

One Minute Brief

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TOPIC: ID From Video

ISSUE: When may a witness identify a person in a video or photo?

Some judges balk when a witness testifies that a person shown in video surveillance is the defendant, unless the defendant was well known to the witness (i.e., a friend or family member). But case law is not so restrictive. The general rule is that a witness may give a lay opinion about the identity of a person in a video or photo if 1) he or she has **personal knowledge** of the person's appearance **at the time**, and 2) the testimony aids the trier of fact in determining identity. (*People v. Ingle* (1986) 178 Cal.App.3d 505, 513; see Evid. Code, § 800 [general requirements for admission of lay opinions].) Extensive familiarity is not required. The witness's degree of familiarity goes to *weight* of the opinion, not its admissibility. (*People v. Perry, supra*, 60 Cal.App.3d at p. 613.)

Several cases uphold admission of such opinions. Indeed, you would be hard pressed to find a case holding such an opinion was *inadmissible*.

In *People v. Perry* (1976) 60 Cal.App.3d 608, 611, several witnesses were shown a video of a robbery during trial and asked if the perpetrator was the defendant. Each witness was separately acquainted with the defendant but had not witnessed the robbery. The court upheld the admission of their opinions because they were based on their personal knowledge of the defendant's appearance at the time, and this assisted the jury because the defendant's appearance had changed since the crime.

In *People v. Mixon* (1982) 129 Cal.App.3d 118, 130, two police officers had many street contacts with the defendant and were thus familiar with his appearance at the time of the crime. Their testimony identifying the defendant from a surveillance still was properly admitted because the photo was not clear and the defendant had changed his appearance before trial.

A witness's familiarity with the defendant need not precede the crime. In *People v. Leon* (2015) 61 Cal.4th 569, 600, a police officer was with the defendant for about two hours after his arrest and became familiar with his appearance, his attire when arrested, and the vehicle in which he had fled police. The trial court properly admitted the officer's testimony identifying the defendant (partially based on his jacket) and his car in surveillance videos. *Leon* also shows that identity need not be based on facial recognition.

Likewise, a witness may become familiar with the defendant from the crime itself. The court upheld such an identification in *People v. Ingle, supra*, 178 Cal.App.3d at p. 514, emphasizing that "the victim/witness here had

an adequate opportunity to view defendant's physical features during the robbery and to relate her observations and recollections to both the video picture and the defendant's person."

A witness's familiarity with the defendant need not come from personal contact. In *People v. Larkins* (2011) 199 Cal.App.4th 1059, 1065, the defendant stole items from several gyms. A loss prevention manager identified the defendant in two surveillance videos. He was familiar with the defendant because he saw the same person in 20 to 30 videos from various gyms, and then learned his name from prior arrests, the defendant's driver's license, and a booking photo. The manager had never seen the defendant in person. The court upheld his testimony identifying the defendant in the videos in question.

A witness's opinion need not be the only evidence of identity in order to assist the trier of fact. In *People v. Mixon, supra*, 129 Cal.App.3d at p. 131, the jury had booking photos showing how the defendant looked on the day of the crime. The court nevertheless allowed the officers' opinions because they had seen the defendant in a variety of contexts. Indeed, cases note that the jury's ability to make their own comparison lessens any potential prejudice from a witness's opinion. (*People v. Leon* (2015) 61 Cal.4th 569, 601.)

What a witness may **not** do is offer an opinion that is no better than what the trier of fact could determine independently. No opinion, expert or lay, assists the trier of fact "if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) Thus, a witness may not simply make an in-court comparison after seeing the defendant for the first time. Also, witnesses may not opine about guilt or innocence. Courts might disallow phrasing identifying a defendant as "the killer" or "the robber," as opposed to simply identifying him or her in the video or photo.

BOTTOM LINE: Witnesses may opine on the identity of persons in videos and photos, so long as they have some knowledge of the person's appearance and it assists the trier of fact.

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