

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.

Ada County Case No. CR01-24-31665

**ORDER ON DEFENDANT’S MOTION IN
LIMINE RE: WITNESS IDENTIFICATION
BY BUSHY EYEBROWS**

I. INTRODUCTION

D.M., a roommate of the victims in this case, was the sole eyewitness to the intruder believed to have carried out the homicides at 1122 King Road. During her interviews with law enforcement and at the preliminary hearing in this matter, D.M. described the intruder at having “bushy eyebrows.” Defendant moves *in limine* to exclude any evidence at trial referencing “bushy eyebrows,” arguing D.M.’s description is unreliable and, therefore, irrelevant and/or barred by IRE 403. The State responds that D.M.’s description is based on her personal knowledge, is relevant and there is no basis for exclusion.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. The Court concludes that D.M.’s description of the suspect’s eyebrows is admissible.

II. STANDARD

The question of whether evidence is relevant one of law, while the decision to admit relevant evidence is discretionary. *State v. Shutz*, 143 Idaho 200, 202, 141 P.3d 1069, 1071 (2006). On discretionary matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

III. FACTS

On November 13, 2022, sometime before 4:19 a.m., D.M. observed a person inside her residence which she shared with her four roommates at 1122 King Road. Exh. S-1 (summary exhibit of D.M.'s phone records). D.M. placed several phone calls and sent several text messages to her roommates. *Id.* The only roommate who responded was B.F., who resided in a downstairs bedroom. They had two short phone conversations and exchanged texts. Within those phone calls and text messages D.M. relayed to B.F. she saw a person in the residence wearing black and he had on a ski mask that covered his forehead and mouth. *Id.*

That same day at approximately 11:56 a.m., a 911 call was placed from 1122 King Road for a reported unresponsive female. Moscow Police Department responded to the scene and Officer Mitch Nunes took a statement from D.M. She told Officer Nunes she saw a male “not insanely tall,” “wearing all black,” and a “mask that was just covering his forehead and mouth.” Exh. D8-A,¹ at 17:5-7. Later, D.M. repeated the description “He was a little bit taller than me,” “I couldn’t really see much of him,” and “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.” *Id.* at 21:2-7. D.M. gave the description a third time, repeating he had a mask, he was an inch or two taller than her, he was “basketball player kind of skinny,” and a voice she did not recognize. *Id.* at 31:8-32:3. D.M. also told Detective Nunes she was “kind of in and out of it because I was so scared and it was really – I was really tired.” *Id.* at 30:6-9. She did not mention anything during that interview about the intruder’s eyebrows.

At approximately 1:47 p.m. that same day, D.M. was interviewed at the Moscow Police Department by Detective Lawrence Mowery. During this interview, D.M. reported she saw a white male she did not know, “maybe my height, a few inches taller,” “skinny, athletic built,” wearing “all black,” “wearing this mask that covers just his forehead and here.” Exh. D8-B at 14:20-25. Regarding his height, she reported “I’m 5’10” so he’s probably around 6’.” *Id.* at 15:20-21. She responded “no” when asked if she saw what color his eyebrows were and added, “I don’t remember what his eyes looked like either,” but she “saw his eyes” and he was “definitely a white guy.” *Id.* at 20:16-21:4. She again mentioned she was “in and out of it”

¹Exhibits D8-A, D8-B and D8-C were among those filed November 26, 2024 in support of Defendant’s Motion for a *Frank’s* Hearing and relied upon by the parties for this motion.

because she was tired and explained “everything was kind of blurry...[l]ike I don’t fully remember it, I would say.” *Id.* at 15:2-6, 17-13:17, 21:10-16.

Four days later, D.M. was interviewed by Idaho State Police (ISP) Detective Victoria Gooch and MPD Captain Dustin Blaker. D.M. gave a detailed recounting of what she did on Saturday, November 12, 2022, until she went to bed at approximately 3:20 a.m. on Sunday, November 13, 2022. Exh. D8-C. She stated that sometime between 4:00 a.m. and 4:20 a.m., she woke up and heard a male’s voice that she did not recognize say “It’s okay, I’m going to help you.” *Id.* at 50:11; 53:17-21; 61:21-62:22. She said at the time she was “out of it” and “[p]robably still tipsy” and “I believe I was also very drunk.” *Id.* at 54:18; 60:13-14. D.M. opened her door and saw someone, explaining:

And I don’t know how I knew it was someone because it – from my mind, it’s, like, I was almost wearing these, like, blurry glasses. Like, it’s fuzzy and cloudy, but it was, like, a figure of someone wearing all black. And it was, like, they had a ski mask that was covering their forehead, and their chin, and mouth. But I could see the – I – all I remember was seeing their eyebrows. And I don’t – I don’t remember what their eyes looked like, but I remember their eyebrows. I don’t remember the color the eyebrows were. I just remember, like, bushy eyebrows. That’s all I could think about.

Id. at 74:25-75:10.

D.M. described the male as “skinny tone, that basketball kind of type.” *Id.* at 76:2-3. D.M. stated she was 5’10” tall so thought the male was “around 5’10” and then 6’, somewhere around there.” *Id.* at 76:8-10. D.M. stated the male was approximately three feet from where she was standing but added, “that could be off because I – obviously, probably still a little bit drunk. I just woke up. I don’t remember fully.” *Id.* at 77: 1-4. She reiterated: “I know he looked at me because I could see his eyebrows. I think it – I think I just – I think I just saw one eyebrow. I don’t know why or how.” *Id.* at 78:6-9.

D.M. then recounted calling and texting her roommate B.F. that there was someone in the house wearing all black and a ski mask. *Id.* at 79:16-19. D.M. conveyed to the interviewers that she did not “know for sure if it fully happened.... I don’t know if my mind’s, like, making up stuff.... It just doesn’t make sense to me and I don’t know how to fully explain it, I guess.” *Id.* at 92:10-18. Detective Gooch explained to D.M. that the most important thing was to tell only things she knew were true, and D.M. agreed. *Id.* at 92:19-25. D.M. also agreed that she was traumatized and it could affect her memory. *Id.* at 93:1-3. Detective Gooch also asked D.M. if

she suffered from anxiety. D.M. responded that she did and added that she had “a lot of lucid dreams of being, like, kidnapped or chased.” 48:2-10. She also indicated she would watch Criminal Minds and fall asleep to crime podcasts. *Id.* at 49:14-20.

Detective Gooch and Cpt. Blaker then sought to reconfirm the facts from D.M.’s memory. D.M. reiterated that she saw a male figure in the hallway approximately three feet from her; he was holding something; he was wearing all black clothes; his forehead was covered; he was wearing a mask; she remembered his eyebrows. *Id.* at 96:18-24; 97:3; 105:18-25. Cpt. Blaker asked what was covering his face and D.M. stated: “I don’t know ...weird-looking ski mask. It wasn’t like the regular ski mask with, like, eyes and, you know, because I saw his eyebrows, and I could –I think I saw his nose and, like, this part of his face, but I don’t know.” *Id.* at 105:22-106:1. She stated she could not see the male’s mouth and did not remember if she saw his nose, but confirmed “I know I saw eyebrows. And I don’t remember his eyes. I just feel like I can see eyebrows, but I mean, that could be it. I mean, that would make sense why the forehead was covered and this part of his face was covered.” *Id.* at 107:2-18.

The investigators inquired if D.M. could provide a composite for an artist, but she said she could not. Again, she reiterated she did not “remember what his eyes looked like. I don’t remember what his nose looked like. I just remember eyebrows. I don’t know exactly what the eyebrows looked like at all really. I just remember thinking, like, eyebrows. ... Yeah, bushy, but that’s all -- like I don’t remember the shape. I don’t remember, like, the color. I just remember, like, bushy eyebrows. That’s the only thing I can remember.” *Id.* at 134:18-135:4.

On November 13 and November 19, 2022, law enforcement took photos of D.M.’s bedroom. On the wall were many magazine photos and drawn pictures pinned to corkboards. The drawings were of human faces with an emphasis on eyes and eyebrows. Some of the eyebrows are heavy. Def’s Exhs. 4, 5.

On December 1, 2022, (18 days after her first interview) D.M. was interviewed by Forensic Interviewer Erin Williamson. D.M. gave a detailed accounting of her day on Saturday, November 12, 2022, until she went to bed on Sunday, November 13, 2022. Def’s Exh. 7, pp. 19-20; Exh. S-3, pp. 21-29. D.M. reported she heard a “man’s voice, and it wasn’t Ethan’s. It was, like ‘It’s okay, I’m gonna help you’.” Def’s Exh. 7 at 32:9-15. D.M. stated she saw a “all black figure about my height, maybe few inches taller,” “skinny build,” wearing a mask. *Id.* at 33:19-22; 34:1. D.M. again stated: “I saw, like -- I don’t remember if it was just, like, one eyebrow or

two, but it was just, like, this bushy eyebrow.” *Id.* at 34: 3-5. She described texting B.F. about a “guy in all black” (*Id.* at 35:22-23) and described the ski mask, stating “I couldn’t see any of his hair...But I remember just like, seeing like, it was like, almost rectangular like not the circle ones. ... It was rectangular because I remember seeing like, just like, I don’t know how to explain it. Just seeing like, this. Maybe, I’d be able to see like, a cross. But I don’t remember seeing his eyes, but I feel like his eyes were there. I could just see like, an eyebrow. I feel like that’s how I know he saw me because I could see his eyebrow. Like, if I can see his eyebrow, he can see me. *Id.* at 97:6-17. She reiterated:

From what I remember, I think he was like just, like, walking past that little wall and going towards the kitchen. And I don’t know – like I just remember seeing an eyebrow. I don’t know why I just see one -- it was just, like, one bushy eyebrow. I don’t remember the color, like the full shape. I just remember it being bushy.

Id. at 98:20-25; 99:1-2.

D.M. also drew the mask for the interviewer. *Id.* at 174:20-25. While drawing, she gave a consistent description of the mask and noted the eyebrows “I don’t remember if I saw one or two. Like, it was – it was just weird.” *Id.* at 176:2-3. D.M. explained that she had “scary lucid dreams” but she would always know she was dreaming. *Id.* at 15:8-12; 17:1-4. When she saw the intruder, however, she did not “fully understand” whether it was a dream or not. *Id.* at 17:24-25. She also indicated that when she first saw the intruder, she thought he might be a fireman. *Id.* at 93:10-15.

On December 29, 2022, Defendant was arrested in Albrightsville, Pennsylvania. The following day, on December 30, 2022, (47 days after her first interview) D.M. was interviewed by Idaho State Police detectives. Def’s Exh. 9. They asked D.M. whether she had seen a picture of Defendant. She stated she had seen the mug shot, but had “no clue” whether Defendant was the person she saw in her house. *Id.* at 96:23-97:19. She explained:

From what I remember, I just remember seeing this figure that was, like, not fat, obviously but more of like the skinnier tone build, and some mask on. I don’t know what the mask exactly was. But when I thought about it, it was just, like, covering here and here. I don’t know if it was covering his mouth, his nose, or below his mouth and nose. I just remember knowing that he was white, but I didn’t know how he was white. I just knew he was. And this knowing there’s -- like I knew he had looked at me because of the bushy eyebrow. That’s all I remember. ... But I have no idea what he looked like. I don’t like --when I looked at his picture, nothing came back to me at all. So that like -- I don’t know. I feel

like if I saw that, my mind would be like, oh, yeah, that's him, but it just – I don't remember at all.

Id. at 97:19-98:20.

When asked whether she told B.F. the male had a big nose, D.M. stated: “All I remember...but I don't remember big nose at all, like at all. That's like – all I remember is like some bushy eyebrow in all black and some sort of mask, but it wasn't like one of those circle ski masks. That's all I remember.” *Id.* at 99:12-16.

On May 15, 2023, (183 days after D.M.'s first interview), D.M. testified at the grand jury proceeding for the above-titled matter. Exh. S-4. Regarding November 13, 2022, D.M. testified she woke up around 4:00 a.m. to noises. *Id.* at 168:4-11. She testified she opened her door and heard a man's voice say, “It's okay, I'm going to help you. And I didn't know who the man's voice was.” *Id.* at 174:25-175:1-2. D.M. testified she opened her door again and saw “a figure in all black, which I believe was a person. ... I knew the person was white. I don't know how, but I just knew it. Knew it was male. I think I knew that because of the voice. The person was around my height or a few inches taller. ... And then I knew his build wasn't like scrawny, and he wasn't fat, so I figured it was like the basketball toned, lean build.” *Id.* at 175:23-176:13.

Regarding what the person was wearing, D.M. testified, “There was like, from what I think I remember, it was like a black mask, almost like a ski mask, but not – it just like covered the head, and then maybe up to the mouth, maybe more. I can't remember if it covered just the chin, the mouth, or the nose or lower. She said his clothing was “all black.” *Id.* at 176:14-25. D.M. also testified, “Well, the thing I can really remember was something about a bushy eyebrow. I don't remember seeing anything else, just something about a bushy eyebrow.” *Id.* at 177:3-6.

IV. ANALYSIS

A. D.M.'s Testimony Satisfies IRE 601 and IRE 602.

Defendant first suggests that D.M. is not competent and/or lacks personal knowledge to testify about “bushy eyebrows” because her testimony is not reliable under the *Mason-Biggers* balancing test – a test that is applied when determining whether witness identification is reliable or whether it was the product of police suggestiveness. *Wurdemann v. State*, 161 Idaho 713, 718,

390 P.3d 439, 444 (2017).² Defendant points out that D.M.'s opportunity to see the intruder in her home was seconds at most, her attention was influenced by sleepiness and alcohol, and she constantly questioned what she saw. Defendant argues D.M.'s description of the physical characteristics of the intruder were "general" in nature and could fit "millions" of individuals. Defendant also notes that while he does not have bushy eyebrows, the artwork on her wall displays individuals with prominent eyebrows.

As the State notes, however, the *Mason-Biggers* test does not apply here because D.M. did not make an identification of Defendant and her descriptions were not the result of the use of law enforcement identification techniques. In fact, the sole instance when D.M. was asked to identify Defendant was when she was shown his mugshot after his arrest. She responded she had "no clue" whether it was the person she saw.

Not to be deterred, Defendant alternatively argues that the Court should find D.M. unreliable based on "scientific studies" that explain the fragility and inaccuracy of memory. Reply, pp. 4-7. The Court finds no basis to do so.³ As a general matter, every person is competent to be a witness. IRE 601. Incompetency, which is determined by the Court, applies to "[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." IRE 601(a). Additionally, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

D.M. was a direct witness in this case. As the factual recitation sets forth in detail, D.M.'s account of what she saw and the physical characteristics of the intruder were remarkably consistent throughout all five interviews and her grand jury testimony. While she did not mention his eyebrows in her initial interview, she thereafter identified the "bushy eyebrows" on multiple occasions as something that firmly stuck out in her mind. Although she might have been intoxicated or tired or questioned her memory, the consistency of her descriptions suggest a high

² The *Mason-Biggers* test 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*, 161 Idaho at 718, 390 P.3d at 444 (citation omitted).

³ Even if the Court were inclined to consider Defendant's arguments about why science supports a finding of unreliability, the application of scientific principles to D.M.'s reported memory for purposes of determining reliability is squarely within the realm of an expert. All Defendant has presented to the Court, however, are citations to scientific articles. This is not an appropriate substitute for expert testimony.

degree of reliability. While Defendant may cross-examine D.M. about his concerns with her memory, his challenges to her competency and personal knowledge as a basis for exclusion are unfounded.

B. There Is No Basis Under IRE 403 to Exclude D.M.'s Testimony.

Defendant next asserts D.M.'s testimony about "bushy eyebrows" must be excluded under IRE 403, which permits exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." IRE 403. Specifically, Defendant points out D.M. could not provide enough details about the intruder to provide a description to a composite artist. He asserts that to allow her to testify about "bushy eyebrows" would confuse the issues and result in unfair prejudice because of the danger the jury will believe he is guilty due to his eyebrows.

However, D.M.'s testimony about "bushy eyebrows" is highly relevant in this case. D.M. is the only eyewitness to the intruder responsible for the homicides. It is the jury's task to determine whether Defendant is that person.

Further, there is nothing confusing about her testimony; her descriptions of the "bushy eyebrows" have been consistent and clear. While she could not provide enough details for a composite sketch, it is unsurprising given her observation that the intruder was wearing a mask on his face. Moreover, while this description might or might not implicate Defendant, it will not result in unfair prejudice. Unfair prejudice arises only when the evidence "has an undue tendency to suggest a decision on an improper basis and appeals to the jurors' sympathies, arouses their sense of horror, provokes their instinct to punish, or otherwise causes a jury to base its decision on something other than the established propositions in the case." *State v. Russo*, 157 Idaho 299, 309, 336 P.3d 232, 242 (2014). D.M.'s description of the intruder having bushy eyebrows will not reasonably compel a jury to find Defendant guilty simply because he may have similar eyebrows.

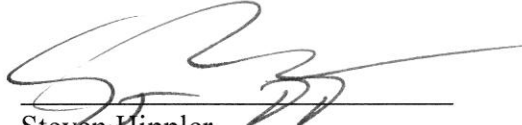
There is a large gulf between a finding that a witness is not competent to testify about what they personally witnessed, and simply allowing impeachment by vigorous cross-examination. This is a matter for cross-examination by Defendant and any concerns with D.M.'s ability to perceive and remember what she claims she saw may be tested in that manner.

V. ORDER

Based on the foregoing, Defendant's Motion *in Limine* re: Witness Identification by Bushy Eyebrows is DENIED.

IT IS SO ORDERED.

DATED this 16th day of April, 2025.


Steven Hippler
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on 4/18/2025, I served a true and correct copy of the **ORDER ON DEFENDANT'S MOTION IN LIMINE RE: WITNESS IDENTIFICATION BY BUSHY EYEBROWS**

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Clerk of the Court

By: 
Deputy Clerk 4/18/2025 10:32:45 AM

CERTIFICATE OF SERVICE