Forensic Facial Identification

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Forensic Facial Identification

Theory and Practice of Identification from Eyewitnesses, Composites and CCTV

Edited by

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Foreword

The criminal justice system involves a pantheon of values, and it is not always easy to figure out the best course of action when one of those values appears to clash with another. And so it is the case with our value about avoiding the wrongful prosecution of innocent people and our value about ensuring the correct prosecution of guilty people. *Forensic Facial Identification* is a superb edited volume whose contributors collectively worry about both of these values, how to balance them, and how scientific evidence on facial identification can help us think about the legal structures that should exist in a world that has a good balance.

Forensic Facial Identification is primarily about the problem of distinguishing accurate eyewitness testimony from mistaken testimony. It is broader than most books on eyewitness testimony in that it concerns not only identification of eyewitnesses who might have actually seen the robbery, or been a victim of the rape, but also the identification of perpetrators from closed-circuit television images, as is becoming increasingly common with the proliferation of cameras throughout our society. And it also concerns the identification of deceased individuals by reconstructions of their faces as they appeared in real life, as happened, for example, when Osama bin Laden was captured and killed. How do you think we know for sure that the man who was shot and killed on May 2, 2011, inside a private residential compound in Pakistan was really the Saudi Arabian bin Laden? The introductory chapter does a splendid job of briefly reviewing these topics – and ones not mentioned – that readers will find in each chapter so there is no need to repeat this review here.

Forensic Facial Identification is broader than most books on eyewitness testimony in other ways. Each chapter begins with a specific case

that is used by the chapter authors to guide discussion. The cases, and discussions, cover many regions of the world, mostly the UK and US, but also Australia and New Zealand in particular. The cases are sometimes famous, as is that of the murder of the foreign minister Anna Lindh in Sweden in 2003, and sometimes not famous, as in the case of a fast food worker in Manchester, UK, who was accused of rapes in 2009 and 2010. The cases are historical, as in the case of Adolf Beck who was convicted in 1896 in London for defrauding women. Most are more modern, as in the numerous cases of wrongful conviction uncovered by the New York-based Innocence Project.

One case that is mentioned frequently (in several chapters) is a recent case that was decided by the New Jersey Supreme Court (*State v. Henderson*). Since the present authors did not go into much detail about this case, and it has been so significant in the US, I thought I would use my "forward platform" to say a bit more about it. In that murder case, the defendant Larry Henderson was accused of being involved in a shooting in an apartment in Camden, New Jersey. About two weeks after the murder, a surviving witness who had been in the apartment identified Henderson from a set of photos. A subsequent identification at trial resulted in Henderson's conviction. It might seem like an open and shut case, but actually there were serious problems with the initial identification. It turns out that the witness only picked Henderson's photo after the investigating officers put on some "pressure" and did some "nudging", as the behaviour of those officers would later be characterized. More specifically, it appears that when the key witness first looked at the photos, he did not see anyone he recognized. He finally narrowed things down to two photos but was indecisive. Pressure and nudging cracked the indecisiveness. On top of this, it turned out that the witness himself had, during the day and just prior to the shooting, consumed large amounts of alcohol and crack cocaine. Henderson appealed his conviction, and when that appeal was heard by the New Jersey Supreme Court in 2011, the criminal justice world paid attention. That decision showed a deep appreciation of the eyewitness problems in the case and a sophisticated appreciation of the science of eyewitness testimony, and the ruling rather dramatically changed the legal standard for how eyewitness evidence is assessed in a criminal case.

What now happens in New Jersey is this. A defendant who can show some evidence of suggestive influences on witness testimony is entitled to a court hearing in which all the psychological factors bearing on the testimony are reviewed and analysed. After this scrutiny, if the judge still decides to admit the testimony at trial, then the judge must also provide to the jury a set of instructions that can guide them on how to

think about the eyewitness evidence. Over the next year or so, those instructions were crafted by a committee, which produced a 26-page document that can be found on the internet at: www.judiciary.state.nj. us/criminal/ModelCrimJuryChargeCommHENDERSONREPORT.pdf

Curious as to what happened to Henderson after his successful appeal, psychology professor John Wixted found a prosecutor who gave him an update. According to this source, another hearing was held in which it was determined that proper procedure had been followed during Henderson's initial trial, which meant that his original guilty verdict was upheld. Of course the procedure might have been "proper" during the trial, but that does not mean that the early identification "activities" shouldn't make us suspicious about whether the identification of Henderson was truly accurate. For now, we have to live with that uncertainty.

The Henderson decision changed the way eyewitness evidence is handled not only in cases where there are questions about the role of law enforcement in producing an identification, but in cases where law enforcement played little or no role. There was a companion case to Henderson that has not received nearly the same attention, but is important because it extends these safeguarding procedures to a wide array of cases. The companion case (*New Jersey v. Chen*) involved some titillating facts. One Sunday in 2005, Mr Kim got a phone call from his ex-girlfriend, Cecilia Chen, the first such call since they had ended their relationship in 2000. Kim told Chen he was happily married and expecting a child; Chen told Kim she was not doing well and wondered about what would have happened had they not broken up. Three days later, Kim's wife Helen was home alone, five months pregnant, and recovering from surgery. A woman came to the Kim home, said her car had broken down and she needed to use the bathroom and phone. The intruder then stabbed Helen with a kitchen knife. Soon thereafter, in discussions with his wife, Kim thought the intruder might be Chen. They accessed Chen's website and looked at photos of her, and Helen became "ninety percent positive" after viewing one particular photo. So we have a case in which key aspects of the identification process were independent of any law enforcement, but nonetheless rather suggestive. Cases with such facts would also, after Henderson, be entitled to the same legal safeguards, namely the hearing and the judicial warnings.

The policy innovations resulting from the Henderson case will hopefully reduce the likelihood of mistaken identification and wrongful conviction that can result. It remains to be seen whether subsequent research confirms the effectiveness of this bold direction.

Forensic Facial Identification not only presents the basic science in each chapter, but also discusses other policy recommendations. There

are recommendations concerning the procedures used to obtain an identification in the first place, such as double-blind testing. There are recommendations concerning the interviewing process, such as taking steps to avoid allowing errors to creep into the early descriptions of witnesses. There are recommendations about the use of composites, mugshot searches, showups, and street identifications, face matching and more. Collectively these authors express their appreciation of procedures that will provide some protection for a suspect who is innocent. But what about catching the guilty? Sadly, some of the reforms may come with a cost, because they reduce correct identifications. So what to do? The editors of *Forensic Facial Identification* came to a resolution that I very much appreciated: (spoiler alert; skip if you don't want to know yet)

> …the potential disadvantage from adopting these recommendations is no reason to abandon the more important duty to avoid wrongfully prosecuting innocent suspects. Indeed a mistaken identification may result in an investigation being terminated because an innocent person has been charged, leaving the guilty free to commit further offences. The justice obtained from maximizing the rate of suspect identifications from unfair procedures would give a false sense of security.

Forensic Facial Identification should be applauded for its heroic efforts to offer society a true sense of security. Hopefully its messages will be read by many who care about fairness, and how psychological science can help us achieve it.

Elizabeth F. Loftus
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Series Preface

The Wiley Series in the Psychology of Crime, Policing and the Law publishes both single and multi-authored monographs and edited reviews of important and emerging areas of contemporary research. The purpose of this series is not merely to present research findings in a clear and readable form, but also to bring out their implications for both practice and policy. Books in this series are useful not only to psychologists, but also to all those involved in crime detection and prevention, child protection, policing and judicial processes.

As the originator of this book series, it has always been my ambition to have a volume devoted to issues surrounding facial identification. It was an early interest of both myself and the co-editor of the series, Professor Ray Bull. Each of us was involved in research into the vagaries of facial identification and we were responsible, with our co-authors, for some of the earliest books and papers published in the UK on this topic (see Clifford & Bull, 1978; Davies, Ellis, & Shepherd, 1981; Shepherd, Ellis, & Davies, 1982). However, we readily acknowledge the primacy of the pioneering work of Elizabeth Loftus (Loftus, 1979), who has provided a forward for this new book.

While research in the UK and the US into facial identification and misidentification stemmed from a common concern over miscarriages of justice based on confident but unreliable witnesses, the drivers and direction which research then took in the two countries was rather different. In the US, a wider range of offences result in jury trials, and the courts have traditionally shown a liberal approach to the admission of testimony by experts which might inform the jury on issues relevant to the evidence (Cutler & Penrod, 1995). Defence attorneys were not slow to grasp the significance of early research by psychologists on eyewitness reliability, but Elizabeth Loftus and another pioneer, the late

Robert Buckhout, still faced considerable resistance to the admission of their testimony in cases where issues of identification formed an important element in the prosecution case. Despite reverses, research on the vagaries of identification has gained in credibility as a growing number of American State Courts now admit evidence from suitably qualified psychologists in cases of disputed identification (Loftus, Doyle, & Dysart, 2013). For Loftus, this courtroom experience helped to highlight issues of concern which subsequently became the subject of research (Loftus, 1986)

In the UK, the interest of psychologists in facial identification did not stem from the adversarial cockpit of the courtroom. British courts have traditionally taken a more conservative view on the admissibility of experts in criminal trials, particularly in relation to the credibility of witnesses, where the *Turner* ruling (Mackay, Colman, & Thornton, 1999) effectively prevents psychologists from commenting on the accuracy or reliability of witnesses in the criminal court: this is a matter for counsel to explore and juries alone to decide. However, miscarriages of justice based on mistaken identification have a long history in the British courts (Davies & Griffiths, 2008), culminating in a Government enquiry led by the distinguished judge, Lord Devlin. Among the recommendations of his report (Devlin, 1976) was that "research should be directed to establishing ways in which the insights of psychology can be brought to bear on the conduct of parades and the practice of the courts" (p.149). Devlin's recommendation helped to ensure that state funding and support flowed toward psychologists involved in improving police procedures and practices, in order to minimize the risk of misidentification, rather than dealing with its consequences in the courts.

Since those early days, the study of facial memory has matured and spread across the globe, raising new issues, and there has been much cross-fertilisation as *Forensic Facial Identification* amply demonstrates. However, those early origins can still be discerned. The North American tradition can be seen in research on such issues as the relationship between confidence and accuracy and the composition and fairness of lineups, while the UK approach is reflected in studies of witness interviewing for identification, facial composite techniques and identification from closed-circuit television.

The editors, Tim Valentine and Josh Davis, both have established reputations in the field. Tim has played a crucial role in the development of video identification procedures, a technique which appears to offer a fairer and more accurate test for establishing a positive identification compared with traditional methods, while Josh has contributed important insights into identification from CCTV. Through their

standing, they have been able to call upon a range of distinguished international contributors, to offer authoritative perspectives on all aspects of human facial identification. This handbook will be read with profit and interest by practitioners and researchers in law, psychology and policing, who seek safe and effective methods of prosecuting the guilty and safeguarding the innocent.

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Part 1

Introduction

1

Identification and Surveillance of Facial Images: Progress and Problems

TIM VALENTINE AND JOSH P. DAVIS

Eyewitness testimony is older than the law. Even today, with sophisticated forensic science, eyewitness testimony forms the bedrock of many criminal cases. Whenever a witness gives testimony in court, jurors, judge(s) or magistrate(s) are faced with two basic questions: Is this witness giving an honest account? If so, can their account be relied upon as accurate? There are many reasons why a witness may deliberately give false testimony or identify a defendant they know to be innocent. The witness may be seeking revenge, have been intimidated into giving a false account, or be motivated to deflect blame away from the true culprit. Legal procedure is designed to expose a dishonest witness. In an adversarial system, for example in the UK, US, Canada, Australia and New Zealand, the defence have the right to test the testimony of prosecution witnesses through cross-examination. Equally the prosecution cross-examines witnesses for the defence. Cross-examination has been described as "the greatest legal engine ever invented for the

Case study

"George Davis is innocent" daubed on walls and bridges was a familiar sight around London in the late 1970s. The graffiti referred to a man convicted for an armed robbery, which targeted a wages delivery at the office of London Electricity Board (LEB), Ilford, on April 4, 1974. Acting on information received, two plain-clothed policemen were watching the building. Two guns were carried by the robbers, and as they made a desperate getaway, one of the policemen at the scene was shot in the leg, and several motorists were hijacked at gunpoint.

At trial in March 1975 the prosecution primarily relied upon identification evidence by the police officers at the scene, and by police and other witnesses at other locations as the robbers switched vehicles during a dramatic car chase. Blood samples, recovered from the scene of a crashed getaway car, did not match any of the defendants. George Davis was the only one of four defendants to be convicted. He was sentenced to 20 years in prison. The conviction was upheld by the Court of Appeal in December 1975.

There was a high-profile campaign against George Davis' conviction, which involved much graffiti around London. The campaign gained notoriety when the Headingley cricket pitch was dug up during an England v. Australia test match, preventing play from continuing. In May 1976 the Home Secretary took the exceptional step of exercising the Royal Prerogative of Mercy to release Davis without referring the case back to the Court of Appeal. The Home Secretary deemed the conviction to be unsafe because of doubts over the police evidence, but Davis was not held to be innocent.

In 1977, George Davis was caught in the act of an armed robbery on the Bank of Cyprus. He pleaded guilty and was sentenced to 15 years in prison. He was released in 1984 but convicted of armed robbery for a third time in 1987.

George Davis' conviction for the armed robbery of the LEB wages office was quashed by the Court of Appeal on May 24, 2011 – 37 years after the original conviction. The principal grounds were concerns about the reliability of the identification of Davis from a live identity parade (lineup) by the two police officers who witnessed the robbery. Most notably the prosecution had not disclosed that one officer, PC Grove, had previously identified a different man from police photographs. Prior to the identity parade in which George Davis was identified, the investigating officer had told PC Grove that he had been mistaken in his identification of the photograph. Confidential

government papers are normally subjected to a 30-year embargo, after which the papers are held by the Public Record Office. In 2006 the embargo of the papers relating to the Home Secretary's 1976 decision to free George Davis was extended by 20 years.

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discovery of truth".[1] It is intended as a method to expose a dishonest witness, but psychological science shows that cross-examination is ineffective in distinguishing reliable eyewitnesses from those who are honest but mistaken (e.g., Valentine & Maras, 2011; Zajac & Hayne, 2003, 2006).

Courts have long acknowledged that a mistaken eyewitness may give convincing identification evidence. The extraordinary case of Adolf Beck, twice wrongly convicted on the basis of mistaken eyewitness identification, described in the case study in Chapter 6, resulted in the Criminal Appeal Act (1907) which established the Court of Criminal Appeal in London (Bogan & Roberts, 2011). Widespread concern about the reliability of eyewitness identification evidence in a number of English cases during the 1970s led the British government to set up an enquiry into eyewitness identification evidence (Devlin, 1976; see case study). Despite legal reforms in the UK since the 1970s, studies of police identification procedures have shown that a third of all identifications from live parades (Valentine, Pickering, & Darling, 2003; Wright & McDaid, 1996) and 40% of all positive identifications from video lineups are known to be mistaken, as the witness selected an innocent volunteer foil or filler (Horry, Memon, Wright, & Milne, 2012). The Innocence Project (2013) in New York has produced incontrovertible evidence of the devastating impact of mistaken eyewitness identification in the US. Over the last 20 years more than 300 prisoners have been exonerated by DNA evidence that proved they were actually innocent of the crimes of which they were convicted. The crimes were serious, mostly rape and murder, because physical evidence from which a DNA profile can be obtained is most likely to be available and collected in serious violent crimes. Mistaken eyewitness identification was the leading cause of wrongful conviction, and occurred in nearly 75% of cases.

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[1] 5 J. Wigmore, Evidence §1367 (J. Chadbourn rev. 1974).