Stetson Journal of Advocacy and the Law

The first online law review designed to be read online

8 Stetson J. Advoc. & L. 1 (2021)

Employing Generally Accepted Scientific Principles to Address False Eyewitness Testimony Through Trial

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I. Introduction

1. On May 12, 2015, a suspect who attacked an NYPD officer with a hammer was shot by police in the middle of the day, on a crowded Midtown Manhattan street.[2] There were eyewitnesses to the incident. Almost all of the witness reports were incorrect. Several people inaccurately reported that the police officers shot an unarmed man while he was on the ground and handcuffed. The incident was recorded on surveillance video, documenting the suspect attacking one of the officers with a hammer and that officer's partner then shooting the man while he was in the midst of the attack.

2. Why is eyewitness memory flawed? How can attorneys use psychology and social science principles to explore and explain issues common to eyewitness testimony throughout trial? The focus of this article is to explore the psychology of memory and techniques specific to addressing these issues starting with jury selection and continuing through

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2 J. David Goodman & Al Baker, *Police Shoot Hammer-Wielding Man Sought in 4 Manhattan Attacks*, N.Y. TIMES, May 13, 2015.

trial to culminate in the selection of appropriately drafted jury instructions. There is a need to incorporate into jury instructions issues such as flawed memory, bias and suggestiveness as potential contributing factors to witness misinformation. A failure to understand and address these issues may result in wrongful convictions of innocent people and, in the civil setting, liability verdicts for significant sums of money as against parties that bear no responsibility for the alleged wrongdoing.

II. Research and Memory

3. Memories are temporary constructions shaped by factors such as the witness' cognitive schemata, attitudes, and environmental conditions. Environmental conditions consist of contact and exchange with other people.[3] Some deviations from the original experience can be attributed to forgetting; some deviations reflect systematic biases and distortions.

4. Persuasion or conformity to an idea that is not necessarily true is called classical social influence. It can be implanted by other people's attitudes, behaviors, and judgments. In social psychology, people's attitudes or behaviors change as a result of other people's communication or responses.[4]

5. According to Dr. Elizabeth Loftus, Distinguished Professor of Psychology and Social Behavior and Professor of Law at the University of California, "If someone has gaps in their narrative, they can fill it in with lots of things. Often, they fill it with their own expectations, and certainly what they may hear from others."[5]

6. Starting with depositions, attorneys defending corporate clients in negligent security cases can ask exhaustive questions regarding situational awareness to piece together a person's memory. For example, attorneys should question the witness' activities immediately prior to and during the incident, surrounding noise level, lighting conditions, potential distractions, etc. Questions at deposition should be open-ended and non-suggestive to offer the best possible opportunity to gather facts. As facts are gathered, attorneys may begin to funnel their questions into leading questions that support their theory of the case. Skipping the initial open ended inquiry stage is, however, a grave investigative error.

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3 Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of Memory*, 118 J. Exp. Psychol. Gen. 100 (1989).

4 Elizabeth F. Loftus, Eyewitness Testimony (1996).

5 Jim Dwyer, *Witness Accounts in Midtown Hammer Attack Show the Power of False Memory*, N.Y. Times, May 14, 2015.

7. At trial, attorneys can attack the environmental conditions and attitudes that may have played a factor informing the alleged memory. For example, in an excessive force case, defense attorneys can address the perception of police brutality as a cultural phenomenon and address the biasing impacts of such an environment on the witness' ability to perceive the reality of the situation. Questions can be asked on cross-examination of the biases that the witness may hold against law enforcement in general and the effects of media attention to certain other police brutality cases of note. Securing experts on these issues, in jurisdictions where permissible, is also particularly helpful. Additionally, many jurisdictions, with a notable exception in the state of Kentucky, allow expert witness testimony on the issue of memory and the pitfalls of eye witnesses testimony. In a number of jurisdictions, courts recognize the usefulness of expert testimony on eye witness identification, particularly in the areas of human memory and perception.[6]

III. A Case Study

8. In the hammer attack in Midtown Manhattan, as described in the New York Times article, a woman riding her bike past Eighth Avenue saw the incident stated, "I did not see the civilian running or swinging the hammer. In my mind I assumed he was standing there passively, and now is on the ground in handcuffs. With all the accounts in the news of police officers in shootings, I assumed that police were taking advantage of someone who was easily discriminated against. . . even though I looked away."

9. According to the Times, a second eyewitness, a man who heard the ruckus, reported that he heard "some shouts, then [saw] a police officer chase a man into the street." He further reported that the officer then shot the man in the middle of the avenue. He told the reporter from the Times, "he looked like he was trying to get away from the officers."

10. Research reveals that eyewitnesses miss things that happen right in front of their eyes. How people focus their attention affects their perception. Eyewitnesses have an idea in their mind and then look for evidence that supports that idea, not always paying attention to evidence suggesting that the idea is inaccurate. This is called confirmation bias.[7] Confirmation bias creates a presumption that makes eyewitnesses insensitive to potentially exonerating information. Addressing confirmation biases, starting with jury selection, is imperative to success at trial. Using an expert psychologist, when appropriate, may also assist during trial.

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6 *U.S. v. Jordan*, 924 F. Supp. 433 (W.D.N.Y. 1996).

7 Gerald Echterhoff & William Hirst., *Social Influence on Memory*, 40 SOC. PSYCHOL. 106 (2009).

11. To put this into context, there was an increasing amount of media attention to instances of police brutality in May 2015. The eyewitnesses in the case study automatically assumed that the man with the hammer was a victim. This is an example of classical social influence and confirmation bias as described above. In Federal Court, where jury selection is conducted by the Judge, attorneys do not have the ability to engage in hypothetical scenarios and a discussion with the jury as they would in State Court in jurisdictions that allow attorneys to voir dire the jury pool. This must all be addressed at jury selection and on cross-examination. Attorneys should ask potential jurors exhaustive questions regarding their media influences and perceptions, their contact with law enforcement and any prior negative experiences. Further, attorneys should engage in hypothetical scenarios with jurors to explain social influence and confirmation bias and to persuade jurors, starting with jury selection, that the witness' testimony may be flawed.

IV. Testimony on Lineups

12. In the renowned case, *United States v. Wade*, the U.S. Supreme Court opined that the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[8] The *Wade* Court went on to opine "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

13. It is, therefore, important for attorneys to secure all discovery about the lineup. The possibility of influence may be supported when comparing the confidence statement made by the witness from the time of lineup to the time of trial; any audio or video recordings of the proceeding; and, most significantly, whether the lineup was single blind or double blind.[9]

14. Research supports that lineups should be conducted by administrators who do not know which lineup member is the suspect (i.e., a double-blind administration). Single-blind lineup administration, in which the administrator does know which lineup member is the suspect is documented to increase the rate at which witnesses identify suspects, increasing the likelihood of false identifications and wrongful convictions. In

8 *United States v. Wade*, 388 U.S. 218, 228 (1967).

9 See also Margaret B. Kovera & Andrew J. Evelo, *The Case for Double-Blind Lineup Administration*, 23 PSYCHOL. PUB. POL'Y. & L. 421 (2017).

single-blind lineups, there is also an increase in correct identifications of the guilty; this may appear desirable but, in fact, this increase in correct identifications is the result of impermissible suggestion on the part of the administrator. Additionally, single-blind administration influences witness confidence through an administrator's feedback to witnesses about their choices, reducing the correlation between witness confidence and accuracy. Finally, single-blind administration influences police reports of the witness' identification behavior, with the same witness behavior resulting in different outcomes for suspects depending upon whether the administrator knew which lineup member was the suspect. Administrators who know which lineup member is the suspect in an identification procedure emit behaviors that increase the likelihood that witnesses will choose the suspect, primarily by causing witnesses who would have chosen a filler (known innocent member of the lineup who is not the suspect) to choose the suspect.[10] To avoid impermissible suggestion, photo arrays and lineups should be administered using double-blind procedures.

V. Suggestive Questioning

15. The *Wade* court further concluded that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all other factors combined. Suggestion can be created intentionally or unintentionally in many subtle ways. However, the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."[11] People respond emotionally to subtle cues such as words, sounds or smells without awareness of their emotions coloring their thoughts.[12]

16. Studies have concluded that witnesses substantially change their description of a perpetrator after learning a particular suspect's height and weight.[13]

17. Studies also show that a speaker may implant biasing information in a listener.[14] The speaker may replace information already existing in the listener's mind with new information in the formulation of the question itself. Credibility and trustworthiness of a social source (i.e. police officer) affects transmitted information in a question or

10 See also Margaret B. Kovera & Andrew J. Evelo, *The Case for Double-Blind Lineup Administration*, 23 PSYCHOL. PUB. POL'Y. & L. 421 (2017).

11 *United States v. Wade*, 388 U.S. 218, 229 (1967) (internal citations omitted).

12 DAN ARIELY, PREDICTABLY IRRATIONAL (2008).

13 Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & HUMAN BEHAVIOR 283 (1997).

14 Vicki L. Smith & Phoebe C. Ellsworth, *The Social Psychology of Eyewitness Accuracy: Leading Questions and Communicator Expertise*, 72 J. APPL. PSYCHOL. 292 (1987).

statement.[15] For this reason, it is imperative to address police techniques on cross examination.

18. Witnesses who are shown multiple photo arrays/lineups, make hesitating identifications such as "might be" or "thought." But, by trial, according to one study, witnesses are confident in their identification.[16]

19. Attorneys should be prepared to address these issues at trial, through the cross examination of witnesses. More importantly, attorneys in jurisdictions that allow for voir dire by attorneys, should explore these psychology concepts in jury selection by presenting hypothetical examples to the jury pool and eliciting their opinions about the power of suggestion, false memory, undue influence and other factors as addressed herein.

VI. The Weapon Focus Effect

20. When there is a gun or knife present, witnesses fixate on that object rather than the perpetrator.[17] Dr. Loftus' research further reveals that stress and anxiety create a tunnel vision on the weapon which negatively affects memory.

21. In a study conducted by Jo Saunders in 2009,[18] two experiments were reported in which individuals were presented with a post event source of purposely incorrect information via suggestive questioning (akin to cross examining) while others were asked to provide their own narratives with open ended questioning (as commonly done with depositions). The second experiment had presented the information in the presence of a weapon and in the absence of a weapon.

22. The results found suggestive questioning (as is common with police interrogative techniques) to increase flawed memory concerning the central item, as compared with a narrative, and more flawed memory was found for the weapon-present than for the alternative scenario with a newspaper present in lieu of a weapon. This weapon focus effect, as it is termed in psychology, should also be explored during jury selection to address issues with witness misidentification.

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15 Gary Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603 (1998).

16 Amy Bradfield Douglas & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006).

17 Elizabeth F. Loftus, et al., *Some Facts About "Weapon Focus"*, 11 L. & HUM. BEHAV. 55 (1987).

18 Jo Saunders, *Memory Impairment in the Weapon Focus Effect,* 37 MEMORY & COGNITION 326 (2009).

VII. Cross-Racial Identification

23. Another factor affecting the accuracy of eyewitness identifications is cross-racial identifications.[19] People are better at recognizing faces of their own race versus a different race. When describing one's own race, witnesses can give more identification accuracy of physical characteristics. Studies suggest that pretrial identifications are less fair for African American defendants than Caucasian defendants. In those situations, victims point to defendants because only that defendant resembles the victim's initial description of the perpetrator. Addressing jurors' cross-racial experiences starting with jury selection is, therefore, crucial. The psychology of prejudice and racism must be explored starting with jury selection.

24. Cross-racial identification and confirmation bias becomes a major issue regarding line-up construction.[20] Jurors are more prone to convict a defendant of a different race.[21] A "fair" line up generally consists of a suspect and several similarly looking individuals. Possible alternatives include having lineups where the perpetrator is present and one where the perpetrator is absent.

25. Attorneys should be prepared to address these issues during the charge conference and propose that appropriate jury instructions, where applicable, be given on the issue of cross-racial identification.

26. In 66 of the 216 wrongful convictions overturned by DNA testing, cross-racial eyewitness identification was used as evidence to convict an innocent defendant. It is well settled in the field of social science research that cross-racial bias exists in identification. While the American Bar Association does recommend that judges read specific instructions to juries in cases involving cross-racial identification, attorneys may propose language that is specific to the facts and circumstances in their case. The ABA's proposed language is "You 'may' consider, if you think it is appropriate . . . ," instead of you "should" consider. The ABA's instruction makes no mention of the numerous scientific studies that have shown, empirically, that cross-racial bias exists. In cases where experts have not testified at trial on the subject (i.e., most cases), jurors are left ignorant of the established researchin this field. Instead of stating that "scientific studies have shown," the court cites the amorphous "ordinary human experience."

27. I encourage attorneys to propose the version as found in *Cross-Racial Identification Errors in Criminal Cases*:

19 ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996).

20 Elizabeth F. Loftus & Edie Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 L. & HUM. BEHAV. 323 (1980).

21 Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials,* 127 Q.J. ECON. 1017 (2012).

> In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members of a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness's testimony, but you must also consider whether there are other factors present in this case that overcome any such difficulty of identification.[22]

28. Attorneys should consider making motions for jury instructions on both estimator and system variables and should, of course, tailor their proposed instructions to the facts of their cases.

VIII. New Jersey's Approach

29. In *New Jersey v. Henderson*,[23] Larry Henderson was accused of holding a gun on James Womble while a man murdered Rodney Harper. Two weeks later, Womble identified Henderson from a photo array and at trial. Henderson was convicted of reckless manslaughter and other charges. Womble failed to identify Henderson at the initial photo array until investigating officers intervened and exerted "pressure" or "nudging." Womble also ingested crack-cocaine and alcohol on the day of the murder. As a result of this case, New Jersey proposed new jury instructions in 2012. These include an instruction that "human memory is not foolproof."

> Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. 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 piece of information; and retrieval — the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.[24]

30. New Jersey also considers the following jury instructions:

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22 Sheri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984)

23 *New Jersey v. Henderson*, 77 A.3d 536 (N.J. Super. Ct. App. Div. 2013).

24 Identification: In-Court and Out-Of-Court Identifications, NEW JERSEY COURTS.

1. Different race: "You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race" and
2. High stress: "Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification."

31. Further, the New Jersey courts instruct that "A witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy."

32. To address weapon focus, they instruct that:

> you should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration.

33. While New York does not yet mandate these, consideration of same is urged to address the dangers of flawed eyewitness accounts.

IX. Conclusion

34. More states are adopting jury instructions that address the principles as discussed in this article. It is crucial that all state adopt these instructions and, further, that the instructions be mandatory, not optional, in cases involving single witness identification. In California, "the court has no sua sponte duty to give an instruction on eyewitness testimony. . . . 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.'"[25] Some states like Oregon and Massachusetts have developed extensive jury instructions to address these issues. In Massachusetts, the Supreme Judicial Court approved and recommended the use of the Model Eyewitness Identification Instruction.[26] In its opinion, the Oregon Supreme Court noted that since 1979, when Classen was decided, there

25 1 JUDICIAL COUNCIL OF CAL. CRIM. JURY INSTR. No. 315 (2011).

26 *Massachusetts v. Gomes*, 470 Mass. 352, 367 (2015).

have been more than 2,000 scientific studies on the reliability of eyewitness identification.[27] Those studies have identified factors known to affect the reliability of such identifications. Those factors are divided into two categories: System variables, which refer to the procedure used to obtain identifications, such as lineups, showups, and suggestive questioning, which can cause post-event memory contamination; and, suggestive feedback and recording confidence; Estimator variables, which refer to characteristics of the witness that cannot be manipulated by the state, like stress, witness attention, duration of exposure, environmental conditions, perpetrator characteristics, speed of identification, and memory decay. In Massachusetts, for example, nine instructions are available specific to the following factors:

1. Opportunity to view the event;
2. Characteristics of the witness;
3. Cross-racial identification;
4. Passage of time;
5. Expressed certainty;
6. Exposure to outside information;
7. Identification procedures;
8. Failure to identify or inconsistent identification; and
9. Totality of the evidence.

35. Contrast this with the State of Kentucky which remains reluctant to embrace instructions on this issue. Section 1.09 Role of Jury in Assessing Evidence, Section A, In General: "It is fundamental that the jury must pass on all questions of fact" and Section D:

> Weight of the Evidence: It is improper to instruct the jury on the weight to be accorded to any evidence, this being a question left entirely to their discretion. . . It is improper to give a reasonable doubt instruction concerning eyewitness identification since such would give undue emphasis to a particular aspect of the evidence. [28]

36. Section 4.30[2]: ". . . the court has not been receptive to expert testimony bearing on credibility of witnesses, and in most instances has been quite unreceptive to such testimony." Section 6.30[9] "The Kentucky case law proves very little room for expert testimony concerning the credibility of individual witnesses, and the federal caselaw is

27 *Oregon v. Lawson*, 352 Or. 724, 739 (2012).

28 *Evans v. Kentucky*, 702 S.W.2d 424 (Ky. 1986); *Brock v. Kentucky*, 627 S.W.2d 42 (Ky. Ct. App. 1981); *Jones v. Kentucky*, 556 S.W.2d 918 (Ky. Ct. App. 1977).

equally unreceptive to such testimony."[29]It is well established that mistaken eyewitness identifications contribute to a majority of wrongful convictions. According to the Innocence Project, mistaken identification resulted in approximately 71% of the more than 360 wrongful convictions in the United States overturned by post-conviction DNA evidence. Therefore, it is incumbent upon the justice system to embrace the scientifically established evidence as a safeguard against lay jurors' overreliance upon eyewitness testimony that is, inherently, flawed.

37. Additionally, all states should adopt the following reforms:

1. lineups should be conducted as "Double-blind" Procedures with the use of a Blind Administrator;
2. A series of statements, instructions, must be issued by the lineup administrator to the eyewitness to deter the eyewitness from feeling compelled to make a selection. One of the recommended instructions includes the directive that the suspect may or may not be present in the lineup;
3. In composing the lineup, suspect photographs should be selected in a manner that does not bring unreasonable attention to the suspect and non-suspect photographs and/or live lineup members (fillers) should be selected so that the suspect does not stand out from among the other fillers. Law enforcement should select fillers using a blended approach that considers the fillers' resemblance to the description provided by the eyewitness and their resemblance to the police suspect;
4. Immediately following the lineup procedure, the eyewitness should provide a confidence statement, in their own words, that articulates the level of confidence they have in the identification made; and
5. The lineup procedure should be documented and electronically recorded. The recommendations are based upon reforms as implemented by 24 states; these states include: California, Colorado, Connecticut, Georgia, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, West Virginia and Wisconsin.

38. At this stage we can be reasonably certain that failing to set forth the scientifically accepted factors for evaluating eyewitness testimony, compounded by providing jurors perhaps incorrect, unclear instructions, cannot and does not advance accurate fact-finding by lay jurors. At the very least, the effort to draft correct instructions, in plain language, narrows the field of discourse and allows the possibility that jurors will

29 See, e.g., *Hester v. Kentucky*, 734 S.W.2d 457 (Ky. 1987); *Hellstrom v. Kentucky*, 825 S.W.2d 612 (Ky. 1992); *Hall v. Kentucky*, 862 S.W.2d 321 (Ky. 1993); *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996).

be able to apply the scientifically accurate, generally accepted, and understandable instructions to their difficult fact-finding responsibilities in both criminal and civil jury trials. We owe to the principle of fairness. I suggest that these concise, plain language, scientifically based eyewitness identification instructions have the capacity to reduce the number of wrongful convictions and enhance the decision-making process.