Eye-witnesses Identification

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The process that an eyewitness goes through in a criminal case is a process of memory. There are three basic stages in that memory process. The witness must first acquire the information. After acquiring, the witness must then store the information. Finally, and critically for the eyewitness called upon to identify the suspect, she must recall the original event and communicate whether the suspect is the person who she witnessed commit the offense.

An eyewitness identification expert is typically a psychologist whose expertise is in witness memory. Most often they are called by the defense to opine as to "the vagaries of eyewitness identification." *State v. Long*, 721 P.2d 483, 491 (Utah 1986). They should never be asked to opine as to the accuracy of any particular witness in the case. The Supreme Court has identified three basic categories of factors that affect the identification process and thus may implicate the need for further explanation by an expert: factors that pertain to the eyewitness, factors that pertain to the event witnessed, and factors that pertain to the identification. *State v. Clopten* 223 P.3d 1103, 1113 n.22 (Utah 2009).

Factors that pertain to the eyewitness include uncorrected visual defects, fatigue, injury, intoxication, bias, exceptional mental condition (intellectual disability etc.), age, and cross race identification. Factors that pertain to the event witnessed include stress or fright, limited visibility, distance from the event, distractions, weapon focus, disguise, distinctiveness of suspect's appearance, attention given to event, and witness' awareness that a crime is occurring. Factors that pertain to the identification include the length of time between observation and identification, instances of prior failures to identify, inconsistent descriptions, line up vs. show up processes, photo array vs. live line up, external influences (news, other witness etc.), and potentially suggestive police conduct.

Persistence has proven effective for the defense bar with regard to the eyewitness expert. The Utah Supreme Court first expressed its concern regarding eyewitness identification accuracy in 1986 with *State v. Long*. In *Long*, the Court held for the first time that if there was an identification issue the trial court must give a cautionary instruction when requested by the defense. The instruction would "not permit a judge to opine as to the credibility of the testimony" but rather "only pinpoint identification as a central issue and highlight the factors that bear on the reliability of that identification." *Long*, 721 P.2d at 492.

In 2001 the Utah Supreme Court upheld the trial court's decision to exclude the defense eyewitness identification expert. *State v. Butterfield*, 27 P.3d 1133, 1147 (Utah 2001). The Court reasoned that it was not necessary to call an expert witness to testify to something that "would apply to any crime or any trial," and would in the end be nothing more than a "lecture to the jury

as to how they should judge the evidence." *Id.* at 1146. The *Long* cautionary instruction was sufficient to address the issues of eyewitness identification.

The next year the Utah Supreme Court reiterated its decision that the admissibility of eyewitness expert testimony was at the discretion of the trial judge in *State v. Hubbard*. The Supreme Court reinforced its decision in *Butterfield* that the *Long* instruction was sufficient and that expert testimony would merely be a lecture to the jury. *State v. Hubbard*, 48 P.3d 953, 961 (Utah 2002). It did invite trial courts to tinker with the substance of *Long* to meet the facts of the case but it did not ever analyze the admissibility of the testimony pursuant to rule 702 of the Utah Rules of Evidence.

That was the law in a nutshell going into the trial in *State v. Clopten*. On the eve of trial the trial court excluded the defense eyewitness identification expert, Dr. David Dodd's testimony on the same basis as the Supreme Court had applied in *Butterfield* and *Hubbard*. There was not any Rule 702 analysis much less a Rimmasch hearing; none of the previous cases had discussed the issue in those terms before. The court of appeals upheld the trial court decision. However, the Supreme Court reversed both trial and appellate courts and in so doing reversed its own precedence. First, the Court held that the testimony of the expert was not "an impermissible lecture" to the jury because juries are informed regarding some study results like the impact of stress or weapon focus on eyewitness identification. It is also helpful to the jury by "quantifying what most people already know." *State v. Clopten*, 223 P.3d 1103, 1109 (Utah 2009). Cautionary instructions it turned out, were not sufficient to properly educate the jury. *Id.* at 1111.

Rule 702 allows for expert testimony so long as the witness is qualified by knowledge, skill, experience, training or education. The evidence is admissible if it is helpful to the jury and the proponent can make a threshold showing that the principles or methods underlying the testimony are reliable, based upon sufficient facts or data and have been reliably applied to the facts of the case. The rule further provides for a short cut to establishing the threshold showing if the underlying principles or methods and the sufficiency of the facts or data and their application to the facts of the case are generally accepted by the "relevant expert community."

The Supreme Court in *Clopten* held that in cases where an eyewitness is called upon to identify a "stranger and where one or more established factors affecting accuracy are present," eyewitness expert testimony "will meet rule 702's requirement to 'assist the trier of fact.'" *Id.* at 1113. (see the three basic categories of factors mentioned above). Moreover, the testimony of the eyewitness identification expert satisfies either standard for making a threshold showing and accordingly courts may take judicial notice of the underlying principles' general acceptance in the relevant expert community. *Id.* at 1114. If an expert testifies, the expert may not opine as to the accuracy of a particular witness' testimony. *Id.* Finally, if the defense calls an eyewitness identification expert then the trial court is freed from the bondage of *State v. Long* and need not give a cautionary instruction. *Id.* at 1113.

Expert Witness Testimony

Much of what an eyewitness expert will say is not the least surprising. Thus there is no sense disputing with the expert or hiring your own to argue that lighting or distance from the witness to the suspect has no impact on subsequent identification. The same thing goes for exposure duration, disguise, impaired vision, mental impairment due to injury or intoxication or the passage of time from the event. As we have always done we should corroborate eyewitness identification with other witnesses, physical evidence or even corroborating other parts of the witness' testimony.

There are significant areas of dispute however. The dispute varies from factor to factor. The impact of stress and the related so called "weapon focus" effect are hotly contested. With regard to stress defense experts argue that "research shows that extreme stress has a debilitative effect on subsequent identification accuracy." Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 327, 334 (2006). The basis for that opinion is a large body of data gathered from numerous laboratory studies. *See e.g.* D.A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & HUM. BEHAV. 687 (2004). As a general proposition, these studies are conducted properly. The problem and therefore the debate is whether such lab studies translate to real life or not. A minority of experts in the field have argued that more work must be done in field studies before making such affirmative claims. See e.g. John C. Yuille et al., *Expert Testimony on Laboratory Witnesses*, 10 JOURNAL OF FORENSIC PSYCHOLOGY PRACTICE, 238 (2010).

> Witnesses appearing in court to testify concerning serious crimes are frequently victims of those crimes and often have been stressed by the events. However, laboratory witnesses are typically unaffected bystanders. For obvious ethical reasons, the controlled research in the laboratory context cannot stress or traumatize an individual. Moreover, laboratory witnesses are often aware that the event is staged, that there will be little or no consequence as a result of the eyewitness account provided or the eyewitness identification made, and are often informed of the upcoming memory tests, a happening that does not transpire in the real world. Even in the rare study in which an event appears to be a real one the event itself, a staged crime, has no direct impact on the witness. The witness studied in the laboratory is different from the typical witness to a crime: an unaffected bystander vs. a stressed or traumatized victim. Consequently, we feel that it is important to differentiate the typical laboratory research participant and witnesses to actual criminal events.

Id. Field studies in contrast are more time consuming and smaller in scale than laboratory tests due to the difficulty in finding cases with fact control patterns similar enough from which to make a comparison. Nevertheless, field studies have demonstrated a much more complex

eyewitness performance. One study "provided a theoretical model of the relationship between trauma and memory, which suggests that a combination of predisposing (e.g., arousal sensitivity, trait dissociation), precipitating (e.g., type of event, state dissociation), and perpetuating (e.g., recall history, context) biopsychosocial factors interact to affect eyewitness recall." Herve, H.F. et al., *Memory Formation in Offenders: Perspectives from a Biopsychosocial Theory of Eyewitness Memory*, in OFFENDERS' MEMORIES OF VIOLENT CRIMES, pp. 37-74, (S.A. Christianson ed.).

Similarly, with weapon focus, defense eyewitness identification experts claim that the witness' attention is drawn to the danger of the weapon to the exclusion of the perpetrator to such a degree that subsequent identification is difficult. Cutler, at 333. Not surprising, the field studies have produced a contrasting result that witnesses appear to have either no detrimental effect or an enhanced detail of the event in cases where perpetrators have brandished weapons. Yuille.

Other areas are less controversial. There is fairly universal agreement regarding "own race bias" in identification. Although most of the work has centered on African American and Caucasian American witnesses, consistent though less dramatic results have been observed with Hispanic and Asian witnesses as well. There has not been any study to determine the reason for the phenomenon. No expert can deny that exposure plays at least a role. Therefore, evidence that the witness in question has cross race relationships will be important. As the Utah Supreme Court has asserted in *Long* and *Clopten* there is a weak correlation between eyewitness confidence and accuracy, (*Clopten*, at 1108) there is nevertheless a correlation and National Institute of Justice recommends that investigators ask eyewitnesses to state how certain they are of any identification. Eyewitness Evidence: A Guide for Law Enforcement, Research Report, U.S. Department of Justice, National Institute of Justice. Accuracy of description is only weakly associated with accuracy in subsequent identification lab tests. Further, consistency of description is not a good predictor of accuracy of identification.

Line up, Photo Arrays and Show Up Procedures

Best practices for identification procedures have evolved with some regularity over the last years. In any given case a compromise might have to be struck between several factors. The first factor to consider is the availability of resources. It is not always possible to have live or photo fillers to assemble a line up at a moment's notice. Nevertheless, studies indicate that initially there is a steep drop off in memory retention after which the memory loss over time flattens out. If a suspect is apprehended immediately following the crime it is important to conduct an identification procedure before the steep loss in memory retention. Thus, a show up may be the ideal procedure. However, line ups and photo arrays provide a system designed to reduce suggestion, therefore baring some reason like immediacy, they are generally preferable to the show up. Thus if any time has passed between the crime and apprehension of a suspect, line up or photo array is the best procedure to follow. Many recent studies have concluded that

sequential rather than simultaneous line ups and photo arrays best avoid suggestion. However, a pair of 2006 studies concluded that sequential line up methods produced "a greater number of filler identifications and fewer suspect identifications." Yuille, (citing Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOO PUBLIC LAW, POLICY & ETHICS JOURNAL 381-413; Mecklenburg, S.H., *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, Illinois State Police: Springfield (March 2006). The overriding objective ought to be an identification procedure designed to obtain an accurate identification that avoids suggestion or the appearance of suggestion. Thus, a show up should only be used if there is a reason for doing it. Second, although the literature does not necessarily support live line ups over photo arrays the Supreme Court suggests that there is a preference for the former over the latter. *State v. Long*, 721 P.2d at 495. Note that in the event a suspect is compelled to participate in a live line up he has a statutory right to have counsel present for it. UTAH CODE ANN. § 77-8-1. Sequential presentation method is preferred over simultaneous presentation by the majority of the experts. Double-blind presentation, the photo array or line up conducted by a person who does not know who is suspect and who is filler avoids the accusation of suggestion. Finally, instructions are important. Police agencies ought to have a written instruction, preferably with a signature line for the witness to acknowledge receipt provides physical evidence of the integrity of the identification procedure.