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## CH. 27 IDENTIFICATION

### §27-1

#### Identification Procedures Generally

##### United States Supreme Court

**Perry v. New Hampshire**, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012) The due process clause is implicated in the admission of suggestive eyewitness identification testimony only if police misconduct caused the suggestiveness. Even where police use a suggestive identification procedure, however, suppression of the identification is not inevitable. Instead, Supreme Court precedent mandates a case-by-case examination to determine whether the indicia of reliability concerning the identification outweigh the corrupting effect of suggestive conduct by law enforcement. In determining the reliability of an identification, courts consider factors such as the witness's opportunity to view the criminal at the time of the offense, the witness's degree of attention, the accuracy of the witness's prior descriptions of the criminal, the level of certainty demonstrated by the witness at the time of the confrontation, and the time lapse between the crime and the confrontation.

The court rejected the argument that any identification testimony that might be tainted by suggestiveness must be screened for reliability before it is admitted, even where the suggestiveness was not caused by the police. The court noted that its precedent concerning suggestive eyewitness identification is intended to deter police from using suggestive lineup procedures. Where suggestiveness was not caused by police officers, no such deterrent effect is possible. Furthermore, where the suggestiveness is caused by sources other than the police, the defendant has adequate means to respond through other constitutional safeguards such as the rights to counsel, compulsory process, confrontation, and cross-examination.

The trial court did not err by failing to make an initial determination whether eyewitness identification evidence was unreliable. A witness who was being questioned by a police officer in her apartment happened to look out the window, and told the officer that the person she had seen breaking into cars was standing in the parking lot next to a police officer. Even if the event amounted to a single-person show-up at which defendant was likely to be identified, the suggestiveness did not result from any action by the police. Therefore, the due process clause was not implicated.

The court also noted that defense counsel challenged the reliability of the identification before the jury, and the trial judge gave a lengthy instruction on eyewitness identification and the factors to be used in evaluating it.

**Stovall v. Denno**, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) An accused is deprived of due process if the totality of the circumstances of a pretrial confrontation are unnecessarily suggestive and conducive to mistaken identification. See **United States v. Wade**, 388 U.S. 218, 232-233, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (giving examples of suggestive procedures).

##### Illinois Supreme Court

**People v. Stitts**, 2020 IL App (1st) 171723 The trial committed plain error when it admitted police identification testimony without abiding by the rules set forth in **People v. Thompson**, 2020 IL App (1st) 171723. At trial, the State published a surveillance video while

a detective was on the stand. The detective explained the video to the jury as they watched, identifying defendant as having the man shown on the screen with a handgun. Because the trial court did not allow the defense to conduct preliminary cross-examination on the officer's familiarity with the defendant, limit the testimony before the jury (rather than allow the detective to mention prior investigative alerts), and instruct the jury, it plainly violated **Thompson**.

The court also found the evidence closely balanced. No eyewitnesses identified defendant as the shooter, and although he was found nearby with a gun and residue on his hand, the State did not establish that he actually fired, rather than simply held, the gun.

**People v. Brooks**, 187 Ill.2d 91, 718 N.E.2d 88 (1999) Under **People v. Blumenshine**, 42 Ill.2d 508, 250 N.E.2d 152 (1969), suggestive identification procedures affect the admissibility of identification testimony.

**People v. Brooks**, 187 Ill.2d 91, 718 N.E.2d 88 (1999) Reviewing court can determine in the first instance whether there was an independent basis for the identification; cause need not be remanded for further proceedings when trial judge fails to determine whether the State established an independent basis. Here, the fact that the witness knew defendant for four years before the offense was so significant that it outweighed all other factors.

**People v. Fox**, 48 Ill.2d 239, 269 N.E.2d 720 (1971) Identification procedures at police station did not lead to misidentification; witness had adequate opportunity to observe defendant during crime. See also, **People v. Tuttle**, 3 Ill.App.3d 326, 278 N.E.2d 458 (1st Dist. 1972).

### **Illinois Appellate Court**

**People v. Gavin**, 2022 IL App (4th) 200314 The trial court did not err in denying the defense motion to suppress a voice identification. Identification by voice may be used to establish guilt of an accused. The weight to be given to a voice identification is a question for the finder of fact to resolve. A voice identification should be excluded under the due process clause of the fourteenth amendment where it is: (1) the product of an unnecessarily suggestive lineup procedure used by the police; and (2) not independently reliable.

Here, defendant did not prove the identifications were the product of an unnecessarily suggestive lineup procedure. A witness who spoke to the defendant on the phone was played four recordings, and she accurately identified the defendant's voice on the first and fourth recordings. Although the first identification may have been influenced by the fact that the witness recognized a second voice on the recording, a woman she knew to be dating defendant, this fact did not render the lineup unduly suggestive. A lineup is unnecessarily suggestive only if it involves police misconduct, and defendant did not establish that the detective knew both voices on the recording. Nor was it the fault of the police that the lineup occurred three years after the initial call, because the witness did not come forward until then.

**People v. Ayoubi**, 2020 IL App (1st) 180518 Lineup and photo array fillers need not be identical or nearly identical to eyewitness' descriptions, but they also should not appear grossly dissimilar to the suspect. Courts consider the totality of the circumstances in determining whether an identification violated due process. A defendant bears the burden of proving that a pretrial identification was impermissibly suggestive, and the State can rebut

that showing by providing clear and convincing evidence that the identification was based on the witness's independent recollection.

Here, the trial court determined that a photo array and lineup were appropriate, and that decision was not against the manifest weight of the evidence. The officer who assembled the photo array included individuals who had similar hairstyles and complexion to defendant, and all but one had a similar build as defendant. The fact that defendant may have been wearing a shirt similar to that described by a witness did not render the array suggestive where the police did not make defendant wear that shirt and the police advised the witness that the perpetrator might not be pictured in the array.

Similarly, the in-person lineup was not suggestive where the police sought out individuals who looked like defendant. The lineup participants were similarly dressed, and any differences in their build were not obvious. Again, the police told the witnesses that the perpetrator may not be present in the lineup. While one of the lineup fillers was not a close match to defendant, two were "good," and two were "remarkably good" according to the trial court. Considering the totality of the circumstances, the lineup was fair.

[In re N.A., 2018 IL App \(1st\) 181332](#) On appeal, defendant challenged the sufficiency of the identification evidence, specifically arguing that the eyewitness's identification was unreliable. In evaluating this challenge, the appellate court refused to consider articles on "weapon focus" and "cross-racial identifications" because those articles had not been presented to the trial court and arguments based on them were therefore forfeited.

The appellate court agreed that the photographic lineup conducted at the eyewitness's residence did not comply with the lineup statute because it was not video or audio recorded. Although the lineup statute allows a witness to refuse to be video-recorded, it does not allow refusal of audio recording. But, the error was harmless where it had no effect on the reliability of the identification, there was no motion to suppress the identification, and the court was presumed to have considered the lack of recording in assessing the eyewitness's reliability at defendant's bench trial.

[People v. Faber, 2012 IL App \(1st\) 093273 725 ILCS 5/107A-5\(a\)](#) provides that all lineups must be photographed, and that such photographs and any photographs shown to eyewitnesses during photo spreads must be disclosed during discovery. Section 107A-5 was violated where defense counsel requested a photo array that had been shown to eyewitnesses, but the State could not tender a copy of the array because it had been lost after a co-defendant's trial.

As a matter of first impression, the court concluded that although §107A-5 was violated, suppression of testimony concerning the photo array was not mandated because §107A-5 is directory rather than mandatory. The statutory language of §107A-5 does not prohibit further proceedings in the event the State fails to disclose a photo array. Although the statute is intended to protect a fair trial, admission of a suggestive photo array constitutes reversible error only if the defendant was prejudiced.

Because defendant gave a statement admitting that he had been the shooter, and he was identified as the shooter by two eyewitnesses, the court concluded that there was at most minimal prejudice from the admission of testimony concerning the photo array. Because the right to a fair trial was not affected by the failure to disclose the array, a directory reading of §107A-5 was appropriate.

The court noted, however, that the State's failure to preserve the photo array was "very disturbing." Furthermore, in a case in which the evidence in a case is closely balanced, "it may be that the correct remedy is to suppress the identification testimony."

The court rejected defendant's argument that apart from §107A-5, as a matter of common law the trial court should have suppressed testimony concerning the lost photo array and the subsequent lineup identifications. The mere fact that the photographs were lost does not justify reversal of the conviction; unless bad faith is shown, the failure to preserve potential evidence does not deny due process. Instead, the relevant question is whether under the totality of the circumstances the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The trial court found that the loss of the photo array was inadvertent, and that the State diligently attempted to track down the array once it was discovered to be missing. In addition, there was testimony that the array was composed of similar-sized photographs of males of the same age and general appearance as the defendant. The court concluded that under these circumstances, the trial court's finding upholding the identification procedure was not against the manifest weight of the evidence.

**People v. Shaver**, 77 Ill.App.3d 709, 396 N.E.2d 643 (2d Dist. 1979) An unlawful arrest does not automatically render subsequent identification testimony inadmissible. See also, **People v. Cunningham**, 130 Ill.App.3d 254, 473 N.E.2d 506 (1st Dist. 1984) (an unlawful arrest did not require suppression of subsequent lineup identification where photo identifications linked defendant to the crime before his arrest). But see **People v. Bean**, 121 Ill.App.3d 332, 257 N.E.2d 562 (1st Dist. 1970) (identification was the product of the unlawful arrest).

**People v. Rodriguez**, 134 Ill.App.3d 582, 480 N.E.2d 1147 (1st Dist. 1985) A suggestive identification at trial does not violate due process; defense counsel can test the witness's perception, memory and bias, and the jury can observe and weigh the suggestiveness.

**People v. Goodman**, 109 Ill.App.3d 203, 440 N.E.2d 345 (1st Dist. 1982) Witnesses' viewing of defendant at bond hearing was impermissibly suggestive. Their attendance at hearing was planned to reinforce their earlier photographic identifications. "This type of confrontation is fraught with dangers of suggestibility because in this setting the defendant stands accused and is presented as one whom the State suspects of being guilty of an offense."

## **§27-2**

### **Right to Counsel**

#### **United States Supreme Court**

**Moore v. Illinois**, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977) Complainant's identification at the preliminary hearing, where defendant was without counsel, violated the right to counsel. Therefore, the complainant may not testify about the identification.

Also, the prosecution may not introduce a pretrial identification that was made in violation of the right to counsel even if it can prove that the identification had an independent source.

**Kirby v. Illinois**, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) An accused has the right to counsel after criminal charges are formally made against him.

**U.S. v. Wade**, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); An accused has the right to counsel at a post-indictment lineup. **Gilbert v. California**, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); **People v. Bolden**, 197 Ill.2d 166, 756 N.E.2d 812 (2001).

### **Illinois Supreme Court**

**People v. Bolden**, 197 Ill.2d 166, 756 N.E.2d 812 (2001) A defendant who is not under arrest, but who agrees to participate in a lineup if his attorney is allowed to observe, may refuse to participate if the officers conducting the lineup refuse to allow counsel to remain in the room with witnesses viewing the lineup. But, the refusal to permit counsel to observe the lineup does not convert defendant's voluntary appearance at the police station into a "seizure" under the Fourth Amendment and the Illinois Constitution.

The court did not err by instructing the jury that a person is not entitled to have counsel at a lineup conducted before the start of adversarial proceedings.

The court did not err by refusing to allow counsel to testify that in other cases, he had been allowed to remain in the same room as the identifying witnesses.

**People v. Hope**, 168 Ill.2d 1, 658 N.E.2d 391 (1995) Even if the prosecutor erred by arguing that defense counsel would have stopped the lineup if he thought it was suggestive, no substantial prejudice occurred where defense objections were sustained, the jury was instructed that closing arguments were not evidence, and the evidence of guilt was overwhelming.

**People v. Hayes**, 139 Ill.2d 89, 564 N.E.2d 803 (1990) The filing of a complaint and issuance of an arrest warrant for one charge (attempt armed robbery) does not indicate that the State was committed to prosecute defendant for an unrelated murder charge. Thus, defendant's right to counsel at a lineup did not attach to the murder charge by virtue of the complaint in the unrelated charge. The complaint in the attempt robbery case was presented ex parte by a police officer, and "[a]bsent proof of significant prosecutorial involvement in procuring the arrest warrant," defendant's right to counsel had not attached.

**People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987) The presentation of the complaint for a search warrant could not be fairly construed as the beginning of adversarial proceedings where a police officer presented the complaint for an arrest warrant to the judge ex parte, the complaint was not presented by a prosecutor, and the complaint was not filed in court until after the lineup.

**People v. Curtis**, 113 Ill.2d 136, 497 N.E.2d 1004 (1986) The right to counsel at a lineup does not apply where a witness is shown photographs of the lineup.

**People v. Nichols**, 63 Ill.2d 443, 349 N.E.2d 40 (1976) The right to counsel was improperly interfered with where, without notice to defense counsel, defendants were taken from their cells and photographed during a recess at trial.

**People v. Burbank**, 53 Ill.2d 261, 291 N.E.2d 161 (1972) The right to counsel applies not only to post-indictment lineups (see **People v. Palmer**, 41 Ill.2d 571, 244 N.E.2d 173 (1969)), but also to lineups held after the initiation of adversary judicial criminal proceedings. Where defendant had been arrested, interrogated and placed in a lineup before he was formally charged, the right to counsel had not yet attached.

## Illinois Appellate Court

**People v. Lewis**, 2015 IL App (1st) 130171 Defendant's Sixth Amendment right to counsel did not attach when he was arrested and arraigned for extradition proceedings in Nevada pursuant to an Illinois arrest warrant. Extradition is a summary ministerial procedure designed to return a fugitive to another State so he may stand trial. An extradition hearing does not commence adversary proceedings and is not a critical stage for Sixth Amendment purposes.

The Court rejected defendant's argument that the extradition hearing was a critical stage because the State at that point committed itself to prosecution. Although defendant was brought before a judicial officer during the hearing, the State had not yet charged him with a crime. The only purpose of the hearing was to transfer defendant to Illinois pursuant to an arrest warrant. Because defendant was not formally charged until he was returned to Illinois and identified in a lineup, the extradition hearing did not entail adversary proceedings against him.

The denial of the motion to suppress lineup identification was affirmed.

**People v. White**, 395 Ill.App.3d 797, 917 N.E.2d 1018 (1st Dist. 2009) A criminal defendant has a Sixth Amendment right to counsel at a post-indictment or information lineup. As an issue of first impression, the Appellate Court held that the right to assistance of counsel at a post-indictment lineup includes the right to have counsel actually observe the identification. Thus, if defense counsel is permitted to come to the police station but required to stand outside the witness room, and is therefore unable to observe the identification, a Sixth Amendment violation occurs.

The rule allowing counsel to attend a post-indictment lineup has two purposes: (1) to safeguard against the inherent risk of suggestion present in all lineups, and (2) to allow the accused to detect any unfairness in the confrontation. The court held that the former purpose is completely frustrated if counsel is not allowed to observe witnesses as they are making an identification:

[D]efense counsel would have no way of knowing whether the witness was improperly led or whether the witness was hesitant or unsure in his identification, and he would not know what language or expressions the witness, police, or State's Attorneys used in the identification process. These facts could have been of great significance in [cross-examination]. . .

The court acknowledged the State's concerns about witness intimidation and the need to preserve witness identify in certain, but said that such interests could be protected by masking witnesses while conducting lineups.

However, the court concluded that defendant's Sixth Amendment right to counsel had not attached at the time of the lineup. Under **Rothebery v. Gillespie County, Texas**, 554 U.S. 191, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008), the right to counsel attaches at the initiation of adversarial judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. **Rothebery** rejected precedent holding that adversarial proceedings commence only where there is "significant prosecutorial involvement" in the proceedings.

Here, adversarial judicial proceedings did not commence when police officers obtained an arrest warrant, arrested defendant, and failed to bring him before a judge for eight days. Under **Rothegery**, an appearance before a judicial officer is required to trigger adversarial judicial proceedings; the delay in taking defendant before a judge, though improper under Illinois law, did not trigger the constitutional right to counsel.

Because defendant's constitutional right to counsel had not attached, no Sixth Amendment violation occurred when counsel was excluded from the room in which lineup witnesses identified defendant.

**People v. Bailey**, 164 Ill.App.3d 555, 517 N.E.2d 570 (1st Dist. 1987) For a valid waiver of counsel at a post-indictment lineup, there must be complete admonitions concerning the right to counsel and the consequences of relinquishing that right, and a knowledgeable and voluntary waiver of that right. Here, the State proved neither.

**People v. Gomez**, 147 Ill.App.3d 928, 498 N.E.2d 767 (1st Dist. 1986) Defendant was not entitled to have counsel at a lineup merely because he was in custody on an unrelated matter. Although defendant's right to counsel had attached on the unrelated charge, no adversarial judicial proceeding had been commenced on the offense for which the lineup was conducted.

**People v. Jones**, 148 Ill.App.3d 133, 498 N.E.2d 772 (1st Dist. 1986) Lineup identification should have been suppressed because defendant was without counsel. Adversarial proceedings had commenced where arrest warrant was issued after the filing of a criminal complaint (and though record did not disclose who prepared the complaint, the State's Attorney was involved in the case before the lineup).

**People v. Martin**, 121 Ill.App.3d 196, 459 N.E.2d 279 (2d Dist. 1984) Defendant did not have the right to counsel at his lineup, which was held prior to preliminary hearing but after his warrantless arrest. "[A] warrantless arrest based on probable cause simply does not initiate such adversary judicial proceedings as would give rise to a right to counsel at a lineup conducted prior to the preliminary hearing." See also, **People v. Agee**, 100 Ill.App.3d 878, 427 N.E.2d 244 (1st Dist. 1981).

**People v. Swift**, 91 Ill.App.3d 361, 414 N.E.2d 895 (3d Dist. 1980) Testimony about a lineup identification must be suppressed where defendant was placed in the lineup after he was formally charged and without the benefit of or waiver of counsel.

**People v. Santiago**, 53 Ill.App.3d 964, 369 N.E.2d 125 (1st Dist. 1977) Supreme Court Rule 413 does not extend the right to counsel to lineups occurring before the commencement of adversarial judicial proceedings.

## §27-3

### Showups

#### United States Supreme Court

**Biggers v. Tennessee**, 390 U.S. 404, 88 S.Ct. 979, 19 L.Ed.2d 1267 (1968) One-to-one confrontation at police station was not suggestive.

#### Illinois Supreme Court



**People v. Lippert**, 89 Ill.2d 171, 432 N.E.2d 605 (1982) A prompt showup near the crime scene is "acceptable police procedure designed to aid police in determining whether to continue or to end the search for the culprits." Here, the identification was reliable because the victims had ample opportunity to view the perpetrators during the offense and provided a description to the police, and each victim separately identified defendant about 55 minutes after the offense. See also, **People v. Elam**, 50 Ill.2d 214, 278 N.E.2d 76 (1972).

**People v. Blumenshine**, 42 Ill.2d 508, 250 N.E.2d 152 (1969) A showup was improper because there was no reason to not place defendant in a lineup. Cause was remanded for determination whether the in-court identifications were influenced by the improper showup. See also, **People v. Lee**, 54 Ill.2d 111, 295 N.E.2d 449 (1973). Not every showup is a denial of due process, for there may be justifying or saving circumstances. See **Stovall v. Denno**, 388 U.S. 293 (1967) (showup in hospital was justified because it was unclear whether victim would survive); **People v. Robinson**, 42 Ill.2d 371, 247 N.E.2d 898 (1969) (the person identified was known to the witness before the crime); **People v. Bey**, 42 Ill.2d 139, 246 N.E.2d 289 (1969) (the principal means of identification were "uncommon distinguishing characteristics.")

**People v. Manion**, 67 Ill.2d 564, 367 N.E.2d 1313 (1977) Identification of defendant at the crime scene, while he was handcuffed and alone in the back of a police car, was reliable under all the circumstances and justified by the need for police to find out whether they should continue the search. See also, **People v. Follins**, 196 Ill.App.3d 680, 554 N.E.2d 345 (1st Dist. 1990).

**People v. McKinley**, 69 Ill.2d 145, 370 N.E.2d 1040 (1977) Showup of defendant (held four blocks from the alleged crime scene and about 30 minutes after the incident) was sufficiently reliable to be admitted despite fact that defendant was handcuffed to a police officer.

**People v. Sanders**, 357 Ill. 610, 192 N.E. 697 (1934) Where a witness is told before the identification that the guilty party is in custody, and defendant is the only person produced for identification, the weight of the identification is impaired.

### **Illinois Appellate Court**

**In re T.B.**, 2020 IL App (1st) 191041 The defendant did not forfeit his arguments about the suggestiveness of the show-up identification, made as part of his attack on the sufficiency of the evidence. A defendant does not have to file a motion to suppress a show-up in the trial court before arguing on appeal that it was too suggestive to support the conviction. And here, the show-up was particularly suggestive where the complainants viewed the defendant together as he was surrounded by police officers. Nevertheless, the evidence was sufficient where the complainants had ample opportunity to observe the offender, and made their identification within minutes of the offense.

**People v. Jackson**, 348 Ill.App.3d 719, 810 N.E.2d 542 (1st Dist. 2004) Even if police had conducted a lawful **Terry** stop of defendant, they were unjustified in transporting defendant two blocks to be identified in a showup where the police were not investigating a crime that had just occurred, as the offense occurred two weeks before defendant's arrest, and the police made no attempt to determine whether there had been a description of the offender or whether defendant matched such description.

**People v. Graham**, 179 Ill.App.3d 496, 534 N.E.2d 1382 (2d Dist. 1989) The reliability of a showup identification is to be determined from the following factors: (1) the opportunity of the witness to view the offender at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of any prior description of the offender, (4) the level of certainty demonstrated at the time of the confrontation, (5) the length of time between the crime and the confrontation, and (6) any acquaintance with the offender before the crime. Here, the identification was reliable.

**People v. Gunn**, 15 Ill.App.3d 1050, 305 N.E.2d 598 (1st Dist. 1973) It was not suggestive to conduct showup at the home of a witness who had been previously acquainted with the defendant.

**People v. Sanders**, 5 Ill.App.3d 89, 282 N.E.2d 742 (1st Dist. 1972) There was no need for police to conduct a showup when defendant was available for a lineup. But, because witness had an adequate opportunity to observe defendant at the crime scene, the in-court identification had an independent origin and was free from taint.

**People v. Magadanz**, 126 Ill.App.2d 335, 261 N.E.2d 703 (1st Dist. 1970) Use of a showup (instead of a lineup) three weeks after the crime was improper and suggestive.

**People v. Wright**, 126 Ill.App.2d 91, 261 N.E.2d 445 (1st Dist. 1970) One-man showup and showing of defendant while handcuffed were grossly suggestive; in-court identification was tainted.

## **§27-4**

### **Photographic Identification**

#### **United States Supreme Court**

**U.S. v. Ash**, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) Defendant does not have a right to have counsel present at post-indictment photographic display for purpose of allowing witness to attempt an identification. See also, **People v. Camel**, 59 Ill.2d 422, 322 N.E.2d 36 (1974).

**Simmons v. United States**, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) Convictions based on pretrial photographic identification will not be set aside unless the procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. See also, **People v. Watkins**, 46 Ill.2d 273, 263 N.E.2d 115 (1970).

#### **Illinois Supreme Court**

**People v. Curtis**, 113 Ill.2d 136, 497 N.E.2d 1004 (1986) An identification made from lineup photographs is not the unlawful fruit of the earlier, unconstitutional lineup.

**People v. Cohoon**, 104 Ill.2d 295, 472 N.E.2d 403 (1984) Photographic array was impermissibly suggestive and presented a very substantial likelihood of irreparable misidentification. Complainant's husband had supplied the police with defendant's name based on complainant's general description of her assailant and complainant mentioned defendant's name to the police. Photographic array, which complainant viewed seven weeks

after the offense, included a picture of defendant with his name on his shirt. Further, prior to a hypnotic interview held shortly before the identification was made, the complainant did not mention defendant's most striking feature, his large ears. In view of the time between the date of the offense and the photographic identification, the complainant's uncertainty during that period, and the admitted hazard of confabulation, the State failed to sustain the burden of proof that 'the witness is identifying the defendant solely on the basis of [her] memory of events at the time of the crime.'"

**People v. Bryant**, 94 Ill.2d 514, 447 N.E.2d 301 (1983) That the witness was shown "mug shots" of several persons and a Polaroid photograph of defendant was not suggestive; "different" need not be equated with "suggestive," and the Polaroid photo did not suggest that defendant had been recently arrested.

**People v. Garcia**, 97 Ill.2d 58, 454 N.E.2d 274 (1983) Upholding trial court's finding that showing photos to two victims in the hospital was not suggestive.

**People v. Allender**, 69 Ill.2d 38, 370 N.E.2d 509 (1977) A police officer's viewing of a single photo of defendant was not so impermissibly suggestive as to give rise to a substantial likelihood of an irreparable misidentification.

**People v. Williams**, 60 Ill.2d 1, 322 N.E.2d 819 (1975) That there were three photos of defendant in the eight photos shown to the witness was not unduly suggestive where it was not readily apparent that the three photos were of the same man. Also, that defendant was dressed similar to the perpetrator in one photo was not suggestive; if the witness had identified defendant by his clothing, she likely would have picked out only that photo and not the other two as well. Further, photographic identification, if suggestive, could not have resulted in irreparable misidentification where there was an independent basis for identification. See also, **People v. Goka**, 119 Ill.App.3d 1024, 458 N.E.2d 26 (1st Dist. 1983).

**People v. Holiday**, 47 Ill.2d 300, 265 N.E.2d 634 (1970) Photographic identification procedure should not be employed when the suspect is in custody and a lineup is feasible. But see **People v. Williams**, 60 Ill.2d 1, 322 N.E.2d 819 (1975) (photograph identification procedure upheld, though suspect was in custody, because extenuating circumstances (the victim was ill and could not have traveled to view the lineup without experiencing considerable discomfort and defendant was in custody for a different offense) justified a photo identification); **People v. Kubat**, 94 Ill.2d 437, 447 N.E.2d 247 (1983) (it was not error to use a photographic identification, though defendant was in custody and a lineup was feasible, where there were numerous potential witnesses from out-of-state, many of whom did not even know if they saw defendant, but it was harmless error to use a second photographic identification after the witnesses had tentatively identified defendant because viewing a lineup would not have sufficiently inconvenienced them or the police).

### **Illinois Appellate Court**

**People v. Roberts**, 2020 IL App (1st) 172262 While the State conceded that the pretrial identification was not conducted in accordance with 725 ILCS 5/107A-2(h), which requires that photographic lineup procedures be recorded, defendant was not deprived of his right to the effective assistance of counsel by the failure to file a motion to suppress the pretrial identification. Failure to comply with the recording requirement is but one factor to be

considered by a court at a suppression hearing, and defendant did not argue that the lineup was otherwise improper. And, because it was a bench trial, the Appellate Court presumed that the trial judge considered the lack of recording when assessing the credibility of the eyewitness identification. Further, even if the pretrial identification had been suppressed, the remaining evidence against defendant was overwhelming. Thus, even if counsel's performance was deficient, defendant suffered no prejudice.

**People v. Ayoubi, 2020 IL App (1st) 180518** Lineup and photo array fillers need not be identical or nearly identical to eyewitness' descriptions, but they also should not appear grossly dissimilar to the suspect. Courts consider the totality of the circumstances in determining whether an identification violated due process. A defendant bears the burden of proving that a pretrial identification was impermissibly suggestive, and the State can rebut that showing by providing clear and convincing evidence that the identification was based on the witness's independent recollection.

Here, the trial court determined that a photo array and lineup were appropriate, and that decision was not against the manifest weight of the evidence. The officer who assembled the photo array included individuals who had similar hairstyles and complexion to defendant, and all but one had a similar build as defendant. The fact that defendant may have been wearing a shirt similar to that described by a witness did not render the array suggestive where the police did not make defendant wear that shirt and the police advised the witness that the perpetrator might not be pictured in the array.

Similarly, the in-person lineup was not suggestive where the police sought out individuals who looked like defendant. The lineup participants were similarly dressed, and any differences in their build were not obvious. Again, the police told the witnesses that the perpetrator may not be present in the lineup. While one of the lineup fillers was not a close match to defendant, two were "good," and two were "remarkably good" according to the trial court. Considering the totality of the circumstances, the lineup was fair.

**In re N.A., 2018 IL App (1st) 181332** On appeal, defendant challenged the sufficiency of the identification evidence, specifically arguing that the eyewitness's identification was unreliable. In evaluating this challenge, the appellate court refused to consider articles on "weapon focus" and "cross-racial identifications" because those articles had not been presented to the trial court and arguments based on them were therefore forfeited.

The appellate court agreed that the photographic lineup conducted at the eyewitness's residence did not comply with the lineup statute because it was not video or audio recorded. Although the lineup statute allows a witness to refuse to be video-recorded, it does not allow refusal of audio recording. But, the error was harmless where it had no effect on the reliability of the identification, there was no motion to suppress the identification, and the court was presumed to have considered the lack of recording in assessing the eyewitness's reliability at defendant's bench trial.

**People v. Faber, 2012 IL App (1st) 093273 725 ILCS 5/107A-5(a)** provides that all lineups must be photographed, and that such photographs and any photographs shown to eyewitnesses during photo spreads must be disclosed during discovery. Section 107A-5 was violated where defense counsel requested a photo array that had been shown to eyewitnesses, but the State could not tender a copy of the array because it had been lost after a co-defendant's trial.

As a matter of first impression, the court concluded that although §107A-5 was violated, suppression of testimony concerning the photo array was not mandated. The court

found that §107A-5 is directory rather than mandatory. The statutory language of §107A-5 does not prohibit further proceedings in the event the State fails to disclose a photo array. Furthermore, although the statute is intended to protect a fair trial, admission of a suggestive photo array constitutes reversible error only if the defendant was prejudiced.

Because defendant gave a statement admitting that he had been the shooter, and he was identified as the shooter by two eyewitnesses, the court concluded that there was at most minimal prejudice from the admission of testimony concerning the photo array. Because the right to a fair trial was not affected by the failure to disclose the array, a directory reading of §107A-5 was appropriate.

The court noted, however, that the State's failure to preserve the photo array was "very disturbing." Furthermore, in a case in which the evidence in a case is closely balanced, "it may be that the correct remedy is to suppress the identification testimony."

The court rejected defendant's argument that apart from §107A-5, as a matter of common law the trial court should have suppressed testimony concerning the lost photo array and the subsequent lineup identifications. The mere fact that the photographs were lost does not justify reversal of the conviction; unless bad faith is shown, the failure to preserve potential evidence does not deny due process. Instead, the relevant question is whether under the totality of the circumstances the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The trial court found that the loss of the photo array was inadvertent, and that the State diligently attempted to track down the array once it was discovered to be missing. In addition, there was testimony that the array was composed of similar-sized photographs of males of the same age and general appearance as the defendant. The court concluded that under these circumstances, the trial court's finding upholding the identification procedure was not against the manifest weight of the evidence.

**People v. Starks**, 119 Ill.App.3d 21, 456 N.E.2d 262 (4th Dist. 1983) Prison guards were properly allowed to look at videotapes of the incident and identify defendants as the persons in the tapes.

**People v. Evans**, 42 Ill.App.3d 902, 356 N.E.2d 874 (1st Dist. 1976) Though the trial court erred by failing to order production of the "mug books" the complainants viewed so that defendant could determine whether complainants had previously failed to identify him as one of the offenders, the error was not prejudicial.

**People v. Meredith**, 37 Ill.App.3d 895, 347 N.E.2d 55 (4th Dist. 1976) Police's failure to preserve the photos used in photographic identification, although contrary to good police procedures, is not cause for reversal. See also, **People v. Purnell**, 129 Ill.App.3d 253, 472 N.E.2d 183 (1st Dist. 1984).

**People v. Hudson**, 7 Ill.App.3d 333, 287 N.E.2d 297 (3d Dist. 1972) While the police should not have shown the witness 19 black-and-white photos of other persons and 1 color photo of defendant, this procedure alone did not lead to a mistaken identification.

**People v. Laurenson**, 131 Ill.App.2d 2, 268 N.E.2d 183 (1st Dist. 1971) Identification procedure held suggestive. No lineup was held, but shortly before the preliminary hearing the witness was shown three photos, including one of defendant and two of persons already identified as having taken part in the robbery.

## §27-5

### Lineups

#### United States Supreme Court

**Foster v. California**, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969) Identification procedures were suggestive where, at first lineup, defendant stood out by difference in height and fact he was wearing jacket similar to that worn by the robber. When no positive identification was made, the police permitted a one-to-one confrontation between defendant and the witness. Another lineup was subsequently held, and defendant was the only participant in both lineups.

#### Illinois Supreme Court

**People v. Tisdell**, 201 Ill.2d 210, 775 N.E.2d 921 (2002) "Statements of identification," as exception to general rule that a witness may not testify in court regarding statements made out of court for the purpose of corroborating his trial testimony concerning the same subject, includes a witness's statement that he viewed lineups containing persons other than defendant and made no identification.

**People v. Nelson**, 40 Ill.2d 146, 238 N.E.2d 378 (1968) An accused does not have the right to refuse to submit to a lineup.

#### Illinois Appellate Court

**People v. Smith**, 2023 IL App (1st) 181070 The trial court erred when it found a lineup was not unduly suggestive. Eyewitnesses to a shooting identified the suspect as wearing a distinctive red and white shirt. The police placed defendant in a lineup wearing the same shirt that he allegedly wore at the scene, and none of the other participants wore a similar colored shirt. A lineup where "only the suspect [is] required to wear distinctive clothing which the culprit allegedly wore" has long been recognized as suggestive. Because a new trial was ordered on other grounds, the appellate court directed the trial court to determine whether the eyewitnesses who identified defendant in the lineup had independent bases for doing so.

**People v. Hardy**, 2020 IL App (1st) 172485 Trial counsel was not ineffective for not moving to suppress identifications made during a live lineup using only four subjects, as opposed to the usual six. Even if the lineup evidence had been suppressed, there was an adequate independent basis for the majority of the identifications such that in-court identifications would have been admissible even if the line-up identifications were not. Factors weighing in favor of finding an adequate independent basis included the eyewitnesses' opportunity to observe, a sufficient degree of attention, accurate descriptions of defendant's build and hairstyle provided by both victims, and the passage of a week, at most, between the incident and the initial lineup identifications.

In determining the independent reliability of the identifications, a dissenting justice would have considered a longer list of factors as set forth in **State v. Henderson**, 27 A. 3d 872 (N.J. 2011), such as the level of stress surrounding the incident, whether a weapon was displayed, how long the witness had to observe, how far away the witness was and what the lighting was like, whether the witness was under the influence of any substances or of an age that would impact his or her ability to observe, whether the perpetrator was in disguise, how much time elapsed since the incident, and whether the case involved cross-racial

identification. The justice would have found ineffective assistance of trial counsel for failing to move to suppress the identifications.

**People v. Ayoubi, 2020 IL App (1st) 180518** Lineup and photo array fillers need not be identical or nearly identical to eyewitness' descriptions, but they also should not appear grossly dissimilar to the suspect. Courts consider the totality of the circumstances in determining whether an identification violated due process. A defendant bears the burden of proving that a pretrial identification was impermissibly suggestive, and the State can rebut that showing by providing clear and convincing evidence that the identification was based on the witness's independent recollection.

Here, the trial court determined that a photo array and lineup were appropriate, and that decision was not against the manifest weight of the evidence. The officer who assembled the photo array included individuals who had similar hairstyles and complexion to defendant, and all but one had a similar build as defendant. The fact that defendant may have been wearing a shirt similar to that described by a witness did not render the array suggestive where the police did not make defendant wear that shirt and the police advised the witness that the perpetrator might not be pictured in the array.

Similarly, the in-person lineup was not suggestive where the police sought out individuals who looked like defendant. The lineup participants were similarly dressed, and any differences in their build were not obvious. Again, the police told the witnesses that the perpetrator may not be present in the lineup. While one of the lineup fillers was not a close match to defendant, two were "good," and two were "remarkably good" according to the trial court. Considering the totality of the circumstances, the lineup was fair.

**People v. Bahena, 2020 IL App (1st) 180197** The photo lineup resulting in defendant's identification was not unduly suggestive. While there were differences amongst the photos in terms of background, clothing, or framing, the differences were not so significant as to render the lineup improper. Further, while the lineup contained only five photos instead of six, the lineup was conducted before the law requiring "at least 5 fillers" and that law did not invalidate prior photo arrays that contained fewer fillers.

Similarly, the in-person lineup was not rendered improper by the fact that defendant was the only person who had also been in the photo lineup or by differences between defendant's clothing and the clothing of other participants, all of whom were in police custody at the time but were dressed in street clothes.

**People v. Corral, 2019 IL App (1st) 171501** A lineup with three fillers, only two of whom resembled defendant, might have been suggestive, but the State presented sufficient evidence that the identification was based on the witness' independent recollection of the incident. The witness spent 30 minutes with the defendant prior to and during the offense, and the Appellate Court found the identification reliable under the **Biggers** factors. Therefore, the evidence of guilt was sufficient, and the court did not err in denying the defense motion to suppress the lineup identification.

**People v. Clifton, 2019 IL App (1st) 151967** The lineup procedure was unduly suggestive where defendant was the only person in the lineup matching all of the characteristics of the offender described by the witnesses – dreadlocks, a dark hoodie, jogging pants, and white gym shoes. There were multiple men in the lineup with dreadlocks, multiple men wearing jogging pants, and one wearing a dark hoodie, but only defendant had dreadlocks and was wearing all of the clothing described by the witnesses. This sort of spotlighting, where only

the suspect matches precisely the descriptions given by witnesses, is improper. The Appellate Court vacated the denial of defendant's motion to suppress identification and remanded to the circuit court for further proceedings, specifically for the State to have an opportunity to provide evidence of an independent basis for the identifications.

**People v. Shanklin**, 367 Ill.App.3d 569, 855 N.E.2d 184 (1st Dist. 2006) Trial court did not err by admitting testimony that defendant refused to participate in a lineup. Participation in a lineup does not implicate the Fifth Amendment privilege against self-incrimination. Also, "the probative value of the defendant's refusal in this case was [not] substantially outweighed by the danger of unfair prejudice."

**People v. Maloney**, 201 Ill.App.3d 599, 558 N.E.2d 1277 (1st Dist. 1990) A lineup was improperly suggestive in light of extreme differences between the physical appearances of the five participants (essentially, defendant appeared unkempt and disheveled while the four other men in the lineup appeared well dressed and well groomed), the seating arrangement of the men, and the differences in the physical size of defendant. However, the error was harmless.

**People v. Williams**, 96 Ill.App.3d 958, 422 N.E.2d 199 (1st Dist. 1981) The physical differences between participants did not make the lineup suggestive. See also, **People v. Young**, 97 Ill.App.3d 319, 422 N.E.2d 1158 (1st Dist. 1981) (defendant was only participant with processed hair and wearing tan coat); **People v. Gardner**, 3 Ill.App.3d 27, 278 N.E.2d 486 (1st Dist. 1971) (defendant was only participant wearing green felt hat); **People v. Holcomb**, 192 Ill.App.3d 158, 548 N.E.2d 613 (1st Dist. 1989) (defendant was slightly younger and shorter than other participants); **People v. Washington**, 182 Ill.App.3d 168, 537 N.E.2d 1354 (1st Dist. 1989) (defendant was the only participant with braided hair).

**People v. Sampson**, 86 Ill.App.3d 687, 408 N.E.2d 3 (1st Dist. 1980) Lineup identification was the fruit of defendant's arrest; cause remanded for a hearing to determine the legality of the arrest.

**People v. Kinzie**, 31 Ill.App.3d 832, 334 N.E.2d 872 (1st Dist. 1975) Due process does not require that a lineup be photographed. Also, a lineup consisting of two codefendants and one other person contained an element of suggestiveness, but did not present a "substantial likelihood of irreparable misidentification."

**People v. Franklin**, 22 Ill.App.3d 775, 317 N.E.2d 611 (1st Dist. 1974) Lineup was suggestive where defendant was forced to wear clothing fitting the description of the assailant. But see, **People v. Hamilton**, 54 Ill.App.3d 215, 369 N.E.2d 377 (4th Dist. 1977) (lineup was not suggestive, though defendant was required to wear clothes matching the description of the assailant, where the identification was based on characteristics other than clothing).

**People v. Boyd**, 22 Ill.App.3d 1010, 318 N.E.2d 212 (1st Dist. 1974) Pretrial identification procedure was suggestive where defendants were the only Indians in the room at the police station (the complainant alleged that the offenders were two Indians) and the only people wearing clothing similar to that described by the complainant.



**People v. Mitchell**, 128 Ill.App.2d 90, 262 N.E.2d 798 (1st Dist. 1970) There is no requirement that police conduct a lineup or other pretrial identification procedure.

## §27-6

### In-Court Identifications

#### United States Supreme Court

**U.S. v. Crews**, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) Trial court excluded photographic and lineup identifications as fruits of defendant's unlawful arrest, but victim's in-court identification was properly admitted. A victim's in-court identification of an accused has three distinct elements: (1) the victim is present at trial to testify as to what happened and to identify defendant; (2) the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify defendant from her observations of him at the time of the crime; and (3) defendant is present at trial so that the victim can observe him and compare his appearance to that of the offender. Here, none of these elements was obtained by the exploitation of the unlawful arrest. See also, **People v. Ortiz**, 188 Ill.App.3d 506, 544 N.E.2d 1019 (1st Dist. 1989) (in-court identification properly admissible).

**Manson v. Braithwaite**, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) An unnecessary and suggestive identification procedure does not, per se, require exclusion of the identification testimony. Such testimony is admissible if it is reliable and there is not "a very substantial likelihood of irreparable misidentification." Factors to be considered in determining the reliability of the identification include: the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors, the corrupting effect of the suggestive identification itself must be weighed. See also, **Neil v. Biggers**, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); **Coleman v. Alabama**, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); **People v. Brooks**, 187 Ill.2d 91, 718 N.E.2d 88 (1999).

#### Illinois Supreme Court

**People v. Lego**, 116 Ill.2d 323, 507 N.E.2d 800 (1987) In-court identification was suggestive where the prosecutor prompted the witness, who initially was unable to identify defendant in court, by pointing to defendant. But the identification was admissible because the jury saw the identification being made and could weigh the credibility of the testimony. See also, **People v. Smith**, 165 Ill.App.3d 905, 520 N.E.2d 841 (1st Dist. 1988).

**People v. Curtis**, 113 Ill.2d 136, 497 N.E.2d 1004 (1986) In-court identifications were properly admitted though the witness had previously identified defendants at an uncounseled lineup where the record "demonstrates convincingly" that the in-court identifications were based on observations the witness made during the robbery and not on having seen defendants at the uncounseled lineup.

**People v. McTush**, 81 Ill.2d 513, 410 N.E.2d 861 (1980) Under factors set forth in **Manson v. Braithwaite**, witness's in-court identification had an independent origin and was reliable, though the witness had failed to identify defendant in a lineup and had previously identified him during a suggestive photographic identification. Further, the impact of the witness's failure to identify defendant at a lineup was reduced by his subsequent claim that he had

recognized defendant in the lineup, but had been afraid to identify him. See also [People v. Manion](#), 67 Ill.2d 564, 367 N.E.2d 1313 (1977); [People v. Jackson](#), 348 Ill.App.3d 719, 810 N.E.2d 542 (1st Dist. 2004).

[People v. Lee](#), 54 Ill.2d 111, 295 N.E.2d 449 (1973) State failed to meet its burden of showing that in-court identification had an origin independent of improperly suggestive identification procedures.

### **Illinois Appellate Court**

[People v. Cooper](#), 2024 IL App (2d) 220158 Defendant's jury trial was held when COVID-19 restrictions were in place, necessitating that masks be worn in court. Defendant was required to wear a mask during the trial. The judge did not wear a mask, and attorneys were allowed to remove their masks while questioning witnesses, who also did not wear masks while testifying. Defendant did not testify. During closing arguments, defense counsel asked that defendant be permitted to remove his mask so that the jury would observe his physical appearance because identity was an issue at trial. The court denied that request on the basis that it was "[n]ot in evidence." On appeal, defendant argued that the trial court's decision denied him a fair trial.

The appellate court affirmed. Defense counsel had numerous opportunities to request that defendant be permitted to remove his mask during the evidentiary stage of the trial, but did not. Thus, the court's refusal to allow him to do so during closing arguments did not deprive him of due process. Defendant's attempt to present evidence of his physical appearance during closing argument was improper. Further, the jury was able to view defendant's full face in the photographic lineup that had been conducted and also on surveillance videos showing defendant at a gas station shortly after the offense. Thus, the jury had evidence of defendant's appearance on the date of the offense and could use that evidence to assess the element of identification.

[People v. Tomei](#), 2013 IL App (1st) 112632 Five factors are used by Illinois courts to evaluate the reliability of an eyewitness identification: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions; (4) the witness's level of certainty at the time of the identification; and (5) the length of time between the crime and the identification. The court concluded that the identification in this case was sufficient to prove beyond a reasonable doubt that defendant was guilty of criminal trespass to property and criminal damage to property.

The first factor was satisfied in that the witness had an adequate opportunity to view the crime although he observed the offense at his home over a live video feed from his business. The witness testified that the camera was positioned eight feet off the ground with spotlights that brightened the field of vision, and that the feed was sufficiently clear that he recognized the defendant's face. In addition, a few minutes later he identified defendant after the latter's apprehension by police. The court concluded that under these circumstances, the witness had an adequate opportunity to observe the crime.

The court rejected the argument that the identification was unreliable because the State offered no evidence of the size, clarity, resolution, or zoom of the live video feed. The court analogized the situation to viewing a crime through a telescope. "As long as the telescope was functioning properly, we see no reason why [the witness] would not be able to testify as to what [he or she] observed."

The court also found that the identification testimony did not require foundational proof that the video camera was functioning properly. First, even had there been evidentiary flaws in the foundation, those flaws would have gone only to the weight of the testimony and not to its admissibility. Second, viewing the facts in a light most favorable to the prosecution, in the absence of any evidence that the camera system was malfunctioning there was sufficient evidence for a rational trier of fact to conclude that the camera system was working properly.

The second factor was satisfied in that the witness was shown to have paid attention to the video although he was talking to a police dispatcher on the telephone and dressing to go to the crime scene. The witness testified he viewed the feed for a few minutes and recognized the defendant's face at the showup a few minutes later. The court concluded that a rational trier of fact could have concluded that the witness paid sufficient attention to make a positive identification.

The third factor was satisfied because the witness gave an adequate description to support the identification. The witness stated that the perpetrators were white males wearing short jackets and dark hats. Despite minor discrepancies, the court concluded that the general descriptions were adequate to allow the trier of fact to find that the identification was reliable.

Concerning the witness's level of certainty in the identification, the court found that the witness expressed no uncertainty. The court distinguished this case from those cited by the defendant, in which the defendant was precluded by the trial court from presenting expert evidence concerning the ability of an eyewitness to make an identification. Here, defendant did not attempt to present such evidence and the trial court did not exclude it. Given that the witness consistently claimed that he was able to identify defendant, this factor was satisfied.

The amount of time between the crime and the identification indicated a reliable identification where only 15 minutes elapsed and the defense did not claim that the passage of time affected the identification. The court rejected the argument that the identification was unreliable because it occurred during a showup. The court concluded that the evidence was sufficient to permit a reasonable trier of fact to find that the identification was reliable.

**People v. Gonzalez**, 268 Ill.App.3d 224, 643 N.E.2d 1295 (1st Dist. 1994) Although the State erred by using a photograph of a suppressed lineup to prepare a witness to testify, the witness's in-court identification was admissible where it had an independent origin from the suppressed photograph.

**People v. Smith**, 232 Ill.App.3d 121, 596 N.E.2d 789 (1st Dist. 1992) There was no independent basis for in-court identifications where: excluded lineups occurred two months after the offense; the witnesses had no prior acquaintance with defendant, gave only general descriptions of the offender, and changed those descriptions between the offense and the lineup; one of the witnesses admitted identifying defendant because he was the only well-groomed person in the lineup; and police officers improperly bolstered the witnesses's certainty by telling them that defendant had been involved in other offenses.

**People v. Follins**, 196 Ill.App.3d 680, 554 N.E.2d 345 (1st Dist. 1990) Victim's in-court identification of defendant was properly admitted despite an allegedly suggestive showup where the victim had an opportunity to view the offender in daylight and in close proximity, gave a fairly accurate description of the offender (including the detail of "white piping" on his blue jogging suit), demonstrated a high level of certainty in identifying defendant, and the

identification occurred within minutes after the crime. See also, [People v. Holcomb](#), 192 Ill.App.3d 158, 548 N.E.2d 613 (1st Dist. 1989); [People v. Canity](#), 100 Ill.App.3d 135, 426 N.E.2d 591 (2d Dist. 1981).

[In re Johnson](#), 43 Ill.App.3d 549, 357 N.E.2d 587 (1st Dist. 1976) In-court identification was not unduly suggestive where defendant was the only black person in a closed courtroom. "[T]he prosecution is not required to fill a courtroom with individuals who resemble the defendant in order to insure a proper identification . . . ."

[People v. Franklin](#), 22 Ill.App.3d 775, 317 N.E.2d 611 (1st Dist. 1974) Where two witnesses viewed defendant at a suggestive identification, one in-court identification was proper because it was based on independent observation. The court ordered a hearing concerning the other witness's identification; if the in-court identification is found to have been independent of the improper lineup, the trial court will enter a new judgment reinstating the conviction. If such identification was not independent, on the other hand, defendant is entitled to a new trial. See also, [People v. Goodman](#), 109 Ill.App.3d 203, 440 N.E.2d 345 (1st Dist. 1982).

## §27-7

### Expert Testimony

#### Federal Circuit Court

[People v. Smithers](#), 212 F.3d 306 (6th Cir. 2000) After discussing the historical treatment of attempts to introduce expert testimony regarding the reliability of eyewitness identification, the court held that the trial judge erred by excluding such testimony without first conducting a hearing under [Daubert v. Merrell Dow Pharmaceuticals](#), 509 U.S. 579 (1993).

#### Illinois Supreme Court

[People v. Lerma](#), 2016 IL 118496 In [People v. Enis](#), 139 Ill. 2d 264, 564 N.E.2d 1135 (1990), the Illinois Supreme Court recognized developing authority in some jurisdictions that expert testimony concerning eyewitness identification should be admissible in certain circumstances, but suggested caution against the overuse of such testimony. Here, the court recognized that in the decades since [Enis](#) there has been a dramatic shift in the legal landscape such that the admission of expert testimony concerning the reliability of eyewitness testimony has become widely accepted. The court concluded, "[T]oday we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony."

The court concluded that the trial court abused its discretion by denying defendant's motion to admit expert testimony concerning the reliability of eyewitness identification testimony. Defendant initially presented a pretrial motion *in limine* to allow a witness who was an attorney and a licensed psychologist to testify as an expert on the topic of memory and eyewitness identification. The trial court denied the motion, stressing that the eyewitnesses knew defendant prior to the shooting.

Defense counsel filed a motion to reconsider and indicated that the expert would testify that misidentifications have occurred where witnesses knew the person who was identified beforehand. The trial court denied the motion to reconsider, stating that the most "glaring" reason was that the witnesses claimed to have known defendant before the offense.

The court also noted that according to an Ohio Court of Appeals opinion, some 12 years earlier the defense's expert witness testified that the factors which indicate that eyewitness identification testimony is unreliable apply where the eyewitness is viewing a stranger. The trial court acknowledged that the expert contested the accuracy of the Ohio court's description of his testimony in that case, but stated that where an appellate court justice made such a description, "I am not going any further down that road."

Defendant then filed a second motion to reconsider, tendering the report of a second expert who was a professor of psychology and a widely recognized expert in the field of human perception and memory. Before the second motion to reconsider was filed, the original expert had passed away. The new expert testified that although it would seem "intuitive to a jury" that a witness's identification would be more accurate if he or she is acquainted with the suspect, "this is not necessarily true."

The trial court again denied the motion to reconsider, stating that it was ruling for the same reasons it set forth in denying the admission of the original witness's testimony.

In finding an abuse of discretion, the Supreme Court stated that expert testimony on the reliability of eyewitness identification was both relevant and appropriate because the only evidence against defendant consisted of eyewitness identifications made by two witnesses, one of whom was deceased at the time of trial and whose identification was admitted as an excited utterance. In addition, most of the factors which both experts identified as potentially contributing to the unreliability of eyewitness testimony "are either present or possibly present in this case." These factors include the stress of the event itself, the use and/or presence of a weapon, the use of a partial disguise, exposure to post-event information, the fact that the event occurred at night, and the fact of cross-racial identification.

Furthermore, because one of the eyewitnesses had died, only one of the two eyewitnesses was subject to cross-examination. It was also unclear whether the witness who did testify actually knew the defendant before the identification, as she stated that she had seen him either 10 times or only once or twice, and in any event had only viewed him from across the street without ever speaking to him or being in the same room or house. When asked directly how long she had known the defendant before the shooting, she responded, "I did not know him." Under these circumstances, expert eyewitness testimony on the reliability of eyewitness identification would have been probative.

The court also concluded that the trial judge abused his discretion by denying admission of the second expert's testimony based on its rejection of the proposed testimony of the expert who died before trial. The original witness's proposed testimony was rejected because of the judge's "personal conviction" that mistaken identifications are unlikely where the witness and perpetrator knew each other before the offense.

The Supreme Court criticized the trial court's reasoning, noting that the first expert's report specifically addressed the issue of the likelihood of mistaken identifications where the witness and suspect knew each other and rebutted the trial court's assumptions about what the expert would say. In addition, the reasons for excluding the first expert's testimony had nothing to do with the testimony of the second expert, whose report flatly contradicted the trial court's beliefs and whom the parties agreed was a qualified and highly respected expert. By relying on its personal beliefs concerning eyewitness identifications as the primary basis for denying the admission of the second witness's testimony, the trial court not only ignored the explicit contents of the report of the expert but substituted its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert. The court also noted that the trial court's ruling was undercut by the conflict in the record concerning the extent to which the surviving eyewitness actually knew defendant before the offense.

Finally, the court rejected the trial court's belief that the first expert's testimony could be rejected based on a single sentence in an Ohio court opinion describing the expert's testimony in an earlier trial. Not only did the expert contest the accuracy of the Ohio court's summary of the evidence, but the testimony occurred some 13 years before the trial in this case. Rather than allow the witness to testify, however, the trial court chose to treat a one-sentence summary of the witness's testimony 13 years earlier "not only as indisputably accurate but also as a binding and authoritative representation" of the expert's opinion at the time of trial.

The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The trial court's ruling prevented the jury from hearing relevant and probative expert testimony concerning the State's sole testifying eyewitness in a case in which there was no physical evidence connecting defendant to the crime, the remaining evidence of guilt was not overwhelming, and the excluded testimony was neither duplicative nor cumulative of other evidence.

**People v. Enis**, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) The trial judge did not err by precluding a defense expert from testifying about the reliability of eyewitness testimony because the expert testimony "would not have aided the trier of fact in reaching its conclusion."

### **Illinois Appellate Court**

**People v. Elliot**, 2022 IL App (1st) 192294 Defendant could not establish that his attorney was ineffective for failing to call an expert on eyewitness identification at his murder trial. Regarding the first **Strickland** prong, defendant could not show counsel's performance was deficient. Although defendant argued that the decision to not call an expert was not sound trial strategy if counsel failed to investigate potential expert witnesses, the appellate court found the record silent on this matter and would not presume that counsel did not investigate.

Even if counsel wanted to call an expert, the appellate court was not convinced the testimony would have been admitted. Unlike **People v. Lerma**, 2016 IL 118496, the case did not hinge entirely on eyewitness identifications, as defendant's text messages and internet searches provided circumstantial evidence of his guilt. And the identifications here occurred in daylight, by at least one witness who was familiar with defendant, making the need for expertise in this area less compelling.

Finally, defendant could not show prejudice. Defendant argued that an expert would be able to discredit the eyewitness by testifying about such phenomena as the witness-confidence fallacy and weapon focus, but the appellate court held that without a proffer, this argument was too speculative to show prejudice.

**People v. Hayes**, 2021 IL App (1st) 190881-B Defendant was convicted of first-degree murder on the basis of six eyewitness identifications. On direct appeal, defendant alleged the evidence was insufficient, relying on studies showing the effects of weapon focus and witness certitude. The Appellate Court rejected the claim because his attorney did not call an expert at trial.

Defendant filed a post-conviction petition alleging ineffective assistance of trial counsel for failing to call an expert on eyewitness identification. After summary dismissal, the Appellate Court reversed, finding the claim arguable. Defendant's petition was supported by citations of cases and secondary authority discussing weapon focus and the weak

correlation between witness certainty and accuracy. These sources made an arguable claim that, even if the identifications were sufficient to support a conviction under a deferential standard of review, the outcome may have been different had they been attacked by an expert witness. Each eyewitness only partially viewed defendant, at night, for a brief amount of time, with particular focus on the gun. Their descriptions varied. No physical evidence or confession linked defendant to the murder. Defendant presented an alibi and his own witnesses. Thus, it was arguable that an expert on eyewitness identifications could have undermined the credibility of the eyewitnesses to the extent that a reasonable probability exists for a different outcome.

In its original decision, the Appellate Court remanded the case to a different judge after finding the circuit court considered matters that should have been reserved for the second stage, namely, whether counsel's decisions stemmed from trial strategy. Pursuant to a supervisory order upon denial of the State's leave to appeal, the Illinois Supreme Court ordered the court to vacate that portion of the opinion.

**People v. Lofton, 2021 IL App (1st) 181618** After an unsuccessful motion to suppress identification testimony, defendant presented an eyewitness identification expert at trial. On the State's motion, that expert was barred from testifying that his expert opinions were based, in part, on studying specific instances of misidentification. And, during rebuttal closing argument, the State argued that the expert's opinions were based on lab experiments but not real life situations. Defendant challenged both on appeal.

Under **People v. Lerma, 2016 IL 118496**, expert testimony concerning eyewitness identifications is admissible in an appropriate case. Where expert testimony is admitted, the court has discretion whether to allow the expert to testify to the basis of his or her opinion, considering whether the probative value of such evidence is outweighed by its prejudicial impact or tendency to create confusion. Here, the court did not abuse its discretion where it prohibited the eyewitness expert from testifying about specific exonerations involving eyewitness testimony. The expert was allowed to testify, however, that his opinions were derived from experiments and were "confirmed in real crimes with real witnesses outside the laboratory." Thus, the defense was able to offer sufficient evidence of the basis for the expert's testimony so that the jury could appropriately weigh his opinions.

The Appellate Court found that the State's rebuttal argument was improper. There was no trial evidence to support the State's assertion that experiments cannot replicate real life. And, further, the expert testified that his experiments were corroborated by studies of actual reversed convictions. Accordingly, the State's arguments were misleading. But, they did not constitute reversible error where the evidence was not closely balanced.

**People v. Corral, 2019 IL App (1st) 171501** A lineup with three fillers, only two of whom resembled defendant, might have been suggestive, but the State presented sufficient evidence that the identification was based on the witness' independent recollection of the incident. The witness spent 30 minutes with the defendant prior to and during the offense, and the Appellate Court found the identification reliable under the **Biggers** factors. Therefore, the evidence of guilt was sufficient, and the court did not err in denying the defense motion to suppress the lineup identification.

**People v. Starks, 2014 IL App (1st) 121169** The court noted that numerous studies have indicated that there is significant potential for error in eyewitness identifications and that jurors have misconceptions about the reliability of eyewitness testimony. In addition,

whether trial courts should admit expert testimony on the reliability of eyewitness identification is a rapidly evolving area of the law.

Although the trial court has broad discretion in determining the admissibility of expert testimony, the record showed that the judge rejected the motion without considering the relevance of the evidence in light of the facts of this case. Because the conviction was being reversed on other grounds, the court directed the trial court to give serious consideration to defendant's request to present expert testimony on eyewitness identification.

Defendant's conviction was reversed and the cause remanded for a new trial.

**People v. Allen**, 376 Ill.App.3d 511, 875 N.E.2d 1221 (1st Dist. 2007) Without finding whether expert testimony concerning the reliability of eyewitness testimony should have been admitted, the court found that the trial judge failed to conduct a meaningful inquiry into the relevance of the proposed expert testimony on the reliability of eyewitness testimony and remanded the cause for a new trial.

## §27-8

### Suppression Hearings

#### United States Supreme Court

**Watkins v. Sowders**, 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) State courts are not constitutionally required to conduct a hearing outside the presence of the jury in all cases in which a defendant contends that an identification was improper.

#### Illinois Supreme Court

**People v. Brooks**, 187 Ill.2d 91, 718 N.E.2d 88 (1999) At a hearing on a motion to suppress, defendant has the burden to show that a pretrial identification was impermissibly suggestive. Once defendant has met this burden, the State must show by clear and convincing evidence that the identification was based on the witness's independent recollection of the incident rather than on the suggestive identification procedures.

Although a reviewing court may consider the evidence introduced at trial when affirming the trial court's denial of a motion to suppress (see **People v. Reese**, 92 Ill.App.3d 1112, 416 N.E.2d 692 (4th Dist. 1981)), such evidence cannot be used to overturn the trial court's ruling unless the defense asked the judge to reconsider the ruling in light of the evidence at trial.

Defendant made a prima facie showing of suggestive identification procedures concerning a witness who testified that before he was shown the photo array, a prosecutor told him several times that defendant was the person who shot him.

**People v. Garcia**, 97 Ill.2d 58, 454 N.E.2d 274 (1983) The trial court did not err at the suppression hearing by sustaining objections to questions concerning whether there was an independent basis for the identifications. Testimony concerning an independent basis is relevant only after it is shown that the identification procedure was suggestive. Because this identification procedure was not suggestive, questions pertaining to an independent basis were "simply not relevant . . ." See also, **People v. Johnson**, 43 Ill.App.3d 649, 357 N.E.2d 151 (1st Dist. 1976).



**People v. Hopkins**, 52 Ill.2d 1, 284 N.E.2d 283 (1972) Denial of hearing to suppress identification was error; however, error was harmless where defendant was adequately identified apart from the identification that was the subject of the motion to suppress.

**People v. Robinson**, 46 Ill.2d 229, 263 N.E.2d 57 (1970) Defendant was denied a fair hearing on his motion to suppress identification where the court refused to allow defense counsel to ask whether the witness had ever seen the robber before, given a description to the police, or been shown any photos. Also, the defense should have been able to ask whether the police had directed attention to defendant and whether there had been a showup before the lineup. Reversed and remanded for a new trial.

### **Illinois Appellate Court**

**People v. Smith**, 362 Ill.App.3d 1062, 841 N.E.2d 489 (1st Dist. 2005) A defendant is generally allowed to call the identifying witness at a suppression hearing. The court did not decide whether the trial court abused its discretion in refusing to allow the witness to testify because the defense did not use proper procedures to issue a subpoena for the witness.

**People v. Scott**, 92 Ill.App.3d 106, 415 N.E.2d 1082 (1st Dist. 1980) A defendant has the right to a pretrial hearing on a motion to suppress an identification.

**People v. Dickerson**, 69 Ill.App.3d 825, 387 N.E.2d 806 (1st Dist. 1979) Trial court did not commit reversible error by failing to set out findings of fact and conclusions of law when denying a motion to suppress. The basis of the ruling was both obvious and supported by the record.

**People v. Boyd**, 22 Ill.App.3d 1010, 318 N.E.2d 212 (1st Dist. 1974) At the suppression hearing, defendants were represented by separate counsel. After one counsel examined a police witness on direct, the other counsel was allowed to ask only "direct" questions and not to cross-examine. The court upheld the trial court's ruling because the motions to suppress had been consolidated without objection and the evidence for both defendants was the same.

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