

Identification via Video or Photo by Non-eyewitness

(Published May 2024)

Note: When an identification of a defendant is made from a photograph or video by a lay witness who was not an eyewitness to the crime, the Court of Appeals in People v Mosley, 2024 NY Slip Op 02125, recommended as a “best practice” that a cautionary instruction be given “both at the time of the testimony and during the final charge.” See Guide to NY Evidence rule 4.35.3.

Cautionary Instruction at the Time of the Testimony.

Members of Jury, the witness’s identification of the defendant in the (specify: e.g. video / photograph) is the opinion of that witness and you may choose to accept or reject that opinion. Remember, you are the finders of fact and it is your opinion as to whether the defendant is depicted in the (specify: e.g. video / photograph) that matters.

Instruction at the Time of the Final Instructions to the Jury

The witness’s identification of the defendant in the (specify: e.g., video / photograph) is the opinion of that witness and you may choose to accept or reject that opinion. In deciding whether to accept or reject the opinion you may consider whether the witness had a sufficient familiarity with the defendant to be able to make an identification and whether the (specify: e.g., video / photograph) presented a sufficient image that would enable an identification by a person who had sufficient familiarity with the defendant. Remember, you are the finders of fact and it is your opinion as to whether the defendant is depicted in the (specify: e.g., video / photograph) that matters.