

B. WITNESSES

(i) Regarding Specific Testimony

315. Eyewitness Identification

You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.

In evaluating identification testimony, consider the following questions:

- **Did the witness know or have contact with the defendant before the event?**
- **How well could the witness see the perpetrator?**
- **What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation[, and _____ <insert any other relevant circumstances>]?**
- **How closely was the witness paying attention?**
- **Was the witness under stress when he or she made the observation?**
- **Did the witness give a description and how does that description compare to the defendant?**
- **How much time passed between the event and the time when the witness identified the defendant?**
- **Was the witness asked to pick the perpetrator out of a group?**
- **Did the witness ever fail to identify the defendant?**
- **Did the witness ever change his or her mind about the identification?**
- **How certain was the witness when he or she made an identification?**
- **Are the witness and the defendant of different races?**

- Were there any other circumstances affecting the witness's ability to make an accurate identification?
- [Was the witness able to identify other participants in the crime?]
- [Was the witness able to identify the defendant in a photographic or physical lineup?]
- [_____ <insert other relevant factors raised by the evidence>.]

The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find that the defendant not guilty.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on eyewitness testimony. (*People v. Richardson* (1978) 83 Cal.App.3d 853, 863 [148 Cal.Rptr. 120], disapproved on other grounds by *People v. Saddler* (1979) 24 Cal.3d 671, 682 [156 Cal.Rptr. 871, 597 P.2d 130].) An instruction relating eyewitness identification to reasonable doubt, including any relevant “pinpoint” factors, must be given by the trial court on request “[w]hen an eyewitness identification of the defendant is a key element of the prosecution’s case but is not substantially corroborated by evidence giving it independent reliability.” (*People v. Wright* (1988) 45 Cal.3d 1126, 1143–1144 [248 Cal.Rptr. 600, 755 P.2d 1049], quoting *People v. McDonald* (1984) 37 Cal.3d 351, 377 [208 Cal.Rptr. 236, 690 P.2d 709], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914 [98 Cal.Rptr.2d 431, 4 P.3d 265]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [31 Cal.Rptr.2d 321, 875 P.2d 36]; *People v. Palmer* (1984) 154 Cal.App.3d 79, 89 [203 Cal.Rptr. 474] [error to refuse defendant’s requested instruction on eyewitness testimony].)

AUTHORITY

- Factors. *People v. Wright* (1988) 45 Cal.3d 1126, 1139, fn. 9, 1141 [248 Cal.Rptr. 600, 755 P.2d 1049]; *People v. West* (1983) 139 Cal.App.3d 606, 609 [189 Cal.Rptr. 36].

- Reasonable Doubt. *People v. Hall* (1980) 28 Cal.3d 143, 159–160 [167 Cal.Rptr. 844, 616 P.2d 826], overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 422, fn. 6 [87 Cal.Rptr.2d 474, 981 P.2d 98].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 640.

2 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 31, *Eyewitness Identification*, §§ 31.01–31.07 (Matthew Bender).

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

COMMENTARY

The court should give the unbracketed factors, if requested, in every case in which identity is disputed. The bracketed factors should be given if requested and factually appropriate. A blank space has also been provided for the court to include any factual circumstances relevant to eyewitness identification that have not been addressed in the preceding list of factors.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1139 [248 Cal.Rptr. 600, 755 P.2d 1049], the court suggested that the trial court select factors from an approved list of eyewitness identification factors and then give counsel the opportunity to supplement with any additional relevant factors. (*Id.* at pp. 1126, 1143.) Additional “pinpoint” factors should be neutrally written, brief, and nonargumentative. (*Ibid.*; see also *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302–1303 [32 Cal.Rptr.2d 169], overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 905, 908 P.2d 1037].)

RELATED ISSUES

Unreliability of Eyewitness Identification

An instruction to view eyewitness testimony with caution and that “mistaken identification is not uncommon” should not be given because it improperly singles out this testimony as suspect. (*People v. Wright* (1988) 45 Cal.3d 1126, 1153 [248 Cal.Rptr. 600, 755 P.2d 1049] [special cautionary instruction unnecessary as duplicative of required eyewitness “factors” instruction]; see also *People v. Benson* (1990) 52 Cal.3d 754,

805, fn. 12 [276 Cal.Rptr. 827, 802 P.2d 330].) If a defendant wants to present information on the unreliability of eyewitness identifications under a particular set of circumstances, he or she must use means other than a jury instruction, such as expert testimony. (*People v. Wright, supra*, 45 Cal.3d at pp. 1126, 1153–1154.)

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