R. IDENTIFICATION

R.1. Reliability of eyewitness identification

R.1.a. Factors affecting reliability

TITLE: Albee v. State
INDEX NO.: R.1.a.
CITE: (2/28/2017), 71 N.E.3d 856 (Ind. Ct. App 2017)
SUBJECT: Suggestive lineup made identification of Defendant unreliable
HOLDING: The trial court abused its discretion by admitting the victim's pre-trial and in-court identifications because the pre-trial identification was impermissibly suggestive, and the in-court indentification was tainted by the pre-trial identification. See Wethington v. State, 560 N.E.2d 496, 501 (Ind. 1990).

Police detained Defendant for allegedly going into the bathroom of a sorority house where he watched Margaret Schuerger shower. Moments later, Defendant allegedly opened Schuerger's bedroom door; they briefly established eye contact and then Defendant left. Once police detained Defendant, they brought Schuerger to the scene to see if Defendant was, in fact, the perpetrator. In Schuerger's presence, police referred to Defendant as "the suspect." Schuerger saw Defendant in handcuffs and surrounded by many police officers. She was allowed to later observe Defendant at the police station through a closed-circuit camera for an unspecified amount of time. It was only after three opportunities to observe Defendant that Schuerger finally identifed him as the perpetrator.

Schuerger's identification of Defendant was not sufficiently reliable to overcome the suggestive procedure. See Hubbell v. State, 754 N.E.2d 884, 892 (Ind. 2001). Schuerger was in Defendant's presence for only a short time, her attention was divided when she noticed him, and she was only able to identify him the third time she saw him. Held, convictions for voyeurism and residential entry reversed but because evidence was sufficient to support the convictions, the State was not precluded from retrying Defendant.

TITLE: Manson v. Braithwaite

INDEX NO.: R.1.a.

CITE: 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)

SUBJECT: Reliability of eyewitness identification - Factors affecting reliability

HOLDING: Due process does not compel exclusion of identification evidence in state criminal trial, apart from any consideration of liability of pretrial identification evidence obtained by police procedure which was both suggestive & unnecessary. Unlike warrantless search, suggestive pre-indictment identification procedure does not, in itself, intrude upon constitutionally protected interest. Reliability is linchpin in determining admissibility of identification testimony. Factors to be weighed against corrupting effect of suggestive identification procedure in assessing reliability set out in Neil v. Biggers, 409 U.S 188 (1972), include: (1) Opportunity of witness to view criminal at time of crime; (2) Witness' degree of attention; (3) Accuracy of witness' prior description of criminal; (4) Level of certainty demonstrated at confrontation; & (5) Time between crime & confrontation. Here, identification was suggestive because only one photo was used, & identification was unnecessary because no exigent or emergency circumstances existed. However, under totality of circumstances, no substantial likelihood of irreparable misidentification existed because identification was made by trained police officer. In addition, officer had sufficient opportunity to view suspect, positively identified D's photo, & made photo identification two days after crime. Held, judgment reversed; Stevens, J., concurring; Marshall & Brennan, JJ., dissenting.

RELATED CASES: Lewis, App., 898 N.E.2d 429 (court declined to adopt New Jersey's rule that identification procedures must be recorded).

TITLE: Marsh v. State
INDEX NO.: R.1.a.
CITE: (7/30/85), Ind., 480 N.E.2d 927
SUBJECT: Independent basis for in-Ct. identification (ID)
HOLDING: Although ID procedure was so suggestive that any ID resulting from it should have been inadmissible, Ct. finds IB existed for in-Ct. ID. Here, witness who knew D's name IDed him after D's name was called & D appeared at arraignment on second robbery of same restaurant. Ct. looks to totality of circumstances to determine if independent basis exists. Kusley 432 N.E.2d 1337. Factors include length of initial observation of D, lighting conditions, distance between witnesses & D, witness's capacity for observation, witness's level of certainty, any discrepancy between witness's initial description & actual description & any IDs of another person. Morgan 400 N.E.2d 111; Swope 325 N.E.2d 193. Witness saw D for a few seconds from 30-40 feet away under fluorescent lights & testified he was certain of his ID based only upon observation in restaurant. Witness initially picked wrong person from lineup, but then picked D. Ct. notes co-D testified against D. Held, no error.

RELATED CASES: Wrencher, App., 635 N.E.2d 1095 (ID of D as triggerman not insufficient despite fact victim initially identified another, because initial ID could have been erroneous due to victim's critical medical condition & confused state); Dorsey 490 N.E.2d 260 (witness's in-Ct. ID of D was supported by evidence independent of one picture display); Hoskins, App., 486 N.E.2d 593 (Ct. examines facts supporting ID, finding independent basis despite short viewing period); Murphy, App., 475 N.E.2d 42 (opinion sets forth 11 factors cited in Cooper 359 N.E.2d 532 & finds independent basis for witness's in-Ct. ID); Alexander 449 N.E.2d 1068 (held, witness's prior acquaintance with D important factor in determining adequacy of independent basis *citing* Frasier 312 N.E.2d 77); Hill 442 N.E.2d 1049 (witness had 15-minute unobstructed view of D in well-lit office during robbery; conviction affirmed); Allen, 439 N.E.2d 615 (no error in admitting in-court identification where witness saw D on 2 occasions at close range in full daylight, no obstruction of witness' vision, and total time witness observed D was at least 5 minutes); Dodson, 377 N.E.2d 1365 (twenty to thirty minute observation of rifle purchaser established independent basis).

TITLE: Mitchell v. State
INDEX NO.: R.1.a.
CITE: (3rd Dist., 1-26-98), Ind. App., 690 N.E.2d 1200
SUBJECT: Show-up - factors leading to misidentification
HOLDING: Tr. Ct. did not abuse discretion by admitting witness' pre-trial & in-Ct. identification of D.

Admissibility of show-up identification evidence turns on evaluation of whether, under totality of circumstances, confrontation was conducted in such fashion as to lead witness to make mistaken identification. Wethington, 560 N.E.2d 496. Factors to consider include: 1) opportunity of witness to view criminal at time of crime; 2) length of initial observation of criminal; 3) lighting conditions; 4) distance between witness & criminal; 5) witness' degree of attention; 6) accuracy of witness' prior description of criminal; 7) level of certainty demonstrated by witness; 8) identifications of another person; 9) length of time between commission of crime & show-up procedure; & 10) practicability of lineup rather than show-up. Id.

Here, witness' description of robber & his car differed slightly from actual characteristics, & witness' identification of D occurred when police walked him through jail lobby. However, witness' description of robber was similar to D's characteristics in many ways, witness had unobstructed view of robber for several minutes & witness identified D approximately two hours & fifteen minutes after robbery. In addition, line-up was impracticable because there were no available prisoners who were same age as D. Thus, show-up of D was not performed in manner leading to misidentification of robber. Held, judgment affirmed in part & reversed in part.

TITLE: Neil v. Biggers
INDEX NO.: R.1.a.
CITE: 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)
SUBJECT: Showup suggestive but identification reliable on totality of circumstances
HOLDING: Even though station showup may have been suggestive, notwithstanding lapse of seven months between crime & confrontation, there was no substantial likelihood of misidentification. Evidence concerning out-of-court identification by victim was admissible. Victim spent up to half hour with her assailant, under adequate artificial light in her house & under full moon outdoors. Victim faced D at least twice directly & intimately. Victim's description to police included assailant's approximate age, height, weight, complexion, skin texture, build & voice. Victim had "no doubt" that D was person who raped her, & victim made no previous identification at any of showups, lineups or photo showings. Held, judgment affirmed in part, reversed in part, & remanded; Brennan, Douglas, & Stewart, JJ., concurring in part & dissenting in part.

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R.1.b Expert Testimony

TITLE: Reed v. State
INDEX NO.: R.1.b.
CITE: (2nd Dist., 10-28-97), Ind. App., 687 N.E.2d 209
SUBJECT: Indigent D's right to eyewitness identification expert
HOLDING: Tr. Ct. did not err in failing to grant funds to allow D to hire eyewitness identification expert, although D was convicted solely upon testimony of one eyewitness. D has burden of showing that expert's services are necessary to defense & precisely how she will benefit form those requested services. Scott v. State, 593 N.E.2d 198 (1992). When determining what services are necessary, Tr. Ct. should consider whether issue to which expert would testify is regarded to be within common experience of average person, or on issue for which expert opinion would be necessary, & whether expert services will go toward answering substantial question or simply ancillary one. In addition, Tr. Ct. should consider cost of expert, complexity of case, & whether State was provided with expert. Id.

Although eyewitness expert would have been remarkably helpful in this case, Ct. found no authority to require Tr. Ct. to provide expert to defense. Cases from other jurisdictions noted that problems associated with eyewitness identifications are within common experience of average person & can be addressed through cross examination of eyewitness. However, Ct. was not thoroughly convinced that average juror is conversant with likelihood or frequency with which misidentifications are made by seemingly unequivocal eyewitnesses. Although Tr. Cts. may be well advised to permit eyewitness expert testimony, flaws or serious questioning of eyewitness identification may be placed within jury's realm of understanding by careful cross- examination & by counsel's argument to jury. Held, judgment affirmed.

RELATED CASES: Beauchamp, 788 N.E.2d 881 (Ind. Ct. App 2003) (D who has managed to retain private counsel still may be found indigent for purposes of hiring an expert witness and entitled to public funds for that purpose); Woodson, 961 N.E.2d 1035 (Ind. Ct. App 2012) (even if counsel acted unreasonably or under a mistaken belief in failing to pursue hiring an expert witness on eyewitness identification, D failed to show prejudice by that failure; see full review at Y.4.b); Cook, 734 N.E.2d 563 (although Ct. acknowledges that there are times when eyewitness expert may be needed, instant case was not one; there were many eyewitnesses to crime).

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R.1.c. Jury instructions

TITLE: Alexander v. State
INDEX NO.: R.1.c.
CITE: (6/17/83), Ind., 449 N.E.2d 1068
SUBJECT: Dangers of eyewitness identification - jury instruction
HOLDING: Ct.'s failure to sua sponte give cautionary instruction re factors to be considered in determining reliability of eyewitness identification was not error. Here, D *cites* US v. Hodges (CA7 1975), 515 F.2d 650 (such an instruction is required where identification is a key issue). See also US v. Telfaire (D.C. Cir. 1972), 469 F.2d 552. KS has adopted a rule requiring instruction (State v. Warren (Kan. 1981), 635 P.2d 1236) if D requests it (State v. Tyus (Kan. 1982), 654 P.2d 947). Ind. S. Ct. refuses to adopt such a rule. Cases cited by D involve closer question regarding eyewitness identification than is present in this case. Held, no error.

RELATED CASES: Burdine, App., 646 N.E.2d 696 (D's tendered instruction placed undue attention on testimony of specific witnesses; Staten J., concurring, argued for adoption of federal caselaw requiring specific instructions on credibility of eyewitness identification testimony); Brown 468 N.E.2d 841 (no error in refusing D's tendered instruction, directing jury to consider eyewitness testimony with caution).

TITLE: Fry v. State
INDEX NO.: R.1.c.
CITE: (4/14/83), Ind., 447 N.E.2d 569
SUBJECT: Instruction - witness credibility
HOLDING: Tr. Ct. did not err in modifying D's tendered final instruction or in refusing another tendered instruction, both addressing witness credibility, where unmodified instruction stressed issues favoring defense position & refused instruction was effectively covered by other instructions given by Tr. Ct. Here, D cited US v. Telfaire (D.C. Cir. 1972), 469 F.2d 552 as authority for his tendered instruction regarding witness credibility. Ct. finds instruction was not given blanket approval by case. Instruction has been rejected in favor of a more general instruction regarding witness credibility. Wooten, App., 418 N.E.2d 538. Held, no error.

RELATED CASES: Lewis, App., 898 N.E.2d 429 (trial court did not abuse its discretion by refusing to give instruction regarding credibility of eyewitness testimony when substance of instruction was covered in the general witness credibility instruction); Farrell, 622 N.E.2d 488 (On transfer of previous decision at 612 N.E.2d 124, Ct. declined to rule on admissibility of expert testimony re reliability of eye witness identification, stating it would be resolved by applying newly-adopted Ind. Rules of Evidence); Hopkins 582 N.E.2d 345 (Although D's tendered cautionary instruction on eyewitness testimony reflected settled federal case law & mirrored concerns discussed above, Ind. law against singling out any witness' testimony, precludes such instruction, & therefore it was not error to deny it.); Anderson 499 N.E.2d 1133 (Tr. Ct. did not err in giving instruction, set forth in opinion); Hinds, App., 469 N.E.2d 31.

TITLE: Murrell v. State
INDEX NO.: R.1.c.
CITE: (4th Dist., 4-17-01), Ind. App., 747 N.E.2d 567
SUBJECT: Refusal to give cross-racial identification instruction - no error
HOLDING: In dealing in cocaine prosecution, Tr. Ct. did not err when it refused following jury instruction on cross-racial identification: You know that the identifying witness is of a different race than the D. When a witness, who is a member of one (1) race identifies a member who is of another race, we say there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness' original perception and/or the accuracy of a subsequent identification.

Notwithstanding general hazards of identification evidence in certain circumstances, Indiana law is distinctly biased against jury instructions which single out eyewitness identification testimony. Brown v. State, 468 N.E.2d 841 (Ind. 1984). Further, D has not demonstrated specific risk that identification in this case may have been mistaken due to cross-racial factors. See State v. Cromedy, 158 N.J. 112, 727 A.2d 457 (1999). Held, no error.

RELATED CASES: Miller, App., 759 N.E.2d 680 (instruction not only singled out eyewitness identification testimony, but also, its substance was covered by preliminary & final instructions that informed jury that it was exclusive judge of witness credibility & could disregard testimony of witness if it had reason to do so.)

TITLE: State v. Cromedy
INDEX NO.: R.1.c.
CITE: 158 N.J. 112 , 727 A.2d 457 (1999)
SUBJECT: Cross-Racial Identification -- Jury Instruction
HOLDING: Supreme Court of New Jersey holds that cross-racial identification instruction should be given when identification is critical issue and eye-witness' cross-racial identification is not corroborated by other evidence giving it independent reliability. Contains excellent review of scientific literature and caselaw on this subject. Appropriate instruction would be cautionary instruction which carefully delineates that jurors may consider race only within narrow context of its possible influence on accuracy and reliability of eye-witness identification.

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R.1.d. Recollection refreshed by hypnosis (see O.5.a.3 and O.12.h)

TITLE: Pearson v. State
INDEX NO.: R.1.d.
CITE: (11-12-82), Ind., 441 N.E.2d 468
SUBJECT: Reliability of eyewitness identification - Recollection refreshed by hypnosis
HOLDING: Fact that hypnosis has been used to refresh witness' recollection is a matter to be given weight by fact finder but does not result in per se witness disqualification. In every case in which hypnosis is used to refresh witness' recollection, fact finder must be presented with sufficient evidence to be able to judge reliability of witness' perception of events before hypnosis session. Factors include manner in which hypnosis procedure was conducted & degree to which witness' statements were changed by hypnosis session. In rape, robbery, battery & burglary prosecution, permitting victim to testify after undergoing hypnosis to refresh memory was not error, under circumstances in which victim had unequivocally identified D as assailant shortly after incident. Though hypnotic session was very unreliable, victim's identification of D & description of major incidents of crime did not change after hypnosis, & jury was aware of procedures used during hypnosis session & changes in victim's testimony. Held, judgment affirmed; Prentice, J., concurring.

TITLE: Peterson v. State
INDEX NO.: R.1.d.
CITE: (5-11-83), Ind., 448 N.E.2d 673
SUBJECT: Reliability of eyewitness identification - Recollection refreshed by hypnosis
HOLDING: Previously hypnotized witness was not permitted to testify in criminal proceeding concerning subject matter adduced during pretrial hypnotic interview. D was denied Sixth Amendment right to confrontation & cross-examination when witness could only identify D after being hypnotized. Hypnosis can affect recall not otherwise attainable; therefore, product is not susceptible to cross-examination & should be excluded for this reason alone. Strong, 435 N.E.2d 969. Tr. Ct. properly admitted witness' general testimony because there was independent factual basis for that testimony. However, identification testimony gained via hypnosis was inadmissible. Held, conviction reversed Hunter, J., concurring.

RELATED CASES: Stephens, 506 N.E.2d 12 (Tr. Ct.'s admission of testimony of witness who had been hypnotized constituted harmless error because witness' testimony was cumulative of other witnesses' admissible testimony).

R. IDENTIFICATION

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R.1.e. Other

TITLE: Hinds v. State
INDEX NO.: R.1.e.
CITE: (4th Dist. 10/10/84), Ind. App., 469 N.E.2d 31
SUBJECT: Admissibility of eyewitness testimony
HOLDING: Tr. Ct. did not err in allowing state's eyewitness to speculate re D's identity as man who robbed liquor store. Here, on-duty manager admitted on cross-exam that he could not positively identify D as robber. On redirect, witness testified it was "very possible" D was robber. D contends answer was pure speculation/inadmissible. Ct. distinguishes cases cited by D - this witness' testimony was based on facts within his personal knowledge. Testimony re possibilities is of slim probative value but is admissible. [Citations omitted.] Held, no error.

TITLE: Murphy v. State
INDEX NO.: R.1.e.
CITE: (4th Dist. 3/5/85), Ind. App., 475 N.E.2d 42
SUBJECT: In-Ct. identification - D not at counsel table
HOLDING: Tr. Ct. did not err in denying D's motion to be allowed to sit elsewhere than counsel table during trial. Here Ct. notes other Tr. Cts. have allowed D to sit in Ct. Room audience/participate in formalized in-Ct. lineup. US v. Williams (CA9), 436 F.2d 1166. However, D has no inherent right to such procedure & can attack denial only for abuse of discretion in that D was otherwise identified under unnecessarily suggestive conditions conducive only to irreparable misidentification. [See cases cited 475 at 47.] Ct. finds witnesses possessed independent bases for in-Ct. identifications. Held, no abuse of discretion.

R. IDENTIFICATION

R.2. Due process requirements - identification procedures

R.2.a. Photo display

TITLE: Andrews v. State
INDEX NO.: R.2.a.
CITE: (1/18/89), Ind., 532 N.E.2d 1159
SUBJECT: Unnecessarily suggestive pre-trial identification; independent basis; witness' training
HOLDING: Training given to bank teller witness regarding observation of robber during bank holdup provided independent basis for in-Ct. identification of D. Tellers made pre-trial photo I.D. of D from six-photo array, where mug shots included placard showing age, weight, & date of arrest; D argues that his large size, age, & fact arrest date shown on placard was same as date of robbery influenced identification by witnesses, & that other bank teller witness was present when first made identification. Ct. finds D's failure to object at trial to either in-Ct. identification or photo-array testimony, waived objections. Outlaw 484 N.E.2d 10. Furthermore, witnesses denied any influence from factors listed, & testified as to how their bank training had cued them to study perpetrator's face; those observations provided independent basis for identifications. Pre-trial I.D. was not unduly suggestive, nor did it taint in-Ct. I.D., Randall 455 N.E.2d 916; Hilton 454 N.E.2d 1216, & in Ct. I.D. had independent basis. Affirmed.

TITLE: Badelle v. State
INDEX NO.: R.2.a.
CITE: (5-6-82), Ind., 434 N.E.2d 872
SUBJECT: Due process requirements - identification procedures - Photo display
HOLDING: Photo display was not unnecessarily suggestive even though four of men depicted in photo display were "too big" to have been perpetrator. Photo display was not unnecessarily suggestive because all photos were those of young men, none of whose features served to suggest anything about their stature, & D's photo was not distinguished from others by virtue of his dress, hair style, or other features. Even assuming robbery victim's in-court identification testimony was erroneously admitted, error was harmless. Although victim picked two subjects out of lineup as possibly being perpetrator, he was more sure of D & no objection was made at that time or when police officer testified victim identified photo of D from challenged photo display. Held, judgment affirmed; DeBruler, J., concurring.

TITLE: Carter v. State
INDEX NO.: R.2.a.
CITE: (4-19-77), Ind., 361 N.E.2d 1208
SUBJECT: Due process requirements - identification procedures; Photo display
HOLDING: Where improper pretrial identification occurred, witness may identify accused in Ct. if subsequent identification is not product of suggestive previous identification. Here, photo display was unnecessarily suggestive where witness described man to police as having goatee & only D had goatee among those in photos displayed to witness. However, Tr. Ct. did not err in permitting witness to make in-court identification of D since she had seen D at least twice prior to crime & had good opportunity to observe him during crime. Held, judgment affirmed Prentice, J., concurring.

RELATED CASES: Bundy, 427 N.E.2d 1077 (rape victim's observation of D was sufficient to support ruling that witness' in-court identification of D was not tainted by possible improper photo display).

TITLE: Emerson v. State
INDEX NO.: R.2.a.
CITE: (10-18-72), Ind., 287 N.E.2d 867
SUBJECT: Due process requirements - identification procedures; Photo displays
HOLDING: Proper procedure for conducting pretrial identifications is to display several photos, preferably not mug shots, to witness with request that he pick out criminal. Pictures themselves should not indicate which among them, if any, police believe is criminal. Police officer displaying photos should try to do so in impartial manner, in order to insure that any selection made by witness is based on what he recalls from crime & not product of suggestive nature of procedure employed. Here, although showing robbery victim just single photo was impermissibly suggestive of D's identity, there was sufficient independent basis for victim's identification of D. Because robbery took at least several minutes, there was face-to-face confrontation, robbers wore no masks & holdup was performed during daylight hours, witness had ample opportunity to observe robbers. Held, judgment affirmed.

TITLE: Henson v. State
INDEX NO.: R.2.a.
CITE: (9/7/84), Ind., 467 N.E.2d 750
SUBJECT: Photo display - single picture
HOLDING: Showing of single picture to gas station attendant, who identified D as having been at station morning of home robbery, was not impermissibly suggestive. Use of one picture for identification purposes of suspect is not per se impermissible suggestion. Bennett, App., 416 N.E.2d 1307; Dowdell, App., 374 N.E.2d 540. Ct. must examine circumstances. Here, attendant was shown picture & asked if he had seen D in vicinity recently. Attendant was not crime victim & had no knowledge/information re crime. Ct. finds this was not photo display for identification purposes. Held, no error.

RELATED CASES: Farrell, 622 N.E.2d 488 (Use of photo array containing only three pictures not unduly suggestive, because police were unable to find more than two other individuals who sufficiently resembled D & victim had ample opportunity to view perpetrator & was 100% certain of her identification of D); but see Dorsey, 490 N.E.2d 260 (Exhibiting single photo to witness is impermissibly suggestive, *citing* Parker, 358 N.E.2d 110; however, Ct. finds in-Ct. identification of D was supported by evidence independent of single photo display: witness saw D on 2 separate occasions, once for 20 minutes); Manns, 299 N.E.2d 824 (photo display which consisted of two photos and showed to victim who was raped by two men was improper).

TITLE: Jacobs v. State
INDEX NO.: R.2.a.
CITE: (2d Dist. 10/17/83), Ind. App., 454 N.E.2d 894
SUBJECT: Photo display - suggestiveness
HOLDING: Photo display was not unduly suggestive (D's picture portrayed shortest haircut; victim had identified one burglar as having short hair) because although D had shortest haircut, he was not only individual in display with short hair. See Harris 427 N.E.2d 658 (more than one person in array was clean shaven). Hair style is only one factor considered in determining whether pretrial identification is unduly suggestive. Other factors are age, hair color, complexion, appearance, stature. Photographed individuals were not so dissimilar in features/coloring to eliminate all subjects except D. See Allen 428 N.E.2d 1237. Held, no error.

RELATED CASES: Smith 490 N.E.2d 748 (although D was only clean shaven man in array, Ct. finds likelihood of misidentification was minimal); Lawrence 476 N.E.2d 840 (fact D's hairstyle (braided) differed from others did not violate due process, *citing* Thurman 262 N.E.2d 635 & Field 333 N.E.2d 742); Stewart 474 N.E.2d 1010 (Ct. finds repetitive display of D's picture in 2 different photo arrays was not suggestive where first picture was 4 years old & second picture, showing 80 pound weight gain, which Ct. notes was "quite dissimilar" from first); James 472 N.E.2d 195 (although identifying markings on photos could constitute unnecessarily suggestive procedure by allowing witness to eliminate all but one photo, see Whitt 361 N.E.2d 913, Ct. finds no error in D's photo array); Williams 465 N.E.2d 1102 (witness told police robber had scar on chin; of 7 photos, only D's showed scar on chin; held, no error); Hoskins, App., 486 N.E.2d 593 (Ct. finds use of only 4 photos not perfect, but not overly suggestive, *citing* Johnson 277 N.E.2d 791; witness testified she didn't pay attention to plates, which showed arrest dates; held, no error).

TITLE: J.Y. v. State
INDEX NO.: R.2.a.
CITE: (3rd Dist., 10-27-04), Ind. App., 816 N.E.2d 909
SUBJECT: Suggestive photo array
HOLDING: Juvenile Ct. erred in admitting detective's testimony regarding complaining witness's (CW's) out-of-Ct. identification of D, because photo array CW looked at was impermissibly suggestive. Distinguishing Harris, 716 N.E.2d 406 & Farrell, 622 N.E.2d 488, Ct. found significant enough differences in a photo array of six juveniles which essentially comprised "two sets of photographs in the array." In a child molesting case where police were trying to identify two brothers, the array included one set of photos of three suspected, unsmiling brothers in white t-shirts & another set of three different smiling individuals in dress shirts & ties. "As a whole, the remarkable difference in appearance ... including clothing & demeanor, & the difference in the quality & composition of the two sets of photographs, render the photo array impermissibly suggestive." The Ct. also considered the totality of the circumstances including that CW could not identify the D in Ct., was unable to identify her assailants with any specificity & used the wrong name to identify a Co-D. Thus, CW's identification violated D's right to due process.

Further, Ct. found insufficient evidence to sustain delinquency finding without the photo ID based upon many of the factors of misidentification noted above. While the DNA of D's younger brother was found in van where the attack allegedly occurred & CW testified that only the younger brother ejaculated, the D was not the only older brother & the DNA evidence only supports that D could have been one of two boys who might have committed the offense. Held, judgment reversed.

RELATED CASES: Bowlds, App, 834 N.E.2d 669 (D's photo, in which he is wearing a standard-issue orange jail uniform, strongly suggests to viewer of array that he was favored target of investigation; also, same photo appeared in local newspaper, thus identification procedure was unduly suggestive).

TITLE: Neukam v. State
INDEX NO.: R.2.a.
CITE: (09-30-10), 934 N.E.2d 198 (Ind. App. 2010)
SUBJECT: Pre-trial identification - displaying photo of D to battery victim
HOLDING: In Class C felony battery prosecution, victim's pre-trial identification of Defendant as the individual who attacked him was not impermissibly suggestive. Defendant argued that the identification process was unduly suggestive because police officer showed victim only one photograph that had Defendant's name on it. A pre-trial identification may occur in a manner so suggestive and conducive to mistaken identification that permitting a witness to identify a defendant at trial would violate due process. Swigeart v. State, 749 N.E.2d 540 (Ind. 2001). A pre-trial photographic identification is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances. Id.

Here, victim was not identifying an unknown assailant. He knew what Defendant looked like from seeing photographs of Defendant and told police that Defendant was his attacker. The police showed the victim Defendant's BMV photograph, not so that the victim could identify an unknown assailant, but simply to confirm that the person victim identified was the same person as Defendant. Under these circumstances, Court could not say that this identification was impermissibly suggestive. See State v. Franklin, 121 P.3d 447 (Kan. 2005). Thus, trial court did not err in denying Defendant's motion to suppress victim's pretrial identification. Held, judgment affirmed.

TITLE: Peterson v. State
INDEX NO.: R.2.a.
CITE: (10-16-87), Ind., 514 N.E.2d 265
SUBJECT: Due process requirements - Photo display; similar-featured individuals & background
HOLDING: Due process requires exclusion of out-of-court identification where identification procedures staged by police are impermissibly suggestive & create substantial likelihood of irreparable misidentification. Here, police told witness that suspects were among those portrayed in fifteen photos. Background of photos as well as physical characteristics of persons shown in array were different. Ct. held that this was not so impermissibly & unnecessarily suggestive as to render out-of-court identification inadmissible, because D & accomplices were very different looking, causing difficulty in fairly representing them in photo array. Moreover, witness paid no attention to background of photos when selecting D's photo. Held, judgment affirmed.

RELATED CASES: Jackson, 33 N.E.3d 1067 (Ind. Ct. App 2015) (photo arrays that contained jail intake photos of five women and a Bureau of Motor Vehicles photo of D that was a higher-quality, close-up photo did not lead to misidentification, as witnesses had an independent basis for in-court identification of D); Swartz, App., 597 N.E.2d 977 (identification of D from photo lineup was not impermissibly suggestive, even though D's photo was only one in lineup with white sheet backdrop, & other photos had white cinderblock background); Opfer, 482 N.E.2d 706 (although not all six males in photo array had mustaches, as did D, & color background in photos varied, photo array was not impermissibly suggestive as to constitute reversible error); Young, 395 N.E.2d 772 (lineup was not unduly suggestive where all individuals had similar complexions).

TITLE: Popplewell v. State
INDEX NO.: R.2.a.
CITE: (10-3-78), Ind., 381 N.E.2d 79
SUBJECT: Due process requirements - Photo display; indicating picture of suspect is in photo array
HOLDING: Police practice of indicating suspect is pictured when exhibiting photos to witness needlessly decreases fairness of identification process. However, conviction based on eyewitness at trial following pretrial identification by photo will be set aside only if photo identification procedure was so impermissibly suggestive as to give rise to very substantial likelihood of misidentification. Here, given length of time & circumstances under which victim had been with D, number of photos contained in display (twelve) & their similarity in appearance, victim's prior viewing of police file photos & correct rejection of all & swiftness & certainty with which he made selection when D's photo appeared, error in indicating that suspects' photos were included in photo array did not influence victim's selection. In addition, officer's error was not deliberate effort to influence victim's choice because officer knew victim previously learned of suspects arrested. Held, judgment affirmed.

TITLE: Miles v. State
INDEX NO.: R.2.a.
CITE: (2-21-02), Ind. App., 764 N.E.2d 237
SUBJECT: Out-of-Ct. identification by arresting officer based on single photo proper
HOLDING: Arresting officer's out-of-Ct. identification of D by viewing single photograph was not unduly suggestive. While Indiana Ct.s have not addressed this particular issue, police officer could not be found through photo identification process to have impermissibly suggested to himself that person he arrested was D. State v. Manna, 539 A.2d 284 (N.H. 1988). Although extrajudicial exhibition of single photograph to victim is unduly suggestive identification procedure, here police officer was both investigator & witness to offense. Brown v. State, 577 N.E.2d 221 (Ind. 1991). Further, probability of misidentification was highly unlikely considering totality of circumstances. Officer was able to observe D on two different hand-to-hand drug buys. During each instance, officer was able to observe D's face from two to three feet away for period of five to ten minutes. Held, judgment affirmed.

RELATED CASES: Hyppolite, App., 774 N.E.2d 584 (although another police officer brought single photograph to officer for identification, officer's in-court identification was independently supported).

TITLE: Shepard v. State
INDEX NO.: R.2.a.
CITE: (5-7-80), Ind., 404 N.E.2d 1
SUBJECT: Due process requirements - identification procedures; Photo display
HOLDING: Tr. Ct. did not err in admitting into evidence photos & testimony concerning photo identification procedure involving one of robbery victims, despite D's claim that only two of six photos portrayed light-complexioned African-Americans without facial hair, & these two photos were of D & Co-D. Such differences were not any greater than might be found in set of photos showing six other persons. Police did not make any suggestion that they believed that one or both suspects might be included in photos. Thus, victim was able to identify D from own memory. Held, judgment affirmed.

RELATED CASES: Beacham, App., 336 N.E.2d 404 (even if photo display was unnecessarily suggestive, witnesses' observance of D while committing robbery was independent basis for in- Ct. identification).

TITLE: Terry v. State
INDEX NO.: R.2.a.
CITE: (2nd Dist., 11-27-06), Ind. App., 857 N.E.2d 396
SUBJECT: Pre-trial identification - showing police officers single photograph of D
HOLDING: In dealing cocaine prosecution, Tr. Ct. did not abuse its discretion in admitting testimony of police officers regarding their pre-trial identifications of D. D argued that the officers identified him pursuant to an impermissibly suggestive procedure in which the officers viewed a single photograph to make their identification. The display of a single photograph of D to a lay witness is impermissibly suggestive. Dorsey v. State, 490 N.E.2d 260 (Ind. 1986). However, when a police officer who is both an investigator & a witness views a single photograph in order to verify a suspect's identity, the identification procedure is not unduly suggestive. Miles v. State, 764 N.E.2d 237 (Ind. Ct. App 2002). Here, although pre-trial identification by officer who was responsible for investigating D's identity was not unduly suggestive, the question of whether the procedure through which three other officers made their pre-trial identifications of D is an open question in Indiana. Unlike the police officer in Miles, these officers had not been involved in the investigation of D's identity. However, Ct. did not address issue because, even if the pre-trial identifications were unduly suggestive, officers observed D during commission of crime & Tr. Ct. properly admitted the in-Ct. identifications of all four officers. Given strong indicia of reliability surrounding officers' in-Ct. identifications, any error in admission of pre-trial identifications was harmless. Held, judgment affirmed.

Note: Ct. emphasized that this holding does not endorse the procedure of obtaining pre-trial identifications from police officer witnesses by showing them single photographs.

TITLE: Wells v. State
INDEX NO.: R.2.a.
CITE: (1st. Dist., 3-18-91), Ind. App., 568 N.E.2d 558
SUBJECT: Due process requirements - identification procedures - Photo display
HOLDING: Fact that two photo arrays both contained pictures of D & detective handed victim two additional photos of D did not taint photo identification. Victim independently selected D's photo & was 80% to 90% certain D was her attacker. Victim told detective that reason for her hesitation was that angle in photo was different from angle at which she observed D. In response to victim's hesitation, detective, without comment, gave victim two additional photos of D at different angles from array. After victim picked photograph from photo array, identification was not tainted by asking victim to confirm identification through additional photos. Held, judgment reversed on other grounds.

RELATED CASES: Utley, 589 N.E.2d 232 (suggestiveness of identification procedure may be determined by degree to which circumstances of procedure & action of police officers indicated to witness which suspect to identify).

R. IDENTIFICATION

R.2. Due process requirements - identification procedures

R.2.b. Show up

TITLE: Atkins v. State
INDEX NO.: R.2.b.
CITE: (3rd Dist., 12-28-77), Ind. App., 370 N.E.2d 985
SUBJECT: Due process requirements - identification procedures; Show up
HOLDING: Test to determine whether testimony concerning pretrial identification should be suppressed because show up confrontation was suggestive is whether confrontation was so unnecessarily suggestive & conducive to irreparable mistaken identification that D was denied due process of law. Confrontations occurring immediately after crime is committed are not per se unduly suggestive, even though accused is only suspect present. Whether on-scene confrontation is overly suggestive must be determined from total circumstances. Therefore, while period of time between crime committed & confrontation is extremely important, it is not only factor to be considered. Here, where two suspects were taken to bakery immediately upon apprehension & within 10 minutes of robbery, & police did not pressure clerk or force her to identify suspects as perpetrators, on-the-scene confrontation was not unnecessarily suggestive. This was despite fact only two suspects were shown, clerk told in advance two suspects were being brought to bakery, & suspects were handcuffed when they arrived. Held, judgment affirmed.

RELATED CASES: Flowers, 738 N.E.2d 1051 (in-court identification in first trial is not considered pretrial show up in second trial); Moore, 518 N.E.2d 1093 (although D was brought back to dimly lighted scene in handcuffs for identification, identification was not impermissibly suggestive because it occurred immediately after robbery).

TITLE: Glover v. State
INDEX NO.: R.2.b.
CITE: (11/30/82), Ind., 441 N.E.2d 1360
SUBJECT: Showup
HOLDING: Identification procedures so suggestive as to give rise to substantial likelihood of misidentification violate D's due process rights. Simmons v. US (1968), 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247; Sawyer 298 N.E.2d 440. It is permissible for police officer to present suspect for identification within a few hours of commission of crime. Coffee 426 N.E.2d 1318. Policy supporting showups: value of witness' observation of suspect while image of offender is fresh. Zion 365 N.E.2d 766; McPhearson 253 N.E.2d 226; Lewis 250 N.E.2d 358. Here, D was stopped several minutes after crime, but no positive identification by companion of victim was made. About 2 hours later, D was stopped again & positively identified by victim. D alleged error in admission of testimony regarding pretrial identification because police employed impermissibly suggestive identification procedures. Ct. finds pretrial identifications not unnecessarily suggestive. Held, no error in admission of testimony or in-Ct. identification.

RELATED CASES: Rasnick, 2 N.E.3d 17 (Ind. Ct. App 2014) (where victims got a close look at D, including seeing a black tattoo on his calf, show-up identification was not unduly suggestive as victims immediately and unequivocally identified D at arrest scene within 30 minutes of realizing that items were missing from their dorm room); Mitchell, App., 690 N.E.2d 1200 (show-up was not performed in manner leading to misidentifcation of robber; see card at R.1.a); Underwood, 644 N.E.2d 108 (R.2.b. (requiring D to get out of police car so victim could identify him while he was handcuffed was not impermissibly suggestive because it occurred short time after commission of crime); Dishman, 525 N.E.2d 284 ((identification was admissible in robbery prosecution, even though victim was brought to scene of arrest for identification); Brown 497 N.E.2d 1049 (Crim L 339.8(3); victim identified D, who stood on lineup stage with getaway driver, 40 minutes after robbery; held, confrontation was not unduly suggestive); Coker 455 N.E.2d 319 (returning D, handcuffed & in police car, to scene not unduly suggestive, *citing* Hill 442 N.E.2d 1049).

TITLE: Head v. State
INDEX NO.: R.2.b.
CITE: (12/14/82), Ind., 443 N.E.2d 44
SUBJECT: Showup
HOLDING: Evidence concerning victim's identification of D at one-on-one confrontation 3 weeks after robbery was improper; however, independent basis existed for in-Ct. identification. Here, victim had picked D's picture out of police mug book & again identified D's picture in photo display. Eighteen days after crime, D demanded victim be required to identify him face to face. Victim was asked to come to station on pretense of having personal items returned to him. Victim viewed D through open door, through one-way mirror & face to face. No line-up was conducted. Ct. finds procedures were unnecessarily & impermissibly suggestive (Carmon 349 N.E.2d 167); however, in light of other unequivocal identification, error is harmless. Held, conviction affirmed.

TITLE: Hicks v. State
INDEX NO.: R.2.b.
CITE: (4/30/86), Ind., 491 N.E.2d 996
SUBJECT: Show-ups - fortuitous
HOLDING: Tr. Ct. did not err in allowing evidence of in-Ct. identification (ID) & out-of-Ct. ID. Here, D broke into home, forced man into closet & attempted to assault a woman who successfully defended herself & shot D. When victim went to hospital for treatment, police advised her that person who might fit description was also there. She looked into cubicle & ID'd D, as well as his clothing. Her husband later ID'd D in same manner. Ct. likens case to Zion 365 N.E.2d 766, in which detective took rape victim to restaurant several days after offense intending that victim could view D as he went to work. D was already in restaurant, so detective brought him out, informed him he was a suspect, & that police would like to meet with him later. Victim remained in car about 15 feet away & ID'd him as her attacker. In Zion, Ct. held initial plan was proper & resulting ID evidence was allowable because of exigent circumstances police faced after failure of initial plan & because elapsed time between commission of offense & one-on-one confrontation was "not of such a magnitude as to lead to a substantial likelihood of mis-ID." Ct. finds Zion similar to this case. When victim ID'd D, he was not in police custody & did not know he was a suspect. Level of police involvement was substantially less than in Zion. Victim went to hospital for treatment; it was only fortuitous that D happened to be there. Victim ID'd D 30 minutes after offenses, during which she observed him for 20 minutes. Held, no error.

RELATED CASES: Woodard, 470 N.E.2d 336 (Crim L 339.8(2); held, showup was not unduly suggestive where D was stopped for possible vehicle violation & victim, who happened to be in police car, ID'd him; D was in public place rather than police custody & was unaware victim observed him).

TITLE: McBride v. State
INDEX NO.: R.2.b.
CITE: (8/15/2013), 992 N.E.2d 912 (Ind. Ct. App 2013)
SUBJECT: Show-up identification not unduly suggestive
HOLDING: Although one-on-one show-up identifications are inherently suggestive, identification evidence gathered via a show-up procedure is not subject to a per se rule of exclusion in accordance with the fundamental error doctrine. Gordon v. State, 981 N.E.2d 1215 (Ind. Ct. App 2013). Rather, the admissibility of show-up identification evidence turns on an evaluation of the totality of circumstances and whether those circumstances lead to the conclusion that the confrontation was conducted in a manner that could guide a witness into making a mistaken identification.

Here, the crime scene was well-lit, and surveillance video showed that mask did not completely hide facial features of robbers. One of the victims testified that he could see the shape of the faces of two of the robbers because the masks were very thin. The show-up identification also occurred soon after the robbery, and the other witnesses presented testimony regarding their identification of D. State presented surveillance video at trial and evidence that D and his accomplice were apprehended wearing the same clothes the robbers were said to have been wearing with other stolen items found were they were apprehended.

Court rejected D's argument that show-up identification was unduly suggestive because the witnesses were told by police that they had recovered the stolen property from them before the witnesses were asked to make the identification. Held, judgment affirmed.

TITLE: N.W.W. v. State
INDEX NO.: R.2.b.
CITE: (2nd Dist., 12-31-07), Ind. App., 878 N.E.2d 506
SUBJECT: Show-up identification - waiver of issue; contemporaneous objection rule
HOLDING: Juvenile waived any objection to admissibility of show-up identification evidence by failing to make timely & specific objections at denial hearing. See Lewis v. State, 755 N.E.2d 1116 (Ind. Ct. App 2001). Instead, juvenile relied on, & juvenile court accepted, a post-hearing motion to suppress the show-up identification evidence. Court strongly disapproved of trial counsel's "high-stakes 'gotcha'" tactic & held that the constitutionality of show-up identification & admissibility of that evidence should have been litigated via a pre-hearing motion to suppress or a specific & timely objection during the State's case in chief. Held, juvenile court's true finding that D committed robbery affirmed.

TITLE: Olson v. State
INDEX NO.: R.2.b.
CITE: (12-11-90), Ind., 563 N.E.2d 565
SUBJECT: Due process requirements - identification procedures - Showup
HOLDING: Ct. held one-on-one confrontations, though inherently suggestive, are not per se improper. In determining whether particular showup is unduly suggestive, factors to be considered include: (1) length of initial observation of D by person identifying him, (2) lighting conditions, (3) distance between witness, (4) witness' capacity for observation & his level of certainty, (5) discrepancies between witness' initial & actual description, & (6) any identifications of another person. Here, victim observed D prior to & during robbery, which occurred on clear & sunny day. In addition, victim identified D as robber within three hours of robbery & his identification was similar to his earlier description of D. Held, judgment affirmed; Dickson, J., concurring.

TITLE: Samaniego v. State
INDEX NO.: R.2.b.
CITE: (4-24-90), Ind., 553 N.E.2d 120
SUBJECT: Due process requirements - identification procedures - Showup
HOLDING: Identification of D at jail by various witnesses, through window in cell a few hours after victim was attacked, was not impermissibly suggestive. In determining whether particular identification is impermissibly suggestive, Ct. will consider whether substantial likelihood of misidentification existed in light of all circumstances. Police line-ups conducted some time after occurrence under which D is charged are unnecessarily suggestive. However, it is entirely proper for witnesses to view accused short time after occurrence when their recollections are fresh & many times accused is wearing same clothing. Held, judgment affirmed; DeBruler & Dickson, JJ., concurring.

RELATED CASES: Gray, 563 N.E.2d 108 (D's identification was not illegally suggestive, even though D was only black person at scene not wearing police uniform & identified at location different from where robbery occurred); Dewey, 345 N.E.2d 842 (pre-indictment identification procedure whereby D was exhibited to kidnaping & rape victims in "showup" at hospital approximately 6 hours following commission of crimes was not so unduly suggestive as to have "tainted" victims' in-court identifications of D where it was clear from testimony of victims that they had bases for their in-court identifications independent of hospital showup).

TITLE: Wethington v. State
INDEX NO.: R.2.b.
CITE: (10/4/90), Ind., 560 N.E.2d 496
SUBJECT: Identification (ID)- show-up; impermissibly suggestive
HOLDING: Show-ups between victims & suspects 2 hrs. after robbery, & again another hour later, with prominent display of weapons taken from suspects, were impermissibly suggestive. D was charged with robbery, & at trial, victims identified D & also testified about 2 prior IDs of him. First ID occurred 2 hrs. after alleged robbery, at scene of D & co-D's arrest, with 3 police cars & 7 officers present. D & co-D were handcuffed & wearing plaid shirts as victims had described robbers, standing next to officer who was much taller & was wearing solid color shirt. Gun & knife taken from D were in prominent view. One hour later, victims were taken to fire station, where numerous officers were milling around. Gun, knife, gloves & package were prominently displayed, & D & co-D were then brought in, alone & one at a time, to be identified by victims. Again, numerous police officers were milling around. Ind. S. Ct. finds these pre-trial show-ups deserving of strongest judicial condemnation. Displaying suspects to victims, with items of physical evidence prominently featured & with so many law enforcement officials present, was highly suggestive of guilt & totally unnecessary. No exigent circumstances existed which precluded setting up properly constituted lineup, & intervening time & events between robbery & confrontations negated freshness of image in minds of victims as justification for one-on-one show-up. Testimony regarding ID of D at both encounters should have been suppressed. However, Ind. S. Ct. finds independent basis for victims' in-Ct. ID of D, so that it was properly allowed. (See Wethington review at R.5.c). Testimony regarding pre-trial IDs by same witnesses was harmless error. Held, affirmed.

RELATED CASES: Black, 79 N.E.3d 965 (Ind. Ct. App 2017) (although 5-hour time elapse between robbery and show-up identification was unnecessarily suggestive, any error in admitting the identification into evidence was harmless because victim was able to identify D at trial independent of the show-up), Rasnick, 2 N.E.3d 17 (Ind. Ct. App 2014) (where victims got a close look at D, including seeing a black tattoo on his calf, show-up identification was not unduly suggestive as victims immediately and unequivocally identified D at arrest scene within 30 minutes of realizing that items were missing from their dorm room); Hubbell, 754 N.E.2d 884 (single person line-up was unduly suggestive, but error was harmless).

TITLE: Whitlock v. State
INDEX NO.: R.2.b.
CITE: (10-19-81), Ind., 426 N.E.2d 1292
SUBJECT: Due process requirements - identification procedures; Showup
HOLDING: Confrontations between eyewitnesses & suspects immediately after crime is committed are permitted because it is valuable to have witnesses view suspect while offender's image is fresh in their minds. Showup of D to victim 45 minutes after armed robbery was not unduly suggestive, even though victim was advised she was going to view "suspect." When D was identified, he was one of two African-American males handcuffed & flanked by police officers. Any suggestiveness in one-on-one confrontation between victim & D did not taint victim's in-court identification of D. Victim had opportunity to view perpetrator for five minutes, lighting was adequate & victim had clear view of perpetrator, who was approximately one foot from victim during crime. Held, judgment affirmed.

R. IDENTIFICATION

R.2. Due process requirements - identification procedures

R.2.c. Lineup

TITLE: Bray v. State
INDEX NO.: R.2.c.
CITE: (12/29/82), Ind., 443 N.E.2d 310
SUBJECT: Lineup - police should not advise witness that suspect is in display
HOLDING: Witness may not be informed that a suspect is present in the lineup. Sawyer 298 N.E.2d 440. Here, D contended police told witness that suspect arrested in area of burglary was in lineup. Witness testified at trial that police said nothing of the kind. Held, no proof of error.

RELATED CASES: Williams 477 N.E.2d 96 (card at R.3.c); Randall 474 N.E.2d 76 (Crim L 339.8(3); police statement to witnesses that there were suspects to observe in Muncie was general statement, not impermissibly suggestive when considered in context made); Woodson 466 N.E.2d 432 (placement of witness to more squarely confront one person in lineup presents slight suggestion that one is suspect; held, reversal not required); Williams, 419 N.E.2d 134 (even if police told victim that D would be in line-up, testimony of line-up was cumulative of other evidence of D's identification).

TITLE: Bray v. State
INDEX NO.: R.2.c.
CITE: (12/29/82), Ind., 443 N.E.2d 310
SUBJECT: Lineup - procedure
HOLDING: In determining whether lineup was impermissibly suggestive, Ct. examines totality of physical characteristics of subjects. Stovall v. Denno, (1968) 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; Hill 370 N.E.2d 889. Here, D was shortest man in lineup (5'6", 158 lbs). Others ranged from 5'9", 150 lbs to 6'2", 180 lbs. D was positioned next to tallest man in lineup. D *cites* Griffin, App., 357 N.E.2d 917, but Ct. distinguishes case (two-man lineup, other man "markedly taller"). Ct. examines other physical characteristics of subjects (hair, facial hair, complexions, build) & finds lineup was not unduly suggestive because of discrepancy in height. Allen 428 N.E.2d 1237; Hill. Held, no error.

RELATED CASES: Stacks, App., 372 N.E.2d 1201 (lineup consisting of four participants whose hair color & complexion were markedly different from D's was not impermissibly suggestive when lineup occurred one hour after robbery).

TITLE: Foster v. California

INDEX NO.: R.2.c.

CITE: 394 U.S. 440, 89 S.Ct. 1127 (1969)

SUBJECT: Due process requirements - identification procedures; lineup was impermissibly suggestive

HOLDING: Although Supreme Ct. decisions relating to right of accused to be represented by counsel at lineup were inapplicable to case in which lineup occurred before date of those decisions, judged by totality of circumstances, conduct of identification procedures may be so unnecessarily suggestive & conducive to irreparable mistaken identification as to be denial of due process independent of any assertion as to denial of right to counsel at lineup. Here, accused was first placed in lineup with considerably shorter men, & after no positive identification, was placed in one-to-one confrontation arranged with robbery victim. Ct. held that procedure was so unnecessarily suggestive & conducive to irreparable mistaken identification as to be denial of due process. Reliability of properly-admitted eyewitness identification, like credibility of other parts of prosecutor's case, is generally matter for jury. However, in some cases, such as here, procedures leading to eyewitness identification may be so defective as to make identification constitutionally inadmissible as matter of law. Held, judgment reversed & remanded; White, Harlan, Stewart, & Black, JJ., dissenting.

TITLE: Harris v. State
INDEX NO.: R.2.c.
CITE: (08-25-93), Ind., 619 N.E.2d 577
SUBJECT: Pretrial lineup identification (ID) not impermissibly suggestive
HOLDING: Under totality of circumstances, pretrial lineup ID was not impermissibly suggestive, & in-Ct. ID was also properly admitted. Gunman fired fatal shot into one victim's head, & turned toward other victim, looked at her, aimed gun & fired, but missed. Survivor initially described gunman as wearing tennis shoes, jeans & long coat, & having dark shoulder-length hair & dark eyes. Two weeks later she made composite picture but wasn't sure of its accuracy. Picture included description of gunman as Caucasian.

Two months later newspaper ran article on recent murders, including photo of African American & victim said man was definitely not gunman. She also now said gunman was hispanic, not caucasian. Month later another article included photo of D, & victim said she looked at photo, but did not read article. Two weeks later victim identified D as gunman from among 9 subjects. Lineup included 7 African American & 2 Hispanic men, with similar physical attributes. At trial victim made positive ID of D.

Standard of review is whether, under totality of circumstances, pretrial confrontation was so suggestive & conducive to mistaken ID that D was denied due process, Stovall v. Denno, 388 U.S. 293, Brooks, 560 N.E.2d 49. Although witness first described gunman as caucasian & none were used in lineup, participants generally had same physical attributes. Viewing of photo did not taint ID because there was no showing police or prosecutor discussed picture with victim prior to lineup or were responsible for circumstances surrounding published photo. Ct. concluded witness had independent ID of D & both pretrial & in-Ct. ID were admissible. **Note:** Ct. also noted pretrial ID must be relevant to be admissible, & if in-Ct. ID is not impeached, there is no reason to admit pretrial ID.

TITLE: Owens v. State
INDEX NO.: R.2.c.
CITE: (11-5-81), Ind., 427 N.E.2d 880
SUBJECT: Due process requirements; Lineup; no requirement of D's cooperation
HOLDING: Propriety of lineup was upheld, despite D's assertion he was made to stand in lineup against his will because detective stated D would be released if he "beat" lineup. Police may conduct lineup without D's cooperation. Ct. has consistently upheld pretrial identification procedures where D was unaware of witness observing him. Zion, 365 N.E.2d 766. Held, judgment affirmed.

TITLE: Parsley v. State
INDEX NO.: R.2.c.
CITE: (8/15/90), Ind., 557 N.E.2d 1331
SUBJECT: Suggestive pre-trial lineup - photo array
HOLDING: Pretrial identification procedures were not so impermissibly suggestive as to require suppression of pretrial ID or to prevent in-Ct. ID. D was charged with armed robbery, & at trial, victim IDed D as man he had viewed for about one & one-half minutes during robbery. Victim described robber as being 5'11" to 6' tall, in his late 30s, with greasy blond hair, wearing dirty baseball cap & with several day's facial stubble. D was 5'8", 44, & had brown hair. Day after robbery, victim went to police station & looked at approximately 50 photos in mug books. When he saw picture of Michael Stone, he shook & said, "this man is very similar" to robber. Stone resembled initial description given by victim, & victim noted that he bore resemblance to robber in eyes, brow, & skull shape. Two months later, police showed victim 5 photos, including one of D but not of Stone. Victim did not make positive ID of D at this time. Two weeks later, victim IDed D in 5-man lineup, which did not include Stone. Each wore baseball cap, which he was asked to remove & replace. Victim noted that D was only one in lineup to place cap on head exactly as robber had. Tr. Ct. denied D's motion to suppress evidence of pretrial lineup & to prevent in-Ct. ID. On appeal, S. Ct. rejects argument based on discrepancy between D & victim's initial description, since all men in lineup resembled one another. Neither does Ct. find lineup impermissibly suggestive because D had more facial hair than others, since others had some. Ct. also finds that Stone's absence from second photo-array & at lineup did nothing to suggest to victim that he should pick D from group of photos or people who resembled each other. Finally, Ct. rejects argument that inclusion of D's photo in array prior to lineup including D was impermissibly suggestive, since victim had not IDed D's photo. Held, conviction affirmed.

TITLE: Patterson v. State
INDEX NO.: R.2.c.
CITE: (3-20-79), Ind., 386 N.E.2d 936
SUBJECT: Due process requirements - lineup; number of persons required in lineup
HOLDING: Generally, lineups of only three or four individuals are considered inadequate. However, absent any other suggestive factors, mere fact that lineup, at which D was identified as robber, consisted of only three persons did not render lineup so suggestive as to provide unreliable identification. In addition, any suggestiveness involved in lineup, at which witnesses identified D as robber did not preclude witness from making in-court identification of D, in view of fact that victim's opportunity to view robber, who did not wear mask & was observed by witness several minutes before robbery, provided adequate basis for in-court identification independent of lineup. Held, judgment affirmed.

RELATED CASES: Long, 385 N.E.2d 191 (improper lineup where there were only four people in lineup & those four were made to say their names & addresses when witness knew D's name).

TITLE: White v. State
INDEX NO.: R.2.c.
CITE: (12-13-79), Ind., 397 N.E.2d 949
SUBJECT: Identification procedures - Lineup; effect of prior confrontation
HOLDING: Victim's identification of D from group of people & from lineup was proper because there was no record of victim ever misidentifying or failing to identify D. Victim identified D twice prior to lineup; once, when D drove by in car & victim was in another car with police, & another time, when victim viewed D & group of people through binoculars. Fact that victim initiated view of D at his home by spontaneously recognizing him as he drove by & victim testified that during attack she had tears in her eyes & had eyes closed during part of attack did not render lineup inadmissible. Men in lineup were of approximately same age, height, general description & were similarly dressed. Victim testified she observed D in daylight & looked straight at him at one point. Held, judgment affirmed.

RELATED CASES: Blacknell, 502 N.E.2d 899 (face-to-face confrontation between witnesses & D during crime provided independent sufficient basis).

R. IDENTIFICATION

R.2. Due process requirements - identification procedures

R.2.d. Identification

TITLE: Heck v. State
INDEX NO.: R.2.d.
CITE: (4/6/90), Ind., 552 N.E.2d 446
SUBJECT: Identification (ID) - voice; suggestive pretrial ID
HOLDING: Fact that witness listened to police recording of D's voice, at her request, before trial, did not taint her in-Ct. ID of D's voice as one she heard on night victim was killed. D was convicted of voluntary manslaughter in death of wife. Witness testified that she heard victim, who lived next door, arguing with man on night victim disappeared, & that while she could not identify D's face, she could identify his voice. On appeal, D challenges this testimony. Opinion does not indicate motion to suppress or objection to in-Ct. ID, & D apparently challenges weight of evidence in context of sufficiency challenge. D argues that in-Ct. voice ID was tainted by impermissibly suggestive pretrial ID. During investigation of killing, witness went to police & asked to hear voice of D on tape. Police complied, & witness verified that D's voice was same voice she heard on night victim disappeared. While it is impermissibly suggestive for police to inform lineup observer that suspect is in lineup, [citations omitted], witness initiated pretrial ID herself. Ind. S. Ct. finds it conscientious attempt to ensure that ID was correct, & sees nothing that would taint in-Ct. ID. DeBruler, J., DISSENTS, arguing that pretrial ID was so suggestive as to render in-Ct. ID inadmissible.

TITLE: Matthews v. State
INDEX NO.: R.2.d.
CITE: (2-9-88), Ind., 518 N.E.2d 807
SUBJECT: Due process requirements - identification procedures - Voice identification
HOLDING: Voice identification procedure was not unduly suggestive, & thus testimony regarding voice identification was admissible. Voice identification procedure in which witness identified D's voice as that of person who threatened murder victim & witness was admissible, notwithstanding any alleged failure to get participant with voices similar to D's. Here, procedure involved six African-American men, including D, reading from prepared statement. Procedure used to make voice identification was not unnecessarily suggestive. Same safeguards should be followed in voice identification as followed in visual identification. In both cases, suspect is being confronted by prospective witness. Held, judgment affirmed.

TITLE: Spears v. State
INDEX NO.: R.2.d.
CITE: (1-14-70), Ind., 254 N.E.2d 196
SUBJECT: Identification procedures - Showup
HOLDING: D was not denied due process by one-on-one pretrial confrontation taking place between D & deputy who identified D in Ct. Confrontation took place in county jail where it appeared only reason confrontation occurred at all was because deputy was one of officers on duty at county jail at time D was brought in to be committed. Because there was no evidence that confrontation was staged for identification purposes, confrontation did not violate due process. Held, judgment affirmed.

TITLE: Wagner v. State
INDEX NO.: R.2.d.
CITE: (2/14/85), Ind., 474 N.E.2d 476
SUBJECT: Voice identification
HOLDING: Tr. Ct. did not err in refusing to suppress voice identification of D. Here, 5 white males with no distinctive speech accents repeated certain phrases communicated to victim by D. Victim did not see individuals & was not told suspect was in lineup. After all 5 read several phrases, victim asked #2 to repeat phrases. Victim then identified #2 (D) as perpetrator. There was no showing that lineup was impermissibly suggestive in any manner. See Smith 432 N.E.2d 1363; Ingram 421 N.E.2d 1103; Porter 397 N.E.2d 269. D did not object when voice identification evidence was admitted, thus waiving any further consideration of issue. Held, no error.

R. IDENTIFICATION

R.2. Due process requirements - identification procedures

R.2.e. Other

TITLE: Griffin v. State
INDEX NO.: R.2.e.
CITE: (5/28/86), Ind., 437 N.E.2d 439
SUBJECT: Due process - in-Ct. identifications
HOLDING: Circumstances of victim's in-Ct. identification of D did not deny D due process. Here, D argues victim's identification was unduly suggestive because he was the only black person in the Ct. Room. Ct. finds there is degree of suggestiveness inherent in all in-Ct. identifications. Practical necessity of having D sit at defense table with attorney naturally sets D apart from everyone else in the Ct. Room. Emerson 255 N.E.2d 532. This type of suggestiveness cannot be avoided because D has constitutional right to attend trial & confront witnesses. Absent any extraordinary effort to single out D at trial, in-Ct. identification is not unduly suggestive where witness is firm in his/her identification of the assailant. Holland 412 N.E.2d 77. Due process does not require that victim identify assailant from Ct. Room containing people of similar physical characteristics. Both victim & accomplice identified D as assailant. Held, conviction affirmed.

R. IDENTIFICATION

R.3. Mug Shots

TITLE: Kelley v. State
INDEX NO.: R.3.
CITE: (3/5/84), Ind., 460 N.E.2d 137
SUBJECT: Mug shots - photo admitted toshow change in appearance/other circumstances
HOLDING: Tr. Ct. did not err in admitting photograph of D (frontal pose showing D wearing jacket used in robbery, barred jail wall visible). Here, D objected to photo as a mug shot. Ct. is unconvinced photo is a mug shot. Purpose of photo was to preserve image of D at time of arrest. It was product of police procedures to secure evidence for trial if, as was case here, D changed in appearance at trial. Jail bars shown in photo are not prejudicial when other direct evidence is offered that D was in jail. Lowery 434 N.E.2d 868. Held, no error.

RELATED CASES: Walker 471 N.E.2d 1089 (where state covered lower portion of pictures (bearing ID plate) in effective manner, photo was admissible to show D's change in appearance from date of molestation to trial). OTHER CIRCUMSTANCES: Rhinehardt 477 N.E.2d 89 (no error in admission of photo of D shown handcuffed to chair in mall security office; Ct. rejects D's contention that photo presented inference of prior criminal activity; here jury was informed of circumstances).

TITLE: Martin v. State
INDEX NO.: R.3.
CITE: (9/29/83), Ind., 453 N.E.2d 1001
SUBJECT: Mug shots - identification plate masked
HOLDING: Tr. Ct. did not err in admitting mugshot of D into evidence where state covered prejudicial material (identification plate); fact that small portion of chain holding plate was still visible does not require reversal. Here, D contends jury could infer from photograph that he had a prior arrest. Photograph of D had "substantial evidential value, independent of other evidence" (robbery victim identified D from photographic display). Strong 435 N.E.2d 969. Ct. distinguishes Miller 436 N.E.2d 1113 (no attempt to conceal inadmissible portions of photo) & Strong (attempted concealment was inadequate). In both Miller & Strong, Ds testified without any mention of any prior record; credibility was significant factor in their defenses. In this case, D did not testify; his credibility was never an issue. Objectionable material on photo was "adequately obfuscate[d]." Held, no error.

RELATED CASES: Jenkins, App., 677 N.E.2d 624 (no error in admitting photographic array, which was highly probative re identity issue, where state redacted all information identifying photos as "mug shots," & no witness explicitly referred to photo as "mug shot"); Menifee, 512 N.E.2d 412 (photo lineup made from mug shots was admissible where information at bottom of picture was completely eliminated and only frontal poses were included); Graves, 496 N.E.2d 383 (although state made no effort to disguise mugshots contained in exhibit, Ct. finds D was not prejudiced because jurors never saw photos; appearance of book itself may contain slight prejudice, but Ct. finds prejudice outweighed by probative value: book was graphic illustration of procedure by which victim identified D; opinion vacates 4th Dist. opinion at 482 N.E.2d 1169); Ashley, 493 N.E.2d 768 (although criminal history was printed on back of photo of another in photo display introduced at trial, Tr. Ct. did not err in admitting display into evidence because D's photo did not have criminal history on back and identification on photos was concealed); Hovis, 455 N.E.2d 577 (Ct. disapproves state's failure to disguise fact photo was mug shot; reversal not required because D did not object on proper grounds); Howell, App., 493 N.E.2d 473 (no error in admission of 8.5" x 11" display of 9 males where prejudicial information was adequately covered; mechanics of covering described in opinion); Hudson, App., 462 N.E.2d 1077 (Ct. does not condone prosecutor's failure to mask mug shots introduced to identify D who was absent from trial; introduction (without objection) was not fundamental error).

TITLE: McHenry v. State
INDEX NO.: R.3.
CITE: (3rd Dist., 3-24-80), Ind. App., 401 N.E.2d 745
SUBJECT: Mug shots - admissible when D fails to appear
HOLDING: Tr. Ct. did not err in admitting D's mug shot & in-court photo identification. Unless D testifies or otherwise puts character in issue, mug shots generally are inadmissible because they tend to imply or prove D has criminal record. Admission of D's mug shot & allowing mug shot to go to jury room was not improper in this case because D chose not to appear at trial, & mug shot was only means available by which crime victim could identify D. In addition, suggestiveness of one-on-one showup conducted approximately one hour after crime was committed was not unduly suggestive as to make in-court identification of D inadmissible. Held, judgment affirmed.

RELATED CASES: Alvarez, 983 N.E.2d 626 (Ind. Ct. App 2013) (no error in admitting mug shot from prior arrest where it was redacted to remove references to D's prior arrest, and neither State nor its witnesses referred to the origin of the mug shot).

TITLE: Pettiford v. State
INDEX NO.: R.3.
CITE: (4-29-87), Ind., 506 N.E.2d 1088
SUBJECT: Mug shots - suspects with similar features
HOLDING: Witness' identifying D from mug shots of persons of like facial features, including facial hair, was not unduly suggestive, absent showing that officers made any suggestion to witness concerning potential identification. Submitting photos for potential witness's identification is unduly suggestive only where display is accompanied by officers' graphic or verbal communications. Mere number of photos submitted for potential witness' identification does not render identification unduly suggestive. Here, witness also had opportunity to view D during commission of crime. Held, judgment affirmed.

RELATED CASES: Rhyne, 446 N.E.2d 970 (identification procedure was not unduly suggestive where robbery witness looked at hundreds of mug shots depicting men of similar identifying characteristics).

TITLE: Smith v. State
INDEX NO.: R.3.
CITE: (2/18/83), Ind., 445 N.E.2d 85
SUBJECT: Mug shots - harmless error/no error
HOLDING: Where D testifies, he has prior convictions, error in admission of photographic array is harmless. Here, array of 10 police file photographs were admitted into evidence after D cross-examined victim of armed robbery concerning his identification of D. Ct. finds state's "meager attempt" to conceal prejudicial portions of photos (plate bearing identifying information) insufficient; photos should not have been admitted without additional alteration to decrease potential prejudicial impact. However, Ct. finds reversal not required, distinguishing Strong 435 N.E.2d 969, because D placed before jury direct evidence of prior crimes which was merely inferred by prejudicial mug shot. Held, conviction affirmed.

RELATED CASES: NO ERROR: Dziepak 483 N.E.2d 449 (no error in admission of mug shot where picture was taken during arrest for this crime, it established that fingerprints on booking card belonged to D & D testified re prior convictions); Rhinehardt 477 N.E.2d 89 (no error in admission of photo of D shown handcuffed to chair in mall security office; Ct. rejects D's contention that photo presented inference of prior criminal activity; here jury was informed of circumstances).

TITLE: Splunge v. State

INDEX NO.: R.3.

CITE: (10-25-94), Ind., 641 N.E.2d 628, superseded by I.R.E. 403 as stated in Wheeler v. State, 749 N.E.2d 1111 (Ind. 2001)

SUBJECT: Mug shots - required redaction

HOLDING: Tr. Ct did not err in admitting mug shot photos of D as part of photo array placed in evidence during testimony of eyewitness to crime. Although identity was not really issue at trial & photos had little probative value, photos were carefully redacted to prevent disclosure of any of D's past; there was no substantial evidence of D's guilt presented. Although mug shot is not per se inadmissible, it should only be admitted with caution since typical mug shots with front & side profile are likely to imply prior arrest record. Held, judgment affirmed; Sullivan & DeBruler, JJ., dissenting.

RELATED CASES: Wheeler v. State, 749 N.E.2d 1111 (Ind. 2001) (although test governing admission of mug shots set forth in Splunge is similar to Indiana Rule of Evidence 403, the formulation was derived from cases decided before the adoption of the Indiana Rules of Evidence. The rules themselves set forth the current formulation to the extent they address an issue specifically).

TITLE: State v. Clanton
INDEX NO.: R.3.
CITE: (3d Dist. 10/26/82), Ind. App., 441 N.E.2d 44
SUBJECT: Mug shots - witness' reference to
HOLDING: Mug shots are generally inadmissible because may suggest, to jury that D has a criminal record. Blue 235 N.E.2d 471; Vaughn 19 N.E.2d 239. Mug shots may be admitted if of substantial independent value as evidence & not unduly prejudicial. Strong 435 N.E.2d 969; Gray 374 N.E.2d 518. Mere reference to "mug shots" may require reversal (Fox, App., 399 N.E.2d 827) unless made inadvertently or if other evidence of guilt is strong (Phillips, App., 369 N.E.2d 434; Bayer, App., 303 N.E.2d 678; Angel, App., 292 N.E.2d 268). Here, robbery victim testified he was shown "pictures"/ "photos"/ "photographs" at police station. Neither prosecutor nor any witness referred to "mug shots." Evidence of pretrial identification is admissible at trial provided identification procedure does not violate D's right to counsel & is not unduly suggestive. Johnson 281 N.E.2d 473 (pre-trial lineup case made applicable to pretrial photographic array by Daye 356 N.E.2d 213). Held, Tr. Ct. grant new trial in response to PCR was error.

RELATED CASES: Vanzandt, App., 731 N.E.2d 450 (witness' inadvertent reference to mugshots did not require reversal where prosecutor attempted to cure any negative inference from the reference); Tucker, App., 646 N.E.2d 972 (reference to mug shot & child molesting conviction together prejudiced D & deprived him of fair trial); Coleman 490 N.E.2d 325 (reference to mug shots was inadvertent; evidence of guilt was strong & admonition cured error); Edwards 466 N.E.2d 452 (officer testified he showed victim "mug shots;" admonishment given; reversal not required because D shows no harm); Jackson 462 N.E.2d 63 (no error in admission of "photograph books"); Conley 445 N.E.2d 103 (detective's volunteered statement that he obtained D's picture from another police department not error where jury was admonished; D not placed in position of grave peril).

R. IDENTIFICATION

R.4. Right to Counsel (U.S. v. Wade)

R.4.b. Lineups

TITLE: Bray v. State
INDEX NO.: R.4.b.
CITE: (12/29/82), Ind., 443 N.E.2d 310
SUBJECT: Lineups - right to counsel
HOLDING: Accused is entitled to have counsel present at lineup conducted subsequent to filing of information or indictment. Kirby v. IL, (1972) 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed.2d 411; US v. Wade (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; Winston 323 N.E.2d 228; Hatcher 414 N.E.2d 561. Lineup conducted prior to filing of information or indictment is not a "critical stage" necessitating presence of counsel in order to preserve D's right to a fair trial. Carman 396 N.E.2d 344. Here, pre-information lineup conducted. No written waiver of counsel was obtained from D. When arrested on current charges, D was on bond on unrelated charges. D maintains phrase "formally charged with any criminal offense" from Kirby & Winston entitled him to counsel at lineup for present charge since adversary proceedings had been initiated against him for albeit an unrelated charge. Ct. finds word `any' cannot be taken literally. Held, no error.

R. IDENTIFICATION

R.4. Right to Counsel (U.S. v. Wade)

R.4.b.1. Pre-indictment

TITLE: Little v. State
INDEX NO.: R.4.b.1.
CITE: (3/25/85), Ind., 475 N.E.2d 677
SUBJECT: Lineups - right to counsel; pre-indictment
HOLDING: Pretrial identification lineup did not violate D's 6th Amend right to counsel. No adversary judicial proceedings had been initiated against D. Bray 433 N.E.2d 310 (card at R.4.b). D contends that although he was not formally charged, he was a "prime suspect" based on earlier photo IDs by victims, & that lineup was no longer investigatory tool but was device to further his prosecution. Bruce 375 N.E.2d 1042 raised similar argument (that police purposefully deferred formal charges in order to undercut D's right to counsel). Ct. finds no basis for D's contentions. D also argues that lineup affected his right to fair trial, thus 6th Amend required counsel despite lack of formal charges, *citing* US v. Wade (1967), 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149. Ct. finds Wade explicitly qualified informal right to counsel to stages of prosecution. Wade requires determination of substantial prejudice in pretrial confrontation & ability of counsel to avoid such prejudice. There is no right to counsel when reconstruction of D's lineup (names recorded, victims' taped interviews re lineup & photograph of lineup) is available & no prejudicial or suggestive factors in here in lineup. Held, conviction affirmed.

RELATED CASES: Auer, App., 289 N.E.2d 321 (D had no right to counsel when witness identified him, prior to arrest or charge, at factory from darkened office located over working area).

R. IDENTIFICATION

R.4. Right to Counsel (U.S. v. Wade)

R.4.b.2. Post-indictment

TITLE: Davenport v. State
INDEX NO.: R.4.b.2.
CITE: (3/20/89), Ind., 536 N.E.2d 263
SUBJECT: Lineup - right to counsel; post-indictment
HOLDING: Denial of motion to suppress & admission over objection of identification (ID) evidence from uncounseled post-indictment lineup was harmless error. ID evidence from uncounseled lineup held after right to counsel has attached is improper absent valid, knowing waiver by D. Hatcher 414 N.E.2d 561. Improper pretrial ID procedure also taints subsequent in-Ct. ID unless sufficient independent basis exists for latter. Brafford 516 N.E.2d 45. However, erroneous admission even of evidence from improper pretrial ID may be rendered harmless beyond reasonable doubt by existence of independent basis for ID. Parsons 472 N.E.2d 915. Here, prior to ID of D during uncounseled lineup, witness picked D from array of 8 photos. Moreover, on night of offense, witness observed D for 30 seconds from upstairs window, & for another 20 to 30 seconds from 10 feet away. There was ample independent basis for in-Ct. ID. Further, D was arrested while fleeing police, not on basis of ID. Held, conviction affirmed. DeBruler, J., DISSENTS, arguing that where ID evidence from improper pretrial ID is admitted during state's case-in-chief, it cannot be buttressed by showing of independent basis. Moore v. IL (1977), 434 U.S. 220, 98 S. Ct. 458, 54 L.Ed.2d 424; Gilbert v. CA (1967), 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178; Hatcher 414 N.E.2d 561.

RELATED CASES: Martin, 279 N.E.2d 189 (although uncounseled post-indictment lineup was improper, fact that admitted accomplice unequivocally identified D as other robber was independent basis for in-court identification).

TITLE: State v. McMorris

INDEX NO.: R.4.b.2.

CITE: 570 N.W.2d 384; 213 Wis.2d 156 (Wis. 1997)

SUBJECT: Counselless Lineup -- Witness' Certainty Not Relevant to Determining Taint

HOLDING: When determining admissibility of eye-witness' in-court identification made after improper, counselless, post-indictment lineup, eye-witness' certainty about identification is not relevant factor to be considered. U.S. v. Wade, 388 U.S. 218 (1967), set out factors to be considered in determining whether an in-court identification may be allowed following a pre- trial identification which violated the defendant's 6th Amendment right to counsel. The state must show by clear and convincing evidence that the in-court identification had an "independent origin," in order to purge the taint of the 6th Amendment violation. The purpose of exclusion of an in-court identification following a counselless lineup is to discourage police misconduct, not merely to ensure that any in-court identification is reliable. Thus, the eye-witness' certainty regarding the identification is irrelevant.

R. IDENTIFICATION

R.4. Right to Counsel (U.S. v. Wade)

R.4.b.3. Role of counsel at lineup/ videotaping in lieu of counsel

TITLE: Bruce v. State
INDEX NO.: R.4.b.3.
CITE: (4/19/78), Ind., 375 N.E.2d 1042
SUBJECT: Videotaped line-ups - right to counsel
HOLDING: Tr. Ct. did not err in denying D's motion to suppress video-tape line-up. Identification proceeding preserved on videotape is not "critical stage" within meaning of US v. Wade (1967), 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149. Existence of videotape recording will assure accurate reconstruction of line-up & deter abuses no less effectively than witnessing of the procedure by suspect's counsel. Human perception of events may vary even among intelligent, alert, & conscientious observers (Whitt 361 N.E.2d 913); electronic recording provides an objective & reliable reconstruction. Held, no error.

R. IDENTIFICATION

R.4. Right to Counsel (U.S. v. Wade)

R.4.c Photo displays

TITLE: United States v. Ash
INDEX NO.: R.4.c.
CITE: 413 U.S. 300, 93 S. Ct. 2568, 37 L.Ed.2d 619 (1973)
SUBJECT: Photo display - no right to counsel
HOLDING: Sixth Amendment does not grant accused right to have counsel present when Government conducts post-indictment photo display containing D's picture for purpose of allowing witness to attempt identification of offender. Pretrial event constitutes "critical stage" when accused requires aid in coping with legal problems or help in meeting adversary. Since accused was not present at time of photo display, &, as here, asserted no right to be present, there was no possibility he might have been misled by lack of familiarity with law or overpowered by professional adversary. Instant case is distinguished from U.S. v. Wade, 388 U.S. 218, where Ct. held that D had right to counsel at post-indictment lineup, because here, Ct. was dealing with post-indictment photo display. Held, judgment reversed & remanded; Stewart, J., concurring; Brennan, Douglas, & Marshall, JJ., dissenting.

R. IDENTIFICATION

R.5. Exclusionary sanctions

R.5.b. Due process violation (see also R.2 categories)

TITLE: Williams v. State
INDEX NO.: R.5.b.
CITE: (5/1/85), Ind., 477 N.E.2d 96
SUBJECT: Suggestive identification (ID) procedures - "suspect in lineup/display"
HOLDING: Tr. Ct. did not err in allowing victims to ID D in Ct. or to testify re out-of-Ct. ID. Here, sometime after offense, one victim was asked to ID D in lineup in parking lot where he was detained. Two other victims viewed photo display. All victims were told suspect was in lineup/display. All victims identified D. D contends pretrial ID procedures were unduly suggestive/created substantial likelihood of mis-ID, *citing* Simmons v. US (1968), 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed. 2d 1247. Police should not inform victim that suspect is in lineup, although witness may logically assume so. See Coleman v. AL (1970), 399 U.S. 1, 90 S. Ct. 1999, 26 L.Ed.2d 387. Information could needlessly pressure witness to make ID. Haun 451 N.E.2d 1072; Sawyer 298 N.E.2d 440. Ct. finds victims' testimony was based on observations (observed D closely in adequate light for several hours) independent of pretrial procedure, *citing* Harding 457 N.E.2d 1098. Held, no error.

RELATED CASES: Hamlet 490 N.E.2d 715 (Crim L 339.10(3); unnecessary suggestiveness alone does not require exclusion of evidence; question is whether under totality of circumstances ID was reliable even though confrontation process may have been suggestive [citations omitted]); Outlaw 484 N.E.2d 10 (officer's statement that suspect's photo might be in array was not suggestive); Petro 455 N.E.2d 332 (Crim L 339.7(3); Ct. distinguishes case from Sawyer, where police told witness that someone had been arrested & their picture would be in photo display; here, police told witness they had a suspect & asked witness to identify him from photo display); Gambill 436 N.E.2d 301 (it is inevitable that witness may know police have a suspect when asked to view lineup or photo display).

TITLE: Woodson v. State
INDEX NO.: R.5.b.
CITE: (8/6/84), Ind., 466 N.E.2d 432
SUBJECT: Violation of due process - suggestive identification
HOLDING: Tr. Ct. did not err in denying D's motion to suppress evidence of pretrial lineup. Here, D contends lineup was unnecessarily suggestive because other 5 men did not resemble him, considerable time elapsed between robbery & lineup & witnesses were seated directly in front of him as he stood in lineup. Ct. finds "astonishing resemblance" (dressed alike, comparable heights, similarly complected & all had facial hair). Two-month time lapse was no problem. Ct. agrees placement of witness so as to more squarely confront one than another in lineup suggests that one is suspect, but "suggestion is slight." Under circumstances, lineup was properly conducted. Held, no error.

RELATED CASES: Deamus 479 N.E.2d 1319 (although one witness was aware that other witness had selected photo out of display, circumstances were not suggestive because first witness did not know which photo was selected & quickly picked out D's photo when shown display).

R. IDENTIFICATION

R.5. Exclusionary sanctions

R.5.c. Independent source for in-court identification (see also R.1.a)

TITLE: Broadus v. State
INDEX NO.: R.5.c.
CITE: (1/20/86), Ind., 487 N.E.2d 1298
SUBJECT: Independent source for in-court identification
HOLDING: In-Ct. identification (I.D.) of Ds was not tainted by victim's observation of suspects' picture in newspaper. Here, victim described short robber to police as having beard. After seeing picture in paper, victim realized error. Ds claim victim's change in description to conform more closely with their characteristics after victim viewed photos suggests unduly biased/impermissive I.D. procedure. Any suggestion implanted in witness' mind by seeing suspects' photo in newspaper goes to weight, not admissibility of in-Ct. I.D. Gaddis 368 N.E.2d 244; Norris 356 N.E.2d 204. Held, no error.

RELATED CASES: Mauricio, 476 N.E.2d 88 (although officer came across D's photo during his investigation, his personal observation of D, and not photo, was independent basis for his in- court identification of D).

TITLE: Cossel v. State
INDEX NO.: R.5.c.
CITE: (12-30-96), Ind. App., 675 N.E.2d 355
SUBJECT: Identification - Independent basis for in-court identification
HOLDING: Where witness's out-of-court identification was erroneously admitted, error may be harmless if in-court identification by witness was properly admitted. In-court identification may be admissible if State establishes by clear & convincing evidence that basis of in-court identification is independent of suggestive pretrial identification. Here, admission of testimony concerning victim's pretrial identification of D, based on suggestive procedure, was harmless where victim identified D at trial. In-court identification was based on victim having observed D briefly during assault in light coming from street light & having spoken to D three months earlier. Held, judgment affirmed.

TITLE: Emerson v. State
INDEX NO.: R.5.c.
CITE: (1-8-74), Ind., 305 N.E.2d 435
SUBJECT: Exclusionary sanctions - in-court identification; State's actions
HOLDING: In-court identification of D was acceptable where witness previously gave detailed description of D's appearance & had ample opportunity to have his appearance imprinted on her memory, prior to her husband being shot. Prosecutor's actions at trial in directing her attention to counsel tables requiring D to stand when she did not see assailant in courtroom were not so suggestive as to constitute reversible error. It is better practice to ask witness to point out person referred to in testimony rather than point out person for witness if there is issue of identity. However, this does not mean that such conduct is per se prejudicial as matter of law. In this respect, evidence as whole must be considered. Here, witness previously gave detailed description of D, & thus, record did not show how identification was tainted by State's actions. Held, judgment affirmed; DeBruler, J., dissenting.

TITLE: Evey v. State
INDEX NO.: R.5.c.
CITE: (4-30-81), Ind., 419 N.E.2d 971
SUBJECT: Determination of independent basis for in-court identification
HOLDING: In-court identification by same witness who has participated in impermissibly suggestive out-of-court identification is admissible if "independent basis" for in-court identification is established. To determine if "independent basis" exists for in-court identification which would allow admitting in-court identification into evidence, Ct. examines totality of circumstances surrounding witness' opportunity to observe perpetrator at time crime occurred. Here, independent basis existed for witness' in-court identification of D. Regardless of any suggestiveness that may have occurred at pretrial identification, such identification was sufficient evidence to support D's robbery conviction. Robbery occurred in broad daylight & witness testified he was in D's presence for approximately 5 minutes. D was right in front of witness' face & prior to identifying D's photo, witness accurately described D's physical characteristics to police. Held, judgment affirmed; DeBruler, J., concurring.

RELATED CASES: Love, 365 N.E.2d 771 (where sufficient light at crime scene & witness observed robber for 5-10 minutes, there was sufficient basis for in-court identification).

TITLE: Gourley v. State
INDEX NO.: R.5.c.
CITE: (4th Dist., 09-21-94), Ind. App., 640 N.E.2d 424
SUBJECT: Sufficient independent basis for in-Ct. identification (ID) of D
HOLDING: Although initial show-up ID of D may have been suggestive, it did not taint in-Ct. ID of D because of independent basis for in-Ct. ID. Victim had numerous opportunities to observe D close up, & did not equivocate when he first saw him at show-up & in picture. Although opinion discusses standard for suggestiveness of show-up at length, it appears to base decision on independent grounds for ID. In so doing, Ct. distinguished Pemberton v. State, Ind., 560 N.E.2d 524 (where ID was found tainted, but witnesses initially equivocated in ID), & appeared to find situation more similar to Wethington v. State, Ind., 560 N.E.2d 496, where ID was upheld. Because ID was not tainted, there was no ineffective assistance of counsel when counsel failed to object to ID at trial. Held, conviction affirmed.

RELATED CASES: Rasnick, 2 N.E.3d 17 (Ind. Ct. App 2014) (show-up identification did not taint in-court identification where victims got a close look at D, noticing a black tattoo on his calf, and minutes later described D in great detail to police); Slaton, 510 N.E.2d 1343 (fact that stolen keys were shown to witness prior to showup enhanced suggestiveness of one-on-one confrontation; however, there was adequate independent basis for victim identifying D to overcome improper one-on-one confrontation at scene); Mendelvitz, App., 416 N.E.2d 2170 (ample opportunity for witness to observe perpetrator provided independent basis for witness' in-court identification); Borden, 400 N.E.2d 1368 (because witness had ample opportunity to observe D, Tr. Ct. did not err in admitting in-court identification); Poindexter, 374 N.E.2d 509 (in-court identification was admissible, despite one-on-one pre-trial confrontation, because victim had ample opportunity to observe robbers during crime).

TITLE: Leslie v. State
INDEX NO.: R.5.c.
CITE: (8-21-90), Ind., 558 N.E.2d 813
SUBJECT: In-court identification - Independent basis for identification
HOLDING: Show up identification in which D sat alone, handcuffed, in backseat of police car at crime scene, surrounded by police officers, for approximately 5 minutes after witness last saw him, was not so impermissibly suggestive as to violate due process. Even when pretrial identification procedure is unduly suggestive, identification in Ct. is still admissible if there is basis for identification independent of suggestive procedure. To determine whether particular identification procedure is impermissibly suggestive, Ct. will examine substantial likelihood of misidentification in light of totality of circumstances. Here, even if show up identification in which witness identified D was impermissibly suggestive, witness' in-court identification of D was admissible based on independent basis. Witness was able to view perpetrator for fairly extensive time period with bright lights aimed at perpetrator, witness accurately described burglar, description matched D's appearance, only short time period elapsed from witness' last viewing of burglar & his identification of D as perpetrator, & witness identified D without hesitation. Held, judgment affirmed.

RELATED CASES: Smith, 553 N.E.2d 832 (victim's in-court identification of D was proper, even though victim was shown single photo of D by someone who told victim that it was photo of D; fact that witness had ample opportunity to observe D during robbery was independent basis for in-court identification).

TITLE: Murphy v. State

INDEX NO.: R.5.c.

CITE: (9-16-88), Ind., 453 N.E.2d 219

SUBJECT: Exclusionary sanctions - Independent source for in-court identification; no denial of due process

HOLDING: Out-of-court identification conducted in unnecessarily suggestive manner creates substantial likelihood of misidentification & must be suppressed to avoid violation of D's right to due process. Any in-court identification that makes reference to, & is from, taint of any impermissible prior identification is inadmissible. Factors that Ct. will weigh in determining existence of independent source of identification so as to remove taint of any impermissible prior identification include opportunity to observe D at time of crime & ease with which witness can identify D. Here, witness' viewing of photo of D on morning after burglary did not interfere with his recall of burglary & did not serve to render admitting in-court identification testimony denial of due process. There was ample evidence to sustain Tr. Ct.'s finding that witness's initial viewing of D during crime took place under such conditions as to permit positive, independent identification. Held, judgment affirmed in part, reversed in part, & remanded with instructions; Pivarnik, J., & Givan, C.J., concurring in part & dissenting in part.

TITLE: Merrifield v. State
INDEX NO.: R.5.c.
CITE: (2-20-80), Ind., 400 N.E.2d 146
SUBJECT: Failure to object to taint on in-court identification - waiver
HOLDING: Where rape victim made in-court identification of D without objection, any issue concerning possible taint on this in-court identification as result of police's hypnotizing victim several days after incident was waived. Moreover, rape victim's in-court identification of D had independent basis free from any possible subsequent influences police hypnosis of victim several days after incident might have had. Here, when D entered restaurant, victim immediately recognized him. Victim remembered D being in restaurant few months earlier propositioning her. Victim was in D's presence for several hours under various lighting conditions & in very close proximity to D at three different times. Victim identified D's picture in two photo display sessions prior to hypnosis session. Held, judgment affirmed.

TITLE: Wethington v. State
INDEX NO.: R.5.c.
CITE: (10/4/90), Ind., 560 N.E.2d 496
SUBJECT: Independent basis for in-Ct. identification (ID)
HOLDING: Although 2 pre-trial IDs were impermissibly suggestive, independent basis exists to support admission of in-Ct. ID of D. D was charged with robbery & confinement, & he & co-D were subjected to 2 impermissibly suggestive, one-on-one show-ups with victims. (See Wethington card at R.2.b) Nonetheless, subsequent in-Ct. ID may be admissible if State establishes by clear & convincing evidence that independent basis exists for in-Ct. ID. [Citations omitted.] Inquiry is whether, in light of totality of circumstances surrounding initial observation at scene of crime, witness could resist suggestiveness inherent in later improper confrontation & make accurate ID based on initial observation. Brooks 560 N.E.2d 49. Factors relevant to this determination are: (1) duration of initial observation & amount of attention witness focused on perpetrator; (2) distance between them & lighting conditions; (3) witness' capacity for observation & opportunity to perceive particular characteristics of perpetrator; (4) lapse of time between crime & subsequent ID; (5) accuracy of any prior descriptions; & (6) witness' level of certainty at pre-trial ID. Id., (*citing* Heiman 511 N.E.2d 458; Dillard 274 N.E.2d 387). Evidence regarding initial observation showed that living room in which encounter occurred was lit by ceiling light which was on at all times during 15-minute incident. Man identified as D was not wearing mask & was within inches of each victim's face as he tied their hands in front of them & gagged them. D's appearance corresponded roughly with collective description given by victims at scene of robbery, with exception of estimate of height. Description of clothing & shoes robber was wearing matched D's attire at time of arrest 2 hours later very closely. All 3 victims testified that when they saw D at each pre-trial confrontation, they were immediately certain he was robber with handgun. Given totality of these circumstances, Ind. S. Ct. finds sufficient independent basis for in-Ct. IDs of D. Held, affirmed.

NOTE: Independent basis for in-Ct. ID of co-D was not as clear, & failure to make trial objection to in-Ct. ID & testimony regarding pre-trial show-ups was found to be ineffective assistance of counsel. See Pemberton 560 N.E.2d 524 (card at Y.4).

RELATED CASES: Black, 79 N.E.3d 965 (Ind. Ct. App 2017) (although 5-hour time elapse between robbery and show-up identification was unnecessarily suggestive, any error in admitting the identification into evidence was harmless because victim was able to identify D at trial independent of the show-up), Hubbell, 754 N.E.2d 884 (single person line-up was unduly suggestive, but error was harmless); Jones, App., 749 N.E.2d 575 (considering totality of circumstances witnesses had independent basis for identifying D in court); Young, 700 N.E.2d 1143 (although identification witness's testimony indicated that police may have focused her attention on D after pretrial lineup, Ct. concluded that totality of circumstances clearly & convincingly demonstrated that witness had independent basis for her in-Ct. identification).

R. IDENTIFICATION

R.5. Exclusionary sanctions

R.5.d. Tainted Identification

TITLE: Perry v. New Hampshire

INDEX NO.: R.5.d.

CITE: (01-11-12), 132 S. Ct. 716 (U.S. 2012)

SUBJECT: Due process does not require scrutiny of eyewitness testimony unless identification procedure was unduly suggestive and was organized by police

HOLDING: Eyewitness identifications obtained during overly suggestive identification procedures are not subject to suppression unless law enforcement authorities orchestrated the identification procedure. Cf. Simmons v. U.S., 390 U. S. 377, 384 (1968); Neil v. Biggers, 409 U. S. 188 (1972). Where, as here, the suggestiveness of the circumstances surrounding the identification was not arranged, ordinary trial safeguards are all that due process requires. Cf. Coleman v. Alabama, 399 U. S. 1 (1970). Thus, Tr. Ct. was not required to create a special screening procedure to scrutinize the identification procedure. If is for jurors, not judges, to evaluate such testimony. Prior decisions addressing unduly suggestive identification procedures were designed to deter police from designing identification procedures in such a way that the witness essentially had no choice but to pick out the suspect on whom police were focusing. Justice Sotomayor criticized the majority from many new studies that conclusively show how wrong eyewitness testimony often is. GINSBURG, J., SOTOMAYOR DISSENTING. Cert. granted, New Hampshire Supreme Court affirmed, judgment affirmed.

R. IDENTIFICATION

R.6. Procedural issues

R.6.b. Defendant's request for lineup

TITLE: Morris v. State
INDEX NO.: R.6.b.
CITE: (12/6/84), Ind., 471 N.E.2d 288
SUBJECT: Lineup - right to
HOLDING: Tr. Ct. did not err in denying D's petition for a live lineup. Order for pretrial lineup requested by D is in nature of discovery order, which is discretionary with trial judge. In weighing equities, considerations are proximity in time of petition to offense, changed appearance of D, likelihood of misidentification & cost of conducting lineup. "[Requests for lineups] should not be granted routinely or in a perfunctory manner." Here, robbery victim positively identified getaway car & picked D's picture from an "especially fair" photo display. D's petition came 4 months after offense & one week before trial. Ct. finds no basis for concluding failure to require lineup appreciably diminished fairness of trial. Held, no error.

RELATED CASES: Howell, App., 493 N.E.2d 473 (Tr. Ct. did not abuse discretion by denying D's request for lineup; Ct. rejects D's contention that a likelihood of misidentification existed; here, victim did not hesitate in selecting D's picture from photo display); Glover, 441 N.E.2d 1360 (although D's request for lineup was initially granted, state moved for reconsideration because D shaved off facial hair & all hair on his head in apparent attempt to disguise his appearance; state showed paramount interest; Tr. Ct. did not err in denying request for lineup).

R. IDENTIFICATION

R.6. Procedural issues

R.6.c. Motion to suppress

TITLE: Dickson v. State
INDEX NO.: R.6.c.
CITE: (9-20-76), Ind., 354 N.E.2d 157
SUBJECT: Procedural issues - Motion to suppress; hearing required
HOLDING: Tr. Ct. erred in denying hearing on D's motion to suppress in-court identification as product of unduly suggestive confrontation. Tr. Ct. had a rule that counsel who does not file motion to suppress waives suppression issue. However, because rule limited consideration of constitutional claims involving defective eyewitness identification procedures, Tr. Ct. must determine whether D & counsel deliberately by-passed opportunity to file motion. Held, remanded for hearing on whether counsel intended to wait until trial to make objection.

R. IDENTIFICATION

R.7. Appellate issues

R.7.a. Record preservation

TITLE: Hoskins v. State
INDEX NO.: R.7.a.
CITE: (3d Dist. 12/17/85), Ind. App., 486 N.E.2d 593
SUBJECT: Identification - preserving error for appeal
HOLDING: D's failure to introduce photographic display into evidence does not constitute waiver of issue (display impermissibly suggestive). Ct. finds record adequate for review. Both parties briefed substantive issue. Ct. prefers to resolve case on merits & does, ruling against D.

R. IDENTIFICATION

R.7. Appellate issues

R.7.b. Sufficiency of Evidence

TITLE: Gorman v. State
INDEX NO.: R.7.b.
CITE: (06-13-12), 968 N.E.2d 845 (Ind. Ct. App. 2012)
SUBJECT: Eyewitness identification alone sufficient to support conviction
HOLDING: Because unequivocal identification of a person by a sole eyewitness is sufficient to sustain a conviction, there was sufficient evidence to identify D as the person who robbed the victim. Here, several hours before sunrise, D robbed Byron and Samantha Daniels at gunpoint while they were smoking a cigarette in a car. Only Samantha got a good look at D's face; Byron's gaze was fixed forward as D pressed his gun against Byron's temple through the driver's window. Several weeks later, Samantha saw D on a neighbor's porch, so she called the police, who later showed her a photo array that included D's picture. She identified D as the robber. Police did not find any other evidence connecting D with the robbery, such as the gun or proceeds from the robbery. At trial, Samantha testified that she was "a hundred percent" certain that D was the robber.

When a conviction is based on identification testimony by a sole eyewitness, such testimony is sufficient to sustain a conviction "if the identification was unequivocal." Richardson v. State, 270 Ind. 566, 569, 388 N.E.2d 488, 491 (1979); cf. Scott v. State, 871 N.E.2d 341, 344-45 (Ind. Ct. App 2007). Samantha's in-court identification of D as the robber was unequivocal, so the evidence was sufficient to sustain D's conviction.

Admittedly, recent cases and studies have challenged the reliability of eyewitness identifications, citing factors that affect reliability. See e.g. State v. Henderson, 27 A.3d 872 (N.J. 2011). However, "the potential unreliability of a type of evidence does not alone render its introduction at . . . trial fundamentally unfair." Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012). Further, considering such factors necessarily requires an appellate court to re-weigh evidence. Finally, the legal system already includes numerous "procedural safeguards against fact finders placing undue emphasis on potentially unreliable eyewitness testimony": the right to counsel, cross examination, and to be convicted on nothing less than proof beyond a reasonable doubt. Held, judgment affirmed.

TITLE: Iseton v. State
INDEX NO.: R.7.b.
CITE: (2d Dist. 12/27/84), Ind. App., 472 N.E.2d 643
SUBJECT: Sufficiency - identification of D absent at trial
HOLDING: Evidence of identification was sufficient where theft testimony of victim & arresting officer positively identified D. Here, D voluntarily absented himself from trial. Even when D is present at trial, witnesses need not point to D to establish identification. State v. Schroeppel 162 N.E.2d 683; Preston 287 N.E.2d 347; O'Brien, App., 422 N.E.2d 1266. Absent D may be identified by photographs (Bullock 451 N.E.2d 646) or by reference (Martin 457 N.E.2d 1085). Held, conviction affirmed.

RELATED CASES: Murphy 555 N.E.2d 127 (DeBruler & Dickson DISSENT, finding ID evidence insufficient where only name links absent D to offense).

TITLE: Lacy v. State
INDEX NO.: R.7.b.
CITE: (8/18/82), Ind., 438 N.E.2d 968
SUBJECT: Sufficiency - eyewitness identification of robber
HOLDING: Eyewitness identification testimony is insufficient to sustain conviction for robbery if inconsistent or equivocal (Lottie 211 N.E.2d 800) or if tainted by equivocation & police coercion (Gaddis 251 N.E.2d 658). Here, despite inconsistencies in trial testimony, evidence showed victim identified D as robber by picture shortly after crime & picked him out of a lineup 2 years later. Held, conviction affirmed.

RELATED CASES: Woodard 470 N.E.2d 336 (jury was fully informed of matters affecting identification of D; held, evidence sufficient to sustain robbery conviction).

TITLE: Mitchell v. State
INDEX NO.: R.7.b.
CITE: (12-5-78), Ind., 382 N.E.2d 932
SUBJECT: Appellate issues - Sufficiency of the evidence
HOLDING: Evidence was sufficient to support conviction, notwithstanding D's assertion that identification of D by one eyewitness was tainted & identifications of D by other three eyewitnesses were equivocal. Identification testimony need not necessarily be unequivocal so long as totality of evidence permits trier of fact to find guilt beyond reasonable doubt. Lottie, 311 N.E.2d 800. Held, judgment affirmed in part, & remanded with instructions.

TITLE: Scott v. State
INDEX NO.: R.7.b.
CITE: (4th Dist., 08-06-07), Ind. App., 871 N.E.2d 341
SUBJECT: Sufficiency - equivocal identification evidence
HOLDING: Identification evidence need not be unequivocal to be sufficient to support a conviction only when the identification is supported by circumstantial evidence; when such identification is the only evidence, the identification must be unequivocal. This interpretation is in accord with "incredible dubiosity" rule, under which Ct. will impinge upon trier of fact's duty to weigh evidence only where a sole witness presents inherently contradictory testimony which is equivocal or result of coercion & there is a complete lack of circumstantial evidence of D's guilt. Tillman v. State, 642 N.E.2d 221 (Ind. 1994). Although this interpretation may be at odds with Poe v. State, 445 N.E.2d 94 (Ind. 1983) & other cases, more recent decisions of Indiana S.Ct. indicate that equivocal testimony of an eyewitness, standing alone, does not support a conviction. Kelley v. State, 482 N.E.2d 701 (Ind. 1985).

However, equivocal testimony can contribute to a finding of guilt beyond a reasonable doubt. Here, in theft prosecution, evidence consisted of eyewitness's eighty-percent identification, the fact that someone did in fact take meat from store refrigerator, D's admission that he was at store the day of theft, evidence that D was familiar with operation of store, & D's admission that he drives a car of a similar color as described by eyewitness. Ct. could not say that no reasonable factfinder could have found beyond a reasonable doubt that D committed theft. Held, conviction affirmed.

RELATED CASES: Gorman, 968 N.E.2d 845 (Ind. Ct. App. 2012) (where the only evidence tying D to robbery was victim's unequivocal eyewitness testimony, the evidence was sufficient to sustain the identification and the conviction; *see* full review, this section).

TITLE: Tillman v. State
INDEX NO.: R.7.b.
CITE: (11-4-94), Ind., 642 N.E.2d 221
SUBJECT: Identification evidence sufficient to sustain conviction
HOLDING: Evidence of identification was sufficient where testimony of three witnesses positively identified D at trial & after viewing photographic arrays. Victim of confinement & three witnesses who saw D near scene shortly before crime viewed photographs with authorities on two occasions. At first viewing, neither victim nor witnesses could identify anyone as perpetrator, but record was unclear whether D's photograph was included among arrays viewed. Victim subsequently viewed another photographic array, identified D, & identified him as perpetrator again at trial. Witnesses also individually met with authorities, & two witnesses identified D as man with whom murder victim had spoken in restaurant shortly before crime. The witnesses also identified D at trial. Ct. rejected D's reliance on "incredible dubiosity rule," which permits Cts. to impinge on jury's responsibility to judge credibility of witnesses, Rodgers, 422 N.E.2d 1211. Application of rule is limited to cases where identification testimony is tainted by equivocation or police coercion, & there is complete lack of circumstantial evidence of guilt, Gaddis, 251 N.E.2d 658. Here, rule is inapplicable because witnesses were unequivocal in identifying D, there was no evidence of coercion, & jury considered evidence of D's confession. There is more than substantial evidence to support convictions. Held, conviction affirmed.

RELATED CASES: Stowers, App., 657 N.E.2d 194 (notwithstanding Ct.'s incorporation of error in record in rejecting D's sufficiency argument, identification evidence establishing D's identity was sufficient to support verdict).

R. IDENTIFICATION

R.8. Defendant's right to present evidence

TITLE: Kucki v. State
INDEX NO.: R.8.
CITE: (4th Dist. 10/17/85), Ind. App., 483 N.E.2d 788
SUBJECT: Mistaken identification (ID) - admissibility of evidence
HOLDING: Tr. Ct. erred in excluding article with picture of person (Hewitt) sought in burglaries in area D was allegedly seen. Here, Tr. Ct. excluded evidence as hearsay/irrelevant. Article was introduced to show existence of other person & that article appeared in newspaper, aside from hearsay purpose of proving police were seeking Hewitt in connection with area burglaries. Article was evidence tending to prove man who resembled D could have committed crime/was relevant to issue of identity. Cts. have been lenient in admitting evidence of mistaken identity [federal, MA & CO citations omitted], perhaps partly because of recognition that while eyewitness IDs are frequently unreliable, juries accord them considerable weight in determining guilt/innocence [citations omitted]. Tr. Ct. discretion to determine relevancy of evidence must be balanced against criminal D's right to present evidence in defense, guaranteed by 6th & 14th Amends. Chambers v. MI (1973), 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297; see also Perry v. Rushen (CA9 1983), 713 F.2d 1447. Held, conviction reversed.

RELATED CASES: Kiner, App., 643 N.E.2d 950 (where there is no evidence linking person depicted in picture to crime in question, D may not submit picture of person who, is not D, to identification witness & affirmatively represent to witness that picture is that of D).