

## **Final Instructions: Consideration of Particular Kinds of Evidence**

### **4.08. EYEWITNESS TESTIMONY**

The value of identification testimony 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 evaluating such testimony you should consider all of the factors mentioned in these instructions concerning your assessment of the credibility of any witness, and you should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time of the offense. You may consider, in that regard, such matters as the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times.

[In general, a witness uses his or her senses to make an identification. Usually the witness identifies an offender by the sense of sight -- but this is not necessarily so, and other senses may be used.]

You should also consider whether the identification made by the witness after the offense was the product of [his] [her] own recollection. You may consider, in that regard, the strength of the identification, and the circumstances under which the identification was made, and the length of time that elapsed between the occurrence of the crime and the next opportunity the witness had to see the defendant.

[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.]

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to [him] [her] for identification, you should scrutinize the identification with great care.

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

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The Government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness be free from doubt as to the correctness of the identification. However you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find [him] [her] guilty. 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.

### Committee Comments

See *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972); 1A Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal §§ 14.10, 14.11 (5th ed. 2000).

Although the court in *Telfaire* found the case before it was not one requiring a special eyewitness instruction, as part of its appellate function it drafted an eyewitness instruction for future use in appropriate cases. The instruction in this manual is basically the same instruction. However, changes have been made in vocabulary and sequence and repetitive material has been eliminated.

The purpose of the *Telfaire* instruction was to adopt the approach of *United States v. Barber*, 442 F.2d 517, 528 (3d Cir. 1971) to (1)"obviate skeletal pattern instructions" and (2) "assure the essential particularity demanded by the facts surrounding each identification." 469 F.2d at 557. *Telfaire* stressed that the instruction was to be used as a model, with the language to be revised and adapted to suit the proof and contentions of each case. *Id.*

This Circuit has strongly recommended the giving of a *Telfaire* instruction, if requested, in a case in which the reliability of eyewitness identification of a defendant presents a serious question, although the exact language need not be given, and further, where the government's case rests solely or substantially on questionable eyewitness identification, it is reversible error to refuse to give a *Telfaire*-type instruction. *United States v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987); *Williams v. Lockhart*, 736 F.2d 1264, 1267 (8th Cir. 1984); *United States v. Cain*, 616 F.2d 1056, 1058 (8th Cir. 1980); *United States v. Greene*, 591 F.2d 471, 474-77 (8th Cir. 1979); *Durns v. United States*, 562 F.2d 542, 549-50 (8th Cir. 1977); *United States v. Dodge*, 538 F.2d 770, 783-84 (8th Cir. 1976); *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir. 1975).

In *Dodge*, the court indicated it would view with concern the failure to give specific and detailed instructions on identification in future cases where the identification of the defendant is based solely or substantially on eyewitness testimony. 538 F.2d at 784. Failure to give such an instruction in that case was not grounds for reversal since the identification was not considered "questionable." See also *United States v. Johnson*, 848 F.2d 904, 906 (8th Cir. 1988) holding that a specific eyewitness instruction was not necessary where nothing suggested that the eyewitness' testimony was unreliable. A general credibility instruction was held sufficient. In

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*Durns* failure to include the first and last paragraphs of *Telfaire* was found not to be error where there was substantial circumstantial evidence in addition to the eyewitness identification. 562 F.2d at 549-50.

In *Greene* the court found failure to give the instruction reversible error, analyzing the basic question as whether eyewitness testimony is essential to support a conviction. 591 F.2d at 475. Three factors not present in *Dodge* were found present in *Greene*: 1) the eyewitness identification was the sole basis for conviction; 2) there was the possibility of misidentification and 3) the trial court gave no instruction alerting the jury to the crucial role that eyewitness identification played in that case. 591 F.2d at 476. It should be further noted that the *Telfaire* instruction was requested. 591 F.2d at 474-75 n.4.

In *Cain* and *Mays* there was no prejudicial error to refuse to give a requested *Telfaire* instruction where the identification testimony was strongly corroborated. 616 F.2d at 1058-59; 822 F.2d at 798. In *Roundtree* the court found no error where the instruction had not been requested. 527 F.2d at 13.

In *United States v. Grey Bear*, 883 F.2d 1382 (8th Cir. 1989), the court upheld a trial court's refusal to give a very detailed identification instruction where the instruction given adequately pointed out the relevant considerations to be weighed in gauging eyewitness testimony including accurate recollection and the ability to observe.