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Kelly McKay

Educating a Jury on Eyewitness Testimony: Using Jury Instructions is a Better Approach than Expert Testimony

KELLY MCKAY*

Eyewitness testimony experts are called to testify during criminal trials to explain the unreliability of eyewitness identifications. These experts describe to the jury how human memory works and try to create some doubt in the eyewitness's testimony. But are these experts really necessary when other methods can be used to create doubt in eyewitness testimony? This Comment discusses why eyewitness testimony experts should not be allowed to testify and the admissibility of eyewitness testimony experts throughout the country, primarily focusing on Illinois. This Comment also mentions New Jersey v. Henderson, which discusses the adoption of expansive jury instructions for eyewitness testimony. Ultimately, this Comment encourages Illinois to implement jury instructions similar to New Jersey instead of allowing eyewitness testimony experts to testify.

* Juris Doctor Candidate, May 2017, and Lead Articles Editor of the Northern Illinois University Law Review. I would like to dedicate this article to my parents, Jim and Mary Jo, for their endless love and support. I would like to thank the entire Northern Illinois University Law Review for their dedication and thorough review.

I. INTRODUCTION

That's the one! "[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says '[t]hat's the one!'"[1]

On the night of July 14, 1966, Richard Speck (hereinafter Speck) broke into a townhouse in a quiet middle-class neighborhood on Chicago's South Side.[2] Nine female nursing students occupied the townhouse.[3] Speck used his gun to force three women into a bedroom.[4] Once in the bedroom, he found three more women.[5] Speck held the women hostage for hours by tying them

1. Watkins v. Sowders, 449 U.S. 341, 352-53 (1981) (quoting Justice Brennan's dissent citing testimony of Professor Elizabeth F. Loftus).

2. Bob Secter, *Speck Dies; Killed Eight Student Nurses: Murder: He has a Heart Attack at 49 After Spending the Last Quarter-Century in Prison for the 1966 Slayings in Chicago. One Woman had Survived*, L.A.TIMES (Dec. 6, 1991), http://articles.latimes.com/1991-12-06/news/mn-624_1_heart-attack.

3. Jerry Crimmins, *Secrets of the Speck Case*, CHI. TRIB. (May 23, 1993), http://articles.chicagotribune.com/1993-05-23/features/9305230298_1_corazon-amurao-eight-student-nurses-nina-jo.

4. *A Mass Murder Leaves Eight Women Dead*, HISTORY, http://www.history.com/this-day-in-history/a-mass-murderer-leaves-eight-women-dead (last visited Oct. 23,2016) [hereinafter *A Mass Murderer Leaves Eight Women Dead*].

5. *Id.*

up by their hands and feet.[6] Around midnight, three more women came home, only to be tied up by Speck.[7]

Speck told the women that he was only going to rob them.[8] He lied. One-by-one he took a woman to a different room to strangle or stab her to death.[9] Speck would spend at least a half-hour with each woman, then would ritualistically wash his hands and grab his next victim.[10] Speck killed eight women that night.[11]

Unbeknownst to Speck, Corazon Amurao (hereinafter Amurao) was hiding under her bed during the mass murder.[12] She waited until six o'clock in the morning the next day to leave her hiding place.[13] Amurao was the lone survivor and was the only eyewitness who could identify Speck.[14] Amurao gave a detailed description to the police, including Speck's distinctive tattoos: "[b]orn to [r]aise [h]ell" on his left forearm and "[l]ove" and "[h]ate" on his right knuckles.[15] Three days later, Speck was arrested after the sketch was placed on the front page of every local newspaper.[16]

During the trial, Amurao was the prosecution's star witness having been the only eyewitness to the crime. While Amurao was testifying, the prosecutor asked her if she could identify the person who killed her roommates.[17] The prosecutor expected her to stand up and point at Speck.[18] Instead, she stepped down from the witness box and walked towards Speck.[19] Once she was about a foot away she raised her arm and pointed her finger within inches of his face stating, "[t]his is the man!"[20]

II. TESTIMONY BY EXPERT WITNESSES

In order for expert testimony to be admissible at trial, the testimony must assist the trier of fact.[21] The Federal Rules of Evidence have a rule stating when an expert is allowed to testify.[22] Testimony by expert witnesses is

6. *Id.*
7. *Id.*
8. *Id.*
9. Secter, *supra* note 2.
10. Secter, *supra* note 2.
11. Crimmins, *supra* note 3.
12. *A Mass Murder Leaves Eight Women Dead*, *supra* note 4.
13. *A Mass Murder Leaves Eight Women Dead*, *supra* note 4.
14. Crimmins, *supra* note 3.
15. Secter, *supra* note 2.
16. *A Mass Murder Leaves Eight Women Dead*, *supra* note 4.
17. DENNIS L. BREO & WILLIAM J. MARTIN, THE CRIME OF THE CENTURY 373 (1993).
18. *Id.*
19. *Id.*
20. *Id.*
21. FED. R. EVID. 702.
22. *Id.*

"[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."[23] There are four elements to determine if an expert may testify:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[24]

In addition to the Federal Rules of Evidence, the admission of expert testimony is also governed by the United States Supreme Court's decision in *Daubert v. Merell-Dow Pharmaceuticals*.[25] Before the Supreme Court holding in *Daubert*, the common law standard for expert testimony admissibility was articulated by *Frye v. United States*.[26] In *Frye*, the Court applied the "general acceptance" test in determining when an expert witness could testify.[27] Most states use the *Daubert* standard, but at least fourteen states still use the *Frye* standard.[28]

The *Daubert* standard lets a trial judge make a preliminary assessment of whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts.[29] The Court in *Daubert* created factors to consider when to determine when expert scientific testimony would be allowed.[30] The four factors are: (1) whether the theory is scientific knowledge that will assist the jury and can be tested, (2) whether the theory has been subject to peer review and publication, (3) the court should consider the known or potential rate of error, and (4) a particular degree of acceptance in the science community.[31]

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23. *Id.*
24. FED. R. EVID. 702(a)-(d).
25. George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 110 (2011); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
26. George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 110 (2011).
27. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
28. Vallas, *supra* note 25, at 110.
29. *Daubert*, 509 U.S. at 592-93.
30. *Id.* at 593-94.
31. *Id.*

III. ADMISSIBILITY OF EYEWITNESS TESTIMONY EXPERTS

The Florida Supreme Court classified three differing views as to the admissibility of an expert witness's testimony regarding the reliability of eyewitness identification.[32] The first view is "discretionary."[33] This view lets the trial judge decide if he or she wants to admit the expert testimony regarding eyewitness identifications.[34] The second view is "prohibitory view," which expressly prohibits the use of eyewitness testimony experts.[35] The third view is "limited admissibility." This view believes that it would be an abuse of discretion to exclude "expert testimony in cases where there is no substantial corroborating evidence."[36] The majority of federal and state courts that have addressed this issue have adopted the discretionary view.[37]

Jurisdictions that adopt the discretionary view "often do so based on concerns that the utility of expert eyewitness testimony is too fact-specific to be subject to either *per se* exclusion or presumptions that such testimony is helpful or unhelpful under certain circumstances."[38] The Florida Supreme Court in *McMullen*, which uses discretionary view, stated, "[t]he trial court was in a far superior position to that of an appellate court to consider whether the testimony would have aided the jury in reaching its decision."[39]

Very few states completely bar eyewitness testimony experts, known as the "discretionary view."[40] The Louisiana Supreme Court stated, "[t]here is still a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial."[41] Additionally, eyewitness testimony experts can be more prejudicial than probative because the expert presumes a misidentification without referencing factors that improve identification accuracy.[42] The credibility of eyewitnesses "could easily be highlighted through effective cross-examination and artfully crafted jury instructions."[43]

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32. McMullen v. Florida, 714 So. 2d 368, 370 (Fla. 1998).
33. *Id.*
34. *Id.*
35. *Id.* at 371.
36. *Id.*
37. *McMullen*, 714 So. 2d at 370.
38. Vallas, *supra* note 25, at 116 (emphasis added).
39. *McMullen*, 714 So. 2d at 373.
40. Vallas, *supra* note 25, at 124.
41. Louisiana v. Young, 35 So. 3d 1042, 1050 (La. 2010).
42. *Id.*
43. *Id.*

IV. ILLINOIS USES THE DISCRETIONARY STANDARD WHEN ADMITTING EYEWITNESS TESTIMONY EXPERTS

The State of Illinois is a *Frye* state when it comes to expert testimony.[44] Meaning they use the "general acceptance" test to determine the admissibility of an expert.[45] The test requires that the scientific principle "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[46] The Illinois Supreme Court stated, "Illinois law is unequivocal: the exclusive test for the admission of expert testimony is governed by the standard first expressed in *Frye v. United States*."[47] In addition, the comment under the Illinois Rules of Evidence Rule 702 confirms that Illinois is a *Frye* state.[48]

Similar to the majority of the states, Illinois uses the discretionary standard when admitting eyewitness testimony experts.[49] A trial court is given discretion when determining the admissibility of expert testimony, and when considering the reliability of the expert testimony, the judge should balance its probative value against its prejudicial effect.[50] The court "should also carefully consider the necessity and relevance of the expert testimony in light of the facts in the case before him prior to admitting it for the jury's consideration."[51] The Illinois courts should make their decisions on a case-by-case basis.[52]

In *Illinois v. Aguilar*, the court found that the trial court properly exercised discretion rejecting defendant's offer of expert testimony regarding any eyewitness identification in a murder trial.[53] Since the evidence at trial would rest primarily on the testimony of three eyewitnesses, the defendant filed a motion requesting to introduce eyewitness expert testimony.[54] The trial court denied the motion finding that expert testimony on eyewitness identification is more likely to confuse rather than assist the jury.[55] On appeal, the court found that since the trial court considered the proffer by the defense before

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44. Donaldson v. Cent. Ill. Pub. Serv. Co., 767 N.E.2d 314, 323-24 (Ill. 2002); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
45. *Frye*, 293 F. at 1013.
46. *Id.* at 1014.
47. *Donaldson*, 767 N.E.2d at 323.
48. ILL. R. EVID. 702.
49. Illinois v. Enis, 564 N.E.2d 1155, 1165 (Ill. 1990).
50. *Id.*
51. *Id.*
52. Illinois v. Tisdel, 788 N.E.2d 1149, 1151 (Ill. App. 1st Dist. 2003).
53. Illinois v. Aguilar, 918 N.E.2d 1124 (Ill. App. 1st Dist. 2009).
54. *Id*. at 1125.
55. *Id.*

excluding the eyewitness expert testimony, the trial court did not abuse its discretion in refusing to admit the testimony.[56]

In *Illinois v. Allen*, the court reversed and remanded the defendant's convictions because the trial court did not conduct a meaningful inquiry into the eyewitness expert proposed testimony.[57] There was only one eyewitness, the victim, and the State filed a motion to exclude the testimony of an expert in eyewitness identification.[58] The trial court granted the State's motion to exclude the testimony.[59] The appellate court reversed because the trial judge did not "carefully scrutinize the proffered testimony to determine its relevance."[60] The court did not give an opinion on whether the expert testimony should be allowed, instead it just held that the offer of proof must be given serious consideration.[61]

On January 22, 2016, the Illinois Supreme Court reversed the judgment of the trial court and remanded for a new trial with directions to allow expert testimony on eyewitness identification.[62] In *Illinois v. Lerma*, the defendant was convicted of murder.[63] The only evidence of the defendant's guilt was based off of two eyewitness identifications.[64] "The first eyewitness identification was made by the victim, Jason Gill, and was [allowed] into evidence under the excited utterance exception to the hearsay rule."[65] The second eyewitness, Lydia Clark, was sitting next to the victim when he got shot.[66] Clark testified, "a man dressed all in black approached Gill's house, pulled a gun, and began shooting at Gill and Clark."[67] The next morning Clark went to the police station and identified the defendant in a photo lineup.[68] Another day later, Clark identified the defendant in a one-person show-up.[69]

On direct examination, Clark testified that she had seen the defendant approximately ten times within the last year.[70] However, on cross-examination she admitted she only saw the defendant once or twice before the shooting.[71]

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56. *Id.* at 1135.
57. Illinois v. Allen, 875 N.E.2d 1221, 1233 (Ill. App. 1st Dist. 2007).
58. *Id.* at 1223.
59. *Id*.
60. *Id*. at 1230.
61. *Id*.
62. Illinois v. Lerma, 47 N.E.3d 985 (Ill. 2016).
63. *Id.*
64. *Id.* at 987.
65. *Id.*
66. *Id.*
67. *Lerma*, 47 N.E.3d at 987-88.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

The defendant filed a pretrial motion in limine to allow an eyewitness testimony expert to testify.[72] The trial court denied defendant's motion relying on the fact that Clark knew the defendant prior to the shooting.[73] One month later, before trial, the defendant filed a motion to reconsider the denial.[74] Stating that the expert would "testify that misidentifications have occurred with people who the witness knew beforehand."[75] The trial court denied defendant's motion to reconsider because "the persons who identify Mr. Lerma *** all claim to have known him."[76]

Halfway through the trial, the defendant renewed his motion to reconsider because he had a new expert witness since the first one passed away.[77] Once again, the trial court denied the motion based on his previous rulings.[78] The jury convicted the defendant of first-degree murder and he was sentenced to forty-five years in prison.[79]

On appeal, the appellate court reversed and remanded based on the reason that the trial court did not "carefully consider the necessity and relevance of the expert testimony in light of the facts in the case before him."[80]

The State appealed to the Illinois Supreme Court, which allowed its petition for leave to appeal.[81] The last time the Illinois Supreme Court addressed the admission of eyewitness testimony experts was over twenty-five years ago.[82] The Court found that the trial court abused its discretion in denying the defendant's request to allow the expert testimony.[83] Stating it is far from clear as to whether Clark "knew" the defendant.[84] The Illinois Supreme Court reversed and remanded for a new trial.[85]

Currently in Illinois, the admissibility of eyewitness testimony experts is left to the discretion of the trial court. As seen above, the admissibility is used on a case-by-case basis.

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72. *Lerma*, 47 N.E.3d at 989.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 989-90.
77. *Lerma*, 47 N.E.3d at 990.
78. *Id.* at 991.
79. *Id.*
80. *Id.*
81. *Id.* at 992.
82. *Lerma*, 47 N.E.3d at 992.
83. *Id.* at 993.
84. *Id.* at 993-94.
85. *Id.* at 997.

V. SCIENTIFIC RESEARCH ON HOW HUMAN MEMORY WORKS

Human memory is complex. Scientific research to understand human memory keeps evolving. Since the research keeps evolving, courts have started looking to scientific variables when addressing eyewitnesses. "The process of remembering consists of three stages: acquisition—'the perception of the original event'; retention—'the period of time that passes between the event and the eventual recollection of a particular piece of information'; and retrieval—the 'stage during which a person recalls stored information.'"[86] Since memory is subject to many influences, researchers recommend that eyewitness identifications be regarded as "trace evidence" and needs to be monitored.[87] The scientific findings the courts use divide the findings into two categories: system variables and estimator variables.

A. SYSTEM VARIABLES

System variables are within the State's control, mostly dealing with police procedures.[88] Research shows that the reliability of eyewitness testimony is highly dependent on police procedures used in live or photographic lineups.[89]

1. Blind Administration

A blind administrator is someone who knows who the suspect is but shields him or herself from knowing where the suspect is located in the lineup or photo array.[90] A double-blind administrator does not know the identity of the suspect.[91] Double-blind lineup administration is "the single most important characteristic that should apply to eyewitness identification" because "[i]ts purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification. . . ."[92] Therefore, a blind administrator should conduct identification procedures.[93]

Police departments have limited resources, which makes it impractical to administer double-blind lineups in every case. The "envelope method" is

86. New Jersey v. Henderson, 27 A.3d 872, 894 (N.J. 2011).

87. REPORT OF THE SPECIAL MASTER NEW JERSEY V. HENDERSON, NO. A-8-08, at 10 (June 18, 2010), http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF [hereinafter REPORT OF THE SPECIAL MASTER].

88. *Henderson*, 27 A.3d at 896.

89. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 19.

90. *Henderson*, 27 A.3d at 896.

91. *Id.*

92. *Id.*

93. Oregon v. Lawson, 291 P.3d 673, 686 (Or. 2012).

an alternative technique if double-blind is not an option.[94] If the administrator knows the suspect's identity, then the administrator can place single lineup photos into different envelopes, shuffle them, and give them to the witness. The administrator refrains from looking at the photos while the witness makes an identification.[95]

2. Pre-Identification Instructions

Witnesses should be instructed that the suspect may or may not be in the lineup and that the witness should not feel compelled to make an identification.[96] Failure to give these instructions will increase the risk of misidentification.[97] Without these instructions, witnesses may misidentify innocent suspects who look more like the perpetrator than others in the lineup.[98]

Research studies identify two dangers if witnesses are not instructed before lineups.[99] First, witnesses infer that police would not conduct a lineup without a suspect and it is their job to pick the right person.[100] Second, "eyewitnesses tend to select the person who looks most like the perpetrator relative to the other members of the lineup."[101] This is known as "the relative judgment process."[102]

3. Lineup Construction

Lineup constructions should test the witness's memory and decrease the chances that the witness is simply guessing.[103] First, the lineup should be comprised of look-alikes.[104] This forces the witnesses to examine their memory and a biased lineup will boost the witness's confidence because the identification was easy.[105] Scientific research found that "mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup."[106] Second, there should be a minimum number of fillers.[107] If the witness has numerous options, the procedure is testing the

94. *Henderson*, 27 A.3d at 897.
95. *Id.*
96. *Id.*
97. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 22.
98. *Henderson*, 27 A.3d at 897.
99. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 22.
100. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 22.
101. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 22.
102. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 22.
103. *Henderson*, 27 A.3d at 897.
104. *Id.* at 898.
105. *Id.*
106. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 24.
107. *Henderson*, 27 A.3d at 898.

witness's ability to identify the perpetrator from an innocent person.[108] There is no set number for fillers, but a common practice among law enforcement agencies is to use at least five fillers.[109] Lastly, lineups should not include more than one suspect.[110] If they do, "the reliability of a positive identification is difficult to assess, for the possibility of 'lucky' guesses is magnified."[111]

4. Simultaneous vs. Sequential Lineups

Simultaneous lineups present all of the suspects to the witness at the same time, allowing for comparisons.[112] Sequential lineups present the suspects one at a time to the witness.[113] There is no evidence that proves one method is better than the other.[114]

5. Show-ups

Show-ups are when a single suspect is presented to a witness to make an identification.[115] These identifications occur in the field after a crime has taken place.[116] When used in appropriate circumstances, show-ups are a useful and necessary technique.[117] Show-ups are "inevitably suggestive" but research shows that the risk of misidentification is not heightened if a show-up is conducted within two hours of the crime.[118] If conducted after two hours of the crime, the likelihood of misidentifications increases.[119]

6. Multiple Viewings

Viewing a suspect more than once during an investigation can affect the reliability of a later identification.[120] This makes it difficult to know whether the later identification came from a memory of the crime or a memory from the first identification.[121] When a witness does not make an identification

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108. *Id.*
109. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 25.
110. *Henderson*, 27 A.3d at 898.
111. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 25.
112. *Henderson*, 27 A.3d at 901.
113. *Id.*
114. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 39-42.
115. *Henderson*, 27 A.3d at 902.
116. Oregon v. Lawson, 291 P.3d 673, 686 (Or. 2012).
117. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 29.
118. *Id.*
119. *Id.*
120. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 27.
121. New Jersey v. Henderson, 27 A.3d 872, 900 (N.J. 2011).

during the first lineup and the police conduct a second with other fillers, the suspect stands out, and the witness will think he is the perpetrator.[122] Because multiple viewings can affect the reliability of identifications, "law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once."[123]

7. Suggestive Questioning

The way in which eyewitnesses are questioned can alter their memory of an event.[124] Witness memory can become contaminated by outside information or assumptions embedded in questions.[125] Therefore, police should pay close attention to how they word their questions to eyewitnesses.[126]

8. Avoiding Feedback and Recording Confidence

Information received before and after an identification can affect the witness's memory.[127] When the police signal to eyewitnesses that they correctly identified the suspect, it gives the witnesses a false sense of confidence.[128] To avoid memory distortion, police officers should record the witness's confidence once an identification is made.[129] Police should also limit feedback when an identification is made.

9. Composites

When the suspect is unknown, witnesses work with a sketch artist to draw a composite.[130] Within the science community, composites produce poor results.[131] Studies show that witnesses create different pictures of the same person.[132] However, there is no evidence on whether making a composite affects the witness's memory.[133] Since there is no research, courts cannot

122. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 28.
123. *Henderson*, 27 A.3d at 901.
124. Oregon v. Lawson, 291 P.3d 673, 687 (Or. 2012).
125. *Id.*
126. *Id.*
127. *Henderson*, 27 A.3d at 899.
128. *Id.*
129. *Id.* at 900.
130. *Id.* at 902.
131. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 38.
132. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 38.
133. *Henderson*, 27 A.3d at 902.

make a finding on composites.[134] Therefore, courts do not limit the use of composites during investigations.[135]

B. ESTIMATOR VARIABLES

Estimator variables are factors that are related to the incident, witness, and perpetrator.[136] These variables are "beyond the control of the criminal justice system."[137] Estimator variables are as significant as system variables because they are "equally capable of affecting an eyewitness' ability to perceive and remember an event."[138]

1. Stress

Even though moderate levels of stress improve cognitive processing, high levels of stress can have a negative effect on a witness's identification.[139] There is no way to measure "high" stress, so courts must determine it on a case-by-case basis.[140]

2. Weapon Focus

If a weapon is present during the crime, it can distract the witness's focus from the perpetrator to the weapon.[141] Therefore, a weapon can impair a witness's memory.[142] There is a misconception that human memory records everything a person sees like a video recorder.[143] If the person pays more attention to one thing versus other aspects of the event, then he will miss them.[144]

3. Duration of the Witnessed Event

The reliability of an identification is related to the amount of time an eyewitness has to observe an event.[145] Naturally, longer durations looking at

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134. *Id.*
135. *Id.*
136. *Id.* at 904.
137. *Id.*
138. *Henderson*, 27 A.3d at 904.
139. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 43; *see also* Oregon v. Lawson, 291 P.3d 673, 687 (Or. 2012).
140. *Henderson*, 27 A.3d at 904.
141. *Id.* at 904-05.
142. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 44.
143. *Lawson*, 291 P.3d at 687.
144. *Id.*
145. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 44.

the perpetrator result in a more accurate identification.[146] There is no requirement for the minimum amount of time to make an accurate identification, but "a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure."[147]

4. Distance and Lighting

It is common knowledge that poor lighting makes it harder to see.[148] Poor lighting in addition to proximity makes it even harder to see a person.[149] These conditions can diminish the reliability of an identification.[150] Identifying faces in the distance can still be difficult, "even with 20/20 vision and excellent lighting conditions, face perception begins to diminish at 25 feet, nears zero at about 110 feet, and faces are essentially unrecognizable at 134 feet."[151]

5. Witness Characteristics

A witness's physical and mental characteristics can affect the reliability of an identification.[152] Studies show that witness accuracy is at its best at ages 18-19 and decreases over time.[153] Persons over the age of seventy generally have the worst memory when it comes to "crime-related information."[154] In addition, witnesses under the age of eighteen are less reliable than persons over the age of eighteen.[155]

Alcohol can also affect the reliability of identifications. "[H]igh levels of alcohol promote false identifications" and "low alcohol intake produces fewer misidentifications . . . ."[156]

146. *Lawson*, 291 P.3d at 687.
147. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 44.
148. New Jersey v. Henderson, 27 A.3d 872, 906 (N.J. 2011).
149. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 45.
150. *Henderson*, 27 A.3d at 906.
151. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 45.
152. Oregon v. Lawson, 291 P.3d 673, 687 (Or. 2012).
153. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 46-47.
154. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 46-47.
155. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 47.
156. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 47.

6. Characteristics of Perpetrator

"Witnesses are better at . . . identifying perpetrators with distinctive features . . . ."[157] Disguises, like hats, sunglasses, and masks can affect the accuracy of a witness making an identification, but it can be argued that most people are aware that criminals wear disguises.[158]

7. Memory Decay

Because memories fade, delays between the crime and the identification can affect the reliability of the identification.[159] The more time that passes will cause the witness's memory to weaken.[160] A study shows "that memory quality declines by 20% after two hours, by 30% within the first day and by 50% one month after the observation."[161]

8. Speed of Identification

The faster an identification is made, the more likely it is accurate.[162] However, the speed of identification can only be taken into consideration if the lineup is fair and unbiased.[163]

VI. *NEW JERSEY V. HENDERSON*: INCORPORATING SYSTEM AND ESTIMATOR VARIABLES INTO JURY INSTRUCTIONS

On August 24, 2011, the New Jersey Supreme Court issued a unanimous decision relating to eyewitness identifications in criminal cases[164] in *New Jersey v. Henderson*.[165] The opinion "revised the legal framework for evaluating and admitting eyewitness identification evidence and directed that revised jury charges be prepared to help jurors evaluate such evidence."[166] In *Henderson*, Rodney Harper was shot to death in an apartment and James Womble witnessed the murder.[167] On the night of the murder, Harper and Womble

157. *Lawson*, 291 P.3d at 688.
158. New Jersey v. Henderson, 27 A.3d 872, 907 (N.J. 2011).
159. *Id.*
160. *Id.*
161. REPORT OF THE SPECIAL MASTER, *supra* note 87, at 45.
162. *Lawson*, 291 P.3d at 688.
163. *Henderson*, 27 A.3d at 910.
164. *Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases*, N.J. CTS. (July 19, 2012), https://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm.
165. *Henderson*, 27 A.3d at 872.
166. *Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases*, *supra* note 164.
167. *Henderson*, 27 A.3d at 879.

were sitting in the apartment when "two men forcefully entered the apartment."[168] Womble recognized one man as George Clark, but did not know the other.[169] While Harper and Clark went off into another room, "the stranger pointed a gun at Womble and told him" not to move.[170] Womble remained in the small, dark hallway with the stranger.[171] "Womble overheard Clark and Harper argue" and eventually heard a gunshot.[172]

Womble led police to Clark, who eventually gave the police the name of the other man, Larry Henderson.[173] Thirteen days after the murder, police had Womble view a photographic array to identify Larry Henderson.[174] Womble quickly eliminated five out of the eight photos.[175] He reviewed the final three photos and eliminated one more, but was unsure about the final two.[176] Two police officers accused Womble of holding back based on fear.[177] An officer told Womble to calm down and they would give him any protection he needed.[178] Womble said he could make an identification, and after the officer reshuffled the eight photos, he quickly identified the defendant, Larry Henderson.[179]

Although Womble did not recant his identification, he testified that he felt the officer was "nudging" him to choose the defendant.[180] "[T]he trial court applied the two-part *Manson/Madison* test to [determine] the admissibility of the eyewitness identification."[181] "The test requires courts to determine first if police identification procedures were impermissibly suggestive; if so, courts then weigh five reliability factors to decide if the identification evidence is nonetheless admissible."[182] The five factors to decide are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) "the time between the crime and the confrontation."[183] The trial court determined that the photo identification was reliable, and Womble testified in

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Henderson*, 27 A.3d at 879.
173. *Id.* at 879-80.
174. *Id.* at 880.
175. *Id.* at 881.
176. *Id.*
177. *Henderson*, 27 A.3d at 881.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Henderson*, 27 A.3d at 882.
183. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

front of a jury.[184] The jury convicted Larry Henderson of reckless manslaughter.[185]

The appellate court found that the "identification procedure in this case was impermissibly suggestive under the first prong of the *Manson/Madison* test."[186] The New Jersey Supreme Court granted the State's petition for certification and also granted leave to appeal as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey and the Innocence Project.[187] The parties raised questions about possible faults "in the *Manson/Madison* test in light of recent scientific research."[188] "The parties and amici . . . produced more than 360 exhibits, which included more than 200 published scientific studies on human memory and eyewitness identification."[189]

New Jersey's Supreme Court revised the framework for evaluating eyewitness identification evidence.[190] The Court came up with a non-exhaustive list of system variables to determine whether there was evidence of suggestiveness to trigger a pre-trial hearing.[191] The list included: (1) blind administration, (2) pre-identification instructions, (3) lineup construction, (4) feedback, (5) recording confidence, (6) multiple viewings, (7) show-ups, (8) private actors, (9) other identifications made.[192] If some proof of suggestiveness remains, courts should consider a list of estimator variables to evaluate the overall reliability of an identification's admissibility.[193] This non-exhaustive list includes: stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of perpetrator, memory decay, race-bias, opportunity to view the criminal at the time of the crime, degree of attention, accuracy of prior description of the criminal, level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.[194]

In addition to the revised framework, the Court asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to revise jury instructions on eyewitness identification.[195] New Jersey Chief Justice Stuart Rabner stated, "[i]n all future criminal trials involving identification evidence in New Jersey, judges will rely on new model jury instructions that can be tailored to the facts of each case. Jurors will then hear about relevant factors that may have affected the reliability of the identification evidence

184. *Henderson*, 27 A.3d at 882.
185. *Id.* at 883.
186. *Id.*
187. *Id.* at 884.
188. *Id.*
189. *Henderson*, 27 A.3d at 884.
190. *Id.* at 919.
191. *Id.* at 920.
192. *Id.* at 920-21.
193. *Id.* at 921.
194. *Henderson*, 27 A.3d at 921-22.
195. *Id.* at 925.

presented at trial."[196] Chief Justice Rabner also added, "[t]he instructions are designed to minimize the risk of wrongful convictions and help jurors reach informed, just decisions . . . ."[197]

The New Jersey Supreme Court changed the *Manson/Madison* test for determining admissibility of eyewitness identification evidence because eyewitness misidentifications are the primary cause of wrongful convictions.[198] The Court made this change because it had been thirty-four years since the United States Supreme Court created the *Manson* test.[199] The *Henderson* court believed that there needed to be a more comprehensive system for educating jurors to counteract common sense misperceptions about eyewitness reliability.[200]

VII. *OREGON V. LAWSON:* CHANGING THE ADMISSIBILITY TEST FOR EYEWITNESSES

In 2012, the Supreme Court of Oregon revised its test for determining the admissibility of eyewitness evidence in *State v. Lawson*.[201] The court found that the thirty-five-year-old test "does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence."[202] The state's original test was the two-step process set out in *Manson v. Brathwaite*.[203]

Oregon revised their eyewitness identification evidence test based on provisions from the Oregon Evidence Code (OEC).[204] First, the witness must have personal knowledge under OEC 602.[205] The state must prove that the witness had an adequate opportunity to observe the facts to which the witness will testify.[206] Second, the testimony must meet the requirements for admissibility of lay opinion under OEC 701.[207] Lay opinion testimony is based on inferences and assumptions made by the witness regarding his perceptions;

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196. *Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases*, *supra* note 164.

197. *Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases*, *supra* note 164.

198. Amy D. Trenary, *State v. Henderson: A Model for Admitting Eyewitness Identification Testimony*, 84 U. COLO. L. REV. 1257, 1294 (2013).

199. *Henderson*, 27 A.3d at 877.

200. Trenary, *supra* note 198, at 1296.

201. Oregon v. Lawson, 291 P.3d 673 (Or. 2012).

202. *Id.* at 688.

203. *Id.* at 684.

204. *Id.* at 690.

205. *Id.* at 692.

206. *Lawson*, 291 P.3d at 692.

207. *Id.*

therefore, it cannot be observed that the defendant is the same person the witness saw at the scene, rather it must be inferred.[208]

Third, the identification must be "rationally based on the witness's perceptions."[209] A court does not need to determine whether the identification was based on the witness's actual perception, instead "whether it was more likely that the witness's identification was based on his or her own perceptions than on any other source."[210] Fourth, "[t]he [i]dentification [m]ust [b]e [h]elpful to the [t]rier of [f]act."[211] If a jury is equally capable of making an inference, then the eyewitness testimony is not necessary.[212] The court used an example of a masked perpetrator with tattooed hands.[213] A jury could make an inference "by comparing the witness's description of those markings to objective evidence of the actual markings on the defendant."[214]

In addition, a court needs to determine if the probative value of the eyewitness identification substantially outweighs unfair prejudice under OEC 403.[215] In applying OEC 403 to eyewitness identifications, a court must examine the reliability of the evidence.[216] The more system and estimator variables that weigh against the reliability of the identification, then that identification will have less probative value.[217] If eyewitnesses are exposed to suggestive police procedures, then there are concerns of unfair prejudice.[218]

Furthermore, the court states that if the case only reveals issues with estimator variables, the defendant should not seek a pretrial motion.[219] The defendant should expose those variables through cross-examination, expert testimony, or case-specific jury instructions.[220] The Oregon Supreme Court intends that the new test be flexible.[221] Oregon wants to hold criminals accountable while still protecting a defendant's right to a fair trial.[222]

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208. *Id.*
209. *Id.* at 692.
210. *Id.* at 693.
211. *Lawson*, 291 P.3d at 693.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 694.
216. *Lawson*, 291 P.3d at 694.
217. *Id.*
218. *Id.* at 695.
219. *Id.* at 697.
220. *Id.*
221. *Lawson*, 291 P.3d at 697.
222. *Id.*

VIII. ILLINOIS SHOULD CREATE JURY INSTRUCTIONS SIMILAR TO NEW JERSEY

Since the United States Supreme Court has yet to revise the federal requirements for admitting eyewitness testimony, "state courts should follow *Henderson's* lead and broaden their state constitutional protections to ensure that defendants are sufficiently shielded against misidentification."[223] Illinois should model their jury instructions of eyewitness testimony on the New Jersey instructions. Illinois's current jury instructions for identification testimony of witnesses are not even half a page[224] compared to New Jersey's minimum of six pages.[225]

New Jersey's jury instructions go into great detail about factors jurors should consider when determining the reliability of the eyewitness.[226] The instructions explain that human memory is not perfect. It explains their job "to determine whether the witness's identification of the defendant is reliable and believable, or whether it is based on a mistake or for any reason or not worthy of belief."[227] The jurors must scrutinize the evidence carefully and remember that "[h]uman memory is not foolproof."[228]

The current Illinois jury instructions were approved on October 17, 2014.[229] These jury instructions list the factors established in *Manson v. Brathwaite*.[230] When the jury is considering eyewitness testimony, they should consider the opportunity the witness had to view the offender at the time of the offense, the witness's degree of attention at the time of the offense, the witness's earlier description of the offender, the level of certainty shown by the witness when confronting the defendant, and the length of time between the offense and the identification confrontation.[231] The Committee Note states that the jury should only be instructed on factors supported by evidence and some factors can be omitted.[232]

Instead of allowing eyewitness testimony experts, Illinois should craft more informative jury instructions. New Jersey was the first state to create

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223. Trenary, *supra* note 198, at 1298.

224. *See generally Circumstances of Identification*: *No. 3.15*, ILL. CTS. (Oct. 17, 2014), http://www.illinoiscourts.gov/circuitcourt/criminaljuryinstructions/crim_03.00.pdf [hereinafter *Circumstances of Identification*].

225. *Identification: In-Court and Out-of-Court Identifications*, N.J. CTS., http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf (last updated July 19, 2012).

226. *Id.*

227. *Id.* at 1-2.

228. *Id.* at 2.

229. *Circumstances of Identification*, *supra* note 224.

230. *Circumstances of Identification*, *supra* note 224.

231. *Circumstances of Identification*, *supra* note 224.

232. *Circumstances of Identification*, *supra* note 224.

well-written jury instructions for eyewitness testimony and they favor exclusion when it comes to expert witness testimony on eyewitness credibility.[233] Unlike certain expert testimony, jury instructions help improve decision-making. It is "well accepted that carefully crafted jury instructions dealing specifically with witness-identification testimony also have the potential to help improve juror decision-making."[234] If Illinois adopts jury instructions similar to New Jersey, then there would be no need for expert testimony because "concise, plain-language, scientifically based eyewitness-identification instructions have the capacity to reduce the number of wrongful convictions and enhance the decision-making process."[235]

IX. JURY INSTRUCTIONS ARE A BETTER APPROACH THAN EXPERTS

Illinois trial courts should bar eyewitness testimony experts. Everything these experts know is second-hand knowledge. They were not at the crime scene and do not know what the witness saw. There is no evidence that these experts who testify would be any better at detecting witness inaccuracy than an uninformed jury. A jury's responsibility is to decide the creditability of a witness, not a hired expert. Additionally, the cost of expert testimony means it may not be available in all trials.[236] Some judges are also reluctant to allow experts to testify because their testimony can consume a large portion of the trial.[237] Therefore, jury instructions are the best method when presenting eyewitness testimony to a jury.

Jury instructions are the best method for educating the jurors because they "can easily be incorporated into a trial."[238] Judges are comfortable using instructions because they are already familiar with them.[239] There is low cost to implementing jury instruction compared to hiring experts.[240] In addition, "[i]nstructions also avoid the adversarial nature of dueling experts and allow for a continuing debate within the legal community."[241]

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233. Vallas, *supra* note 25, at 142.

234. Jeannine Turgeon, Elizabeth Francis & Elizabeth Loftus, *Crafting Model Jury Instructions for Evaluating Eyewitness Testimony*, PA. LAW 51 (Sept./Oct. 2014), http://www.ncsc.org/~/media/Files/PDF/Topics/Jury/ModelJuryInstructions-EyewitnessTestimony-SM.ashx.

235. *Id.* at 52.

236. Derek Simmonsen, *Teach Your Juror Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1078 (2011).

237. *Id.*

238. *Id.* at 1080.

239. *Id.*

240. *Id.*

241. Simmonsen, *supra* note 236, at 1080.

Jury instructions are a more efficient method than expert testimony. Expert testimony increases the cost and length of trials, while jury instructions do not.[242] Experts can cost thousands of dollars and take up a large portion of the trial.[243] Jury instructions do not prolong trials because they can be given within minutes.[244]

There is also a concern that eyewitness testimony experts could lead to a "battle of the experts."[245] Jurors may believe experts because of their credentials instead of listening to eyewitness testimony and determining the reliability of the identification.[246] If experts were not allowed to testify, then jurors could focus on the eyewitness testimonies and use the jury instructions to make a decision.

Since expert testimony is expensive, eyewitness expert testimony only benefits wealthy defendants.[247] There are no constitutional rights stating indigent defendants are entitled to an expert on eyewitness identification.[248] In order to ensure all defendants, including indigents, get a just trial, jurors must be informed about the factors that affect the reliability of identifications. The only way to do that is by having more informative jury instructions.

In addition, jury instructions can avoid any prejudice that could be created by expert testimony.[249] Courts fear that jurors will be astounded by the knowledge of experts, thus ignoring the eyewitness evidence.[250] There is also a concern that expert testimony could confuse the jury, "the nature of what is known about human memory is so complex that an honest presentation of this knowledge to a jury would only serve to confuse rather than improve their decision-making."[251] Some psychologists believe that eyewitness expert testimony should not be allowed in court because it is more prejudicial than probative.[252]

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242. Christian Sheehan, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 674 (2011).

243. *Id.*

244. *Id.* at 675.

245. *Id.*

246. Sheehan, *supra* note 242, at 675.

247. Sheehan, *supra* note 242, at 675.

248. Jackson v. Ylst, 921 F.2d 882, 887 (9th Cir. 1990).

249. Sheehan, *supra* note 242, at 677.

250. Sheehan, *supra* note 242, at 677.

251. Ebbe Ebbesen & Vladimir Konecni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, EXPERT EVIDENCE 2 (1996), http://konecni.ucsd.edu/pdf/1997%20Eyewitness%20Memory...%20Expert%20Evidence.pdf.

252. *Id.* at 24.

X. JURORS' COMPREHENSION OF INSTRUCTIONS

Empirical research shows that jurors often struggle to comprehend jury instructions.[253] Studies show that simplifying jury instructions improve a juror's comprehension.[254] Using shorter sentences, active voice instead of passive, and eliminating legal jargon are some techniques to simplify jury instructions.[255] In addition to improving comprehension, modifying instructions also improves a juror's decision making.[256]

However, modifying jury instructions about eyewitness identification does not improve comprehension.[257] Because jurors usually have erroneous perceptions about witness identifications, it makes it difficult to address identifications through modified instructions.[258] Therefore, it is necessary to educate the jury about the fallibility of identification witnesses through detailed instructions such as the New Jersey instructions.[259]

It is the judge's job to inform the jury about the fallibility of identification witnesses.[260] Research studies show that the "exact language judges use to deliver jury instructions influences jurors' comprehension."[261] Therefore, judges need to be aware of the word choices they use while reading jury instructions. In addition, it has been questioned whether a judge's nonverbal behavior influences a jury.[262] A research study examined the effects of a judge's nonverbal communication.[263] The study examined this by videotaping two versions of how the instructions were read.[264]

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253. Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, CT. REV.: J. AM. JUDGES ASS'N 48, 49 (Jan. 1, 2012), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1380&context=ajacourtreview.

254. *Id.*

255. *Id.*

256. *Id.* at 53.

257. *Id.*

258. Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, CT. REV.: J. AM. JUDGES ASS'N 48, 53 (Jan. 1, 2012), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1380&context=ajacourtreview.

259. *Id.*

260. *Id.* at 48.

261. *Id.* at 49.

262. *Id.*

263. Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, CT. REV.: J. AM. JUDGES ASS'N 48, 52 (Jan. 1, 2012), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1380&context=ajacourtreview.

264. *Id.*

The first version was referred to as the "encouraging" condition.[265] This judge seemed interested and engaged in the trial and used language to encourage the jury.[266] The second version was referred to as the "stoic" condition.[267] This judge seemed disinterested in the trial, abstained from using encouraging speech, and "emphasized the imperatives in the instructions . . . ."[268]

The study did not indicate any significant effects for the judge's nonverbal communication.[269] A judge's demeanor did not improve jurors' decision making.[270] When the judge read the instructions in a friendlier manner, "jurors perceived the judge more favorably; but the judge's demeanor likewise did not influence their verdicts or make them more sensitive to identification witness testimony."[271]

XI. ESTABLISH OFFICIAL PROCEDURES FOR LAW ENFORCEMENT AGENCIES

Because erroneous eyewitness identifications can occur during criminal trials, law enforcement agencies should create a standardized procedure when dealing with eyewitnesses. These procedures could prevent erroneous convictions based on eyewitness misidentifications. According to the National Academy of Science, "[i]n recent years, more law enforcement agencies have created written eyewitness identification policies and have adopted formalized training. However, there are many agencies that do not have standard written policies or formalized training for the administration of identification procedures or for ongoing interactions with witnesses."[272]

When a suspect is unknown, police officers typically use three procedures to identify a perpetrator: show-ups, photo arrays, and live lineups.[273] A show-up is an identification procedure arranged by the police.[274] The police show one person to the witness and ask if he recognizes that person.[275] A

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265. *Id.*
266. *Id.*
267. *Id.*
268. Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, CT. REV.: J. AM. JUDGES ASS'N 48, 52 (Jan. 1, 2012), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1380&context=ajacourtreview.
269. *Id.*
270. *Id.*
271. *Id.* at 53.
272. NAT'L RES. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 14 (2014), http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.
273. *Id.*
274. *Id.* at 27.
275. *Id.*

show-up is usually done shortly after the commission of the crime and within close proximity to the scene.[276] Police typically restrict show-ups to a two-hour period after the crime because case law limits the time of this procedure to pass legal standards.[277] "A photo array consists of six to nine photographs [shown] to [the] witness."[278] A police officer may create a photo array by selecting photographs, or some police departments use computer systems to access image databases to create the photo array.[279] There are two different ways to display the photo arrays: sequential or simultaneous.[280] Sequential means the photos are displayed one at a time.[281] Simultaneous means the photos are displayed together, at the same time.[282] A live lineup is when the suspect and at least five fillers stand in front of the witness.[283] Similar to photo arrays, police departments use both simultaneous and sequential procedures for live lineups.[284] According to a study done by the Police Executive Research Forum, "the most commonly used eyewitness identification strategy was photo lineups, followed by show-ups, composite sketches, mugshot searches, and then live lineups."[285]

The National Academy of Sciences gave five recommendations to establish practices for the law enforcement community.[286] If these recommendations were adopted by all law enforcement agencies, then erroneous convictions based on eyewitness misidentifications will most likely decline.

The first recommendation is to "[t]rain [a]ll [l]aw [e]nforcement [o]fficers in [e]yewitness [i]dentification."[287] Because memories can be compromised by outside influences, officers should be trained to ask open-ended

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276. *Id.*

277. NAT'L RES. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESSES IDENTIFICATIONS 27 (2014), http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

278. *Id.* at 23.

279. *Id.*

280. *Id.*

281. *Id.*

282. NAT'L RES. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESSES IDENTIFICATIONS 23 (2014), http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

283. *Id.* at 25.

284. *Id.*

285. *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies*, POLICE EXEC. RES. F. 48 (Mar. 8, 2013), http://www.policeforum.org/assets/docs/Free_Online_Documents/Eyewitness_Identification/a%20national%20survey%20of%20eyewitness%20identification%20procedures%20in%20law%20enforcement%20agencies%202013.pdf.

286. NAT'L RES. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESSES IDENTIFICATIONS 105-09 (2014), http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

287. *Id.* at 105.

questions, avoid suggestiveness, and minimize interactions among multiple witnesses.

The second recommendation is to "[i]mplement [d]ouble-[b]lind lineup and [p]hoto [a]rray [p]rocedures."[288] Blind procedures will minimize intentional or unintentional suggestiveness.[289] This procedure could enhance fairness in the criminal justice system.[290]

The third recommendation is to "[d]evelop and [u]se [s]tandardized [w]itness [i]nstructions."[291] Before making an identification, witnesses should be instructed that the perpetrator may or may not be in the lineup.[292] Administrators should read these instructions in a manner similar to how Miranda rights are read.[293]

The fourth recommendation is to "[d]ocument [w]itness [c]onfidence [j]udgments."[294] Confidence at the time of the trial is not a reliable predictor of eyewitness accuracy because a witness's confidence could be different at the time of the identification.[295] It is recommended that police document the witness's level of confidence at the time of the first identification.[296]

The fifth recommendation is to "[v]ideotape the [w]itness [i]dentification [p]rocess."[297] Videotaping the identification process will preserve a permanent record of what happened during the identification procedure, which will ensure that the system variables were followed. [298]

An official list of eyewitness procedures used by all law enforcement agencies should be created to help ensure reliability of eyewitness identifications.

XII. CONCLUSION

Eyewitness identification testimonies are extremely important in criminal trials because they lead to convictions of criminals. However, since human memory is so complex, the jury needs to be informed on it. The best

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288. *Id.* at 106-07.
289. *Id.* at 107.
290. *Id.*
291. NAT'L RES. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESSES IDENTIFICATIONS 107 (2014), http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.
292. *Id.*
293. *Id.*
294. *Id.* at 108.
295. *Id.*
296. NAT'L RES. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESSES IDENTIFICATIONS 108 (2014), http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.
297. *Id.*
298. *Id.* at 109.

way to do that is through jury instructions. Jury instructions are more efficient than expert testimony. Jury instructions do not increase the cost or length of a trial. The probative value of jury instructions substantially outweighs the prejudice.

Currently, Illinois's jury instructions for eyewitness identifications use factors from a United States Supreme Court case that is over thirty-eight years old. Research on how the memory works keeps evolving and Illinois needs to keep up on the times. Illinois needs new, more informative jury instructions for eyewitness identifications. The instructions should include detailed information regarding the system and estimator variables. Since memory is individualized, the instructions should be case specific. The court should pick and choose which variables are relevant to the case. In addition, to help improve eyewitnesses, law enforcement agencies should create universal, standardized procedures when dealing with eyewitnesses.