

The Pennsylvania Bar Institute

PART ONE--General Instructions

CHAPTER IV--Witnesses and Testimony

Date of Last Revision - June 2010

4.07B (Crim) Identification Testimony--Accuracy in Doubt

1. In [his] [her] testimony, [name of witness] has identified the defendant as the person who committed the crime. There is a question of whether this identification is accurate.

2. A victim or other witness can sometimes make a mistake when trying to identify the criminal. If certain factors are present, the accuracy of identification testimony is so doubtful that a jury must receive it with caution. Identification testimony must be received with caution [if the witness because of bad position, poor lighting, or other reasons did not have a good opportunity to observe the criminal] [if the witness in [his] [her] testimony is not positive as to identity] [if the witness's positive testimony as to identity is weakened [by qualifications, hedging, or inconsistencies in the rest of [his] [her] testimony] [by [his] [her] not identifying the defendant, or identifying someone else, as the criminal [at a lineup] [when shown photographs] [give specifics] before the trial]] [if, before the trial, the defendant's request for a [lineup] [specify request] to test the ability of the witness to make an identification was denied and the witness subsequently made a less reliable identification] [if, [give specifics]].

[*First Alternative:* Court rules as a matter of law that caution is required:]

3. In this case [there was evidence that [name of witness] could not see the criminal clearly] [give specifics]. Therefore, you must consider with caution [his] [her] testimony identifying the defendant as the person who committed the crime.

[*Second Alternative:* When there is a jury issue as to whether caution is required:]

3. If you believe that [this factor is] [one or more of these factors are] present, then you must consider with caution [name of witness]'s testimony identifying the defendant as the person who committed the crime. If, however, you do not believe that [this factor] [at least one of these factors] is present, then you need not receive the testimony with caution; you may treat it like any other testimony.

4. You should consider all evidence relevant to the question of who committed the crime, including the testimony of [name of victim or witness], [any evidence of facts and circumstances from which identity, or non-identity, of the criminal may be inferred] [give other circumstances]. You cannot find the defendant guilty unless you are satisfied beyond reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.

ADVISORY COMMITTEE NOTE

This instruction is dictated by the principles set forth in *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954). A Kloiber instruction is appropriate where an eyewitness did not have a clear opportunity to view a defendant, equivocated on the identification of the defendant, or had some difficulty making an identification in the past. See *Commonwealth v. Rollins*, 738 A.2d 435, n.14 (Pa. 1999); *Commonwealth v. Bormack*, 827 A.2d 503, 507-08 (Pa.Super. 2003).

The Supreme Court noted this instruction with approval in *Commonwealth v. Trivigno*, 750 A.2d 243, 252 (Pa. 2000). See also *Commonwealth v. Ogrod*, 839 A.2d 294 (Pa. 2003).

The Pennsylvania courts have steadfastly refused to permit expert testimony regarding eyewitness identifications, fearing that it would encroach upon the jury's prerogative to determine credibility. See *Commonwealth v. Bormack*, 827 A.2d 503, 509 (Pa.Super. 2003), citing numerous cases. This view of the admissibility of such evidence is not shared by all jurisdictions, *Bormack* at 509-12, particularly the federal system. See *United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006).