



Street Crimes, Stress, And Suggestion: Helping The Jury See What The Witness Did Not

Agnes Foster is a petite 60-year-old African American woman. A lifelong New York resident, she is a domestic worker, who starts her day at 6:00 a.m. and returns home at 8:00 p.m., walking two blocks to catch a bus to and from work. Having followed this routine year-round for the last 30 years, she could make the trip blindfolded.

On Feb. 1, 2010, having just finished work, Foster stepped off the bus and began her trek home. The sun had already gone down and the street lights were lit. It was a cold night and she walked briskly to get out of the frigid air. As she approached the front of her apartment, she heard the sound of footsteps behind her, moving quickly in her direction. As they closed in on her, she became nervous. Although there was a streetlight in front of her apartment building, it had not worked for the last week. Suddenly, she heard a loud voice coming from only two feet away: “Give me your money or give up your life!” Instinctively, Foster

turned. The first thing she saw was a New York Yankees baseball cap. Next, she noticed that a man of Asian descent was wearing it. Lastly, she zeroed in on a black revolver. As she stared at the gun, the man grabbed her purse and ran away. The entire incident lasted about 10 seconds. Foster ran into her apartment, dialed 911, and reported that “an Asian man wearing a Yankees cap” had robbed her. Detective Smith arrived at Foster’s apartment 30 minutes later, filled out an incident report, and left. This was the extent of his investigation.

A week later, Smith learned that at 9:00 p.m. on the night of the Foster robbery, a young man named Alan Chin had been arrested for possession of marijuana three blocks from Foster’s apartment. An Asian American standing five feet three inches tall, Chin had been wearing blue jeans, a black jacket, and a Yankees cap at the time. Smith learned that Chin, unable to make bail, was still housed at the local jail. Suspicious that Chin might have been the person who robbed Foster, Smith called to arrange a time for her to view a lineup. “I think we got the guy who robbed you,” he said. “Can you come down to make an I.D.?”

On Feb. 14th Foster went to the police station to view the lineup. Along with Chin, there were five other men in the lineup. Two were of Asian descent and three were Caucasian. They all ranged in height between five feet six and five feet nine inches. Chin occupied position number three. Before asking Foster to view the lineup, Smith said, “Now, I want to be sure I understood what you told me the night of the robbery. When you turned to look, you first saw a Yankees baseball cap, right?” Foster agreed. “And the hat was right there at your eye level? You did not have to look up to see the hat, did you?” he asked. “Uh, no, I guess not,” Foster replied. “Good. And you are five feet three inches tall, right?” Again, Foster agreed. “Okay, it’s

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really important that you get this right. You're the only witness we have. Good luck." With that, Smith led Foster into the lineup room.

Immediately, Foster turned her attention to the three Asian men, studying each carefully. After several minutes she focused on Chin. Foster looked at Smith, who was unable to hold back a very slight smile. Foster said, "It might be number three." Smith walked Foster out of the room, and with a smile, said, "Good job. I will be in touch." Other than a still photo of the lineup, nothing was recorded or memorialized.

Four months later, Chin was tried for the robbery of Agnes Foster. While on the stand, Foster testified about the events. She admitted that as she walked home the sun had already gone down, but the street lights were on, she told the jury. "As a matter of fact," she explained, "there is a streetlight right in front of my apartment where the robbery occurred." She went on to say that when she turned around, she was staring right into the man's face. They were the exact same height. She studied him carefully, she testified, and when she saw him in the lineup two weeks later, she immediately recognized him. She then pointed to Chin, sitting at the defense table. "That is the guy," she stated. "Are you sure?" asked the prosecutor. "I am 100 percent certain," Foster replied with confidence. Without ammunition to undermine this damning testimony, Chin's lawyer made little headway on cross-examination. The jury returned a guilty verdict in less than an hour and the judge sentenced Chin to 20 years.

This story plays out in courtrooms across the country every day. For defense attorneys who are familiar with this narrative — perhaps because we have had clients fall victim to it — there is no question of how Agnes Foster went from only being able to give the vaguest details of her attacker under less than optimal circumstances, to sitting in court assured of her identification of Alan Chin. But to a juror, only privy to Foster's testimony, there is no question about Chin's guilt.

Defense attorneys understand the fallibility of eyewitness identification, yet it remains the single most persuasive evidence in the prosecutor's arsenal. How can defense attorneys help a jury understand the problems with such evidence? They must understand where in the case the reliability of eyewitness identification can be undermined, how to discover the factors that contribute to it, and how to help the jury understand the impact of these variables.

A. Factors Contributing to Unreliable Eyewitness Identification

Before defense lawyers can educate a jury about problems with eyewitness identification, they must understand the factors contributing to it. These factors can be categorized into three areas: (1) the impact of estimator variables, (2) the quality of the police investigation, and (3) the administration of identification procedures.

1. The Impact of Estimator Variables

Estimator variables refer to characteristics of the witness, characteristics of the perpetrator, or conditions of the crime.¹ These factors are independent of the crime investigators. Because these variables can influence the accuracy of eyewitness identification, it is important to understand the relationship between the two. Estimator variables frequently present during various street crimes include: (1) cross-racial identification, (2) exposure duration, (3) hairline, (4) weapon focus, (5) stress, and (6) time between crime and identification.² While the correlation between some of these estimator variables and their impact on a subsequent identification may be more obvious than with others, the defense must understand these relationships to effectively work them into a narrative that demonstrates problems with the eyewitness testimony.

Social science studies indicate that people have more difficulty identifying people of a different race; it is more difficult for witnesses to make an accurate identification when they only have a brief time to view the suspect; stress decreases one's ability to recall important details about a perpetrator; the presence of a weapon is correlated with wrongful identifications; head coverings hiding the hairline make identification more difficult; and a person's ability to accurately recall details about a perpetrator rapidly decreases over time.³ More significantly, social science studies indicate that jurors do not appreciate the relationship between these variables and the reliability of eyewitness identification.⁴ Therefore, if one of the defense team's goals is to help jurors understand and appreciate how a witness who claims to be certain about an in-court identification might be mistaken, the team must learn about the estimator variables in each case and effectively explain their impact.

2. The Quality of the Police Investigation

A second area in which to locate evidence that helps explain problems with eyewitness identification is the police investigation. Almost invariably, there will be something the police did that taints a subsequent identification or something they did not do that could have made the identification evidence more reliable. These procedural flaws will remain hidden, however, if the defense does not unearth and present them to the jury.

Any time an eyewitness interacts with law enforcement, there is the potential for identification contamination. Whether it is during a 911 call, the initial investigation, or follow-up investigation, when agents speak to witnesses the potential arises for subtle suggestions about the identity of the perpetrator. While this potential is greater when the investigating officer has a suspect in mind, it is also present before the police identify a suspect. Each time an officer asks a leading question, there is the potential for contamination. For example, because many witnesses and victims assume police officers are expert crime solvers, a question like, "Was the gun black?" could lead the witness to believe that is the answer most helpful to solving the crime. Contamination may also occur when police interview multiple witnesses together. In this scenario, while the officer may not suggest information, the officer creates a scenario where witnesses can tailor their version of events to fit what others saw. Because these influences can be subtle, the witnesses may not recognize them. Therefore, it is critical that defense counsel attempt to learn about these conversations during the pretrial phase of the representation.

In addition to looking into what the police *did* during the investigation, it is also imperative that defense attorneys explore what the police *did not do* that may have either corroborated or cast doubt on the eyewitnesses recollection. By showing that the police failed to gather evidence that could help the jury gauge the reliability of the identification, the defense can raise questions about the reliability of the investigation. Without this information, the defense cannot attack the "thoroughness [or] good faith of the investigation," a potentially integral component of a viable defense theory.⁵ By learning whether the police failed to conduct an immediate and thorough interview of the witness or to record her recollection while it was

fresh, to canvass the area to locate witnesses who may have offered additional information about the incident, or to memorialize important characteristics of the scene using photographs, diagrams, and notes, the defense can begin to “[lay] the foundation for a vigorous argument that the police [have] been guilty of negligence.”⁶

3. The Administration of Identification Procedures

Contamination of eyewitness identification evidence frequently takes place during the administration of pretrial identification procedures. First, defense counsel should try to get details about any pre-procedure interviews to determine whether leading or otherwise suggestive questioning or comments may have contributed to contamination. As in the investigative stage, the manner in which police talk to witnesses, and the information they convey, can affect the reliability of the identification.

Next, counsel should examine how the police assembled the lineup or photo array. Arranging the fillers (non-suspects that complete the lineup or photo array) in a way that causes the target to stand out will affect the reliability of the identification. Therefore, counsel should examine the relative height, weight, facial features, skin complexion, and other features of each lineup participant as compared to her client. Counsel should then look at any cautionary instructions given before the viewing and the manner in which the police administered the identification procedure. Because witnesses are inclined to assume that the perpetrator is in the lineup, they will be inclined to make a best guess, identifying the person who looks most like their recollection of their assailant. To avoid the risk that an uncertain witness will feel compelled to select someone from the lineup, the administering officer should give a preliminary instruction that the perpetrator “may or may not” be in the lineup. Witnesses should be assured that they should not feel that the procedure is unsuccessful if they fail to make an identification.

The subjects should be presented to the witness sequentially, allowing the witness to study each subject independently and to move on to the next only if the witness declines to select the previous candidate. This prevents the witness from making a relative judgment, i.e., comparing all of the choices and selecting the one that looks most like the perpetrator, something the research shows witnesses are wont to do when presented

with all candidates simultaneously.

Research also warns of the dangers of the “single blind” administration of the identification procedure, i.e., when the witness does not know the identity of the suspect, but the administering officer does. Under this scheme there is the risk that the officer might, even unconsciously — by a slight smile, nod, or other body language when the witness is studying the suspect — give a hint about which candidate is the suspect or confirm that the witness made the “right” choice. The officer might say “good job” or “you did well” if the witness selects the suspect, reassuring the selection in the witness’s mind and increasing her confidence in a subsequent identification at trial. To avoid the chance that an officer involved in the process will inadvertently suggest or reinforce the selection made by the witness, experts recommend “double blind” administration, i.e., when neither the witness nor the officer knows the identity of the suspect in the lineup.

Finally, police should document the procedure, including anything said to and by the witness during the procedure, and photographs that recreate (to the extent possible) what the witness viewed. This documentation will be important for the jury to accurately assess whether law enforcement suggestively tainted the outcome.

B. Discovering Factors That Help Jurors Understand Unreliability

Once the defense team understands the variables that contribute to the unreliability of eyewitness identification, it must determine which factor is present in the defendant’s case. Only then can the team consider how to develop the narrative that explains why the identification evidence is problematic and how best to convey that to the jury. However, the defense cannot expect the prosecutor to appreciate how these variables impact the case, or that the prosecutor will provide this information to the defense even if he appreciates the impact. To determine which problem areas exist in a particular case, the defense team must explore several avenues — the client, investigation, discovery, and pretrial litigation.

1. The Client

The client is an important source when he possesses information about the crime scene or the witnesses. Even when the client was not present during

the commission of the crime, he may know the area or the witnesses involved through previous experience and may be able to offer insight into some of the above factors. Whether or not the client has information about the incident, the crime scene, or the witnesses, he was certainly present during the identification procedure. The client can help defense counsel recreate that procedure and understand how the police administered it. Whether the defense decides to introduce any of this evidence through the client’s testimony at a pretrial hearing or trial, the information can certainly inform the investigation, discovery, and motions strategies. The defense attorney should not overlook the client as an important source of information!

2. Investigation

While the client will be an important source, there will be much that the client cannot tell the attorney. Since police reports also may be incomplete and written through the lens of an officer prone to bolster the credibility of the eyewitness, there is no substitute for independent investigation. The defense should try to talk to every eyewitness to explore the factors discussed above, and to memorialize these interviews in witness statements so that early accounts of events are preserved. The defense should also explore the earliest accounts of eyewitnesses by talking to other witnesses who may not have firsthand knowledge of the incident, but who may have discussed the incident with those who do. By going to the crime scene, investigators can explore whether obstacles to a witness’s ability to observe are present. Obstacles may include obstructions, lighting conditions, distances, and perspectives of various witnesses. To accurately recreate the scene, the investigation must occur early in the case before conditions change, and should include interviews with witnesses who can help pinpoint where they were relative to the incident at the time of the crime. Investigation should include viewing the scene of the identification procedure itself to recreate the conditions of this critical process. Where possible, all information should be documented with diagrams (including relevant measurements) and photographs.

3. Discovery

Perhaps one of the most underutilized tools in the defense lawyer’s arsenal is discovery. Too often lawyers treat the discovery process as complete when the government provides defense coun-

sel a stack of documents — usually a small one — the prosecutor deems adequate to fulfill his discovery obligations. But since compiling the “usual discovery” can become a rote process, the prosecutor will seldom be thoughtful about what information is material to the preparation of the defense — a standard that renders various categories of evidence discoverable under many jurisdictions’ discovery schemes. Furthermore, it is unlikely the prosecutor will appreciate the importance of revealing evidence that favors the defense — a standard that requires disclosure under the *Brady* doctrine.⁷ And even the most thoughtful prosecutor will not be in a position to consider how all of the information in the government’s possession might impact any number of potential defense theories. It falls to the defense to understand how evidence can be material or favorable to the defense in order to seek and litigate discovery accordingly.

Through this process the defense attorney wants to learn about the opportunity the eyewitness had to view the perpetrator, the physical or mental condition of the eyewitness at the time of the viewing, post-incident descriptions given, the amount of time that

passed before the identification, the witness’s confidence level initially and at the identification, and as many details as possible about the identification procedure. The defense attorney also wants to learn the procedures that govern the relevant law enforcement agency so that those procedures can be compared to what happened in the defendant’s case. These procedures may be documented in general orders or regulations that the defense can subpoena from the agency or obtain through a public record or the Freedom of Information Act. The defense attorney should also understand best practices for purposes of comparing what the police did in the defendant’s case with nationally recognized standards.⁸

4. Pretrial Proceedings

Pretrial hearings provide a valuable source of information. The preliminary hearing and hearings on motions to suppress provide opportunities to explore factors shedding light on why the police initially focused on the defendant, such as the initial descriptions given, the opportunity of the witnesses to observe the client, obstructions, lighting, and things that undermine the reliability of the initial account given by the witnesses.

Motions to suppress out-of-court identifications will give the defense a chance to examine the circumstances surrounding the procedure, including any statements made to the witness, how the police assembled and administered the lineup, and what efforts the police made to document this phase of the investigation. Even encounters between the witness and the defendant that were not the product of police involvement may give rise to a motion to exclude on evidentiary grounds. For example, if a complainant saw the defendant on the street some time after an incident, and another person told the complainant that the defendant is the perpetrator, this may contaminate the complainant’s subsequent identification. Such an interaction may be the basis for a motion to exclude as being substantially more prejudicial than probative and win the defense a hearing that provides the opportunity to learn more about the encounter.

C. Developing the Proper Narrative: Theories and Themes

After understanding the factors that contribute to problems with eyewitness identification, and after discov-

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ering which factors are present in the defendant's case, the defense attorney is ready to develop a theory that best explains why the testimony of the eyewitness is unreliable. Moreover, the defense attorney can develop themes that will help craft a powerful narrative of innocence.

1. Theories

The relationship between the defendant and the eyewitness at the time of the incident will fall somewhere along a familiarity spectrum ranging from strangers to well known. The theories that might make sense in any given case will depend on where along this spectrum this relationship falls. In a case in which the witness had never seen the defendant prior to the incident, a theory of purely mistaken identification may be feasible, making the role of the police less significant. When the witness has seen the client once or twice before the incident, but does not know him well, the previous encounters might explain the mistaken identification due to a phenomenon known as "unconscious transference." This is defined as "the transfer of one person's identity to that of another person from a different setting, time, or context' ... without having a conscious recollection of the previous exposure."

Suggestive identification procedures and unconscious transference can help explain why a witness might innocently place too much confidence in a mistaken identification. However, it may be that the witness believes she has identified the right person but is deliberately exaggerating her degree of certainty, recognizing that the government's case, and the likelihood of keeping a criminal off the streets, rides on her identification and justifies her bolstering. This theory will be strengthened by evidence that the government insinuated the witness's understanding of her importance to the case. Perhaps at some point a detective said, "You're doing a great job. Without you, we would not have solved this case." Perhaps the prosecutor said, "Do not worry, your testimony will have this guy behind bars for a long time and no one will be victimized by him again." These comments put a lot of pressure on the witness to contribute to a successful prosecution. It is understandable that the witness might lie about her certainty in such instances, and the jury does not need to dislike her to recognize the potential for exaggeration and unreliability.

A theory embracing a mistaken or

exaggerated confidence in identification will be a less likely choice when the witness and client are well-known to one another. In this case, the theory will frequently have to involve a witness who is deliberately lying, perhaps about the crime itself. Consider two examples: (1) after being sold bad drugs, the buyer says he was robbed in an effort to recoup his money, and (2) after getting caught renting his girlfriend's car out for a hit of crack, the complainant claims he was carjacked. Perhaps the crime was committed, but involved a witness who is lying about the identity of the perpetrator in order to protect the actual culprit: (1) a teenage girl whose parents discover she is sexually active and misidentifies her partner to protect her boyfriend, or (2) a cooperating witness shifting blame to another in exchange for less harsh treatment.

Whenever the theory involves a witness who is deliberately lying, it will have to include a motive to fabricate. This motive might be dislike for the client, loyalty to the actual perpetrator, a desire to cover up the witness's own wrongdoing or embarrassing behavior, or personal profit or self-preservation. The defense investigation should target potential areas of witness bias, as the most viable motives to fabricate will drive the theory of the case.

For each of these theories, defense counsel will also have to be conscious of the role the police officers play. On one end of the spectrum, the police might play no role at all, as in the case of the witness who concocts a fabricated story independent of police behavior. The police may also innocently contribute to the mistaken identification by using a procedure believed not to be suggestive but which, in fact, does not comply with best practices. The theory may embrace a higher degree of police incompetence under which the investigation is so flawed, the jury cannot have faith in the government's case. This theory is reinforced not only by identification procedure practices that are blatantly inconsistent with best practices, but also by other investigative shortcomings such as failure to canvass for witnesses, memorialize interviews, document the crime scene, or process the scene for forensic evidence. Finally, a theory might involve a law enforcement officer who deliberately intends to manufacture unreliable evidence to strengthen the state's case. Whatever the role the police play in the defense theory, the attorney must be ready to explain that component to the jury.

2. Themes

In addition to a cogent theory, it is important to develop themes that make the defense narrative more powerful. These themes should relay to jury members concepts they understand that reinforce the theory. Examples of common themes in such cases include forced choice, no villain, contamination of trace evidence, and memory source error.

The "forced choice" theme involves the ambivalent witness who feels pressure to make an identification with confidence because of the need for closure in the witness's life, the need to feel safe, or the desire to help the police catch a bad guy. Whatever the reason, once the witness makes the choice, it is hard to go back.

The "no villain" theme paints a picture of everyone trying their best to do what's right in an environment in which mistakes are inevitable. This will usually involve an identification procedure that is inadvertently tainted by the police. This theme will be supported by an investigation that both shows what the police did and did not do that is inconsistent with best practices. Often police officers will administer the lineup in a manner consistent with their own standards or traditions, but those guidelines will not be in compliance with nationally recognized best practices.

The "contamination of trace evidence" theme helps the jury understand that memory, like any other forensic evidence, can be contaminated by outside influences. With this theme it will be important to show these influences before and during the administration of the identification procedure, but also any external influences that reinforced the erroneous identification after it was made. For this theme, the comments or reassurances of police and prosecutors after the identification will be critical.

The "memory source error" theme focuses on how the witness first came to believe the client was her assailant. This might be supported by conscious transference (prior exposure to the client) or subsequent sightings of the client on the street or through the media.

When the defense team has developed a persuasive theory and compelling themes, it is ready to piece together the trial's storyline. The tools available for telling a convincing narrative include expert witnesses, jury instructions, and cross-examination. Depending on which of these is available to counsel in any given case, the defense attorney should consider and use the most effective combination.

D. Helping the Jury Understand

1. Expert Witness

Because so much about the science behind eyewitness identifications is counterintuitive, expert testimony is a valuable tool to help jurors accept concepts that go against what they see as common sense. Erroneous views held by laypersons often include: (1) memory is like a tape recorder that accurately replays an incident, (2) a witness's confidence is correlated with accuracy, (3) stress increases attention and sharpens focus, and (4) the more peripheral details remembered, the more accurate the recollection of important details. These are factors the prosecution routinely uses to credit the eyewitness account. The problem is that studies have shown them to be incorrect. Experts can help a jury understand these considerations as well as the impact of estimator variables and how procedures are conducted.

While expert testimony regarding the problems with eyewitness identification can be helpful to the defense, the likelihood of getting such evidence admitted depends on the jurisdiction in which the trial is held. On the more promising end of the spectrum, the Utah Supreme Court recently held that at least "in cases where eyewitnesses are identifying a stranger and one or more established factors affecting accuracy are present, the testimony of a qualified expert is both reliable and helpful ... and should be routinely admitted."¹⁰ However, the Supreme Court of Louisiana reached the opposite conclusion just four months later.¹¹ In that case the Louisiana court held that expert testimony caused jurors to give too much weight to the problems with eyewitness identification testimony and therefore invaded the "exclusive province of the jury."¹² Finding that expert testimony was more prejudicial than probative, the court concluded that the problems with eyewitness identification could better be addressed through "effective cross-examination and artfully crafted jury instructions."¹³

Therefore, where the attorney practices and the law of that jurisdiction will determine how difficult it will be to use an expert to educate the jury. However, the more effectively the defense attorney can demonstrate that the factors she wishes to have an expert address are beyond the common understanding of the layperson, the better the attorney's chance of earning admission of such testimony. Whether or not the attorney is



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able to use an expert witness, the attorney should also consider how best to use creative jury instructions and artful cross-examination to help the jury understand some of the shortcomings in the government's case.

2. Jury Instructions

Effective use of jury instructions can be a powerful way to help the jury appreciate problems with eyewitness identification. Therefore, counsel should consider proposing helpful instructions backed up by law, science, or both. Examples of effective jury instructions in eyewitness identification cases include those that warn the jury about the potential danger of misidentification when the police fail to give eyewitnesses cautionary instructions before viewing a lineup,¹⁴ or fail to contemporaneously document the identification procedure in writing.¹⁵ Instructions that highlight problems with cross-racial identification¹⁶ and the fact that confidence and accuracy are not correlated¹⁷ have also found favor in some courts. And when the police fail to use procedures that have been proven to reduce the risk of error or conduct the investigation in a manner inconsistent with best practices, the defense should consider requesting an instruction that these investigative

shortcomings can provide reasonable doubt.¹⁸ While these are some examples of areas that may be addressed through jury instructions, the defense should consider proposing instructions to address other issues present in the case at hand.

The defense should be aware, however, of some of the possible shortcomings of jury instructions that are not accompanied by expert testimony.¹⁹ One concern is that when given as part of the overall instructions to the jury at the end of the case, the impact can be lost as the instruction gets buried amidst many others. Another concern is that instructions at the end come too late to alter opinions already formed in a juror's mind. A final shortcoming is that instructions can reveal factors that influence perception and memory but do not explain how or to what extent. One possible solution is for defense attorneys to request that the court identify the instructions it will give regarding eyewitness testimony. Defense attorneys should argue these instructions in both opening and closing, so they can highlight the problems when they first and last address the jury and point out that the court will confirm that these shortcomings should be considered. A second idea is to request that the court instruct

the jury mid-testimony, when the issue is first raised, as well as at the end of the case. The defense should also move to preclude the prosecution from arguing the alternative, or in a manner inconsistent with the jury instructions.

Well-crafted jury instructions, and thoughtful strategy about how and when to present them, will not substitute for expert testimony. However, when the defense has an available expert, instructions can be a great supplement. On the other hand, when the court precludes the use of a defense expert, creative instructions can be invaluable, as they will be the only chance for the jury to hear the problems with eyewitness testimony from an authoritative voice — the judge.

3. Cross-Examination²⁰

Through expert witnesses and jury instructions, the defense can present the jury with the central components of its theory. But a well-designed cross-examination can create a narrative that brings these concepts to life. Cross-examination is an opportunity to share with the jury the story behind the theory and help the jury order the important concepts underlying the theory. Two cross-examinations that are common in eyewitness identification cases are the clinical cross of the misguided police officer and the gentle cross of the mistaken eyewitness.

a. Misguided Police Officer

Below are a series of questions the defense lawyer might ask the police officer who did not consider factors that undermine the reliability of the identification or who did not follow best practices. These questions will also help educate the jury about the science in the event that an expert is precluded from testifying.

Q: You use lineups because it is one way to help ensure that you have the right person?

Q: But you also understand that mistakes can be made?

Q: There is always the risk that a witness will choose an innocent person?

Q: This could potentially lead to a great injustice when an innocent member of our community is convicted of a crime he did not commit?

Q: You have to do what you can to minimize that risk?

Q: As a matter of fact, you don't have every witness look at a lineup?

Q: If you conclude that a witness will not be able to make an identification, you will not have that witness view a lineup?

Q: If the witness feels compelled to choose someone, the risk is too great that the choice would not be reliable?

Q: It's important that you first thoroughly investigate to determine whether you think having the witness view the lineup will be helpful in the case?

Q: To do that you need to be familiar with the factors that cast doubt on the ability of a witness to make an accurate identification?

Q: [Ask about estimator variables.]

Q: [Ask about failures to investigate.]

Q: [With a modified cross, ask about failures to use best practices in setting up the procedure.]

b. Mistaken Eyewitness

By using the prosecution's facts, the defense can build a narrative illustrating how a witness came to a wrong conclusion about the identification. The line of questioning below might be used to help demonstrate how a well-meaning witness came to a wrong conclusion. The defense attorney can pose these questions rather than simply asking, "You just chose the person who looks most like the robber, right?"

Q: You got a call?

Q: From Detective Smith?

Q: Who had been at the scene?

Q: And interviewed you there?

Q: And showed some empathy for what you were going through?

Q: And tried to help?

Q: He wanted you to come to the station?

Q: He picked you up?

Q: And he drove you down?

Q: And he sat you down at a desk?

Q: And he had you look at some pictures?

Q: He was polite?

Q: He was concerned?

Q: He asked how you were?

Q: He knew this was hard for you?

Q: You didn't think he brought you there to waste your time?

Q: You figured he had a reason?

Q: You figured he had a suspect?

Q: And you figured the suspect was probably in these pictures?

Q: You knew this procedure was serious?

Q: You wanted to get the guy?

Q: Before he robbed again?

Q: So you were careful?

Q: And you took your time?

Q: And you studied all six pictures?

Q: No one ever pointed out my client to you?

Q: No one ever said, "The robber may not be here"?

Q: No one ever said, "We do this to clear the innocent as well as catch the guilty"?

Q: No one showed you his picture alone?

Q: Or showed you anyone's picture alone?

Q: You always saw them in a group?

Q: You always had someone to compare with?

Q: Never saw the man wearing number 5 alone?

Q: And answered “Yes/No”?

Q: Or saw the man wearing number 2 alone?

Q: And answered “Yes/No”?

Q: You know now that my client was wearing number 3?

Q: Never saw his picture alone to answer “Yes/No”?

Q: You carefully compared the pictures?

Q: After you compared you made a choice?

Q: Didn't tell you to try again?

Q: Didn't tell you that you made a mistake?

Q: Two weeks later Detective Smith brought you in again to compare another group?

Q: Brought you to a live lineup?

Q: With another subpoena?

Q: Same name on this subpoena?

Q: Made you feel more confident?

Q: Detective Smith brought you here today?

Q: You've known him for a year?

Q: And met him many times?

Q: He knows you are nervous?

Q: That this is hard for you?

Q: Would he bring you here to make a fool of yourself?

From these examples it should be clear how defense counsel could use cross-examination to articulate the defense the-

ory through a compelling narrative. When coupled with jury instructions, and potentially reinforced through expert testimony, the defense lawyer can help the jury see how the damaging direct examination testimony from the certain eyewitness is the end result of a process that calls the government's case into question.

E. Conclusion

When Alan Chin's prosecutor presented Agnes Foster's testimony, he probably did not appreciate all the factors that rendered it suspicious. Chin's lawyer also was not prepared to help the jury understand, and the result was devastating to Chin. Had defense counsel understood the issues that affect the accuracy of eyewitness testimony, she could have helped the jury understand that at the time of the incident Foster was nervous and focused on the gun. The incident lasted several seconds. The attacker wore a hat that covered his hairline, and he was of a different race than Foster. Each of these factors is an estimator variable that undermines the ability of the witness to make an accurate identification. Defense counsel also would have learned that Foster's original description on the 911 call was very vague and that while Foster was under a streetlight, it was not working at the time of the incident.

Had counsel thought to look into it, she would have learned that when Detective Smith arrived on the scene, he did not canvass the area, thoroughly interview Foster, or conduct any further investigation that might have corroborated or undermined Foster's trial testimony. She would have been prepared to show the jury that instead of conducting a thorough investigation, Smith relied on a highly problematic identification procedure. The jury would have learned that Smith suggested to Foster that her attacker was probably in the lineup and was about her height, that he counted on her solely to solve this crime, that the lineup itself was highly suggestive, that the administration of the lineup further suggested Chin as the “right” choice, and that Smith boosted Foster's confidence in her initially shaky identification through post-lineup reinforcement. Finally, the jury would have appreciated how Smith's failure to memorialize the procedure kept them from honestly evaluating its fairness.

Chin's lawyer could have tried to enlist the services of an expert to explain the plethora of problems with the government's case and could have proposed jury instructions to help the jury evaluate these issues. She would have weaved

these factors through a cross-examination that would have illustrated a persuasive theory. Moreover, she would have argued this theory using themes that would anchor these concepts in common sense. By doing these things, Chin's lawyer could have helped the jury members see what they otherwise could not.

Notes

1. Brian L. Cutler, Overview of Estimator Variables: Findings From Research on the Effects of Witness, Crime and Perpetrator Characteristics on Eyewitness Accuracy, Presented at Reforming Eyewitness Identification: Convicting the Guilty, Protecting the Innocent, Benjamin N. Cardozo School of Law, Yeshiva University, New York, N.Y. (Sept. 12-13, 2004).

2. *Id.*

3. *Id.*

4. *Id.*

5. See *Kyles v. Whitley*, 514 U.S. 419, 445 (1995).

6. *Id.* at 447.

7. *Brady v. Maryland*, 373 U.S. 83 (1963).

8. For national standards and best practices, see *Eyewitness Evidence: A Guide for Law Enforcement* (1999) and *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003), both published by the U.S. Department of Justice, National Institute for Justice.

9. David F. Ross, Stephen J. Ceci, David Dunning & Michael P. Toglia, *Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person*, 79 J. APPLIED PSYCHOL. 918-930, 918 (1994) (internal citation omitted).

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