

7.11 IDENTIFICATION TESTIMONY

(1) You have heard the testimony of _____, who has identified the defendant as the person who _____. You should carefully consider whether this identification was accurate and reliable.

(2) In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider the visibility, the distance, whether the witness had known or seen the person before, and how long the witness had to see the person.

[(3) You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier identification was conducted, and how much time passed after the alleged crime before the identification was made.]

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

(5) Consider all these things carefully in determining whether the identification was accurate and reliable.

(6) Remember that the government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged.

Use Note

This instruction should be given when the identification has become an issue because of lack of corroboration, or limited opportunity for observation, or when the witness's memory has faded by the time of trial.

Bracketed paragraph (3) should be included when evidence of an out-of-court identification has been admitted.

Bracketed paragraph (4) should be included when evidence of an earlier failure to make identification or evidence of an inconsistent identification is admitted.

Committee Commentary 7.11 (current as of December 1, 2009)

The testimony of a single eyewitness is sufficient to take a criminal case to the jury. However, courts have recognized that there is a serious possibility of mistake inherent in uncorroborated identification testimony. *United States v. O'Neal*, 496 F.2d 368 (6th Cir.1974). In cases where identification is a key issue, courts have required an instruction that emphasizes the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt.

The leading case is *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). *Telfaire* set out a model instruction in an appendix which emphasized: (1) the capacity and opportunity of the witness to observe reliably the offender; (2) the question whether the identification was the product of the witness's own recollection; (3) the inconsistent identification made by the same witness; and (4) the credibility of the witness. *Id.* at 558-59. The *Telfaire*-type instruction was adopted by the Sixth Circuit in *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir. 1978). The language in the instruction is drawn directly from *Telfaire, supra*.

The instruction should be given when the identification has become an issue because of lack of corroboration or limited opportunity for observation, or where the witness's memory has faded by the time of trial. *Scott, supra*.

This instruction omits any mention of the credibility of the identification witnesses because that topic is adequately covered in the general credibility instruction, Instruction 1.07. If the credibility of identification witnesses is a particularly significant issue in a case, the *Scott* decision gives district courts the leeway to mention the credibility factor in this instruction as well as in the general credibility instruction. *See Scott, supra* (listing as a factor the jury should consider “(4) the credibility of the witness.”).