

WPIC 6.52
EYEWITNESS IDENTIFICATION TESTIMONY

Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:

- **The witness's capacity for observation, recall, and identification;**
- **The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;**
- **The emotional state of the witness at the time of the observation;**
- **The witness's ability, following the observation, to provide a description of the perpetrator of the act;**
- **[The witness's familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act;]**
- **The period of time between the alleged criminal act and the witness's identification;**
- **The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and**
- **Any other factor relevant to this question.**

NOTE ON USE

This instruction is intended for use solely in criminal prosecutions in which the jury has heard eyewitness identification testimony. The court may use this instruction as appropriate when evidence has been presented concerning an identification made by an eyewitness either at trial or pretrial, whether or not expert testimony on the subject was presented. Use bracketed language regarding cross-racial identification if requested. See Comment. Although the other factors are not bracketed, the court may choose to delete some or add others based on the evidence and issues in the particular case.

COMMENT

The prosecution must prove the identity of the perpetrator of an alleged crime. When the prosecution evidence includes eyewitness identification testimony and the defense includes a denial of this aspect of the case, the jury may be called upon to evaluate this testimony.

The fallibility of eyewitness identification is a subject that has been duly noted and discussed

over the years. “The annals of criminal law are rife with instances of mistaken identification.” [United States v. Wade](#), 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed. 1149 (1967). The role of a jury instruction on the topic as a potential safeguard has also been debated for some time. See [United States v. Telfaire](#), 469 F.2d 552 (D.C. Cir. 1972). In Washington, courts initially expressed concerns that such instructions could constitute a comment on the evidence. See [State v. Laureano](#), 101 Wn.2d 745, 767–69, 682 P.2d 889 (1984); [State v. Hall](#), 40 Wn.App. 162, 167, 697 P.2d 597 (1985); [State v. Watkins](#), 53 Wn.App. 264, 275, 766 P.2d 484 (1989).

More recently, the notion of an instruction to assist a jury in evaluating eyewitness identification testimony has gained more of a foothold. This development was noted by the U.S. Supreme Court in [Perry v. New Hampshire](#), ___U.S.___, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012). Footnote 7 in that opinion cites to the pattern instructions of fifteen states that now address the topic. Such instructions are noted approvingly as being among the “safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability.” [Perry v. New Hampshire](#), 132 S.Ct. at 728.

In 2013, the Washington Supreme Court decided the case of [State v. Allen](#), 176 Wn.2d 611, 294 P.3d 679 (2013). Although on the facts before it the court declined to find an abuse of discretion in the trial court's failure to instruct on “the fallibility of cross-racial eyewitness identifications,” the opinion in its entirety (lead, concurrence, and dissent) is supportive of the committee's conclusion that publication of a general instruction on the topic is advisable. The court emphasized that there is no case law establishing a due process requirement for such an instruction under either the U.S. or Washington constitutions. [State v. Allen](#), 176 Wn.2d at 624.

The committee's instruction is drawn from the California pattern instruction that is set forth in a footnote in [State v. Allen](#), 176 Wn.2d at 618 fn. 3. See [People v. Wright](#), 45 Cal.3d 1126, 755 P.2d 1049, 248 Cal.Rptr. 600 (1988). With a view to juror comprehension and neutrality of phrasing, and Washington's prohibition on judicial comments on the evidence, the committee has made some modifications. ([Wash. Const. Art. IV, § 16](#); compare [Cal. Const. Art. VI, § 10](#).)

Much of the discussion in [State v. Allen](#), 176 Wn.2d 611, concerns the circumstances under which a trial court either must, should or may instruct a jury specifically on impediments to identifying a person of a different race. Although this is commonly referred to as “cross-racial identification,” the committee has phrased this bracketed factor somewhat differently both to avoid commenting on the evidence and also to leave it to the jury to evaluate the particular witness's basis for his or her conclusion. The *Allen* opinions (as well as the Court of Appeals opinions in the same case at [161 Wn.App. 727 \(2011\)](#)) should be carefully reviewed in determining whether this factor must or should be included.

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