Indiana Public Defender Council

EYEWITNESS MANUAL
With case summaries

2022

Jack Kenney and Michael Wilson

Indiana Public Defender Council, 309 W. Washington St., Indianapolis IN 46204

Eyewitness Identification Cases

1. Unreliability of Eyewitness ID Evidence

"Today, the leading cause of wrongful convictions is eyewitness identification. In over seventy percent of DNA-based convictions eyewitness misidentification helped seal the innocent person's conviction." Stenzel, *Eyewitness Misidentification: A Mistake That Blinds Investigations, Sways Juries, and Locks Innocent People Behind Bars*, 50 Creighton L.Rev. 515, 516 (2017).

Stinson v. State, 262 Ind. 189, 313 N.E.2d 699, 701 (1974) ("...It has often been observed by this Court...that personal identification evidence is doubtful at best and should be subject to close scrutiny. It would be naive to say that any person could be absolutely certain of the identification of another person whom they had never known previously and had observed only in a brief period of excitement and great tension. All testimony of such a nature must certainly be subject to extensive cross-examination in order that the jury may properly evaluate its content.").

Woodson v. State, 961 N.E.2d 1035, 1044 (Ind. Ct. App. 2012) (Court is "very cognizant of the close scrutiny eyewitness identification in criminal cases has received in recent years . . . .").

Reed v. State, 687 N.E.2d 209, 213-14 (Ind. Ct. App. 1997) ("...we are not thoroughly convinced that the average juror is conversant with the likelihood or frequency with which misidentifications are made by seemingly unequivocal eyewitnesses....[T]rial courts might be well advised to permit...expert testimony in order to assist the jury in its evaluation of the evidence....[T]he concept that eyewitness identification is flawed or subject to serious question in a particular instance may be placed within the jury's realm of understanding by careful cross-examination and by counsel's argument to the jury.").

Gorman v. State, 968 N.E.2d 845 (Ind. Ct. App. 2012) (trial court as fact-finder was in the best position to determine the veracity of eyewitness ID evidence after extensive cross-examination of the eyewitness).

2. Admissibility of Eyewitness Identification Evidence

The prevailing standard for the admission of identification evidence was set out in Neil v. Biggers, 409 U.S. 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977). In those cases, the U.S. Supreme Court wrote that reliability is the linchpin of admissibility of eyewitness identifications. The Court held that the admission of identification evidence based on a suggestive procedure denies due process only if the defendant can prove "a very

substantial likelihood of irreparable misidentification." Manson identified several factors for trial courts to consider when determining whether evidence from a suggestive identification procedure is reliable: the accuracy of the witness' prior description, the witness' opportunity to view the perpetrator at the time of the crime, the witness' degree of attention, the length of time between the crime and the identification, and the witness' level of certainty about the identification. In Perry v. New Hampshire, 132 S.Ct. 716, 728 (2012), the U.S. Supreme Court rejected the argument that estimator variables/factors alone could render an identification so unreliable that due process would require a pre-trial hearing on admissibility. Cf. State v. Lawson, 342 Ore. 834, 291 P.3d 673 (Ore. 2012) (Manson-based two-part test for admissibility was not adequate to protect against admission of unreliable eyewitness identifications); see also State v. Harris, 330 Conn. 91, 191 A.3d 119 (2018).

3. Sufficiency of Evidence

When a conviction is based on identification testimony by a sole eyewitness, such testimony is sufficient to sustain a conviction "if the identification was unequivocal." Richardson v. State, 270 Ind. 566, 569, 388 N.E.2d 488, 491 (1979); cf. Scott v. State, 871 N.E.2d 341, 344-45 (Ind. Ct. App. 2007). Cases and studies have challenged the reliability of eyewitness identifications, citing factors that affect reliability. See e.g. State v. Henderson, 27 A.3d 872 (N.J. 2011). However, "the potential unreliability of a type of evidence does not alone render its introduction at . . . trial fundamentally unfair." Perry v. New Hampshire, 132 S.Ct. 716, 728 (2012). Thus, the U.S. Supreme Court rejected the argument that estimator variables/factors alone could render an identification so unreliable that due process would require a pre-trial hearing on admissibility. Cf. State v. Lawson, 342 Ore. 834, 291 P.3d 673 (Ore. 2012) (Manson-based two-part test for admissibility insufficient to protect against the admission of unreliable eyewitness identification).

4. Improper Suggestion by Police

Perry v. New Hampshire, 565 U.S. 228, 132 S. Ct. 716 (2012) (the Due Process Clause of the U.S. Constitution does not require trial judges to conduct preliminary assessments of the reliability of eyewitness identifications that were made under suggestive circumstances not created by law enforcement personnel. A primary aim of the line of cases that excluded eyewitness identification evidence that was obtained under unnecessarily suggestive circumstances that police created was to deter police from using improper procedures, and that rationale is inapposite in cases involving no improper police conduct).

Williams v. State, 477 N.E.2d 96, 97 (Ind. 1985) (it is improper for police officers to inform witness that suspect is in lineup that witness is being asked to observe).

Peterson v. State, 514 N.E.2d 265 (Ind. 1987) (due process requires exclusion of out-of-court identification where identification procedures staged by police are impermissibly suggestive and create substantial likelihood of irreparable misidentification).

Sawyer v. State, 260 Ind. 597, 298 N.E.2d 440, 443 (1973) (when police tell a witness a

suspect is present in a lineup, the witness tends to "feel that he has an obligation to choose one of the participants in the display since the police evidently are satisfied that they have apprehended the criminal. The result may be that the witness strains to pick someone with familiar characteristics or someone who most resembles the actual criminal or the result may be that the witness will choose the one least dissimilar by the process of elimination."). **Note:** This conclusion arguably applies with as much force to situations where the witness comes to his own conclusions about the presence of a culprit or suspect as when an improper police comment leads a witness to believe a culprit is present.

Popplewell v. State, 269 Ind. 323, 381 N.E.2d 79 (1978) (police practice of indicating suspect is pictured when exhibiting photos to witness needlessly decreases fairness of identification process. However, conviction based on eyewitness at trial following pretrial identification by photo will be set aside only if photo identification procedure was so impermissibly suggestive as to give rise to very substantial likelihood of misidentification).

5. Show-up Identifications

One-on-one show-up identifications are inherently suggestive. In some circumstances, a show-up identification may be so unnecessarily suggestive and so conducive to irreparable mistake as to constitute a violation of due process. Rasnick v. State, 2 N.E.3d 17, 23 (Ind. Ct. App. 2013). "The practice of conducting a one-on-one show-up between a suspect and a victim has been widely condemned as being inherently suggestive both by the United States Supreme Court and by this Court." Wethington v. State, 560 N.E.2d 496, 501 (Ind. 1990) (citing Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), and Slaton v. State, 510 N.E.2d 1343, 1348 (Ind. 1987)). "Even when the police use such a procedure . . . suppression of the resulting identification is not the inevitable consequence." Perry v. New Hampshire, 565 U.S. 228, 239, 132 S. Ct. 716, 725, 181 L. Ed. 2d 694 (2012).

> Wethington v. State, 560 N.E.2d 496 (Ind. 1990) (admissibility of show-up identification evidence turns on evaluation of whether, under totality of circumstances, confrontation was conducted in such fashion as to lead witness to make mistaken identification; factors to consider include: 1) opportunity of witness to view criminal at time of crime; 2) length of initial observation of criminal; 3) lighting conditions; 4) distance between witness & criminal; 5) witness' degree of attention; 6) accuracy of witness' prior description of criminal; 7) level of certainty demonstrated by witness; 8) identifications of another person; 9) length of time between commission of crime & show-up procedure; & 10) practicability of lineup rather than show-up).
>
> Albee v. State, 71 N.E.3d 856 (Ind. Ct. App. 2017) (a one-person show-up identification was unduly suggestive where a witness was initially unable to identify the defendant, only doing so after additional opportunities to view the defendant).
>
> Hubbell v. State, 754 N.E.2d 884, 892 (Ind. 2001) (a one-person show-up was unduly suggestive where it was held six hours after alleged offense and State did not establish any exigent circumstances requiring show-up).

Means v. State, 807 N.E.2d 776, 786 (Ind. Ct. App. 2004) (one-on-one confrontations are inherently suggestive, but such confrontations are not per se improper; immediate confrontations may be valuable because they allow witnesses to view a suspect while image of perpetrator is fresh in the mind of the witness; the immediacy of the confrontation may substantially diminish potential for misidentification).

McBride v. State, 992 N.E.2d 912 (Ind. Ct. App. 2013) (where the totality of the circumstances—a well-lit crime scene, imperfect concealment by masks, identical clothing, proximity to the crime scene, and immediate apprehension—limited the likelihood that a one-person show-up ID was unduly suggestive); see also Rasnick v. State, 2 N.E.3d 17 (Ind. Ct. App. 2013).

N.W.W. v. State, 878 N.E.2d 506 (Ind. Ct. App. 2007) (objections as to the constitutionality of the show-up identification and the admissibility of that evidence should be litigated via a pre-hearing motion to suppress or a specific and timely objection during the State's case in chief).

Wethington v. State, 560 N.E.2d 496 (Ind. 1990) (show-up identification between victims and suspects two hours after robbery, and again another hour later, with prominent display of weapons taken from suspects, was impermissibly suggestive; there were no exigent circumstances which precluded a properly conducted line-up; however, there was independent basis for victims' in-court identification of D).

Mitchell v. State, 690 N.E.2d 1200 (Ind. Ct. App. 1998) (witness' identification of D occurred when police walked him through jail lobby; although witness' description of robber and his car differed slightly from actual characteristics, witness' description of robber was similar to D's characteristics in many ways, witness had unobstructed view of robber for several minutes and witness identified D approximately two hours after robbery. In addition, line-up was impracticable because there were no available prisoners who were same age as D. Thus, show-up of D was not performed in manner leading to misidentification of robber).

Leslie v. State, 558 N.E.2d 813 (Ind. 1990) (showup identification in which D sat alone, handcuffed, in backseat of police car at crime scene, surrounded by police officers, for approximately 5 minutes after witness last saw him, was not so impermissibly suggestive as to violate due process).

6. Photographic Arrays

J.Y. v. State, 816 N.E.2d 909 (Ind. Ct. App. 2004) (juvenile court erred in admitting detective's testimony regarding complaining witness's out-of-court identification of D, because photo array CW looked at was impermissibly suggestive. Array included one set of photos of three suspected, unsmiling brothers in white t-shirts & another set of three different smiling individuals in dress shirts and ties. "As a whole, the remarkable difference in appearance ... including clothing and demeanor, and the difference in the quality and composition of the two sets of photographs, render the photo array impermissibly suggestive.").

Bowlds v. State, 834 N.E.2d 669 (Ind. Ct. App. 2005) (D's photo, in which he is wearing a standard-issue orange jail uniform, strongly suggests to viewer of array that he was favored target of investigation; also, same photo appeared in local newspaper, thus identification procedure was unduly suggestive).

Williams v. State, 774 N.E.2d 889, 890 (Ind. 2002) (a photographic array was suggestive because five of the color photographs had gray backgrounds and the photograph of the D had a light green background).

James v. State, 613 N.E.2d 15, 27 (Ind. 1993), appeal after remand 643 N.E.2d 321 (Ind. 1994) (a photographic display is not necessarily impermissibly suggestive when a witness selects a suspect's photograph from the display and the officer then states that he or she believes that the photograph is of the person who committed the crime).

Miles v. State, 764 N.E.2d 237 (Ind. Ct. App. 2002) (arresting police officer's out-of-court identification of D by viewing single photograph was not unduly suggestive; officer was both investigator and witness to offense, and could not be found through photo identification process to have impermissibly suggested to himself that person he arrested was D); See also Hyppolite v. State, 774 N.E.2d 584 (Ind. Ct. App. 2002) (although another police officer brought single photograph to officer for identification, officer's in-court identification was independently supported).

Neukam v. State, 934 N.E.2d 198 (Ind. Ct. App. 2010) (use of a BMV photograph displaying D's name was not suggestive because the victim knew what D looked like and was merely confirming his identity).

Terry v. State, 857 N.E.2d 396 (Ind. Ct. App. 2006) (potentially suggestive pre-trial identifications in which police officers were shown a single photo were offset by reliable in-court identifications and the circumstances surrounding the investigation).

Sutherlin v. State, 784 N.E.2d 971 (Ind. Ct. App. 2003) (non-identical photo arrays were both considered original under Ind. R. Evid. 1001(3) where two photo arrays were used to identify the D and a third was reproduced for the court and the veracity of the data was unchallenged).

7. Lineups

Patterson v. State, 386 N.E.2d 936 (Ind. 1979) (generally, lineups of only three or four individuals are considered inadequate. However, absent any other suggestive factors, mere fact that lineup, at which D was identified as robber, consisted of only three persons did not render lineup so suggestive as to provide unreliable identification. In addition, there was adequate basis for in-court identification independent of lineup).

Morris v. State, 471 N.E.2d 288, 290 (Ind. 1984) (Court recognized authority of Indiana trial courts to grant D's request for pretrial lineup where appropriate).

Young v. State, 700 N.E.2d 1143 (Ind. 1998) (although identification witness's testimony indicated that police may have focused her attention on D after pretrial

lineup, court concluded that totality of circumstances clearly and convincingly demonstrated that witness had independent basis for her in-court identification).

8. In-court Identification - Independent Basis for Identification

Even if the unduly suggestive out-of-court identification has been erroneously admitted, the error may be harmless. Furthermore, a subsequent in-court identification may still be admissible if the State establishes by clear and convincing evidence that an independent basis for that in-court identification exists. A determination that an in-court identification by a witness was properly admitted will, in many instances, render the erroneous admission of a pretrial identification by the same witness harmless. Wethington v. State, 560 N.E.2d 496, 503 (Ind. 1990) (citations omitted). The inquiry with reference to the in-court identification is whether, under the totality of the circumstances surrounding the witness's initial observation of the perpetrator at the scene of the crime, the witness could resist any suggestiveness inherent in the improper confrontation staged by the police and make an accurate decision, based on that earlier contact with the perpetrator, that the person presented to him at trial was the one who committed the crime. Id.

Griffin v. State, 493 N.E.2d 439, 442 (Ind. 1986) (..."[t]here is a degree of suggestiveness which is inherent in all in-court identifications; the practical necessity of having the appellant sit at the defendant's table with defense counsel naturally sets him apart from everyone else in the courtroom. This type of suggestiveness cannot be avoided because the defendant has a constitutional right to attend his trial and confront the witnesses against him.").

Albee v. State, 71 N.E.3d 856 (Ind. Ct. App. 2017) (in-court identification was tainted by the suggestive, unreliable pretrial show-up identification).

Moore v. Illinois, 434 U.S. 220, 230, 98 S.Ct. 458, 465, 54 L.Ed.2d 424, 435 (1977) (footnote 5 suggested ways to avoid suggestive in-court identification; " [f]or or example, counsel could have requested that the hearing be postponed until a lineup could be arranged at which the victim would view petitioner in a less suggestive setting....Short of that, counsel could have asked that the victim be excused from the courtroom while the charges were read and the evidence against petitioner was recited, and that petitioner be seated with other people in the audience when the victim attempted an identification....Counsel might have sought to cross-examine the victim to test her identification before it hardened...Because it is in the prosecution's interest as well as the accused's that witnesses' identifications remain untainted, ... we cannot assume that such requests would have been in vain. Such requests ordinarily are addressed to the sound discretion of the court...").

Leslie v. State, 558 N.E.2d 813 (Ind. 1990) (even if show-up identification in which witness identified D was impermissibly suggestive, witness' in-court identification of D was admissible based on independent basis. Witness was able to view perpetrator for fairly extensive time period with bright lights aimed at perpetrator, witness accurately described burglar, description matched D's appearance, only short time period elapsed from witness' last viewing of burglar & his identification

of D as perpetrator, & witness identified D without hesitation.); see also Black v. State, 79 N.E.3d 965 (Ind. Ct. App. 2017).

Smith v. State, 553 N.E.2d 832 (Ind. 1990) (victim's in-court identification of D was proper, even though victim was shown single photo of D by someone who told victim that it was photo of D; fact that witness had ample opportunity to observe D during robbery was independent basis for in-court identification); see also Jackson v. State, 33 N.E.3d 1067 (Ind. Ct. App. 2015) (photo arrays that contained jail intake photos of five women and a Bureau of Motor Vehicles photo of D that was a higher-quality, close-up photo did not lead to misidentification because witnesses had an independent basis for in-court identification of D).

Wade v. State, 718 N.E.2d 1162 (Ind. Ct. App. 1999) (in-court identification of D was not tainted even though prosecutor told witness where D would be sitting; record clearly demonstrated a proper independent basis for witness's identification of D).

9. Expert Witnesses - Getting Them and Getting Them in Front of the Jury

Indiana Evidence Rule 702(b) states that "expert scientific testimony is admissible only if the court is satisfied that expert testimony rests upon reliable scientific principles." Rule 704(b) provides that witnesses may not testify to opinions concerning whether a witness has testified truthfully.

Farrell v. State, 622 N.E.2d 488 (Ind. 1993) (On transfer of Court of Appeals' decision at 612 N.E.2d 124, Court declined to rule on the admissibility of expert testimony regarding the reliability of eyewitness identification, stating the issue would be resolved by applying the newly-adopted Ind. Rules of Evidence. Although the Court of Appeals affirmed the trial court's exclusion of the defendant's expert testimony on the reliability of eyewitness testimony, the Court suggested in a footnote that trial courts should carefully consider this issue. "In order to give the jury the greatest amount of assistance in weighing the evidence, trial courts might well be favorably inclined toward the admission of such expert testimony in a particular circumstance. Such circumstance would clearly seem to exist where only one or two eyewitnesses testify and when the testimony is uncertain, equivocal or contains inconsistencies." 612 N.E.2d 124, 129, n.4.).

Farris v. State, 818 N.E.2d 63 (Ind.App. 2004) (trial court properly excluded eyewitness identification expert's testimony regarding truthfulness of witness's testimony; during D's offer to prove, expert testified to various psychological phenomena that might cause an eyewitness to misidentify a suspect, but expert also gave his opinion as to whether eyewitnesses in this case testified truthfully. This testimony was inadmissible under Rule 704(b), which provides that witnesses may not testify to opinions concerning whether a witness has testified truthfully. Moreover, based on evidence presented and D's cross-examination of eyewitnesses, trial did not err in finding that, pursuant to Indiana Evidence Rule 702(a), expert testimony was not necessary to place the concept of eyewitness misidentification within jury's realm of understanding. While eyewitness

identification expert testimony is admissible in certain circumstances, in this case circumstances necessitating such testimony were not present because two eyewitnesses' accounts of robbery were consistent and supported by gas station's surveillance video, & identification was not primary issue at trial. Baker, J., concurring, wrote separately to emphasize importance of eyewitness identification experts and that courts need to be mindful of research regarding reliability of eyewitness testimony).
Note: Although admissibility of expert testimony focuses on assistance to the trier of fact and relevancy, the defendant's constitutional protections should be argued. The Sixth and Fourteenth Amendment right to confront witnesses, the right to call witnesses and the right to present a defense cannot be ignored when arguing for admissibility of expert's testimony. Also raise the Due Course of Law clause of Indiana Constitution, Art. 1, Sec. 12).

Woodson v. State, 961 N.E.2d 1035, 1044 (Ind. Ct. App. 2012) ("[T]he facts of Farris and Woodson's case are so similar that a trial court likely would have properly excluded any eyewitness identification testimony in Woodson's case on the basis of Farris. … The present case is not a proper vehicle for challenging the holding of the majority in Farris, or generally for litigating the propriety of eyewitness identification evidence. Such a case would be a direct appeal from a ruling regarding the admissibility of eyewitness expert testimony." Even if counsel acted unreasonably or under a mistaken belief in failing to pursue hiring an expert witness on eyewitness identification, D failed to show prejudice by that failure).

Reed v. State, 687 N.E.2d 209 (Ind. Ct. App. 1997) (Trial court did not err in failing to grant funds to allow D to hire eyewitness identification expert, even though D was convicted solely upon testimony of one eyewitness. D has burden of showing that expert's services are necessary to defense and precisely how she will benefit from those requested services. Although eyewitness expert would have been remarkably helpful in this case, court of appeals found no authority to require trial court to provide expert to defense. Trial courts may be well advised to permit eyewitness expert testimony, but flaws or serious questioning of eyewitness identification may be placed within jury's realm of understanding by careful cross-examination and by counsel's argument to jury).

See also Cook v. State, 734 N.E.2d 563 (Ind. 2000) (although Ind. Supreme Court acknowledges that there are times when eyewitness expert may be needed, instant case was not one, because there were many eyewitnesses to crime).

State v. Guilbert, 49 A.3d 703 (Conn. 2012) (expert testimony regarding eyewitness ID did not invade province of jury, because it does not state an opinion on the accuracy of a specific identification but rather educates jurors about the factors that have an adverse effect on eyewitness identifications, which are beyond jurors' common knowledge).

10. Trial and Additional Evidentiary Issues (see also #11, Voice ID/Analysis)

Ind. Evidence Rule 801(d)(1)(C) provides that out-of-court statements are not hearsay when the declarant testifies at the trial and is subject to cross-examination concerning the

statement, and the statement is one of identification of a person made shortly after perceiving the person. The Rule does not require that the prior statement be made under oath.

Davis v. State, 13 N.E.3d 939 (Ind. Ct. App. 2014) (State witness's prior statements to police identifying D as one of two individuals who robbed and assaulted victim admissible under IRE 801(d)(1)(C)); See also Beasley v. State, 30 N.E.3d 56 (Ind. Ct. App. 2015), *sum. aff'd*, 46 N.E.3d 1232 (Ind. 2016).

Muncy v. State, 716 N.E.2d 587 (Ind. Ct. App. 1999), *trans. denied* (Erroneous admission of police officer's testimony that participant in robbery and burglary identified D as his confederate affected D's fundamental rights and required reversal. Indiana Evidence Rule 801(d)(1)(C) provides that statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross examination about a prior statement, and the statement…is an identification of a person shortly after perceiving the person. Here, declarant was not subject to direct examination by State or subject to cross examination concerning statement as required by Evid.R. 801(d)(1)(C). Because D did not have opportunity to cross-examine declarant about whether he made statement to officer identifying D as his confederate, trial court erred in allowing admission of officer's testimony about declarant's alleged identification statement).

Harris v. State, 619 N.E.2d 577, 580 n.1 (Ind. 1993) (evidence concerning a pretrial identification is inadmissible as a prior consistent identification unless witness' in-court identification is impeached in some way).

Robinson v. State, 682 N.E.2d 806 (Ind. Ct. App. 1997) (previous identification statements made two months and thirteen days after the commission of a crime were properly admitted over hearsay objections because the declarant knew the suspects, witnessed defendant commit the crime, testified under oath, and was subject to cross-examination; the term "shortly" in Evid.R. 801(d)(1)(C) is relative rather than precise).

Mack v. State, 736 N.E.2d 801 (Ind. Ct. App. 2000) trans. denied (detective's comment that he identified D out of group of people known to deal drugs in area where D was arrested subjected D to grave peril and required mistrial).

Gibson v. State, 709 N.E.2d 11 (Ind. Ct. App. 1999) (an officer's lay opinion on video evidence was helpful to the jury, and thus admissible under Ind. R. Evid. 701).

Vinson v. State, 735 N.E.2d 828 (Ind. Ct. App. 2000), *disapproved on other grounds by* Long v. State, 743 N.E.2d 253 (Ind. 2001) (trial court properly allowed officer to testify re: his opinion of D's identity as person depicted in surveillance video because officer's extensive viewing of video was basis for trial court to conclude that officer was more likely to identify D correctly from video than jury).

Pritchard v. State, 810 N.E.2d 758 (Ind. Ct. App. 2004) (no error in admitting testimony of two prison officials regarding what they saw in a video recording that was later destroyed; not hearsay because testimony merely recounted what they saw in

recording; "silent witness theory" did not apply to case since the video was never admitted).

Goodson v. State, 747 N.E.2d 1181 (Ind. Ct. App. 2001) (lay opinions of three officers familiar with defendant for two years were admissible under Ind. R. Evid. 701 to help the jury make a decision about identification of the person depicted in the videotape).

Pemberton v. State, 560 N.E.2d 524 (Ind. 1990) (where defense counsel filed motion to suppress identification testimony on grounds that pre-trial IDs were impermissibly suggestive, but failed to object to testimony at trial, and where this prejudiced D, counsel provided ineffective assistance).

11. Mistaken Identification Defense

Kucki v. State, 483 N.E.2d 788 (Ind. Ct. App. 1985) (trial court committed reversible error in excluding newspaper article with picture of person sought in burglaries in area D was allegedly seen; article was evidence tending to prove man who resembled D could have committed crime and was relevant to issue of identity).

Kiner v. State, 643 N.E.2d 950 (Ind. Ct. App. 1994) (where there is no evidence linking person depicted in picture to crime in question, D may not submit picture of person who is not D to identification witness and affirmatively represent to witness that picture is that of D; D may not misrepresent facts to witness in order to obtain misidentification).

12. Jury Instructions

Burdine v. State, 646 N.E.2d 696 (Ind. Ct. App. 1995) (D's tendered instruction on credibility of eyewitness identification testimony placed undue attention on testimony of specific witnesses; Staton J., concurring, argued for adoption of federal caselaw requiring specific instructions on credibility of eyewitness identification testimony).

Fry v. State, 447 N.E.2d 569, 573 (Ind. 1983) (sanctioning the use of a redacted version of defendant's tendered eyewitness credibility instruction but favoring use of general witness credibility instructions; *See* IPDC jury instruction manual for instructions).

Miller v. State, 759 N.E.2d 680, 684 (Ind. Ct. App. 2001) (court implies that where cross-racial identification testimony is a "critical issue," a jury instruction on cross-racial ID might be necessary); see also State v. Cromedy, 727 A.2d 457 (N.J. 1998) (cross-racial identification instruction should be given when identification is critical issue and eye-witness' cross-racial identification is not corroborated by other evidence giving it independent reliability); Murrell v. State, 747 N.E.2d 567 (Ind. Ct. App. 2001) (trial court did not err in refusing to give jury instruction on cross-racial identification; D failed to demonstrate specific risk that identification in this case may have been mistaken due to cross-racial factors).

13.Voice Identification/Analysis

A voice ordinarily must be identified to provide connective relevancy of a statement to a speaker. Consequently, the identification of a person's voice is often crucial in criminal proceedings. Under Indiana Evidence Rule 905(b)(5), "a person's voice, whether heard firsthand or through mechanical or electronic transmission or recording" may be identified through a witness's opinion "based on hearing the voice at any time under circumstances that connect it with the alleged speaker."

The proponent of the opinion testimony need only present evidence sufficient to support a finding that the witness heard the voice in question and has sufficient familiarity with the voice to identify it. Indiana Evidence Rule 901(a). The identification's accuracy is left for the trier of fact. Williams v. State, 669 N.E.2d 956, 958 (Ind. 1996).

Foundation for voice identification contains the following elements:

(1) At a specific time and place, the witness heard a voice.
(2) The witness recognized the voice as that of a certain person.
(3) The witness is familiar with that person's voice.
(4) The witness explains the basis for his or her familiarity with that person's voice.
(5) The person made a statement during the conversation.

Imwinkelried, *Evidentiary Foundations* § 4.05[2] (9th ed.).

Davis v. State, 598 N.E.2d 1041, 1050 (Ind. 1992) (the witness may, but need not, have heard the voice in person; opinion may be based upon hearing the voice after, as well as before, the events in question; witness need not be certain of the identification).

Atkins v. State, 499 N.E.2d 1180, 1183 (Ind. Ct. App. 1986); Robinson v. State, 262 Ind. 463, 317 N.E.2d 850, 852 (1974) (witness's familiarity with the person's voice need not be extensive, and may be based upon hearing few words spoken).

Hyppolite v. State, 774 N.E.2d 584 (Ind. Ct. App. 2002) (since Cornett v. State, 450 N.E.2d 498 (Ind. 1983), advances could have been made in field of voice analysis; here, D, as proponent of evidence, failed to demonstrate that scientific principles upon which his voice expert's testimony rested were reliable).

Lee v. State, 916 N.E.2d 706 (Ind.Ct.App. 2009) (in trial for invasion of privacy, State properly identified telephone conversations between D from jail and victim to show D violated protective order; it was proper for detective to testify on the basis of his familiarity with victim's voice, that she was the person whom D called and was speaking to from the jail).

14.Hypnosis

Indiana Evidence Rule 602 provides that "[a] witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis."

Peterson v. State, 448 N.E.2d 673 (Ind. 1983) (evidence derived from witness while witness is in hypnotic trance is inherently unreliable and is not to be admitted into evidence; here, admission of witness' testimony regarding D's identification (of which witness had no recall prior to pretrial hypnotic interview) denied D his due process rights to confront and cross-examine).