

4.15 Eyewitness Identification of the Defendant

One of the *(most important)* issues in this case is whether *(name of defendant)* is the same person who committed the crime(s) charged in *(Count(s) ___ of)* the indictment. The government, as I have explained, has the burden of proving every element, including identity, beyond a reasonable doubt. Although it is not essential that a witness testifying about the identification *(himself)(herself)* be free from doubt as to the accuracy or correctness of the identification, you must be satisfied beyond a reasonable doubt based on all the evidence in the case that *(name of defendant)* is the person who committed the *crime(s)* charged. If you are not convinced beyond a reasonable doubt that *(name of defendant)* is the person who committed the crime(s) charged in *(Count(s) ___ of)* the indictment, you must find *(name of defendant)* not guilty.

Identification testimony is, in essence, the expression of an opinion or belief by the witness. The value of the identification depends on the witness' opportunity to observe the person who committed the crime at the time of the offense and the witness' ability to make a reliable identification at a later time based on those observations.

You must decide whether you believe the witness' testimony and whether you find beyond a reasonable doubt that the identification is correct.

You should evaluate the testimony of a witness who makes an identification in the same manner as you would any other witness. In addition, as you evaluate a witness' identification testimony you should consider the following questions as well as any other questions you believe are important (*include only those called for by the facts of the case*):

(First), you should ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crime charged. Many factors affect whether a witness has an adequate opportunity to observe the person committing the crime; the factors include the length of time during which the witness observed the person, the distance between the witness and the person, the lighting conditions, how closely the witness was paying attention to the person, whether the witness was under stress while observing the person who committed the crime, whether the witness knew the person from some prior experience, whether the witness and the person committing the crime were of different races, and any other factors you regard as important.

(Second), you should ask whether the witness is positive in the identification and whether the witness' testimony remained positive and unqualified after cross-examination. If the witness' identification testimony is positive and unqualified, you should ask whether the witness' certainty is well-founded.

[(Third), you should ask whether the witness's identification of (name of defendant) after the crime was committed was the product of the witness' own recollection. You may take into account both the strength of the later identification and the circumstances under which that identification was made. You may wish to consider how much time passed between the crime and the witness' later identification of the defendant. You may also consider (whether the witness gave a description of the person who committed the crime) (how the witness' description of the person who committed the crime compares to the defendant). (You may also consider whether the witness was able to identify other participants in the crime.) If the identification was made under circumstances that may have influenced the witness, you should examine that identification with great care. Some circumstances which may influence a witness'

identification are whether the witness was presented with more than one person or just (name of defendant); whether the witness made the identification while exposed to the suggestive influences of others; and whether the witness identified (name of defendant) in conditions that created the impression that (he)(she) was involved in the crime.]

[(Fourth), you should ask whether the witness failed to identify (name of defendant) at any time, identified someone other than (name of defendant) as the person who committed the crime, or changed his or her mind about the identification at any time.]

[The court should also give the following admonition if the witness' opportunity to observe was impaired or if the witness' identification is not positive, was shaken on cross-examination, or was weakened by a prior failure to identify the defendant or by a prior inconsistent identification:

You should receive the identification testimony with caution and scrutinize it with care.]

If after examining all of the evidence, you have a reasonable doubt as to whether (name of defendant) is the individual who committed the crime(s) charged, you must find (name of defendant) not guilty.

Comment

This instruction is derived from O'Malley et al., supra, § 14.10, which is based on the instruction recommended in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (set out below), which the Third Circuit cited with approval in *United States v. Wilford*, 493 F.2d 730, 734 n.9 (3d Cir. 1974).

This instruction should be given in any case in which eyewitness identification of the defendant is an issue. The Third Circuit has recognized the problems with eyewitness identification testimony as well as the important role of expert testimony in helping jurors evaluate eyewitness identification of the defendant in a criminal case. See *United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). In *Brownlee*, the court held that the exclusion of portions of the defense expert's proffered testimony on eyewitness identification required reversal of the defendant's conviction even though the trial court permitted the expert to testify as to some factors that challenged the government's identification witnesses. 454 F.3d at 144. The court emphasized that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." 454 F.3d at 142 (quoting Rudolph Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell Law Review 1097, 1099 n.7 (2003)).

In *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), the Third Circuit addressed the importance of instructing the jury on identification testimony:

[W]e recognize a compelling need for guidelines which will obviate skeletal, pattern instructions and assure the essential particularity demanded by the facts surrounding each identification. Accordingly, we approve for use in this circuit the approach taken by the Pennsylvania courts concerning jury instructions on identification, and require, for prospective application only, that such instructions satisfy the following:

In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict or uncertainty on the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the

jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.

442 F.2d at 528 (citations omitted).

In *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), the D.C. Circuit, building on *Barber*, recommended that the following instruction be adapted to the facts of the case and given in any case where eyewitness identification of the defendant is an issue:

Appendix: Model Special Instructions on Identification

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past. [In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight-but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances

under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

See United States v. Wilford, 493 F.2d 730, 734 n.9 (3d Cir. 1974) (citing with approval *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)).