

## A Note on Identification

Every defence lawyer learns about the frailty of eyewitness identification firsthand. The following experience is probably common to all of us.

It is the day of trial, and the client has gone missing. Some weeks have passed since he or she last came in for an interview. One hopes that the client will show up in court. Upon confirming to Crown counsel that defence counsel is present, the next question heard is, “Is your client here?”

Turning to the gallery, one scans the crowd, hoping for a nod of recognition. If the nod occurs, there is great relief at being able to reply, “Yes he is.” If there is no such nod, one suddenly realizes that the truthful answer is, “I have no idea”.

Having instead mumbled something non-committal, one immediately marches out of the courtroom hoping someone will follow, or that the client will approach outside. If not, one simply has to wait for the name to be called in the court and watch for someone to stand up.

When that happens, and it does happen, *Atfield* never reads the same way again. Despite having spent at least an hour with the person in an interview, in the best of circumstances, we cannot spot our own client in the crowd, or worse, thought he was one of the other people waiting.

This experience is followed by other direct reminders over the years, such as when a police officer, before court, identifies your student, your agent, or the client’s friend as the accused. The cue was the police officer’s knowledge of the identity of the accused’s lawyer and the person the officer wrongly believed to be the accused was with that lawyer.

Yet, lawyers see police officers and civilian witnesses confidently identify strangers whom they saw only for a few minutes, or under great stress, or in a very unremarkable situation, every day. And, every day, most of those identifications are accepted by trial judges with little hesitation. If the witness does not hesitate, rarely does the court.

Further, the courts still permit, and still rely upon, the charade of dock identification, where the cues to the witness are virtually overwhelming. Whenever I see the very rare civilian or police officer who is *not* sure that the accused in the dock is the perpetrator, I am so impressed with the honesty of the witness that I am not likely to question their veracity about anything else that comes out of their mouth.

Nonetheless, and with depressing regularity, many courts continue to convict and uphold convictions resting on eyewitness identification, even where there are acknowledged flaws in the process. As long as the judge “cautions” him or her self and acknowledges the dangers inherent in such evidence, the conviction can be entered and is usually sustained. The recommendations made by Mr. Justice Cory in the *Sophonow Inquiry* remain merely that, and failure to follow them is not fatal (ie. *R. v. Grant* 2005 ABCA 222).

Experiences with two recent cases in our office have, however, given me some new insight which should be shared. In both cases the charge was robbery, and as is often the case in robbery trials, the convictions depended on the civilian eyewitnesses' identification of the accused.

The first was an allegation that a male and female, armed with a knife, robbed two people in a bus shelter. A police dog led the police to a residence in which there were two females and a male, two of which generally matched the vague descriptions. Both denied, and the female said she had just been at a store which the police then went to and obtained evidence that suggested she had not. When police returned to arrest the female, she admitted that she had done it but the male was innocent. In their report, the police officers acknowledged that the admission was probably inadmissible.

The prosecutor assigned to the case sent, and disclosed, a written request to the officer to conduct a photographic line-up with both witnesses. Also disclosed, most ethically, by the same prosecutor was the officer's written response:

*I subsequently received a written request from the Crown Prosecutors' Office for additional information. Both witness statements are attached. The second request was to conduct photo line-ups in relation to the female suspect....who was involved in this matter. I have not yet done the photo line-ups as I have some concerns about this request. In my experience, not everyone does well viewing a photo line-up. Both complainants were shown photo line-ups of the male suspect at the time of the initial investigation, but were not able to select a photograph. I have concerns that if the complainants do not identify [the female] in a photo line-up but subsequently identify the accused in court, we may have created credibility issues for the complainants. Since [the female] admitted committing the offence in question, I do not believe a photo line-up is necessary at this time. I recognize that [the female's] admission will not necessarily be admitted in court, but trust that an identification of [the female] in court should be adequate...*

Having been informed that it was in fact necessary, the line-ups were conducted and neither witness identified the female accused. Crown counsel stayed the charge.

In the second case, there were three civilian eyewitnesses. The written disclosure package came with the photographic line-ups shown to each, as well as the usual typed forms containing the "Photographic Line-Up Instructions" and the identification and comments of the witnesses.

One could not identify anyone. But both of the other two did, and the forms were filled in to show that each had picked out a numbered photograph, and their comment on making their selection such as, "Her mouth and her lips. They jump out at me."

However, what was also disclosed, and it is the first time anyone in our office had seen it, was a videotape of the line-up being conducted. And upon viewing the videotape, it was immediately and undeniably obvious that neither witness had any confidence whatsoever about their selection and that it was truly nothing more than a hesitant guess.

A call was made to Crown counsel asking whether he had viewed the videotape. He agreed to do so noting that he had identification proven from the line-up. The next day he called back, and again most ethically, advised that the prosecution was over.

This one experience makes one feel ill about the hundreds of times photographic line-up results have gone in on the strength of the police officer's evidence alone. Why are not all line-ups videotaped? Where were our objections?

In both of these cases, Crown counsel acted properly and fairly and prevented any injustice from occurring. But in both of these cases, the police officers prepared the case in such a way that suggests they were utterly oblivious to the risks of wrongful conviction. And only the unusual features of the cases, the videotape in the one case, the written response of the police officer in the other, exposed those risks.

The recommendations of the Soponow Inquiry should be mandatory. It is time for the courts to stop treating tainted identification evidence as a matter of weight and start treating it as an issue of admissibility. And videotaped line-ups should be insisted on in every single case.

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