

MEMORANDUM

To: Creighton Horton
From: Jason Nelson
Re: Long eyewitness identification instruction
Date: February 28, 2007

QUESTION PRESENTED

What cautionary jury instruction is currently typically given in Utah trial courts for eyewitness identification?

BRIEF ANSWER

The sample instruction given in footnote eight of *State v. Long* is the jury instruction that is currently favored in most Utah courts. However, the Utah Supreme Court stated in that case that trial courts were not obligated to give this specific instruction verbatim.

DISCUSSION

This memorandum will address jury instructions for two different issues: eyewitness identification, and eyewitness certainty testimony. The question presented does not address this second type of jury instruction, but language from a recent case demonstrates a possible need for a model jury instruction for eyewitness certainty testimony.

I. Eyewitness identification

The Utah Supreme Court gave a sample jury instruction for addressing eyewitness identification in *State v. Long*, 721 P.2d 483 (Utah 1986). The court first noted that a cautionary jury instruction addressing eyewitness identification should include the following factors:

- (1) the opportunity of the witness to view the actor during the event;
- (2) the witness's degree of attention to the actor at the time of the event;
- (3) the witness's capacity to observe the event, including his or her physical and mental acuity;
- (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and

(5) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.
Id. at 493.

The court then gave two sample instructions that addressed these factors. The first instruction was borrowed from a D.C. Circuit case, *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). The second instruction was a proposed instruction, outlined in footnote 8 of the opinion. Although the court noted that the second instruction was much longer than the *Telfaire* instruction, it also found the second instruction to be more understandable and “a substantial improvement over *Telfaire*.” *Long*, 721 P.2d at 494-95. Copies of both of these instructions are attached to this memorandum.

The court noted that this second, favored instruction need not be given verbatim, but that it was only given by the court as an example of an appropriate instruction. *Id.* at 495. It specifically stated that instructions could be shorter than this aptly-named *Long* instruction. *Id.*

Despite this statement by the court, and the fact that the case giving rise to this jury instruction was decided over 20 years ago, it appears that trial courts have continued to use the *Long* instruction for eyewitness identification. See *State v. Hubbard*, 48 P.3d 953, 958 (Utah 2002); *State v. Hollen*, 44 P.3d 794, 804 (Utah 2002); *State v. Mecham*, 9 P.3d 777, 781 (Utah Ct. App. 2000). Not all courts, however, have used the instruction. In *State v. Diaz*, the trial court used the following language in its cautionary instruction:

When weighing eyewitness testimony you may consider (1) the opportunity of the witness to view the defendant during the event; (2) the witness's degree of attention to the defendant at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

55 P.3d 1131, 1143 (Utah Ct. App. 2002).

The court of appeals noted that this instruction “is not a model of clarity,” *Id.* This abbreviated form of the *Long* instruction is therefore an unlikely candidate for use as a model jury instruction. However, the court noted that this instruction, “coupled with trial counsel’s consistent effort” to challenge the identification, was sufficient to satisfy the concerns of the *Long* court, and that this choice of jury instruction was not so deficient as to prejudice the defendant.

II. Eyewitness certainty testimony

Another issue that may need to be addressed is the drafting of a model jury instruction for eyewitness certainty testimony. In *State v. Guzman*, a victim had identified the defendant twice, first with a level of certainty described by her as “ten out of ten” and later with “one hundred percent certainty.” 133 P.3d 363, 365 (Utah 2006). The defendant sought to have this testimony relating to the witness’s certainty of the identification excluded from the trial, but his motion was denied. *Id.* The court of appeals affirmed the subsequent conviction, and the conviction was again affirmed by the Utah Supreme Court. *Id.* The Utah Supreme Court held that such “certainty” testimony relating to an eyewitness identification was admissible evidence. *Id.* at 365-69.

However, in a concurring opinion, Chief Justice Durham stated that a defendant “is entitled to a cautionary jury instruction summarizing the troublesome nature of certainty testimony and explaining that it is only one indicator of witness accuracy,” if the defendant requests such an instruction. *Id.* at 369 (Durham, C.J., concurring). Although this language is found in a concurring rather than majority opinion, it may be helpful to draft a model jury instruction addressing this topic in order to avoid challenges in future cases in which certainty evidence is admitted.

CONCLUSION

The model instruction given by the Utah Supreme Court in *State v. Long* is still the preferred cautionary instruction for eyewitness identification. However, this instruction can be modified. It may also be prudent to draft a model jury instruction for eyewitness certainty evidence in order to avoid potential challenges in the future.