

IDENTIFICATION¹

DRAFT

One of the most important issues Thus, is the identification of the defendant² as the perpetrator of the crime. The State has the burden of proving identity beyond a reasonable doubt. It is not essential that a witness be free from doubt as to the correctness of his or her identification. 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.

The value of identification testimony depends on the opportunity the witness had to observe the person who committed the crime at the time of the crime and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:

1. Did the witness have the capacity and an adequate opportunity to observe the person in question at the time of the crime? In determining this, you may consider such factors as:
 - a. The length of time available for the observation;
 - b. The distance between the witness and the person observed;
 - c. The lighting conditions;
 - d. The witness's degree of attention to the person observed;
 - e. The accuracy of any prior description of the alleged perpetrator;
 - f. Whether the witness had an occasion to see or know the person identified in the past.³

[In general, a witness bases any identification he or she makes on his or her perception through the use of his or her senses. Usually the witness identifies someone by the sense of sight - but this is not necessarily so, and he or she may use other senses].

[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 that results from the presentation of the defendant alone to the witnesses.]

2. Was the identification made by the witness after the crime the product of his or her own recollection?

¹ *State v. Burke*, 122 N.H. 565, 571 (1982), held that when eyewitness identification is "essential to support a conviction," the court "will view with grave concern the failure to give specific and detailed instructions on identification . . . where identification of the defendant is based solely or substantially on eyewitness testimony." The court went on to "suggest that the trial courts be guided by the instruction set forth in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), where applicable." The following instruction is modeled extensively upon the *Telfaire* instruction, although it incorporates some modifications found in John M. Dinse, *et al.*, *Vermont Jury Instructions; Civil and Criminal* § 5.45, at 5-93 -- 5-94 (1993).

² Specify name of person referred to throughout this instruction as appropriate

³ *Telfaire*, 469 F.2d at 561-3 (Bazelon, C.J., concurring). Judge Leventhal, in his concurrence to the opinion, *id.*, at 561-563, stated that such an instruction would not be appropriate unless the litigants developed an adequate factual record supporting the need for it.

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

[3.[4.] Finally, you must consider the credibility of each identification witness in the same way as any other witness, including whether you consider the witness to be truthful and whether the witness had the capacity and opportunity to make a reliable observation on the matter covered in the identification testimony.

I again emphasize that the State has the burden of proving identity beyond a reasonable doubt. If, after examining the evidence, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

Reporter's Note

In appropriate cases involving cross-racial identification, Chief Judge Bazelon recommended that the following instruction be given [to be inserted after paragraph 1 (f)]:

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 or her for identification, you should scrutinize the identification with great care. You may also consider the length of time that elapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant as a factor bearing on the reliability of the identification.