

Eyewitness in Criminal Procedure

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ABSTRACT

A witness is someone who has knowledge of something. It is a person who, voluntarily or under duress, gives oral or written evidence of what he knows or claims to know.

Key words: Witness, eyewitness, evidence, testimony, police

INTRODUCTION

In most crime investigations, deoxyribonucleic acid (DNA)-rich biological traces are not available as evidence.^[1] Hence, eyewitness evidence is often crucial for investigating and prosecuting crimes. Especially in cases of murders, drive-by shootings, convenience store robberies, muggings, and other common crimes, perpetrators almost never leave DNA trace evidence. Despite the importance of eyewitness evidence in criminal proceedings, some legal scholars have argued that eyewitness misidentification is the most important contributing cause of wrongful convictions in the USA, playing a role in more than 75% of convictions overturned through DNA testing. Although the justice system relies heavily on eyewitness memories, many factors were investigated within the last four decades demonstrating the error-proneness of person identifications. One of these factors presumably having a great impact on how people remember witnessed crimes is the presence of a weapon.

The so-called weapon focus effect (WFE) describes the phenomenon that eyewitnesses observing a crime in which a perpetrator carries a weapon are less accurate in describing or identifying the suspect in a lineup compared to crimes with no weapons involved.

Several, partially overlapping explanatory approaches are discussed in the literature to explain the WFE. First, the stress and arousal approach assumes that the perceived threat induced by a weapon produces a general reduction in eyewitness performance, or, alternatively, may improve memory for central details of a crime from a neurobiological perspective. Second, and closely related to the first approach, the attentional focus approach more specifically addresses the presence of a weapon by distinguishing between central (the weapon) and peripheral details of an emotional event. Third, more recently researchers following the unusualness approach have argued that arousal is not the primary cause, but that a weapon is unexpected in certain situations. Even if we know that bank robberies might happen from time to time based on schemata and script knowledge, few of us think about this possibility when entering a bank and hence do not expect the presence of a weapon (except for an armed security guard in the USA). Hence, attention is focused on any unusual object present at the expense of processing other information.

Forensic psychology is probably one of the fastest growing areas of professional psychology around the world, in part because of the attractive myth of offender profiling and the widespread interest in crime and criminals.^[2] Yet, this mushrooming growth must be set against a backdrop of the remarkable difficulties of carrying out proper studies in this area and the many challenges practitioners face. Access to real criminals or juries for research purposes, or to witnesses or police officers, is always fraught with legal and practical

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constraints. In some cases, there are also real dangers that need to be planned for and avoided. Therefore, much research of relevance to forensic psychology, notably on eyewitness testimony, has been carried out in rather artificial settings, often consisting of scenarios that can be somewhat unrealistic, in which students are shown videos then requested to indicate what they remember. This has rather limited applicability outside of the laboratory because it is based on simulations, with people drawn from a limited subset of the population who are under no real pressure.

INTERROGATION

There are numerous legal and procedural incentives to understanding the interrogation process.^[3] First, police hold tremendous influence over the fate of criminal and delinquency cases. Officers may arrest, detain, or release individuals based (among other things) on the information acquired during questioning. Police decide whom to question about a crime as well as where, when, and how to conduct questioning to obtain accurate and complete information. Second, research demonstrates that confession evidence is extremely powerful. Laboratory studies reveal that confession evidence affects mock jurors' verdicts more than eyewitness and character testimony, regardless of whether the confession is perceived as voluntary or coerced.

Third, interrogation is a legal context that may be especially susceptible to due process violations or other procedural justice concerns, even inadvertently. Due to the "innate secrecy of such proceedings," the Supreme Court has historically acknowledged the impossibility of transparency in police interrogations and has accordingly imposed restrictions on police behavior and interrogation procedures. For example, police are not allowed to make explicit threats or promises, and physical force has long been prohibited. Although the incidence of such behaviors cannot be determined, the frequency of overt police misconduct is likely low relative to the potential due process violations that are more relevant to routine interrogation procedures that are ill defined in case law and policy.

IDENTIFICATION

Few things short of a smoking pistol carry as much weight with a jury as an eyewitness who points to the defendant and says, "That's the one."^[4] Eyewitness identifications, however, are notoriously unreliable and probably account "for more miscarriages of justice than any other single factor." A witness cannot always easily observe the height, weight, age, and other features of a suspect at the time of the crime because the encounter between the witness and the criminal is often brief, frequently in poorly lit conditions, and under stressful circumstances. Police identification processes

can further aggravate the inherent unreliability of human perception and memory. For example, lineups often resemble a multiple-choice recognition test in which the eyewitness feels compelled to pick the "most correct answer" rather than choose "none of the above." Further problems are created if the police inadvertently or deliberately suggest the "right" choice to the witness.

Suspects who are placed in a lineup or show up are not witnesses against themselves. Violation of the Fifth Amendment privilege against compulsory self-incrimination occurs only when a suspect is "compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature." Compulsory display of a suspect's physical characteristics in a lineup or show up is not testimonial or communicative in nature because it does not require the suspect to disclose any personal knowledge. Thus, a defendant has no Fifth Amendment privilege against participating in a lineup or show up. The defendant's refusal to participate in a lineup or show up may be introduced as evidence of a consciousness of guilt. Courts also have used criminal or civil contempt to coerce or punish a suspect who refuses to comply with a court order to participate in some identification procedure. On other occasions, the police have forcibly conducted the identification proceeding over the accused's objection. Forcing the accused to furnish some form of identification evidence requires the police to control or "seize" the accused, which places the action within the Fourth Amendment requirement that such seizures be reasonable.

Some eyewitnesses already reduce the possibility of identifying a potential perpetrator in advance, so the appointed persons in the line look only briefly and superficially.^[5] Before recognizing, the personal description of the perpetrator should be determined as closely as possible, that is, the person to be identified, and the possibility of disguises. Finally, it should be determined whether the eyewitness has a personal interest in recognizing someone or not. Some witnesses feel fear of moral condemnation of the environment, especially in sexual offenses, fear from family troubles, etc. In such witnesses there is a tendency to consciously not recognize the suspect.

Law enforcement officers use a variety of techniques to identify a person as a criminal, such as eyewitness identifications, fingerprinting, blood tests, and, recently, DNA tests.^[6] The use of any of these procedures raises certain constitutional issues, such as the right to be free from self-incrimination and the right to counsel.

There is also another concern: Reliability. Eyewitness identification, though powerful, has a few inherent problems. First, each person will testify to his or her perception of an event, and people often perceive the same event differently. Second, not every person will use the same language to

describe what was witnessed. Third, a witness may simply have a faulty memory and unintentionally testify to an untruth. Fourth, for a variety of reasons, a witness may intentionally lie.

Scientific testing may also prove to be invalid or unreliable. How accurate is the test when performed properly? Was the test performed properly in this case? Is the evidence tested actually the defendant's? These types of questions are asked of expert witnesses who testify to the results of scientific testing. This discussion begins with eyewitness identification procedures.

Witnesses often take part in identification tests that serve the dual purpose of assessing the general quality of the witness's memory, and of verifying whether the witness really recognizes the suspect.^[7] This dual purpose is only achieved in properly organized lineups, but unfortunately procedural mistakes are often made. In the majority of cases, the result is that we learn nothing about the quality of the witnesses' perceptual powers or the quality of their memory, and consequently we cannot relate them to the distribution of subjects in our research outcomes. As a result, the vast body of general research findings on eyewitness identification cannot easily be applied to the situation in which an individual witness claims to recognize a suspect.

EVIDENCE

First and foremost, the forensic scientist must be skilled in applying the principles and techniques of the physical and natural sciences to analyze the many types of physical evidence that may be recovered during a criminal investigation.^[8] Of the three major avenues available to police investigators for assistance in solving a crime – confessions, eyewitness accounts by victims or witnesses, and the evaluation of physical evidence retrieved from the crime scene – only physical evidence is free of inherent error or bias.

Criminal cases are replete with examples of individuals who were incorrectly charged with and convicted of committing a crime because of faulty memories or lapses in judgment. For example, investigators may be led astray during their preliminary evaluation of the events and circumstances surrounding the commission of a crime. These errors may be compounded by misleading eyewitness statements and inappropriate confessions. These same concerns do not apply to physical evidence.

What about physical evidence allows investigators to sort out facts as they are and not what one wishes they were? The hallmark of physical evidence is that it must undergo scientific inquiry. Science derives its integrity from adherence to strict guidelines that ensure the careful and systematic collection, organization, and analysis of information – a process known

as the scientific method. The underlying principles of the scientific method provide a safety net to ensure that the outcome of an investigation is not tainted by human emotion or compromised by distorting, belittling, or ignoring contrary evidence.

POLICE

Police officers commonly serve as eyewitnesses, and there is no reason to believe that their memory performance will tend to be qualitatively different from other eyewitnesses.^[9] Although some legal opinions have taken the position that police are particularly good eyewitnesses, others have concluded that police may be no more effective at eyewitness identification. However, some research in more naturalistic settings has indicated that police do show better recall than civilians, only under conditions of relatively long exposure, such as when a target asks for directions. Regardless, the empirical work on this topic is limited to just a small handful of studies. More central to our purposes, none of the work comparing police to civilian eyewitnesses has involved race as a variable of interest.

Because police do serve as eyewitnesses to crimes and their aftermath, it is sensible to target them for individuation training. Furthermore, because police training is so highly proceduralized, it is much more plausible to engage police in a systematic individuation training intervention than it would be to target civilians more broadly. As such, our primary recommendation is to consider engaging police officers in other-race individuation training. Such training has been effective in laboratory settings at reducing the ORB, and we propose that preliminary programs could investigate how such training might be implemented among police departments, and to study the training's efficacy in improving face memory among officers.

CONFIDENCE

The confidence that eyewitnesses express in their decision at an identification test or lineup has long been recognized within the criminal justice system as an indicator of the likely reliability or accuracy of the witness.^[10] In contrast, psychology researchers have downplayed the diagnostic value of eyewitness identification confidence. Although only a relatively small proportion of the variance in identification accuracy is associated with variance in confidence, recent research using what is known as a confidence-accuracy (CA) calibration procedure suggests that confidence – measured immediately after the identification decision – can provide a useful (but not infallible) pointer for crime investigators to the likely accuracy of positive but not negative (i.e., lineup rejections) lineup decisions. This conclusion definitely does not apply, however, to confidence judgments expressed in the courtroom as, by this time, there has been an opportunity for

post-identification influences (such as feedback from lineup administrators or other witnesses) to shape any subsequent confidence judgments. Nor is the conclusion applicable to judgments expressed by witnesses before having viewed a lineup. A major challenge for future research in this area will be to define the boundary conditions for obtaining robust CA calibration, which, in turn, will enhance the capacity to diagnose the likely accuracy of identification decisions.

Eyewitnesses will often provide some sort of expression of confidence in their memory when they examine a police lineup or photo spread or when they testify in court about the identity of the offender. Their degree of confidence is known to exert a strong influence on assessments made by the police, lawyers, and jurors about the likely reliability of their testimony. Yet, it is known that eyewitness confidence is sometimes an extremely misleading cue to the likely accuracy of identification. The following sections examine when identification confidence is informative about the offender's identity and when it is likely to mislead.

Eyewitness confidence has been of major interest because confidence is an easily obtainable index that could potentially provide a guide for the criminal justice sector as to the likely reliability of an eyewitness identification response.

TESTIMONY

The public trial in the context of the common law is a case in point. The sheer performativity of the multi-party body interactions, such as witness testimonies and closing speeches, make a public trial appear to be both an event of drama and the source of truth in the last instance.^[11] Among the classical ethnomethodological studies of the court as a social order, we find several distinct foci: (a) General studies of the social organization of trials in traffic courts, civil courts, or – mainly – criminal courts; (b) court-related communication events, such as informal mediation, pre-trial communications, examination of eyewitnesses, especially cross examination, or expert testimony; (c) principal players in the courtroom, for example, professional judges, lay judges, defense lawyers, and jurors; and (d) legal language and discourse, for example, verbal deception and formulations. Obviously, this list is merely suggestive: The study of courtroom interaction involves many diverse phenomena and components. At the same time, the list is fairly representative of courtroom studies insofar as it demonstrates a priority for phenomena that are available for the researcher in terms of recorded speech or talk.

When we speak of eyewitness testimony, we want to believe that a witness to a crime can describe what they saw in detail.^[12] It sounds rather simple. You see something and have to communicate that information to the police. Yet if this is so simple, why, if we ask 100 witnesses to an event what

they saw, do their descriptions vary widely? Did not they all witness the same event? Yes, however, what they witnessed is influenced by their perception. From an investigator's perspective, it is important to understand that each witness provides pieces of information, allowing investigators to piece together the puzzle of what actually happened.

When it comes to handling eyewitnesses and victims, an investigator ideally meets them at the crime scene or has them describe where they were in relationship to the incident, to be aware of their vantage point. In addition, investigators need to consider the impact that an incident has had on witnesses' psyches and how that may impact – perhaps reduce or skew – their ability to recall. Finally, an investigator should have an independent investigator present the lineup to victims/witnesses. This removes any potential future concern that the lead investigator influenced the identification.

EXPERT TESTIMONY

Expert testimony on eyewitness reliability cannot and does not address the accuracy and completeness of the testimony of single eyewitnesses.^[13] However, this does not mean that the opinions of an expert cannot be of assistance to the trier of fact. Expert eyewitness testimony can provide a social framework, in which general conclusions from social science research are presented as a means of helping the trier of fact determine factual issues in a specific case. That is, expert testimony can provide scientific information which could assist the trier of fact in interpreting and evaluating eyewitness statements of “what happened” and “who did it.” Expert testimony can provide a context for evaluating what eyewitnesses report, but the trial judge or jurors do the evaluating. Eyewitness researchers do not attempt to predict behavior from single cases, but this is no different from that of other sciences, for example, botanists do not predict the behavior of falling leaves from a specific tree. Instead, empirically-validated aggregate data on situational factors, witness factors, and procedural factors are presented which may assist in the understanding of the single instance. To the extent that a particular variable or set of variables were present at the time of the witnessing, and those variables are known through scientific research to have a particular effect or set of effects, then it is possible that expert testimony on those witnessing conditions could be relevant and of assistance to the trier of fact in evaluating particular points at issue.

FORENSIC PSYCHOLOGY

Forensic psychologists have an abundance of information to refer to, including mainstream psychological research from the fields of cognitive and social psychology.^[14] Research from cognitive psychology has been particularly helpful in areas such as understanding how our memory performs under stressful conditions (e.g., during a criminal event),

and the best ways of maximizing memory retrieval. In the case of social psychology, understanding how social biases and attitudes interact to affect our perceptions of people has led to research findings about how the physical appearance of a defendant can influence the jury's verdict. Forensic psychologists are in the fortuitous position of being able to keep the criminal justice system informed of new findings from psychology – one example being the social science brief delivered to the judge through an *amicus curiae* (or “friend of the court” brief). Another means of divulging information is through collaborative research. Collaborative research with police, probation, and prison services has often been effective and has led in many cases to changes in practice and ethos. For instance, it is through collaborative research between the police and forensic psychologists that an effective way of interviewing witnesses called the cognitive interview has been successfully implemented. Further research of this nature has also improved the way police interrogate suspects. The working ethos of having to obtain a confession no matter how the interrogation is carried out has been replaced by an equitable interview approach. Furthermore, the reliability of evidence presented in court, especially eyewitness testimony, is of paramount importance. As a consequence of psychological research on memory, the credibility of eyewitness evidence is questioned and scrutinized to ensure the description of events and of the perpetrator provided by witnesses is plausible. In the U.S., having an expert psychologist provide evidence concerning the reliability of eyewitness testimony is not uncommon. To understand how forensic psychologists can help improve practice in the criminal justice system, from its initial stage of police evidence-gathering to presenting a case in the courtroom, the legal process needs some explanation.

Forensic psychologists may conduct research on topics related to the civil and criminal legal systems or may focus on specific questions that these institutions of justice consider; such findings may take the form of expert testimony, whose goal is to educate a jury or judge about a specific legally relevant topic (i.e., issues related to eyewitness identification; factors that may contribute to false confessions).^[15] Those in the practice of forensic psychology typically conduct individual assessments of defendants, plaintiffs, or parents involved in child custody cases; the product of these evaluations has a similar goal: To educate jurors and judges by providing them with information they may not otherwise have known when they consider making a legal determination (i.e., the impact of mental retardation or mental illness on the ability of a defendant to assist an attorney in defending the client in court; the possible role that duress or coercion may have played in a defendant's involvement in a criminal act to be considered by a federal judge at the time of sentencing; the effects of Alzheimer's disease on a patient's ability to make an informed decision about consenting to or refusing medical treatment).

CONCLUSION

The task of a witness in criminal proceedings is to give a statement that does not relate to an opinion or views, but to a statement of facts that he has observed or learned from other subjects. The main purpose of testifying is to answer questions about what happened, when and who the participants were, assuming that the witness has knowledge that is helpful in the court proceedings. There are two types of witnesses: An eyewitness who directly observed the event for which the proceedings are being conducted, and a rumored witness who came to know indirectly, that is, from communication with other people.

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