

4.35.5 Identification: Non-Eyewitness by Video or Photo

(1) When a defendant is purported to be depicted in a video or photo related to the commission of an offense, a person who was not an eyewitness to the commission of the offense may testify that the defendant is the individual depicted in the video or photo when the witness is sufficiently familiar with the defendant that the witness's testimony would be reliable and there is reason to believe the jury might require assistance in making its independent assessment of whether the person depicted is the defendant because, for example: the person in the video or photo used a disguise, or the defendant's appearance changed between the time of the video or photo and the trial, or the clarity of the depiction of the person in the video or photo is such that the jury could not identify the person but someone sufficiently familiar with the person's appearance could.

(2) The factors a court may consider in determining whether a non-eyewitness may testify to an identification include: the witness's level of familiarity with the defendant's appearance; whether the witness's familiarity spanned an extended period of time and variety of circumstances; whether the witness was familiar with the defendant's appearance at the time the video or photograph was taken; whether the witness was familiar with the defendant's customary manner of dress or clothing on the day of the video or photograph; and whether the witness testifies that the defendant has a specific trait (such as a distinctive gait, scar, or tattoo) and identifies that trait in the video or photograph.

Note

Subdivision (1) is derived from the holding of *People v Mosley* (41 NY3d 640, 642 [2024]) that the testimony of a person “who is not an eyewitness to a crime . . . may be admitted where the witness is sufficiently familiar with the defendant that their testimony would be reliable, and there is reason to believe the jury might require such assistance in making its independent assessment.” The examples set forth in subdivision (1) are also derived from *Mosley* (41 NY3d at 649).

Subdivision (2) states factors listed in *Mosley* (41 NY3d at 648-649).

Whether the witness is “sufficiently familiar” with the defendant should be explored and determined “outside the presence of the jury in a separate hearing or voir dire,” and the party offering the witness bears the “burden of establishing that their testimony would both be helpful and necessary.” (*Mosley*, 41 NY3d at 650; see Barry Kamins, *Lay Opinion Identification Testimony: The New ‘Mosley’ Hearing*, NYLJ, June 3, 2024.)

Examples of where the testimony of a person who was not an eyewitness was permitted to identify a defendant via a video or photo include:

- *People v Russell* (79 NY2d 1024 [1992]) where the defendant had altered his appearance after the date of a robbery, four witnesses who knew the defendant but who did not witness the robbery were properly permitted to identify the defendant as the person depicted as the robber in two bank surveillance photographs.
- *People v Sanchez* (21 NY3d 216, 225 [2013]) where it was “undisputed” that the defendant’s “appearance had changed since the robbery” of a cab driver, detectives who were familiar with the defendant were permitted “to state their beliefs that defendant was depicted” in the photographs taken during the robbery by a “taxi cam” inside the taxi.
- *People v Pinkston*, 169 AD3d 520, 521, 94 NYS3d 268 [1st Dept 2019] [the officer’s testimony identifying the defendants as persons depicted in videotapes was properly admitted given that “the circumstances suggested that the jury would be less able than the officer to determine whether the defendants were seen in the videotapes, given the poor quality of the surveillance tapes, which showed groups of young men, mostly from a distance”].

In *Mosley*, however, the Court of Appeals determined that the detective-witness was not sufficiently familiar with the defendant “to render his identification helpful to the jury.” (*Mosley*, 41 NY3d at 641.) Further, the “shooter in the video did not wear a disguise, and there is no indication that [the defendant’s] appearance changed”; so, if the defendant were depicted and identifiable in the video “there was no reason to think that the jury would not be equally well positioned to identify the defendant based on his appearance in the courtroom.”

(*Mosley*, 41 NY3d at 651-652); see *People v Ruiz*, — Misc 3d —, —, 213 N.Y.S.3d 698 [Sup Ct, Kings County 2024] [“the jury does not require assistance in making its independent assessment” of whether the defendant is depicted in video because the defendant’s “appearance from the time of the surveillance video to the trial had not changed”; the person in the video is seen “walking around . . . with different angles of his face toward the camera”; and the person “was not disguised”].)

When an identification is made by a person who was not an eyewitness, the Court of Appeals advised that the “best practice” would be for the trial court to instruct the jury “both at the time of the testimony and during the final charge . . . that lay non-eyewitness identification testimony is mere opinion testimony that they may choose to accept or reject, and reminding the jurors that because they are the finders of fact, it is their opinion as to whether the defendant is depicted in the surveillance footage that matters.” (*Mosley*, 41 NY3d at 650; see CJI2d[NY] Identification via Video or Photo by Non-eyewitness, https://www.nycourts.gov/judges/cji/1-General/CJI2d.Identification_by_non-eyewitness.pdf.)