

Testifying with Confidence

Ralph Slovenko, JD, PhD

Credibility is usually accorded witnesses who testify with certainty. There is also the widely held belief that stress creates an indelible picture on the mind. The experimental studies and decisions by the courts involving these beliefs are set out.

To be uncertain is to be uncomfortable, but to be certain is to be ridiculous.—Chinese proverb

In general, credibility is accorded witnesses who testify with confidence or certainty. The witness who testifies in that way is considered more likely to be accurate than the less positive witness. Intuitively, credibility is related to the perceived confidence of the witness. There is also the belief that stress creates an indelible picture in the mind. A common refrain among victims of crime is, "I was so scared, I'll never forget that face."

The standard jury instruction on eyewitness identification in Michigan (and elsewhere) states, in part: "Think about. . . how sure the witness was about the identification."¹ It also instructs: "How did the witness look and act while testifying?"²

Jurors tend to assume that a witness who is nervous is lying. Witnesses who appear anxious tend not to be believed. Wiping one's hands while testifying is

taken almost always as an indication of lying.³

Experiments, however, show that witnesses who say that they are 100 percent certain the accused is the culprit are just as likely to be wrong as witnesses who are vague or ambivalent about their identification. The study of eyewitness identification by psychologists has a long history, particularly in the United States and England, going back at least to the influential work of Hugo Munsterberg in the early 1900s.⁴

Can expert testimony be used to show that credibility is not related to the confidence of the witness? Because it is counterintuitive, expert testimony may be helpful to the jury, but when the expert testimony is about witnesses generally, the courtroom is turned into a classroom; and because the experts would be called in by the defense, they would tend to emphasize those experiments that would undermine any eyewitness testimony.⁵ In a civil case the burden of proof is a preponderance of the evidence, but in a criminal case the State has the burden of proving the case beyond a reasonable doubt; as a consequence, testimony on eyewit-

Address correspondence to: Ralph Slovenko, Professor of Law and Psychiatry, Wayne State University School of Law, Detroit, MI 48202.

ness testimony, although of a general nature, can inject a reasonable doubt.

Psychologists, when allowed to offer expert testimony on eyewitness identification, trace the process of eyewitness observation and testimony from the initial acquisition phase (the initial observations of the event) to the retention phase (when these observations are organized and stored in memory) and then the retrieval phase (when the eyewitness, on interrogation, reports on the observations as modified and then retrieved from memory). There follows the stage of matching and recognition, during which the images of the persons involved in the crime, retrieved from memory, are matched against a photograph or live lineup. Then there is the formation of opinions and judgment by the eyewitness, followed by further identification and testimony in the courtroom.⁶

Psychologists claim that the rate of mistaken identification is significantly higher than most people tend to believe. They point out that witnesses have particular difficulty in making an accurate identification in cross-ethnic identification.

Testifying with confidence, albeit inaccurately, may stem from various considerations. For example, a victim wanting revenge testifies with confidence. Witnesses who feel a social role in seeking justice "help out" by testifying with confidence. Witnesses who have been hypnotized testify with confidence. The delusional paranoid person has immutable beliefs, although they are contradicted by every shred of physical evidence. Then

too there is the psychopath or con artist, who can be very convincing.⁷

Generally the trial courts are left to decide whether they will allow expert testimony on the fallibility of eyewitness testimony (appellate courts usually defer to their judgment), and the trial courts are divided on admissibility. In 1978 in *People v. Hill*,⁸ the Michigan Court of Appeals concluded that the trial court had not committed reversible error in excluding expert testimony regarding the process by which people perceive and remember events. In 1996 in *People v. Carson*,⁹ the Michigan Court of Appeals reaffirmed its decision in *People v. Hill*. Not long ago in a conference dealing with eyewitness testimony, Michigan trial judge Donald Shelton stated that he would be "reluctant to allow expert testimony on the credibility of eyewitnesses generally, but would allow it, of course, about a particular witness" (e.g., to show that the witness had poor eyesight).¹⁰

The appellate court decisions, however, reveal increasingly divided opinion. In *United States v. Amaral*,¹¹ defense counsel sought to introduce the expert testimony of Bertram Raven, a social psychologist, as regards the effect of stress on perception and, more generally, regarding the unreliability of eyewitness identification. The trial court considered this a novel question and, in view of the prosecutor's opposition, requested both sides to submit authorities supporting their respective contentions. No appellate or trial court decision was cited by either counsel. The trial court excluded the proffered testimony on the ground that "it would not be appropriate to take from the

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jury their own determination as to what weight or effect to give to the evidence of the eye-witness and identifying witnesses and to have that determination put before them on the basis of the expert witness testimony as proffered.”¹² The Ninth Circuit Court of Appeals, in an opinion rendered in 1973, ruled that the trial court did not err in excluding the testimony. Six years later a trial judge allowed Dr. Raven’s testimony, and he thereafter similarly testified a number of times, as have several other social psychologists.¹³

In *United States v. Fosher*,¹⁴ the First Circuit in 1979 upheld a trial court’s exclusion of such expert testimony on the ground that “the proffered testimony would not assist the jury in determining the fact at issue; that the jury was fully capable of assessing the eyewitnesses’ ability to perceive and remember, given the help of cross-examination and cautionary instructions, without the aid of expert testimony; that expert testimony would raise a substantial danger of undue prejudice, given the aura of reliability that surrounds scientific evidence; and that the limited probative value of the proof offered was outweighed by its potential for prejudice.”

The Arizona Supreme Court in 1983 took a different position in *State v. Chapple*,¹⁵ the first decision in the United States to hold that a judge abused his discretion in excluding expert testimony concerning eyewitness reliability. In this case, a murder prosecution in which the only issue was accuracy of eyewitness identification, the court held it an error to exclude expert testimony offered by the defendant regarding factors relevant to

identification accuracy: the effect of stress on perception, the rate of forgetting, “transference”—the tendency to believe a person was seen at a certain time and place when the person was actually seen at that place at a different time or at another place—and the tendency of witnesses who have talked together to reinforce one another’s identifications. The court said, “Depriving [the] jurors of the benefit of scientific research on eyewitness testimony force[d] them to search for the truth without full knowledge and opportunity to evaluate the strength of the evidence. In short, this deprivation prevent[ed] [the] jurors from having ‘the best possible degree’ of ‘understanding the subject’ toward which the law of evidence strives.”

A number of federal circuits have joined the ranks of *Chapple*. In *United States v. Downing*,¹⁶ the Third Circuit in 1985 held that excluding expert testimony of the accuracy of eyewitness testimony is inconsistent with the liberal standard of admissibility under the Federal Rules of Evidence adopted in 1975. In this case, the defendant sought to adduce, from an expert in the field of human perception and memory, testimony concerning reliability of eyewitness identifications. The trial court refused to admit the testimony, apparently because it believed such testimony can never meet the “helpfulness” standard under the rules of evidence. The Third Circuit, holding error by the trial court, said that admission of such testimony is conditional, not automatic.¹⁷

In *United States v. Moore*,¹⁸ the Fifth Circuit in 1986 concluded: “Expert testimony on eyewitness reliability is not sim-

ply a recitation of facts available through common knowledge. Indeed, the conclusions of the psychological studies are largely *counter-intuitive*, and serve to 'explode common myths about an individual's capacity for perception'" (emphasis in original).

A number of state appellate courts have also joined the ranks of *Chapple*. In 1984 in *People v. McDonald*,¹⁹ the California Supreme Court held that when an eyewitness identification "is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony."²⁰

In *People v. Beckford*,²¹ a 1988 New York decision, a professor of psychology who was an expert in the field of memory and perception was permitted to testify at trial on behalf of the defendant as to the effect of stress on identification, the psychological effect of delay between the criminal event and subsequent identification, and the lack of correlation between a prospective witness's confidence and accuracy of recollection.

In 1991 in *State v. Whaley*,²² the South Carolina Supreme Court, reversing a conviction, ruled it prejudicial error to exclude a psychologist's testimony on the unreliability of eyewitness identifications by white victims of black defendants.

In sum and substance, expert testimony on eyewitness identification in general

invariably puts into question its accuracy. The expert urges jurors to be wary of it. As the prevailing view would have it, as set out by Judge Shelton,¹⁰ the appropriate role of the expert is to assist the attorney in attacking the credibility of a particular witness, not to discuss as in a classroom the credibility of eyewitnesses generally.

In testifying generally about the fallibility of eyewitness testimony, the expert invariably calls into question the credibility of the testifying witness, although the expert may have no particular reason to challenge that witness. What is supposed to be may be what is—"a cigar may be a cigar," as Freud said; or, in this case, an accurate witness.

The expert witness testifying skeptically about the validity of eyewitness testimony, no matter what is really believed by this expert, brings to mind Freud's "skeptical" Jewish joke. "Two Jews met in a railway station in Galicia. 'Where are you going?' asked one. 'To Cracow,' was the answer. 'What a liar you are!' replied the other. 'If you say you're going to Cracow, you want to me to believe you're going to Lemberg. But I know that in fact you're going to Cracow. So why are you lying to me?'"

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