Eyewitness Identification

Problems for Discussion

Jeff Welty

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1. *Mrs. Smith was returning from the grocery store one afternoon when she saw a person run out the side door of her house. She called 911 and described the intruder as "a skinny black kid in a gray sweatshirt and baggy jeans." An officer happened to be nearby and he noticed a slender African-American male, about 20 years old, in a gray hoodie and dark pants. The officer detained the suspect and took him to Mrs. Smith's home. He asked Mrs. Smith whether the detainee was the person she saw leaving her house, and she said yes. The matter is now before you on the defendant's motion to suppress the identification as the result of an unnecessarily suggestive identification procedure. The defendant argues that the officer should have used a photographic lineup instead of a show-up. How should you rule?*

Right to counsel. The defendant did not raise this issue. It would be meritless in any event, as adversary judicial proceedings had not begun, so his Sixth Amendment right to counsel had not yet attached.

Due process. The show-up would violate due process if it (1) was unnecessarily suggestive and (2) created a substantial risk of misidentification.

Show-ups are always suggestive. However, this one may not have been *unnecessarily* suggestive because it was conducted shortly after the crime and provided the only opportunity to clear the suspect prior to arrest. *See Stovall v. Denno*, 388 U.S. 293 (1967) (implying that any suggestiveness was necessary in a show-up conducted shortly after the crime, but with the additional fact that the witness was injured and her survival was uncertain).

Even if the procedure was unnecessarily suggestive, it may not have created a substantial risk of misidentification. Applying the factors from *Manson v. Braithwaite*, 432 U.S. 98 (1977), it seems that (1) Mrs. Smith had a good opportunity to observe the person leaving her house, as it was daytime; (2) she had reason to pay close attention to the person; (3) her description of the suspect was generally accurate; (4) there is no indication that she was less than certain about her identification; and (5) only a short time had passed between the break-in and the show-up. *See Neil v. Biggers*, 409 U.S. 188 (1972) (ruling that an identification made during an unnecessarily suggestive show-up was nonetheless admissible because the identification was likely reliable); *In re Stallings*, 318 N.C. 565 (1986) (admitting as reliable an identification made during a show-up under facts similar to the problem).

The EIRA. The defendant did not raise this issue. In any event, the show-up probably meets the standards in the Act, as it was a live show-up involving a "suspect matching the description of the perpetrator" who had been "located in close proximity in time and place to the crime." Perhaps the defendant could argue that there were no "circumstances that require[d] the immediate display of a suspect to an eyewitness," but the opportunity for immediate identification or exoneration while the

witness's memory is still fresh and before formal charges have been brought against the suspect may be sufficient to meet that standard. Note that the EIRA requires the officer to take a picture of the suspect at the time of any show-up.

2. *An informant told Durham officers that "Big Tony" Hardison was selling cocaine from his apartment. The officers confirmed that the apartment was rented to Hardison, and observed unusual amounts of traffic into and out of the residence. They enlisted a Chapel Hill officer to enter the residence undercover and buy cocaine, which he did. The Chapel Hill officer reported that the seller was a large male who others called "Tony." Later, the Durham officers showed the Chapel Hill officer a photograph of Tony Hardison, a/k/a "Big Tony," and the Chapel Hill officer confirmed that was the man from whom he had purchased drugs. Hardison was then arrested and charged with drug offenses. Hardison's defense attorney argues that the showing of the photograph was an "improper identification" and that the officers should not be allowed to testify about it at trial. How should you rule?*

Right to counsel. Any argument that the identification procedure violated the defendant's Sixth Amendment right to counsel would be meritless, as (1) the right to counsel had not yet attached and (2) only live identification procedures are critical stages for purposes of the Sixth Amendment right.

Due process. The identification procedure violates due process if the procedure (1) was unnecessarily suggestive and (2) created a substantial risk of misidentification. The court of appeals has decided several cases involving similar facts and in each instance has found no due process violation, under one or both prongs of the analysis. *See State v. Ross*, 207 N.C. App. 265 (2010) (unpublished) (on facts similar to the question, the court ruled that an undercover officer's identification of the defendant as "Boss Lady," the person who sold him drugs, did not create a substantial risk of misidentification; the officer had a good opportunity to observe the suspect, paid close attention, and noted distinguishing features that made the identification likely accurate); *State v. McCullough*, 168 N.C. App. 409 (2005) (unpublished) (similar, affirming the trial court's ruling that an officer's identification of the defendant was neither unduly suggestive nor likely to result in misidentification, given officer's ample opportunity to observe the person who sold him drugs); *State v. Bailey*, 223 N.C. App. 521 (2012) (unpublished) ("Assuming arguendo that Officer Schuster's presentation of one photo to Detective Lackey was unnecessarily suggestive, the out-of-court identification is reliable considering the totality of the circumstances. Detective Lackey had a few minutes of face-to-face contact with Defendant. He was very attentive since he intended to arrest the seller of the drugs at a later date. Detective Lackey gave a detailed description that was communicated to patrol officers before the buy, and he confirmed the description after the buy. Shortly after the buy, he positively identified Defendant.").

The question asks only about the out-of-court identification. However, even if the out-of-court identification were held to violate due process, the State might be able to argue that the Chapel Hill officer could make an in-court identification of the defendant based on the officer's independent recollection of the transaction. *See State v. Macon*, __ N.C. App. __, 762 S.E.2d 378 (2014) (ruling, on similar facts, that "even assuming the procedure was impermissibly suggestive, the officers' in-court identification was admissible because it was based on an independent source").

The EIRA. The defendant's strongest argument may be that the identification procedure was a photographic show-up in violation of the EIRA. The law states that "[a] show-up shall only be performed using a live suspect and shall not be conducted with a photograph." That may prohibit this type of identification procedure, but the matter is not cut and dried for two reasons. First, the statutory

definition of a show-up involves a "single live suspect," so arguably it is merely a tautology to say that show-ups "shall only be performed using a live suspect." In other words, it may be that single photograph identifications are simply not covered by the Act, rather than being prohibited by the act. Second, the act contains a subsection that provides: "Nothing in this section shall be construed to require a law enforcement officer while acting in his or her official capacity to be required to participate in a show-up as an eyewitness." The exact meaning of that provision is not clear but perhaps it could be read to exclude situations like this fact pattern from the Act. Finally, assuming *arguendo* that the identification procedure violated the EIRA, exclusion is only one of several possible remedies.

3. *A convenience store clerk called 911 to report that he had been robbed. When officers arrived, the clerk described the perpetrator by race, height, and weight and stated that he had a tattoo of a cross under his left eye. The officer suspected "Rock" Sampson was the robber, and he showed the clerk a photo lineup that included Sampson. The clerk picked Sampson out of the lineup and Sampson was subsequently arrested and charged with the crime. The defense has moved to suppress the identification, arguing that only one of the five fillers had facial tattoos, and that one had the word "killer" tattooed on his forehead, while Sampson had a cross under his eye. The defense argues that the fillers didn't match the clerk's description of the perpetrator and that the defendant stood out from the fillers. The officer testifies that he didn't have access to photographs of five white males with Sampson's build who had cross facial tattoos. Except for the tattoo, the fillers generally resemble the clerk's description and Sampson. How should you rule?*

Right to counsel. Any argument that the identification procedure violated the defendant's Sixth Amendment right to counsel would be meritless, as (1) the right to counsel had not yet attached and (2) only live identification procedures are critical stages for purposes of the Sixth Amendment right.

Due process. The lineup would violate due process if it (1) was unnecessarily suggestive and (2) created a substantial risk of misidentification. A lineup in which the suspect unfairly stands out from the fillers may violate due process. *See State v. Pigott*, 320 N.C. 96 (1987) ("assum[ing]," but also strongly suggesting, that a photographic lineup was unnecessarily suggestive where 6 of 10 images were "so poor as to be virtually unidentifiable," one was obviously older and heavier than the suspect, and one was a uniformed officer).

However, a lineup does not necessarily violate due process just because the suspect has a facial tattoo and some or all fillers do not. *See*, *e.g.*, *Stewart v. State*, 131 So. 2d 569 (Miss. 2014) (ruling that a photographic lineup was not unduly suggestive; although the defendant was the only person in the lineup with facial tattoos and a victim testified at trial that the perpetrator's tattoos were "what stuck out the most" about him, the tattoos were not extremely prominent and the victims had an ample opportunity to observe the perpetrator and were very confident in their identification of the defendant); *United States v. Lang*, 2007 WL 1725548 (5th Cir. June 14, 2007) (unpublished) (rejecting the defendant's argument that a "lineup . . . contained no other photographs of a man with a tattoo on his face [and was therefore] impermissibly suggestive"; police stations "are not theatrical casting offices" and a reasonable effort to find fillers is sufficient); *Gonzalez v. Jacquez*, 2011 WL 4550151 (C.D. Cal. May 19, 2011) (unpublished) ("The fact that Petitioner was the only person with a head tattoo does not suggest that the lineup was impermissibly suggestive. Rather, it shows only that Petitioner had a unique identifying characteristic. More importantly, however, nothing suggests that the other individuals in the

live lineup did not resemble Petitioner's general physical appearance."). Here, the fillers generally resembled the clerk's description and the suspect, and the lineup likely did not violate due process.

As the technology for manipulating photographs becomes more widely available and easier to use, the argument for granting the defendant's motion becomes stronger. The United States Department of Justice has produced a manual regarding eyewitness evidence that recommends "[c]reat[ing] a consistent appearance between the suspect and fillers with respect to any unique or unusual features (e.g., scars, tattoos) used to describe the perpetrator by artificially adding or concealing that feature." United States Department of Justice, *Eyewitness Evidence, a Guide for Law Enforcement* 29 (1999). Court opinions reveal that this technique has been used. *See*, *e.g.*, *Garza v. State*, 2008 WL 4271701 (Tex. Ct. App. Austin Sept. 19, 2008) (unpublished) (noting that "[b]ecause appellant has a teardrop tattoo under his left eye, to ensure a representative lineup, [an officer] digitally enhanced three other pictures in the array to show tattoos under the subjects' left eyes," and finding that the result was not unduly suggestive).

The EIRA. The EIRA requires that "the suspect does not unduly stand out from the fillers" and "[a]ll fillers . . . resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features." G.S. 15A-284.52. The inclusion of the terms "unduly" and "as much as practicable" appear to make the analysis similar to the due process inquiry, likely with the same result.

4. *You are presiding over a felony larceny trial. The State contends that the defendant ran out of an Apple store with an expensive computer he had snatched from a display table. A security guard at the mall testified that he apprehended the defendant moments after he left the store. An Apple "genius" is now on the stand. He did not participate in any type of pretrial identification procedure, but he saw the theft take place. The prosecutor asks, "Do you see the person who stole the computer in the courtroom today?" Before the genius can answer, defense counsel objects that the question constitutes a suggestive identification procedure and violates due process. How should you rule?*

Right to counsel. The defendant did not raise a Sixth Amendment claim. In any event, while he has a Sixth Amendment right to counsel at this stage, by the time a felony case reaches trial, the defendant will either have counsel or will have waived his or her right to counsel.

Due process. It is "not required" that a witness participate in a pre-trial identification procedure before being asked to identify the defendant at trial. *State v. Tyson*, 278 N.C. 491 (1971). However, any in-court identification must comport with due process. The due process analysis asks whether the procedure (1) was unnecessarily suggestive and (2) created a substantial risk of misidentification.

In-court identifications may be suggestive. *Cf. Moore v. Illinois*, 434 U.S. 220 (1977) (stating that "[i]t is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case," where the victim identified the defendant at his preliminary hearing, "after she was told that she was going to view a suspect . . . and after she heard the prosecutor recite the evidence believed to implicate petitioner"). Nonetheless, the appellate division has generally upheld in-court identifications against due process challenges, under one or both prongs of the analysis. *See State v. Bass*, 280 N.C 435 (1972) (applying the due process test and finding "no evidence of impermissible suggestiveness" where a rape victim identified the defendant in court at a preliminary hearing after apparently failing to identify him in a pretrial photographic lineup); *State v.*

Fowler, 353 N.C. 599 (2001) (applying the due process test and finding an in-court identification of the defendant in a murder case was not unnecessarily suggestive, and quoting *State v. Covington*, 290 N.C. 313 (1976), for the proposition that "the viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so unnecessarily suggestive and conducive to irreparable mistaken identification as would deprive defendant of his due process rights").

The EIRA. Although the defendant's argument focused on suggestiveness, the defendant might be able to argue that the in-court identification procedure is a show-up that violates the requirements of the EIRA. The Act defines a show-up as "[a] procedure in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." Arguably, an in-court identification without a previous identification is such a "procedure," although the Act generally seems to be focused on identification procedures at the investigative stage of a case. If an in-court identification is a covered show-up, the procedure described in the problem almost certainly violates the EIRA's rules regarding how and when such show-ups may be conducted, including the requirement that a show-up take place close in time and place to the crime. Any violation of the EIRA could result in suppression under the Act or G.S. 15A-974, or in a lesser remedy under the Act.

5. *You are hearing motions just before the start of a felony assault trial. The victim was jogging one afternoon near her home when an assailant struck her from behind in a random attack, knocking her down. She looked up and saw him run away. She saw his face when he briefly looked back. She participated in a photographic lineup shortly thereafter. Initially, she failed to identify anyone, but after the investigating officer asked her to "look again at picture number three," which was a photograph of the defendant, she said that he was her assailant. The defense moved to suppress the identification, arguing that the lineup was suggestive. You agreed. Now the defense has moved to suppress any in-court identification by the victim, arguing that it would be tainted by the faulty lineup. The victim says that although the assault took place nine months earlier, she had a clear look at her attacker and committed his face to memory, and she is sure it was the defendant. How should you rule?*

Right to counsel. The defendant has not raised a Sixth Amendment claim and there is no viable Sixth Amendment issue here. The defendant did not have a right to counsel at the pretrial lineup because (1) the right to counsel applies only at live identification procedures, and (2) the lineup appears to have taken place before adversary judicial proceedings began. The defendant has a right to counsel at any in-court identification procedure, but by that stage, the defendant will either be represented or will have waived his right to counsel.

Due process. Determining whether an in-court identification is tainted by an impermissibly suggestive pretrial identification procedure requires the consideration of "(1) the opportunity of the witness to view the individual at the time of the event; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the individual; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the event and the confrontation." *State v. Wilson*, 313 N.C. 516 (1985); *State v. Thompson*, 303 N.C. 169 (1981) (reciting the same factors). All five factors need not be present in order to allow the in-court identification. *State v. Powell*, 321 N.C. 364 (1988) (affirming the trial judge's ruling that a rape victim's in-court identification of her assailant was of

"independent origin" although only three of the five factors supported that conclusion and the trial was years after the attack).

This is a relatively close call. The victim's opportunity to observe the perpetrator was brief, there is no indication that she provided an accurate description of the perpetrator prior to the lineup, she could not initially identify anyone in the lineup, and it has been nine months since the crime. On the other hand, she had a clear view of the perpetrator, was attentive to his face, and is now certain in her identification. *See generally State v. Rogers*, 355 N.C. 420 (2002) (ruling that a witness's in-court identification of the defendant was independent from a pretrial lineup and was admissible where she "had the opportunity to view the perpetrator from a distance of approximately forty feet for several seconds on two occasions"; "[a]lthough it was night, lighting was adequate to allow her to see the man's face"; "[s]he was paying close attention and shortly thereafter provided a detailed description to the investigators"; and she "was confident of her [in-court] identification"). Based on the large number of appellate cases finding an independent basis for in-court identifications and the lack of cases the other way, a decision to admit the victim's testimony likely would not be reversible error.

The EIRA. Although the defendant's argument does not focus on the EIRA, to the extent that the State presents the in-court identification procedure as independent from the pretrial lineup, it implicates the same considerations as the previous question about whether it could be described as a show-up that violates the EIRA.

6. *You are presiding over an armed robbery trial. The State contends that the defendant robbed Al and Becky at gunpoint in a dimly-lit parking garage. The principal evidence that the defendant was the perpetrator is the testimony of Al, who identified the defendant in a photo line-up prior to trial and identified the defendant confidently at trial, and Becky, who was unable to identify the defendant in a photo array before trial but who did identify him in court. The defendant is Hispanic, while Al and Becky are black. The defendant seeks to present expert testimony of a psychology professor who conducts research about memory and eyewitness identification. The witness has reviewed the police reports regarding the incident and the photo arrays that Al and Becky viewed. Most of his testimony will concern his research findings regarding weapons focus and cross-racial identification. Should the testimony be admitted?*

"[T]he admission of expert testimony regarding memory factors is within the trial court's discretion." *State v. McLean*, 183 N.C. App. 429 (2007).

No North Carolina appellate case has ever reversed a conviction based on the trial judge's decision to exclude expert testimony of this type, and a reasonable argument could be made for excluding the expert's testimony in this case. Some of the proposed testimony may be common sense information that will not "assist the trier of fact." N.C. R. Evid. 702. *See also State v. Cotton*, 99 N.C. App. 615 (1990) (finding that testimony from an eyewitness identification expert would be of "minimal value" because jurors understand many of the potential problems with eyewitness identification, and affirming the exclusion of such testimony under the balancing test of Rule 403). Some of the proposed testimony may lack a close connection to this specific case. *See generally State v. Lee*, 154 N.C. App. 410 (2002) (affirming the exclusion of testimony from an expert on eyewitness identification in part because much of the proposed testimony was not case specific). And any time an expert testifies, there is a risk that the jury will overvalue the witness's testimony. *See Cotton, supra* (proposed testimony "that there were certain factors present which affected the eyewitness identification" in the case, including "lighting,

stress, cross-racial identification, priming of memory, unconscious transfer, and loss of memory over time" was properly excluded as placing "[e]mphasis on the frailty of human perception presented by an unbiased expert . . . constitutes an argument of potentially substantial weight in favor of the accused" and so "would be unduly prejudicial in the defendant's favor").

On the other hand, the case is serious and the eyewitness identification evidence appears to be critical to proving the perpetrator's identity. In *Lee, supra,* the court stated that "expert testimony concerning eyewitness identification may be appropriate in some cases," and suggested that a relevant consideration is whether or not the evidence of identity is "overwhelming." And expert testimony on eyewitness identification has been admitted in some cases, including *State v. Robinson*, 330 N.C. 1 (1991), where an expert testified about weapons focus and cross-racial identification.

This appears to be a discretionary decision where neither choice is likely to be viewed as an abuse of discretion.

7. *Same case. At the charge conference, the defendant submits a written request for a jury instruction on eyewitness identification to the effect that (1) eyewitness identifications are sometimes inaccurate, (2) they are a major source of wrongful convictions, (3) in evaluating them, the jury should consider eyewitnesses' opportunity to observe the perpetrator and whether the eyewitnesses were distracted by the presence of a weapon, and (4) cross-racial identifications are typically less accurate than same-race identifications. What parts of the requested instruction should you give, if any?*

The general standard for requests for jury instructions is: "When a defendant makes a written request for an instruction that is timely, correct in law, and supported by the evidence, the trial court must give such an instruction. However, the trial court is not required to give a requested instruction verbatim, so long as the instruction actually provided adequately conveys the substance of the requested instruction." *State v. Lucas*, 353 N.C. 568 (2001).

North Carolina does not have a detailed pattern jury instruction regarding eyewitness identification. N.C.P.I. – Crim. 101.15, *Credibility of Witnesses*, instructs the jury generally to consider "the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified," but does not address identification testimony specifically. N.C.P.I. – Crim. 104.90, *Identification of a Defendant as a Perpetrator of a Crime*, simply instructs the jury that the State has the burden of proving beyond a reasonable doubt that the defendant committed the crime. There are two instructions concerning the EIRA and its requirements, but those are relevant only in cases in which there is evidence of noncompliance with the Act. *See* N.C.P.I. – Crim. 105.65, 105.70.

The appellate courts have held repeatedly that instructions more detailed than the pattern instructions are not required. *See, e.g., State v. Watlington*, __ N.C. App. __, 759 S.E.2d 116 (2014) (the defendant requested an eyewitness identification instruction that was "eight pages long and contained language that bore a strong resemblance to" a detailed New Jersey pattern instruction developed recently; the trial judge gave the pattern instructions about witness credibility and the State's burden to identify the defendant; the court of appeals affirmed, stating that "this Court and the Supreme Court have clearly held that the existing pattern jury instructions . . . sufficiently address the issues arising from the presentation of eyewitness identification testimony"); *State v. Dodd*, 330 N.C. 747 (1992) (the defendant requested an eyewitness identification instruction that, among other things, "emphasized . . . whether [eyewitnesses] had the opportunity to observe the alleged crime, their ability to identify the perpetrator

given the length of time they had to observe, their mental and physical conditions, and the lighting and other conditions that might have affected their observation"; the trial judge instead gave essentially the pattern instructions regarding witness credibility and the State's burden to identify the defendant; the supreme court ruled that "[t]he charge adequately explained to the jury the various factors they should consider in evaluating witness testimony" and "emphasized the importance of proper identification and . . . that the burden rested with the State to prove such identity beyond a reasonable doubt"; therefore, it was substantially similar to the requested instruction). Therefore, it would not be reversible error to give the pattern instructions rather than the defendant's requested instruction.

Of course, the fact that a judge is not required to give the defendant's requested instruction does not mean that a judge is prohibited from doing so. Trial judges sometimes go beyond the pattern instructions, as illustrated by *State v. Carson*, 80 N.C. App. 620 (1986). In that case, the trial judge instructed the jury extensively on eyewitness identification, including that the jury should consider "the capacity of the witness to make such an observation . . . the opportunity . . . the witness had . . . to make an observation, and details, such as, the lighting of the scene of the crime at the time of the incident" as well as "the mental and physical condition of the witness, the length of time of the observation and any other contention, condition or circumstance which might have tainted or hindered the witness in making her observation." The court also cautioned the jury to consider the witness's subsequent exposure to the defendant. The court of appeals ruled that this was sufficient but that an even stronger instruction "may well have been appropriate had defendant offered expert testimony on the perils of a single eyewitness identification."

Even a judge inclined to go beyond the pattern instruction probably should limit himself or herself to listing factors that a jury could or should consider, rather than advising the jury about particular pitfalls or research findings. In *Watlington*, the court of appeals found especially inappropriate those aspects of the defendant's requested instruction that "contained . . . factual statements about the impact of weapons, focus, stress, racial differences, and the degree of certainty expressed by the witness in identifying the defendant as the perpetrator."