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Trials&TRIBULATIONS

Eyewitness misidentification

Eyewitness identification evidence is the leading cause of wrongful convictions in the United States.

Of the more than 200 people exonerated by way of DNA evidence in the United States, more than 75 percent were convicted wrongfully on the basis of erroneous eyewitness identification evidence. (See The Innocence Project's Web site at www.innocenceproject.org for more on Eyewitness Misidentification.)

By JAMES S. WOLFORD
Daily Record Columnist

The Innocence Project has facilitated the exoneration of 214 men convicted of crimes they did not commit, based on faulty eyewitness evidence. Despite substantial scientific support for the proposition that eyewitness testimony is unreliable, it often is held in high regard by jurors in criminal trials.

In the words of former U.S. Supreme Court Justice William J. Brennan, "eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says That's the one!" *Watkins v. Souders,* 449 U.S. 341, 352 (1982)(Brennan, J. dissenting).

The persuasiveness of eyewitness testimony, coupled with the inherently human potential for a witness to inaccurately perceive or recall an event, has led many defense counsel to seek to present expert testimony regarding the potential for misidentification. Such experts typically testify regarding the flawed nature and procedures used for lineups or photo arrays, the desire to make an identification at all costs, and the subtle cues by police — intentional or not — that lead to a false identification.

The New York State Court of Appeals repeatedly has addressed the admissibility of expert testimony on witness identification. The precedent has evolved to, as stated in the recent ruling in *People v. Abney, et al.*, _NY3d_, 2009 WL 3425059 (Oct. 27), the admission of expert testimony on eyewitness identification when there is "little or no" evidence — aside from a witness's memory — tying the suspect to a crime.

The Court of Appeals has revisited the eyewitness testimony issue several times since the 1990 case of *People v. Mooney,* 76 NY2d 827 (1990). In that case, former Chief Justice Kaye (in her dissent) argued and identified that scientific research had made expert testimony concerning eyewitness identification "sufficiently reliable to be admitted." *Id.* at 829.

Later, in *People v. Lee,* 96 NY2d 157 (2001), the court ruled that expert testimony regarding eyewitness identification could be admitted within the sound discretion of the trial court.

In *People v. Young,* 7 NY3d 40 (2006), the court indicated it should be up to the trial judges to determine, on a case by case basis, whether the trier of fact should hear expert testimony on the issue, but suggested it may be an exception where a case "turns on uncorroborated identification evidence."

Finally, in *People v. LeGrand,* 8 NY3d 449 (2007), the court — based on the prior holdings identified herein — noted an exception and overturned a case upon finding an abuse of discretion when the trial court excluded expert testimony on the reliability of eyewitness identification. The court found that testimony relevant to the witness's identification of the defendant.

In *LeGrand,* the defendant moved to permit testimony by an expert on eyewitness identification. The trial court, after a *Frye* hearing, refused to allow the expert to testify, holding that the proposed expert testimony generally was not accepted in the relevant scientific community. The Court of Appeals reversed the First Department, finding that where the case turns on the accuracy of eyewitness identification, and there "is little or no corroborating evidence" connecting the defendant to the crime charged, the expert should be permitted to testify.

The court found it was "an abuse of discretion" for a trial court to exclude expert testimony on the reliability of eyewitness identification if that testimony is "(1) relevant to the witness' identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror." *Id.* at 867.

The court provided an overview on the admissibility of eyewitness identification in finding that expert testimony regarding the factors that affect the accuracy of eyewitness identifications, in the appropriate case, may be admissible in the exercise of a court's discretion.

On the *Frye* issue, the court found it was not an error for the

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trial court to have conducted a hearing, even though other courts have permitted such testimony without a hearing. The court also found that *Frye* hearing does not need to be conducted when prior court rulings can be relied upon.

The court found last week that the evidence — produced by the defense itself in attempting to establish its alibi — did not provide sufficient enough corroboration to preclude the defense's eyewitness expert from testifying. The ruling, written by Justice Susan P. Read, reversed the First Department's decision to uphold the exclusion of expert testimony in *People v. Abney*, 57 AD3d 35 (First Dept. 2008).

Justice Read wrote that the trial court abused its discretion by refusing to allow the defendant's expert to testify on "witness confidence." A hearing must be held to determine whether the scientific community accepted the body of knowledge relating to the topics the defendant wished to explore with its expert, Justice Read held.

Abney involved a single witness identification and the 20-years-to-life sentence given to Quentin Abney for robbing a 13-year-old girl at knife point as she entered a subway station on Manhattan's Lower Eastside. The defendant's pretrial motion, denied as premature and overly broad, was renewed after the close of the People's direct case.

"By that point, it was clear that there was no evidence other than Farhana's [victim] identification to connect defendant to the crime, and she did not describe him as possessing any unusual or distinctive features or physical characteristics."

In response, the defense requested to present the testimony of Dr. Fulero, a qualified expert on the subject of eyewitness identification research findings, about the following topics: the effect of event stress, exposure time, event violence and weapon focus, cross racial identification, lineup instructions, double blind lineups [officers conducting lineup have no knowledge of suspect] and witness confidence. The Court of Appeals ruled that all but two of the proposed subjects — lineup instructions and double blind lineups — seemed relevant to the witness's identification of the defendant, given the particular circumstances of the matter.

The court found the principles related to witness confidence on which Dr. Fulero proposed to testify generally are accepted within the relevant scientific community. They also are "counterintuitive," placing them beyond the "ken of the average juror." The court did not consider the trial judge's error not to permit this testimony as harmless because the defendant's "muddled alibi evidence" was not helpful to his cause with the jury, and not overwhelmingly inculpatory.

"[O]f course, it is possible that [the] defendant would not have pursued an alibi defense in the first place if Dr. Fulero had testified," the court wrote.

The conviction was vacated and a new trial was ordered.

Representing a client who claims he or she is innocent and wrongly identified poses one of the most daunting challenges to any attorney. An attorney knows from experience that the traditional truth-testing tools that may expose a witness's motive to lie are ineffective in the case of an unbiased eye witness. Demonstrating that an eyewitness is mistaken is extraordinarily difficult, particularly when a witness appears to be a sympathetic crime victim or a minor with no motive to falsely accuse a defendant who insists the identification is accurate.

When that is the case, an attorney must become familiar with the legal and scientific literature on the "vagaries of eyewitness identification." *U.S. v. Wade*, 388 U.S. 218, 228 (1967). An attorney who represents a client who claims he is the wrong man must develop a strategy in an effort to undermine the identification. Aggressively investigating eyewitnesses' backgrounds, challenging the circumstances of the initial viewing of the accused, producing independent evidence proving a suspect was wrongly accused and retaining a scientific expert who can testify on the ways in which memory and perception affect an eyewitness's reliability and the factors that contribute to misidentifications, all are necessary tasks.

One can discern from the recent ruling that a trial court, on a case-by-case basis and not until after the People have rested, will be able to determine whether expert testimony on eyewitness identification should be admitted. Ppractitioners clearly should be mindful that when a case hinges solely on such proof, an expert should be retained as soon as possible.

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