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Home > Expert Witnesses and Human Biometrics

Expert Witnesses and Human Biometrics

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Rick Kopstein / New York
Law Journal

Psychological research has shown, and the courts have come to accept, that a witness' observation and recollection are vulnerable to certain kinds of errors. From another perspective, a study of the precise metrics of the human body can expose shortcomings in trying to match a stranger in a surveillance photo to the man or woman sitting at the defense table. The science of biological form measurement, underlying an entire industry of security tools, can be brought to bear on the analysis of surveillance images and problematic identifications.

During a crime, the security cameras in banks and stores can capture the image of a suspect. In most instances the person committing the offense is unknown to the employees behind the counter. Eventually someone is connected to the event based on a tip or some other correlate.

But someone has to positively link the person in the surveillance picture with the suspect in custody. This is the role of lay opinion witnesses whose knowledge of the defendant allows them to help the jury identify the person in the video or photograph.

Courts have allowed these witnesses to identify suspects in crime scene photos as long as there was some basis for believing they could more accurately make that assessment than the juries. The rationale was that a lay opinion witness would have insights into the defendant's appearance that the jury would not.

Arguments in favor of lay opinion witnesses rested on the assumption that their special knowledge or continuous contact with the suspect would overcome the poor quality of the picture or video or changes in the accused's appearance since the event. **[FOOTNOTE 1]** Presumably the jury lacked sufficient familiarity with defendant's appearance to make their own judgment about whether there was a match with the crime scene photo.

The problem at the heart of this type of identification is the use of a non-crime scene witness whose only qualification is their knowledge of the accused. They start from a known, the defendant, to establish the identity of an unknown, the person in the photograph. And in some cases these witnesses are law enforcement or the defendant's jailer, whose familiarity with the defendant grew out of an inability to make bail.

Swimming against a tide of constructive identifications, defense lawyers have turned to the field of biometrics for help.

The idea has its roots in the reciprocal use of lay witness testimony for the defense. In *United States v. Robinson*, **[FOOTNOTE 2]** the defendant was among three men accused of robbing a branch of the Connecticut National Bank. Two tellers were present, one of whom activated the security cameras. The police were led to Robinson by an informant's tip. After two trials he was convicted of bank robbery.

The first two holdup men were identified, but the third was a mystery. The FBI canvassed the staff at the city's jail to see if anyone was familiar with him. Correctional Officer George Maher and his staff agreed that the third man was named Turner (not Robinson), someone suspected in two other local bank robberies and still at large. The trial judge excluded this evidence out of fear that it would have led to a mini-trial over the resemblance of the person in the security photo to Robinson.

Facing bank tellers exposed to "mildly suggestive" identification procedures and the testimony of a co-defendant who may have struck a deal with the prosecution, the defendant, who had a credible alibi defense, desperately

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needed to bring in alternate suspect evidence.

Officer Maher's testimony would have excluded Robinson as the culprit and pointed to someone already under suspicion for two recent area robberies. His identification was "rationally based on [his] perceptions" having seen Turner, and it would have been helpful to the jury in assessing the identity of the third man in the surveillance tape.

On appeal, the Second Circuit concluded that exclusion of defense witness testimony identifying the man in the bank photograph as someone other than the defendant severely harmed Robinson's alibi defense. **[FOOTNOTE 3]**

This opinion illustrates the value of evidence, in this case lay opinion testimony, that the person in the surveillance photograph was not the defendant but positively shown to be another potential suspect. Such witnesses are hard to find, so the next logical step is to garner evidence that can exclude the defendant when it's not possible to point the finger at someone else or establish an alibi.

In the last 20 years, students of human morphology have been called upon to lend their expertise on the accuracy of comparative identifications. Unlike the prosecution witness asked to establish identity (inclusive identification), the defense expert's job is to exclude the defendant based on differences in the metrics of the person in the picture and the accused.

In 1985, the Central Savings & Loan Association in the heart of New Orleans was robbed, **[FOOTNOTE 4]** and the bank's cameras captured photos and video of the robber. The FBI showed the surveillance images to three bank employees who confirmed that the man in the pictures was the same one who held them up. Scouring the neighborhood, the FBI came across an unnamed person who identified the man in the photos as Dr. Victor Alexander, whose practice was located a few blocks from the bank.

A photo array using Dr. Alexander's driver's license picture was shown to the bank workers, each of who picked him as the culprit. In spite of the absence of any physical evidence connecting him with the robbery, the agents arrested Dr. Alexander based solely on the identification.

LAY OPINION WITNESSES

As in any case relying on comparative photo identification, the prosecution called the witnesses to the event, i.e. the bank employees, and then four people acquainted with the defendant. The lay opinion witnesses testified that Dr. Alexander was the man in the bank photographs. In his defense, based on mistaken identity, the defendant called five witnesses who said he was not the man in the pictures. After eight hours, the jury brought in a guilty verdict and the judge sentenced Dr. Alexander to five years in prison.

Although 12 people testified on both sides of the identification issue, two witnesses were not allowed to speak. The defendant had retained the services of an orthodontist, who specialized in cephalometrics (the science of measuring the head), and a former FBI agent with an expertise in photographic comparison. They too had reviewed the surveillance film and concluded that Dr. Alexander was not the man who robbed the bank.

Before trial, the court had granted the prosecution's motion to exclude these expert witnesses believing that the jury could make the photographic comparison without their assistance. Why the jury needed the help of lay opinion witnesses familiar only with the defendant but not experts in the science of human feature comparison was not answered.

The U.S. Court of Appeals for the Fifth Circuit looked at the case differently. The knowledge to be shared by the defense experts was well beyond the ken of jurors. The careful study of the bank surveillance by a specialist trained in head measurements would have revealed "specific differences" in facial features between the photo subject and defendant, which only the application of cephalometry could show. Jurors were not equipped to make that assessment without help.

The ex-FBI agent, trained in photo comparison, would have highlighted the distortion created by the bank cameras and its effect on the image of the robber. A professional photographer was hired to recreate the exact conditions of the bank cameras with Dr. Alexander as the subject. Contrasting these photos with the crime scene pictures would have demonstrated that the defendant was not the man who entered the bank that day.

In essence, the defense was denied the opportunity to rebut lay opinion testimony with analytical expert evidence. The strength of the prosecution's case rested on tenuous threads: Dr. Alexander's proximity to the event, a serendipitous identification and comparison between his driver's license photo and a bank surveillance tape. Fortunately, the appellate court recognized that it was an abuse of discretion to exclude expert rebuttal testimony on photographic comparison, and reversed the conviction.

ATTACHED EARLOBE CASE

Nearly 20 years later, James McClintock faced a similar dilemma. **[FOOTNOTE 5]** He was charged with holding up a bank in Philadelphia. He was picked out from a surveillance photo published in the local paper. This time the defense proposed using a physical anthropologist, a student of human variation, whose specialty was ear biometrics.

Her critical examination of the bank photo revealed a perpetrator with an attached earlobe. Mr. McClintock's ear lobe was unattached. The attachment morphology was an immutable characteristic. Based on 30 years of methodical study and comparison of human physical traits, this forensic anthropologist was able to exclude defendant from

being the man in the picture.

Again the prosecutors moved to exclude the expert.

Unlike the trial in the Alexander case, this judge had the benefit of *Daubert*. The court assiduously applied the standards required by case law and Federal Rules of Evidence 702: (1) specialized knowledge earned through practical experience; (2) reliable evidence based on sound methods and objective scientific procedures, which included a testable hypothesis, peer reviewed studies, known error rates, standards, and generally accepted and applied methods, and non-judicial uses; and (3) whether it would assist the trier of fact.

Finding the expert evidence to be based on valid reasoning and reliable methods satisfying the criteria listed above, and conscious of the absence of any direct physical evidence connecting Mr. McClintock to the crime, the court denied the prosecution's motion and allowed the expert to testify.[\[FOOTNOTE 6\]](#)

It is conceivable these cases could be resolved in the grand jury, where the prosecutor is obligated to present evidence that amounts to a "complete defense."[\[FOOTNOTE 7\]](#)

For example, a defendant charged with robbery testified in the grand jury that he was shoveling snow in front of his home at the time and watched by a neighbor. Although the grand jury asked for the neighbor to be called as a witness, the prosecutor refused. In the end, the indictment was dismissed because that testimony might have resulted in a no bill.[\[FOOTNOTE 8\]](#)

If a prosecutor can call an expert to testify to an element of the crime, why can't the grand jury ask to hear from a defense expert who could establish a complete defense?

CONCLUSION

In photo comparison identification cases, prosecutors have argued against the science or the appropriateness of biometric evidence. But, a defendant has due process and compulsory process rights to present a defense to a critical element of the state's case, identification.

In *LeGrand*, *Young* and *Lee*,[\[FOOTNOTE 9\]](#) the New York Court of Appeals recognized that eyewitness identification has a psychological dimension and fallibility that cannot be discounted. Similarly, courts in other jurisdictions have recognized that scientific measurement of the human form can play a significant role in unseating dubious identifications.

Since juries are allowed to hear from laypersons familiar with the defendant to help them in judging the identity of an unknown person in a surveillance photo, fairness and justice dictate that they should also hear from experts in human form comparisons.

Ken Strutin is director of legal information services at the New York State Defenders Association.

::::FOOTNOTES::::

FN1 See *People v. Russell*, 79 N.Y.2d 1024 (1992).

FN2 544 F.2d 110 (2d Cir. 1976).

FN3 See *People v. Washington*, 99 A.D.2d 848 (2nd Dep't 1984) (Judge Titone's dissent supported defendant's right in pursuit of a mistaken identification defense to display a third party, who confessed, to the jury for comparison calling its exclusion a "constitutional error of the first magnitude.").

FN4 *United States v. Alexander*, 816 F.2d 164 (5th Cir. 1987).

FN5 *United States v. McClintock*, 2006 U.S. Dist. Lexis 201 (E.D. Penn. Jan. 5, 2006).

FN6 See also *United States v. Johnson*, 114 F.3d 808, 811 (8th Cir. 1997) (plastic surgeon testified about ear lobe differentials pointing to an alternate suspect).

FN7 See, e.g., *People v. Hackett*, 110 A.D.2d 1055 (4th Dep't 1985) (temporary and lawful possession of a weapon).

FN8 *People v. Johnson*, 155 Misc. 2d 791 (Sup. Ct. Monroe County 1992).

FN9 *People v. LeGrand*, 8 N.Y.3d 449 (2007); *People v. Young*, 7 N.Y.3d 40 (2006); and *People v. Lee*, 96 N.Y.2d 157 (2001).

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