

3.11 Eyewitness Identification

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider the following:

First, the capacity and opportunity of the eyewitness to observe the suspect based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;

Second, whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;

- > Third, any inconsistent identifications made by the eyewitness;
- > Fourth, the witness's familiarity with the subject identified;
- > Fifth, the strength of earlier and later identifications;
- > Sixth, lapses of time between the event and the identification[s]; and
- > Seventh, the totality of circumstances surrounding the eyewitness's identification.

Comment

It is within the trial court's sound discretion to instruct a jury both on eyewitness identification and general witness credibility. The need for heightened jury instructions should correlate with the amount of corroborative evidence. *See United States v. Masterson*, 529 F.2d 30, 32 (9th Cir. 1976).

The Ninth Circuit has approved the giving of a comprehensive eyewitness jury instruction, at least when the district court has determined that proffered expert witness testimony regarding eyewitness identification should be excluded. *See, e.g., United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996), *overruled on other grounds, United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008).

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