interview by Detective Mowrey was attached to Amended Defendant’s Memorandum in Support for a Franks Hearing as Exhibit D-8 B at pp. 306-340 (filed November 26, 2024).

with prominent eyebrows. Many of which she had drawn. Some of the eyebrows are heavy, voluminous, puffy, or perhaps subjectively bushy. (Motion in Limine 7 - Exhibit 4, D.M. ██████'s Room Search, p. 1-3.) According to Detective Lake, he found “artwork of human figures with an emphasis upon the eyes and eyebrows were pinned to corkboards.” (Motion in Limine 7 - Exhibit D.M. ██████'s Room Search, p. 2.)

(3) Interview on November 17, 2022. On November 17, 2022, four days later, D.M. was interviewed by Detective Gooch and indicated that she was really asleep and probably very drunk when she woke up around 4:00 a.m. on November 13, 2022. (Motion in Limine 7 - Exhibit 6 Gooch/ Blaker interview, p. 53, l. 17- 54, l. 20.³) Throughout the interview, D.M. expressed uncertainty about what she heard and saw and did not know if it was real or if it was a dream or if her mind was playing with her. *Id.* p. 54, ll. 19-23; p. 58, l. 14-p. 59, l. 4; p. 61, ll. 1-12; p. 76, ll. 18-23. “It just doesn’t make sense...” *Id.*, p. 69, l. 25-70, l. 2. D.M. described the intruder and told Detective Gooch that she recalls seeing his eyebrows...his bushy eyebrows... but she did not recall the color of the eyebrows. *Id.*, p. 74, l. 24 – p. 76, l. 10. She did not remember the eyes or the mouth, just the eyebrows. *Id.*, p. 107, ll. 10-18. When she saw the intruder, she thought that the intruder was about three feet away from her but that could be off since she was “still a little bit drunk.” *Id.* p. 76, l. 24 – p. 77, l. 3. She did not think that she could remember enough to give composite for a composite artist. *Id.*, p. 134, l. 13-p. 135, l. 4. She could just recall the bushy eyebrows but not the shape or color of them. *Id.* In this interview, Det. Gooch asked if D.M. had anxiety which led to D.M. stating that she had a lot of lucid dreams of being kidnapped or chased. *Id.*, p. 48, l. 2-p. 49, l. 25. She indicated that she watched Criminal Minds and fell asleep to crime podcasts. *Id.* These lucid dreams began in high school. *Id.*

³ The full transcript of the November 17, 2022, interview by Detective Gooch was attached to Amended Defendant’s Memorandum in Support for a Franks Hearing as Exhibit D-8 C at pp. 341-526 (filed November 26, 2024).

(4) Interview on December 1, 2022. On December 1, 2022, a half of a month later, D.M. was interviewed again and described the intruder. She did not see his eyes, but she saw “one eyebrow or two, but it was just, like, this bushy eyebrow”... “I could just see, like, an eyebrow...this bushy eyebrow.” (*See Motion in Limine 7 - Exhibit 7, Williamson interview, p. 33, l. 17 – p. 34, l. 8; p. 97, ll. 3-18.*) She did not remember the color or the shape of the eyebrow. She just remembered it being bushy. *Id.* p. 98, l. 23-p. 99, 2. She did not remember if she saw one eyebrow or two. *Id.*, p. 175, l. 23 – 176, l. 3 Throughout the interview, D.M. indicated that she had always had really bad dreams, lucid dreams, and scary dreams. *Id.*, p. 15, ll. 3-22. She did not know what parts of her recollections were dreams and what parts were real. *Id.*, p. 15, l. 20– p. 18, l. 2. When she woke up that morning [morning of November 13, 2022], she did not fully understand what was a dream or not. *Id.* In this interview, she indicated that she thought that the person she saw was a fireman. *Id.*, p. 93, l. 7-p. 94, l. 14.

(5) Statement/ Affidavit to Support Arrest Warrant. On December 29, 2022, a statement submitted by law enforcement in support of the arrest warrant, used descriptive information from D.M.’s interviews: “D.M. described the figure as 5’10” or taller, male, not very muscular, but athletically built with bushy eyebrows.” (*See Motion in Limine 7 - Exhibit 8, Statement of Brett Payne, p. 4.*)

(6) Interview on December 30, 2022. On December 30, 2022, after the arrest of Mr. Kohberger, D.M. was interviewed by Detective Lake and Detective Tolleson. When she learned that an arrest had been made, she found a mugshot of Mr. Kohberger online. When asked if Mr. Kohberger was the person that she saw in the house, she did not know if Mr. Kohberger was the intruder. She knew that the intruder had looked at her because of the “bushy eyebrow.” (*See*

*Motion in Limine 7 - Exhibit 9, Lake interview, p. 96, l. 23-p. 98, l. 5.*⁴) All that she remembered is “some bushy eyebrow and all black and some sort of mask.” *Id.* p. 98, l. 24 – p. 99, l. 14.

(7) Grand Jury Testimony on May 15, 2023. Subsequently, D.M. provided grand jury testimony and was questioned about what the intruder was wearing. She was again uncertain and that testimony is attached but not quoted verbatim here. (*See Motion in Limine 7 - Exhibit 10, p. Grand jury testimony, p. 176, l. 14-p. 177, l. 6, 199.ll 6-10.*)

B. Reliability of Witness Identification

(1) Opportunity to View. D.M. peeked out her bed door three times after 4:00 a.m. on November 13, 2022. The third time, she saw a figure dressed in black. At the scene, she described the intruder as “—he was a little bit taller than me, and I couldn't really see much of him, but I -- he -- I'm almost positive he was wearing a full black outfit, and he had this mask that was just over his forehead and over his mouth, and he didn't say anything to me, like, at all.” (*See Motion in Limine 7 - Exhibit 2, Nunes bodycam transcript, p. 20, l. 25- p. 21, l. 7.*) At the police department, her description of the intruder was similar: “And then I opened the door again and the guy is right there. And he’s maybe my height, a few inches taller, not -- like, skinny, athletic build. He has all black. He's wearing this mask that covers just his forehead and -- here, and it goes, like, around. He was white.” (*See Motion in Limine 7 - Exhibit 3, Mowery interview transcript, p. 14, ll. 19-25.*) There were no lights on the stairs, D.M. was uncertain whether either the kitchen light or the bathroom light was on, the kitchen light might have been on, but the twinkle lights in the living room may have been on. (*See Motion in Limine 7 - Exhibit 7 p. 38, ll.11-19; p. 80, l. 14-p. 81, l. 13.*)

(2) Degree of Attention. D.M. [REDACTED] acknowledged that her brain might have been fuzzy due to alcohol and sleepiness when she saw the intruder. She stated that she had been

⁴ The full transcript of the December 30, 2022, interview by Detective Lake and Detective Tolleson was attached to Amended Defendant’s Memorandum in Support for a Franks Hearing as Exhibit D 23 at pp. 849-970 (filed November 26, 2024).

drinking alcohol just hours prior to peeking out her bedroom door sometime around 4:00 a.m. and seeing an intruder. She was intoxicated when she arrived home around 1:15, 1:30-ish. (*See Motion in Limine 7 - Exhibit 6, p. 20, l. 15-p. 32, l. 5.*) She was probably “very drunk” and tired when she saw the intruder at 4:00 a.m. *Id.*, p. 53, l. 17- 54, l. 18.

(3) Accuracy of Description. When asked if she could see the intruder’s face, she testified that “I wouldn't say I fully remember their face, but I remember seeing his eyebrows, so at some point I probably did see his face and don't remember it.” (*See Motion in Limine 7 - Exhibit 10 p. Grand jury testimony, p. 199, ll. 6-10.*) During other interviews she said he was wearing a mask.

(4) Level of Certainty. During each interview D.M. was uncertain. On December 30, 2022, after the arrest of Mr. Kohberger, D.M. was interviewed by Detective Lake and Detective Tolleson. When she learned that an arrest had been made, she found a mugshot of Mr. Kohberger online. When asked if Mr. Kohberger was the person that she saw in the house, she did not know if Mr. Kohberger was the intruder. She knew that the man had looked at her because of the “bushy eyebrow.” (*See Motion in Limine 7 - Exhibit 9 Lake interview, p. 96, l. 23-p. 98, l. 5.*) All that she remembered is “some bushy eyebrow and all black and some sort of mask.” *Id.* p. 98, l. 24 – p. 99, l. 14. Several weeks after the murders, D.M. thought that the person she saw was a fireman. (*See Motion in Limine 7 - Exhibit 7, p. 93, l. 7-p. 94, l. 14.*) In her mind, D.M. thought that the intruder went out of the back sliding door, but she doesn’t know “if he actually went out the back door.” (*See Motion in Limine 7 - Exhibit 6, p. 78, ll. 14-19; p. 135, ll. 7-14.* The sliding back door was not visible from the doorway of D.M.’s bedroom. (*See Motion in Limine 7 - Exhibit 4., pp. 4-5.*)

(5) Time between Event and Identification. At approximately 4:00 a.m. on November 13, 2022, D.M. saw the intruder. (*See Motion in Limine 7 - Exhibit 2, p. 16, l. 18-p. 17, l. 17.*) Roughly eight hours later, the 911 call was made. (*See Motion in Limine 7 - Exhibit 1 , p. 1.*) More than eight hours after seeing the intruder, D.M. provided a very limited and uncertain description

of the intruder to two different officers. (*See Motion in Limine 7 - Exhibits 2 and 3.*) On November 17, 2022, four days later, D.M. did not think that she could sufficiently describe the intruder for a composite artist. (*See Motion in Limine 7 - Exhibit 6., p. 134, l. 13-p. 135, l. 4.*) On December 30, 2022, after Mr. Kohberger’s arrest, D.M. could not recognize Mr. Kohberger from a photo. (*See Motion in Limine 7 - Exhibit 9, Lake interview, p. 96, l. 23-p. 98, l. 5.*) Further, by the time that D.M. testifies at trial later this year, more than three and one-half years will have passed since the murders occurred on November 13, 2022.

ARGUMENT

A. Case law and Idaho Criminal Rules 601 and 602 Excludes Evidence of “Bushy Eyebrows”.

With certain exceptions, every person is competent to be a witness. I.R.E. 601. Incompetency determined by the Court occurs when “[p]ersons whom the court finds are incapable of receiving just impressions of the facts about which they are examined, or of relating them accurately.” I.R.E. 601(a). Idaho law tends to favor the finding of competency.

Under I.R.E. 602, “a witness must have sufficient personal knowledge of the matter to which he or she is testifying.” *State v. Smith*, 170 Idaho 800, 816, 516 P.3d 1071, 1087 (2022). Testimony satisfies I.R.E. 602 “if the jury or other trier of fact could reasonably find that the witness perceived the event.” *Id.* citing *State v. Gutierrez*, 143 Idaho 289, 293, 141 P.3d 1158, 1162 (Ct. App. 2006). “Evidence to prove personal knowledge may consist of the witness’s own testimony.” I.R.E. 602.

When considering whether identification by a witness is reliable, the Idaho Supreme Court has applied the *Manson-Biggers* balancing test which looks at: “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification.” *Wurdemann v. State*, 161 Idaho 713, 718 390 P.3d 439, 444 (2017) citing *State v. Trevino*, 132 Idaho 888, 893,

980 P.2d 552, 557 (1999). When the *Manson-Biggers* balancing test is applied to the facts of this case, there is no reliable witness identification. As explained in detail above, D.M.'s opportunity to view was seconds at most, her attention was influenced by alcohol and sleepiness and the only identifying attributes are height in relation to her own, a skinny athletic build and a "bushy eye brow." He was wearing a mask. She has repeatedly, each time interviewed, expressed uncertainty about what she saw. These general descriptors could fit millions of individuals. Her uncertainty is repeated in each interview and at least 8 hours passed before she interviewed the first time. Six weeks passed before she was interviewed by law enforcement the final time, and six months passed when she testified before the grand jury. Balancing the *Manson-Biggers* factors, there is no reliability of the physical characteristics that D.M. has reported. Mr. Kohberger does not have bushy eyebrows, but the art work on D.M.'s wall and that which should draw eyes with eyebrows could be described as bushy, full, or prominent. There is great risk that at trial in front of a jury, her testimony will be viewed as a clear identification of Mr. Kohberger. This would be a false identification and would prejudice the proceedings in a way that must be avoided.

B. Rule 403 Excludes Evidence of "Bushy Eyebrows" as Irrelevant and Unfairly Prejudicial.

To be admissible, evidence must be relevant. I.R.E. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." I.R.E. 401.; See also *State v. Smith*, 107 Idaho 800, 809, 516 P.3d 1071, 1080 (2022); *State v. Sheldon*, 145 Idaho 225, 228, 178 P.3d 28, 31 (2008). "Whether a fact is of consequence or material is determined by its relationship to the legal theories presented by the parties." *Smith*, 107 Idaho at 809, 516 P.3d at 1080. In this case, evidence of "bushy eyebrows" is not relevant to the crimes charged and would not tend to make any material or disputed fact of the crimes charged in this case more probable or less probable than it would be without the evidence. The purpose of admitting such testimony is for identification

purposes. Given the argument above, such testimony is inadmissible. There is no other relevant reason to allow this testimony.

Under I.R.E. 403, this Court may exclude evidence related to “bushy eyebrows” “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” I.R.E. 403. “This rule requires the court to balance the probative value of the evidence against the danger that the evidence may be unfairly prejudicial.” *State v. Johnson*, --- Idaho ---, 544 P.3d 766, 774 (Idaho 2024). See also I.R.E. 403.

Even assuming this Court concludes that the descriptive words “bushy eyebrows” are somehow relevant, whatever minimal probative value they may have is substantially outweighed by the danger of unfair prejudice and confusion of the issues. “Unfair prejudice” is prejudice that “tends to suggest a decision on an improper basis.” *Johnson*, 544 P.3d at 774 citing *State v. Diaz*, 170 Idaho 79, 91, 507 P.3d 1109, 1121 (2022). D.M. could not recall enough details about the intruder to provide a description to a composite artist. Allowing her to use the descriptive words “bushy eyebrows” confuses the issues. If evidence of “bushy eyebrows” is presented to the jury, the jury might well believe that Mr. Kohberger is guilty simply because of “bushy eyebrows.” As a consequence, there is a danger that the jury would reach a decision on an improper basis due to evidence that is unfairly prejudicial.

CONCLUSION

For the reasons addressed above, Mr. Kohberger respectfully requests this Court grant his Motion in *Limine* to exclude D.M. from using the words “bushy eyebrows” to identify the intruder that she saw and to exclude D.M. from identifying Mr. Kohberger based on “bushy eyebrows.”

DATED this 24 day of February, 2025.



ELISA G. MASSOTH
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CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 24 day of February, 2025, addressed to:

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