

IDENTIFICATION

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Commonwealth has the burden of proving the identity of the perpetrator beyond a reasonable doubt.

It is not essential that any witnesses themselves be free from doubt as to the correctness of their identification of the defendant. 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 (her). 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 a 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:

Are you convinced that the witness had the capacity, and an adequate

opportunity, to observe the person? Whether a witness had an adequate opportunity to observe the person 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 lighting conditions were, and whether the witness had occasion to see or know the person in the past. In general, witnesses base any identification they make on their perception through the use of their senses. Usually witnesses identify a person by the sense of sight — but this is not necessarily so, and witnesses may use their other senses.

Are you satisfied that any identifications made by witnesses after the crime were the products of their own recollection? Here, you should examine all the circumstances under which the identification was made. If a witness's identification may have been influenced by the circumstances under which the defendant was presented to the witness for identification, you should scrutinize the identification with great care.

Another factor that you may consider in determining the reliability of any identification is the length of time that lapsed between the occurrence of the crime and the opportunity of a witness, some time after the occurrence of the crime, to see and identify the defendant as the offender.

You may also take into account that any identification that was 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 a witness.

You may take into account whether a witness ever tried and failed to make an identification of the defendant, or made an identification that was inconsistent with the identification that such witness made at trial.

You must consider the credibility of each identification witness in the same way as any other witness. Consider whether he or she is truthful, and consider whether he or she had the ability and opportunity to make a reliable observation on the matter covered in his or her testimony.

I again emphasize that the Commonwealth has the burden of proof on 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 (she) 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.

modified by *Commonwealth v. Santoli*, 424 Mass. 837, 845-846, 680 N.E.2d 1116 (1997) (language that jury may consider “the strength of the identification” should not be included in standard charge where witness is confident of identification, but may be appropriate where the witness’s identification was doubtful); *Commonwealth v. Jones*, 423 Mass. 99, 110 n.9, 666 N.E.2d 994, 1001 n.9 (1996) (language that jury may consider “the strength of the identification” is disfavored because it equates confidence with accuracy); *Commonwealth v. Cuffie*, 414 Mass. 632, 609 N.E.2d 437 (1993); and *Commonwealth v. Fitzpatrick*, 18 Mass. App. Ct. 106, 109-111, 463 N.E.2d 571, 574-575 (1984). See *Commonwealth v. Monteiro*, 51 Mass. App. Ct. 552, 556 n.4, 747 N.E.2d 721, 725 n.4 (2001) (affirming language of model instruction). The judge is not required to particularize the instruction to the circumstances of the case. *Commonwealth v. Horne*, 26 Mass. App. Ct. 996, 999, 530 N.E.2d 353, 357 (1988) (judge need not mention witness’s disputed sobriety).

SUPPLEMENTAL INSTRUCTIONS

1. *Honest mistake.*

In deciding whether or not to believe a witness who identifies the defendant as the perpetrator, remember that you must consider not only whether the witness is trying to tell you the truth or is lying. You must also decide whether that witness’s identification is accurate or instead is an honest mistake. Sometimes people perceive an event erroneously, or forget things, or get confused. Deciding whether a witness is trying to tell you the truth is only the first step. You must then go on to decide whether the witness’s identification is accurate in fact.

Commonwealth v. Pressley, 390 Mass. 617, 620, 457 N.E.2d 1119, 1121 (1983). It is reversible error for the judge to refuse the defense an instruction on honest mistake where it is a live issue. *Commonwealth v. Williams*, 58 Mass. App. Ct. 139, 142-143, 788 N.E.2d 580, 583-584 (2003); *Commonwealth v. Williams*, 54 Mass. App. Ct. 236, 244, 764 N.E.2d 889, 896 (2002); *Commonwealth v. Spencer*, 45 Mass. App. Ct. 33, 39, 695 N.E.2d 677, 682 (1998). Absent a request, the judge is

not required to give such an instruction sua sponte. *Commonwealth v. Vardinski*, 438 Mass. 444, 457, 780 N.E.2d 1278, 1290 (2003); *Commonwealth v. Willard*, 53 Mass. App. Ct. 650, 659, 761 N.E.2d 971, 979 (2002); *Commonwealth v. Crowley*, 29 Mass. App. Ct. 1, 7-8, 556 N.E.2d 1043, 1047-1048 (1990).

See also *Commonwealth v. DeLong*, 72 Mass. App. Ct. 42, 47-49, 888 N.E.2d 956, 960-961 (2008) (indicating uncertainty whether the SJC requires an express reference to honest but mistaken identification if the charge covers the issue in the factors that the jury is to consider), and *Commonwealth v. DeJesus*, 71 Mass. App. Ct. 799, 807 n.9, 887 N.E. 2d 283, 291 n.9 (2008) (approving wording of model instruction).

2. *Cross-racial identification.* In this case, the identifying witness

is of a different race than the defendant. If you think it is appropriate to do so, you may consider whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcome any such difficulty of identification.

[For example, you may conclude that the witness had

sufficient contacts with members of the defendant's race that (he) (she) would not have greater difficulty in making a reliable identification.]

It is within the judge's discretion whether to instruct that the jury may consider the cross-racial nature of an identification and whether an identification by a person of a different race from the defendant may be less reliable than identification by a person of the same race. *Commonwealth v. Hyatt*, 419 Mass. 815, 818-819, 647 N.E.2d 1168, 1171 (1995); *Commonwealth v. Charles*, 397 Mass. 1, 8, 489 N.E.2d 679, 684 (1986); *Commonwealth v. Ingram*, 43 Mass. App. Ct. 804, 807-808, 686 N.E.2d 1080, 1082 (1997). In *Commonwealth v. Jean-Jacques*, 47 Mass. App. Ct. 909, 911, 712 N.E.2d 1150, 1152 (1999), the Appeals Court suggested that "a judge should consider a request for such an instruction with a measure of favorable inclination to grant it."

The American Bar Association has recommended that in cases in which a judge finds a sufficient risk of misidentification based on cross-racial factors, the judge should have available a model jury instruction that informs jurors of all of the factors that may enhance or detract from the reliability of an eyewitness identification, one of which may be the cross-racial nature of the identification. Resolution 104D, ABA House of Delegates, Resolution 104D (adopted Aug. 11, 2008) (available at http://www.abavideo.org/ABA531/pdf/hod_resolutions/104d.pdf).

The model instruction was developed by the ABA Criminal Justice Section's Committee on Rules of Criminal Procedure, Evidence, and Police Practices for use in appropriate cases. It draws on language from *United States v. Telfaire*, 469 F.2d 552, 557-560 (D.C. Cir. 1972).

NOTES:

1. **Expert testimony.** Whether to permit expert testimony on the general reliability of eyewitness identifications generally rests in the judge's discretion. The weight of authority is against the general admissibility of such expert testimony, but some jurisdictions favor its admission if special factors are present (typically, lack of corroboration, or discrepancies, concerning the identification). At least where there is other evidence corroborating the identification, the admissibility of such evidence is consigned to the judge's discretion. Before admitting such evidence the judge must, at minimum, find that it meets the general requirements for expert testimony: that it is relevant to the circumstances of the identification; that it will help, rather than confuse or mislead, the jury; that the underlying basis of the opinion, and any tests or assumptions, are reliable; and that the opinion is sufficiently tied to the facts of the case so that it will aid the jury in resolving the matter. General acceptance by other experts is a factor, but is not controlling. *Commonwealth v. Santoli*, 424 Mass. at 841-845, 630 N.E.2d at 1118-1121; *Commonwealth v. Hyatt*, 419 Mass. 815, 818, 647 N.E.2d 1168, 1171 (1995); *Commonwealth v. Francis*, 390 Mass. 89, 95-102, 453 N.E.2d 1204, 1207-1211 (1983); *Commonwealth v. Weichell*, 390 Mass. 62, 77-78, 453 N.E.2d 1038, 1047-1048 (1983), cert. denied, 465 U.S. 1032 (1984); *Commonwealth v. Jones*, 362 Mass. 497, 501-502, 287 N.E.2d 599, 602-603 (1972) (psychological characteristics and dangers of recall are probably "well within the experience of [ordinary jurors]"). Expert testimony on a particular witness's visual acuity is proper. *Commonwealth v. Sowers*, 388 Mass. 207, 215-216, 446 N.E.2d 51, 56 (1983).

3. **Other potential perpetrators.** A defendant is entitled to introduce evidence tending to show that someone else committed the crime or had motive, opportunity and intent to do so, provided such evidence is not too remote in time, probatively weak, or irrelevant. Doubtful cases should be resolved in favor of admissibility. *Commonwealth v. Lawrence*, 404 Mass. 378, 387-388, 536 N.E.2d 571, 577-578 (1989); *Commonwealth v. Murphy*, 282 Mass. 593, 597-598, 185 N.E. 486, 487-488 (1933); *Commonwealth v. Walker*, 14 Mass. App. Ct. 544, 552, 441 N.E.2d 261, 266 (1982); *Commonwealth v. Magnasco*, 4 Mass. App. Ct. 144, 147-148, 343 N.E.2d 444, 446-447 (1976). This may include evidence of other recent, similar crimes by similar methods. *Commonwealth v. Rosario*, 21 Mass. App. Ct. 286, 291, 486 N.E.2d 769, 772 (1985). However, a judge should exclude evidence of other, allegedly similar crimes by another perpetrator where they are insufficiently proximate in time and location, or where they do not share similar features. *Commonwealth v. Brown*, 27 Mass. App. Ct. 72, 75-76, 534 N.E.2d 806, 808 (1989).

4. **Evidence of prior identifications.** A witness's testimony as to his own prior identification is admissible to corroborate his in-court identification, and is not hearsay. *Commonwealth v. Nassar*, 351 Mass. 37, 42, 218 N.E.2d 72, 77 (1966) (photograph); *Commonwealth v. Locke*, 335 Mass. 106, 112, 138 N.E.2d 359, 364 (1956) (line up). A third party may testify as to another witness's prior identification even in the absence of any in-court identification and even when the witness denies having made an identification. *Com. v. Le*, 444 Mass. 431, 828 N.E.2d 501 (2005). A third party's testimony is also admissible to impeach an identification witness who now denies having made the prior identification. *Commonwealth v. Daye*, 393 Mass. 55 at 60, 469 N.E.2d at 487; *Commonwealth v. Swenson*, 368 Mass. 268, 274, 331 N.E.2d 893, 897 (1975). At present, where a witness is unavailable after a good faith, unsuccessful effort to obtain his or her testimony, evidence of his prior in-court identification is admissible if it was made under oath and subject to cross-examination; it may be admitted by means of a transcript or by the testimony of someone who was present. *Commonwealth v. Furtick*, 386 Mass. 477, 480, 436 N.E.2d 396, 398-399 (1982); *Commonwealth v. Bohannon*, 385 Mass. 733, 740-749, 434 N.E.2d 163, 168-172 (1982). This issue has not been tested under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

5. **Reliability.** If the defendant proves by a preponderance of evidence that a prior identification was unnecessarily suggestive in all the circumstances, the identification may not be admitted at trial. Art. 12 of the Massachusetts Declaration of Rights requires this rule of per se exclusion of out-of-court identification evidence, without regard to reliability, whenever the identification has been obtained through unnecessarily suggestive confrontation procedures. *Commonwealth v. Johnson*, 420 Mass. 458, 650 N.E.2d 1257 (1995). Massachusetts thus follows the former *Wade-Gilbert-Stovall* Federal rule instead of the current reliable-in-the-totality-of-circumstances rule adopted in *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977). Any subsequent identifications may be admitted only if the prosecution proves by clear and convincing evidence that they have an independent source, considering (1) the extent of the witness's opportunity to observe the perpetrator at the time of the crime (the "most important [factor] because the firmer the contemporaneous impression, the less the witness is subject to the influence of subsequent events," *Commonwealth v. Bodden*, 391 Mass. 356, 361, 461 N.E.2d 803, 807 [1984]); (2) any prior errors in description; (3) any prior errors in identifying another person; (4) any prior failures to identify the defendant; (5) any other suggestions; and (6) the lapse of time between the crime and the identification. *Commonwealth v. Johnson*, 420 Mass. 458, 650 N.E.2d 1257 (1995); *Commonwealth v. Botelho*, 369 Mass. 860, 343 N.E.2d 876 (1976).

As to other reliability issues, see *Commonwealth v. Harris*, 395 Mass. 296, 299-300, 479 N.E.2d 690, 692 (1985) (one-on-one confrontations); *Commonwealth v. Chase*, 372 Mass. 736, 741-745, 363 N.E.2d 1105, 1109-1112 (1977) (same); *Weichell*, 390 Mass. at 68-73, 453 N.E.2d at 1042-1045 (composite drawings); *Commonwealth v. Porter*, 384 Mass. 647, 657-658, 429 N.E.2d 14, 20-21 (1981) (showing single photo); *Commonwealth v. Venios*, 378 Mass. 24, 29, 389 N.E.2d 395, 398 (1979) (same); *Commonwealth v. Simmons*, 383 Mass. 46, 49-53, 417 N.E.2d 1193, 1195-1197 (1981) (identification of inanimate object); *Commonwealth v. Moynihan*, 376 Mass. 468, 476, 381 N.E.2d 575, 580-581 (1978) (identification in presence of other witnesses); *Commonwealth v. Amorin*, 14 Mass. App. Ct. 553, 555, 440 N.E.2d 1305, 1307 (1982) (same); *Walker*, 14 Mass. App. Ct. at 550-551, 441 N.E.2d at 265 (same); *Commonwealth v. Marks*, 12 Mass. App. Ct. 511, 515-516, 426 N.E.2d 1172, 1175 (1981) (same); *Commonwealth v. Marini*, 375 Mass. 510, 516-517, 378 N.E.2d 51, 55-57 (1978) (voice identification); *Commonwealth v. Dickerson*, 372 Mass. 783, 787-788, 364 N.E.2d 1052, 1056 (1977) (initial failure to identify does not bar later positive identification); *Commonwealth v. Lacy*, 371 Mass. 363, 368-369, 358 N.E.2d 419, 423-424 (1976) (same); *Commonwealth v. Wilson*, 360 Mass. 557, 562, 276 N.E.2d 283, 286 (1971) (weight of identification testimony is for jury); *Commonwealth v. Cunningham*, 104 Mass. 545, 547 (1870) (several non-positive identifications can provide proof beyond reasonable doubt); *Commonwealth v. Bishop*, 9 Mass. App. Ct. 468, 471-473, 401 N.E.2d 895, 898

(1980) (weight of uncertain identification is for jury); *Commonwealth v. Jones*, 9 Mass. App. Ct. 83, 92-93, 399 N.E.2d 1081, 1086-1087 (1980) (same); *Commonwealth v. Cincotta*, 6 Mass. App. Ct. 812, 817, 384 N.E.2d 1244, 1248, aff'd, 379 Mass. 391, 398 N.E.2d 478 (1979) (doubts as to reliability not of constitutional dimension are matters of weight for jury).

6. **When required.** Where the issue of mistaken identification is fairly raised by the evidence, the defendant is entitled on request to a charge on the possibility of mistaken identification. *Commonwealth v. Pressley*, 390 Mass. 617, 620, 457 N.E.2d, 1119, 1121 (1983); *Commonwealth v. Bowden*, 379 Mass. 472, 483-484, 399 N.E.2d 482, 489-490 (1980); *Rodriguez*, 378 Mass. at 302, 391 N.E.2d at 892-893, *Commonwealth v. A Juvenile*, 22 Mass. App. Ct. 905, 906, 491 N.E.2d 278, 279 (1986). Compare *Commonwealth v. Key*, 19 Mass. App. Ct. 234, 242-243, 472 N.E.2d 1381, 1387-1388 (1985). The *Cuffie/Rodriguez* model charge may be modified or embellished as the allegations and evidence require. *Rodriguez*, 378 Mass. at 310 n.1, 391 N.E.2d at 897 n.1. For additional elaborative language, see *Commonwealth v. Napolitano*, 378 Mass. 599, 608 n.13 & 609 n.14, 393 N.E.2d 338, 344 n.13 & 345 n.14 (1979). Any variation should avoid "the vice of linking the reliability of the identification to the victim's veracity." *Commonwealth v. McMaster*, 21 Mass. App. Ct. 722, 726-728, 490 N.E.2d 464, 469-470 (1986). The defendant is entitled on request to have the possibility of an honest but mistaken identification expressly mentioned to the jury. *Pressley*, 390 Mass. at 619, 457 N.E.2d at 1120. See *Commonwealth v. Caparota*, 34 Mass. App. Ct. 473, 612 N.E.2d 696 (1993); *Commonwealth v. DiFonzo*, 31 Mass. App. Ct. 921, 922, 576 N.E.2d 1382, 1383-1384 (1991).

An identification instruction is also required on request if the defendant disputes being the perpetrator involved in "other bad acts" evidence admitted on the issue on intent (see Instruction 3.760), even if there is no question of identity on the charge being tried. *Commonwealth v. Delrio*, 22 Mass. App. Ct. 712, 719-721, 497 N.E.2d 1097, 1101-1102 (1986).

An identification instruction should not be given in a case where the defendant and the victim were so well known to each other that the identification is either correct or the victim lying. *Pressley, supra*; *Commonwealth v. Walker*, 33 Mass. App. Ct. 915, 916, 597 N.E.2d 72, 73 (1992).

The judge may give an instruction on identification sua sponte where appropriate, even if the defense is not based on a claim of mistaken identity. *Commonwealth v. Murray*, 396 Mass. 702, 709, 488 N.E.2d 415, 419-420 (1986).