

IDENTIFICATION: IN-COURT IDENTIFICATION ONLY

(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find (defendant) guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant as the person who committed [insert the offense(s) charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the identification of (defendant) is reliable and believable or whether it is based on a mistake or for any reason is not worthy of belief.¹ You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged. You should consider the observations and perceptions on which the identification was based, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence,

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

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standing alone, may not be an indication of the reliability of the identification.² In deciding what weight, if any, to give to the identification testimony, you may consider the following factors [cite appropriate factors]:³

[If necessary or appropriate for purposes of clarity, the judge may comment on any evidence relevant to any of the following factors]⁴

- (1) The witness's opportunity to view the person who committed the offense at the time of the offense.⁵
- (2) The witness's degree of attention to the perpetrator at the time of the offense.⁶
- (3) The accuracy of any description the witness gave prior to identifying the perpetrator.⁷
- (4) The degree of certainty expressed by the witness in making the identification.⁸

² State v. Romero, 191 N.J. 59, 76 (2007).

³ The first five factors listed below were enumerated in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972), and United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940, as the factors to be considered in evaluating the likelihood of misidentification. New Jersey courts employ the same analysis. State v. Madison, 109 N.J. 223, 239-240 (1988). See also State v. Cherry, 289 N.J. Super. 503, 520 (App. Div. 1995).

⁴ See State v. Cromedy, 158 N.J. 112, 128 (1999) ("when identification is a critical issue in the case, the trial court is obligated to give the jury discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification"); State v. Green, 86 N.J. at 292, 293 (noting that model charge could have been used as a guide, court holds that "the defendant had a right to expect that the appropriate guidelines would be given, focusing the jury's attention on how to analyze and consider the factual issues with regard to the trustworthiness of [the witness's] in-court identification"); but see State v. Robinson, 165 N.J. 32, 42-45 (2000) (reaffirming obligation under Green to explain abstract identification factors in factual context of case, but holding that court need not necessarily summarize weaknesses of State's evidence); see generally, State v. Gartland, 149 N.J. 456, 475 (1997) (holding that jury charges must relate the law to the specific facts in a case); State v. A. Gross, 121 N.J. 1 (1990) (same); State v. Concepcion, 111 N.J. 373 (1988) (same).

⁵ Facts that may be relevant to this factor include the witness's ability to observe what he/she said he/she saw, the amount of time during which the witness saw the perpetrator, the distance from which the witness saw the perpetrator, and the lighting conditions at the time. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); Neil v. Biggers, 409 U.S. at 200-201, 93 S.Ct. at 382; State v. Madison, 109 N.J. at 239.

Where supported by evidence that the victim might have difficulty perceiving, recalling, or relating the events, it may be appropriate to add the following to factor (1): "... including the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly." State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

⁶ Facts that may be relevant to this factor include whether the witness was merely a passing or casual observer or one who would be expected to pay scrupulous attention to detail, whether the witness was involved in a direct confrontation with the perpetrator, whether the witness was nervous, shocked or scared as a result of any confrontation with the perpetrator, and whether the witness's attention was focused on or away from the perpetrator's features. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 382-383; State v. Madison, 109 N.J. at 240.

⁷ Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, whether the prior description provided details or was just general in nature, whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 383; United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 240-241; State v. Edmonds, 293 N.J. Super. 113 (App. Div. 1996).

⁸ Facts that may be relevant to this factor include whether witnesses making the identification received inadvertent or intentional confirmation, whether certainty was expressed at the time of the identification or some time later, whether intervening events following the identification affected the witness's certainty, and whether the identification was made spontaneously and