Winter 1985

Videotaped Prior Identification: Evidentiary Considerations for Admissibility

Karl F. Findorff

Follow this and additional works at: http://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Karl F. Findorff, Videotaped Prior Identification: Evidentiary Considerations for Admissibility, 50 Mo. L. Rev. (1985)
Available at: http://scholarship.law.missouri.edu/mlr/vol50/iss1/10

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.
NOTES

VIDEOTAPED PRIOR IDENTIFICATION: EVIDENTIARY CONSIDERATIONS FOR ADMISSIBILITY

State v. Mayhue

The expanded use of videotaped evidence is likely to be approved by courts. The videotape is not an inherently prejudicial medium for presenting a case. In fact, many advantages have been suggested for its increased use. Admissibility of videotape evidence should depend on the admissibility of its component audio and visual aspects. In State v. Mayhue, the Missouri Court of Appeals for the Western District was confronted with difficult evidentiary objections to the use of videotapes in a criminal case. A videotape depicting a witness identifying a suspect was held not to be hearsay, cumulative, or prejudicial. The Mayhue case is significant because it should increase the use of videotapes in the criminal identification process.

Mayhue and two other men forcibly entered an automobile occupied by Ronald Fellman and Shardell Super. Fellman was locked in the trunk while Super was raped. Super was then locked in the trunk. While trying to escape, Fellman was shot and killed by one of Mayhue's cohorts. Mayhue later opened the trunk, shot Super, and left her for dead.

A preindictment lineup was staged and videotaped without counsel present. A second videotape showed Super viewing the videotaped lineup from

1. 653 S.W.2d 227 (Mo. App., W.D. 1983).
2. See infra note 106 and accompanying text.
3. See infra notes 118-123 and accompanying text.
4. 653 S.W.2d 227 (Mo. App., W.D. 1983).
5. Id. at 234-35.
6. 653 S.W.2d at 230. Although the bullet passed through both sides of Super's face, it did not kill her. Id.
7. Id. This tape will be referred to hereinafter as the first videotape or the videotaped lineup. On appeal, the only objection to the admission of this tape was that it violated the sixth amendment right to counsel. See infra note 13 and accompanying text.
her hospital bed. For approximately ten seconds at the end of the tape, the camera focused directly on the victim displaying her incapacitation, bandages, and intravenous tubes.

At trial, only a small scar remained on Super's face. Prior to showing the second tape to the jury, Super testified that she had seen it before and that it was a fair and accurate representation of her viewing the videotaped lineup. She further testified that the tape depicted the trio that had committed the offenses, but she did not identify them by name. Mayhue presented no evidence to impeach this testimony. The videotapes were introduced and shown to the jury over Mayhue's objections.

Mayhue was convicted of first degree murder, forcible rape, first degree robbery, assault, and armed criminal action. On appeal, Mayhue asserted five contentions. First, Mayhue argued that both tapes violated his sixth amendment right to counsel. Second, Mayhue argued that the second tape was inadmissible as hearsay evidence. Third, Mayhue asserted that this tape was cumulative and inadmissible to bolster Super's unimpeached testimony. Fourth, Mayhue claimed that the trial judge erred by allowing the jury to view the visually gruesome and prejudicial tape of Super. Finally, Mayhue argued that videotaped evidence is inherently prejudicial in a criminal trial.

The Missouri Court of Appeals rejected each of these contentions and affirmed

8. 653 S.W.2d at 230. The audio portion of this tape included statements by Super regarding the culpability of each defendant. These statements were struck by the trial judge because they were hearsay. The only sound presented to the jury was the recitation of predetermined numbers identifying the suspects. Id. at 233.
9. Telephone interview with Carrie Franke, Assistant Prosecutor in Mayhue (September 18, 1983).
10. 653 S.W.2d at 230.
11. Id. Although the Mayhue court purported to review the case as "plain error," Mayhue apparently objected to the second tape at trial at least on hearsay and prejudice grounds. A videotaped confession was also displayed to the jury, but Mayhue raised no argument concerning this tape on appeal. Id.
12. Id. at 229.
13. Mayhue contended that his right to counsel was denied at both the original videotaping of the lineup and the subsequent identification by the victim. The trial court correctly held that there is no right to counsel at a lineup staged prior to indictment. Id. at 234; see also State v. Young, 597 S.W.2d 223, 225 (Mo. App., W.D. 1980) (citing Kirby v. Illinois, 406 U.S. 682, 690 (1972)). There probably is no right to counsel at the taping or viewing stage of a post-indictment lineup either. In United States v. Ash, 413 U.S. 300 (1973) (Stewart, J., concurring), Justice Stewart declared that there was no right to counsel at the time the lineup was photographed or when the victim selected the photograph from a display. The video evidence reconstructs the circumstances of the display without the necessity of the eyes and ears of counsel. Id. at 324-25. In McMillan v. State, 83 Wis. 2d 239, 265 N.W.2d 553 (1978), the Supreme Court of Wisconsin held that a videotaped lineup was similar to a photographic display and did not constitutionally entitle the suspect to have counsel present at either the taping or viewing stage. Id. at 248, 265 N.W.2d at 556-58. But see Cox v. State, 219 So. 2d 762, 765 (Fla. 1969) (right to counsel at viewing stage if requested after arrest).
Mayhue’s convictions.\textsuperscript{18}

Mayhue argued that the videotape of Super viewing the lineup was hearsay evidence in that it was an out-of-court declaration introduced to prove the truth of the matter asserted.\textsuperscript{16} The prosecution claimed that the tape was similar to live, direct testimony by a witness that had identified the suspect on a prior occasion.\textsuperscript{17} Mayhue characterized the tape as analogous to the testimony of a third party concerning identification and circumstances.\textsuperscript{18} In the alternative, Mayhue contended that videotapes differ from live prior identification testimony in that they allow a recreation of the lineup and dramatically appeal to jurors’ emotions.\textsuperscript{19} The Missouri Court of Appeals rejected Mayhue’s arguments.

In-court testimony by an identifying witness as to a prior identification is not hearsay evidence under Missouri case law.\textsuperscript{20} In \textit{State v. Baldwin},\textsuperscript{21} the Missouri Supreme Court held such evidence to be hearsay and inadmissible to bolster unimpeached testimony.\textsuperscript{22} However, in \textit{State v. Buschman},\textsuperscript{23} the Missouri Supreme Court distinguished \textit{Baldwin}, holding that testimony by an identifying witness that he or she had previously seen or recognized the defendant was admissible. The \textit{Buschman} court emphasized that the witness did not testify that he communicated to anyone by an overt act, such as pointing, that he recognized the suspect.\textsuperscript{24} The recognition testimony referred to the witness’ own mental processes and thus was not a hearsay declaration.\textsuperscript{25}

Later Missouri cases rejected \textit{Baldwin} and seemed implicitly to reject the “recognition” versus “identification” distinction.\textsuperscript{26} These cases placed emphasis on who was testifying at trial. Identifying witnesses were allowed to testify about prior “identifications” rather than simply “recognitions.”

\begin{itemize}
\item[15.] \textit{Id.} at 241.
\item[16.] 653 S.W.2d at 230.
\item[17.] \textit{Id.} at 234.
\item[18.] \textit{Id.} Testimony of this type by a third party will be referred to hereinafter as “corroborating testimony” and that by the identifier will be labelled testimony by the “identifying witness,” although both types tend to corroborate the earlier identification.
\item[19.] \textit{Id.} at 231.
\item[20.] \textit{E.g.,} State v. Quinn, 594 S.W.2d 599, 603 (Mo. 1980) (en banc); State v. O’Toole, 520 S.W.2d 177, 180 (Mo. App., St. L.D. 1975).
\item[21.] 317 Mo. 759, 297 S.W. 10 (1927) (en banc).
\item[22.] \textit{Id.} at 775, 297 S.W. at 15.
\item[23.] 325 Mo. 553, 29 S.W.2d 688 (1930).
\item[24.] \textit{Id.} at 559, 29 S.W.2d at 691.
\item[25.] \textit{Id.} at 560, 29 S.W.2d at 691. The court apparently defined “recognition” to mean actual recollection of appearance in the witness’ memory and “identification” as the overt communication of the fact of recognition to another person. \textit{See also} State v. DePoortere, 303 S.W.2d 920, 924 (Mo. 1957) (retaining the “recognition” versus “identification” distinction).
\item[26.] \textit{See, e.g.,} State v. Hale, 400 S.W.2d 42, 44 (Mo. 1966) (identifying witness allowed to testify about prior identification from stack of photographs); State v. Rima, 395 S.W.2d 102, 104-05 (Mo. 1965) (en banc) (identifying witness allowed to testify about prior identifications from both lineup and police mug shots).
\end{itemize}
In *State v. Degraffenreid,* the Missouri Supreme Court attempted to clarify this issue. An identifying witness was allowed to testify concerning prior identifications both from a lineup and police “mug shots.” However, corroborating testimony was impermissible hearsay evidence. Recent Missouri cases adhere to this distinction because an identifying witness should be able to testify about a fact personally known even if the fact involves an overt identification.

Mayhue next contended that the videotaped identification should be treated as corroborating hearsay testimony under *Degraffenreid.* Mayhue claimed that the tape differed from live testimony in that it involved a reenactment of the circumstances surrounding the identification process and was not subject to cross-examination. The *Mayhue* court concluded that videotaped identification was in the nature of direct adoptive testimony by the identifying witness. Further, the identifying witness was available at trial for cross-examination regarding both the videotaped and in-court identifications.

Other jurisdictions are split as to whether testimony by identifying or corroborating witnesses concerning prior identifications is admissible. The fed-

---

27. 477 S.W.2d 57 (Mo. 1972) (en banc).
28. Id. at 59. The court made some confusing statements which seemed to revive the “recognition” versus “identification” distinction. The court indicated that an identification communicates a declaratory statement either audibly or visually (e.g., by a pointed finger). Id. at 63. The court also emphasized that the principal issue was whether the accused was the person seen committing the crime and not whether the accused had been previously identified. Id. at 64.
29. The probative value of this evidence was considered minimal because it related only to the fact of identification. Further, the testimony was highly prejudicial as lending credibility to the identifying witness. The *Degraffenreid* court reversed the conviction due to the improper corroborating testimony even though the identifying witness was subject to cross-examination at trial. Id. at 34.
30. E.g., *State v. Quinn,* 594 S.W.2d 599, 603 (Mo. 1980) (en banc); State v. *O'Toole,* 520 S.W.2d 177, 180 (Mo. App., St. L.D. 1975). This reasoning has the advantage of explaining why an identifying witness is permitted to testify about a prior identification. However, under this rationale, a declarant would be allowed to testify concerning any prior communication personally made. Most such statements are considered hearsay and cumulative. See infra note 36.
31. 653 S.W.2d at 233. The courts in *Quinn* and *O'Toole* neither discussed nor disputed the *Degraffenreid* holding that corroborating testimony was improper.
32. Id. at 233-34.
33. Id. at 233.
34. See *Gilbert v. California,* 388 U.S. 263, 272 n.3 (1967); *People v. Gardner,* 402 Mich. 460, 484-85, 265 N.W.2d 1, 10 (1978) (identifying witness testimony admissible under Michigan counterpart to Federal Rule 801(d)(1)(4) and corroborating testimony admissible if limited to circumstances surrounding identification); Annot., 71 A.L.R.2d 449 (1960). The Supreme Court has deliberately left this question open while resolving sixth amendment and fourteenth amendment due process issues. The Court, however, has refused to prohibit all pretrial identifications from photographs. See, e.g., *Simmons v. United States,* 390 U.S. 377, 384 (1968).
In *Gilbert* (decided the same day as *United States v. Wade,* 388 U.S. 218 (1967)), the Court held that both in-court and prior identifications were per se excludable if
eral rule quite clearly states that live testimony by the identifying witness about a prior identification is not hearsay. The primary reason for allowing such testimony is that prior extrajudicial identifications are generally more reliable than in-court identifications.

Although state courts are split on whether this evidence is hearsay, the

tainted by a post-indictment lineup violating the sixth amendment right to counsel. 388 U.S. at 272-73. The Court did not distinguish between testimony by identifying and corroborating witnesses. In Kirby v. Illinois, 406 U.S. 682, 690 (1972), the Court refused to label a pre-indictment lineup as a critical stage entitled to sixth amendment protection.

In Mason v. Brathwaite, 432 U.S. 98 (1977), the Court decided whether the per se exclusionary rule or totality of circumstances test should be applied when prior identification evidence was impermissibly suggestive by fourteenth amendment due process standards. The Court concluded that “reliability is the linchpin in determining the admissibility” of extrajudicial identifications and then considered all relevant facts. Id. at 114. By implication, the Supreme Court suggests that the hearsay rule is an inappropriate vehicle for protection against unreliable extrajudicial identifications. See J. Weinstein & M. Berger, Weinstein's Evidence, Commentary on Rules of Evidence for the United States Courts and for State Courts § 801(d)(1)(C), at 173 (2d ed. 1984) [hereinafter cited as Weinstein's Evidence]; Weinstein, Alternatives to the Present Hearsay Rules, 44 F.R.D. 375, 384 n.14 (1968).

35. FED. R. EVID. 801(d)(1)(C) defines a prior statement by a witness as nonhearsay if: "The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . one of identification of a person made after perceiving him."

36. The original unpublished draft of the federal advisory committee classified all prior statements by a witness subject to cross-examination at trial as nonhearsay. Congress rejected this position and required specific limitations on the types of statements to be treated this way. Weinstein's Evidence, supra note 34, § 801(d)(1), at 100 and 169. Admitting most kinds of prior consistent statements would be cumbersome and valueless. J. Wigmore, Evidence in Trials at Common Law § 1130 at 277 (Chadbourn rev. 1972). Further, cross-examination at trial is generally not an adequate substitute for contemporaneous cross-examination.

Thus, the adopted federal rule recognized that the general rule is exclusion, but particular circumstances call for a contrary result. FED. R. EVID. 801(d)(1) advisory committee note. Prior identification testimony is special in that it is generally more reliable than in-court identification. J. Wigmore supra, § 1130, at 277. Professor Wigmore contends that in-court identifications have very little probative value due to circumstances at trial, and prior identifications are usually less suggestive. Id. Procedural irregularities at the lineup can certainly destroy this advantage. See P. Wall, Eye-Witness Identification in Criminal Cases 76-77 (1965).

Prior identifications are also nearer in time to the crime, which alleviates problems with changes in the suspect's appearance and the witness' memory during the period before trial. E.g., People v. Gardner, 402 Mich. 460, 488, 265 N.W.2d 1, 10 (1978). Interestingly, the original rule of evidence promulgated by the Supreme Court required that the prior identification be made "soon" after perception, but this requirement was dropped on recommendation of the Department of Justice. J. Weinstein, Weinstein's Evidence, Commentary on Rules of Evidence for the United States Courts and for State Courts § 801(d)(1)(C), at 125 (1981).

Finally, videotaped prior identifications arguably have even greater probative value because circumstances are recorded and need not be recreated from memory through oral testimony.
recent trend is to admit prior identification as substantive evidence if the identifying witness is available for cross-examination. Arizona, Florida, and Michigan, for example, have adopted the federal rule. Hawaii treats prior identification as an exception to the hearsay rule. Minnesota and Maryland require additional indicia of reliability before the evidence will be admitted. New York courts treat prior identification as nonhearsay but exclude the evidence if the identification was made from photographs. Other courts have simply refused to apply the hearsay rule without explanation.

These courts recognize that the hearsay rule is designed to protect against the lack of contemporaneous cross-examination. For prior identification testimony, cross-examination generally does not attack the identification itself. Rather, procedural improprieties are the primary concern. Because the identifying witness can be cross-examined at trial regarding procedures, this hazard is obviated.

38. ARIZ. REV. STAT. ANN. § 801(d)(1)(C) (Supp. 1984); FLA. STAT. ANN. § 90.801 (West 1976); MICH. STAT. ANN. § 801(d)(1) (Callaghan 1980).
40. Bean v. State, 234 Md. 432, 444, 199 A.2d 773, 779 (1964) (admitting both photographic and corporeal pretrial identification evidence under reliable circumstances); 50 MINN. STAT. ANN. EVID. § 801(d)(1)(C) (West 1980). For other state adaptations, see WEINSTEIN'S EVIDENCE, supra note 34, § 801(d)(1)(c), at 179-84.
42. See People v. Gardner, 402 Mich. 460, 494 n.1, 265 N.W.2d 1, 14 n.1 (1978) (Ryan, J., concurring). Justice Ryan, citing People v. Londe, 230 Mich. 484, 203 N.W. 93 (1925), and People v. Hallaway, 389 Mich. 265, 275-76, 205 N.W.2d 451, 454 (1973), notes that prior identification statements traditionally have been excluded as hearsay and cumulative, but several courts have summarily allowed such evidence without discussing these issues. Gardner, 402 Mich. at 494 n.1, 265 N.W.2d at 14 n.1.
43. See People v. Gardner, 402 Mich. 460, 487-88 & n.3, 265 N.W.2d 1, 11 & n.4 (1978). Most prior consistent statements made by a declarant available for cross-examination at trial are still inadmissible. See supra note 36. However, testimony concerning the substantive identification itself is "a simple yes or no proposition" rather than "narration of a complex event" where cross-examination on details is vital. P. WALT, supra note 36, at 135. The true purpose of cross-examination in such a case is to determine the suggestiveness of procedures and is not (as would normally be the case) to attack the statement's veracity. Id. at 135-36. The identifying witness' memory concerning procedural details can be boosted by taking all available third party testimony at a pretrial "Wade" hearing to determine improprieties. When the procedures are recorded on videotape, memory of details becomes completely unnecessary. Thus, cross-examination at trial becomes an adequate substitute for contemporaneous cross-
Other jurisdictions are also divided on whether corroborating testimony is hearsay. The federal rule has been interpreted to allow such evidence when the identifying witness testifies at trial. Some state courts also have admitted corroborating evidence.

The *Mayhue* court probably reached the correct result on the hearsay issue under Missouri law. Videotaped evidence should be bifurcated into its component audio and visual aspects. Foundational prerequisites to admission should be the same for videotapes as for other types of audio and visual demonstrative evidence. The sound can be turned down or the video blacked out if one part is admissible but the other is not.

A prior identification, whether audio or visual, should be admissible under the hearsay rule. Missouri case law traditionally stressed the "recognition" versus "identification" distinction. This concern was justifiable since historically an overt implicit or explicit declaration of the suspect's identity has been treated as hearsay. Until the identifying witness communicates the "recognition" examination. See *id.*; *Weinstein's Evidence, supra* note 34, § 801(d)(1)(C) at 127-28; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 196 (1948).

44. *E.g.*, United States v. Elemy, 656 F.2d 507, 508 (9th Cir. 1981) (permitting F.B.I. agent testimony when identifying witness also testified); United States v. Cueto, 611 F.2d 1056, 1063 (5th Cir. 1980) (corroborating testimony not hearsay, but original identification from only one photograph violated due process); United States v. Fritz, 580 F.2d 370, 375-76 (10th Cir. 1978) (en banc) (allowing police officer to testify about fellow officer's statement remembering suspect from prior case), *cert. denied*, 449 U.S. 947 (1978); *cf.* *Weinstein's Evidence, supra* note 34, § 801(d)(1)(C), at 177 (constitutional standards for meaningful confrontation and trial judge discretion provide safeguards for reliability of third party testimony when identifying witness does not testify at trial or cannot remember).


46. *See infra* note 117 and accompanying text.

47. *See supra* notes 23-25 and accompanying text.

48. *See* FED. R. EVID. 801(a) advisory committee note. The committee uses the act of pointing to identify a suspect in a lineup as an example of a nonverbal assertive statement. The oral declaration of numbers assigned to the suspects in *Mayhue*, see *supra* note 8, should be treated similarly.

However, the statement is arguably a mere operative fact if the witness does not testify as to the truth of the identification, but only to the fact that it was made and the surrounding circumstances. The statement will not be admitted for substantive purposes, but it will serve the related purpose of bolstering the credibility of the in-court identification. *See Weinstein's Evidence, supra* note 34, § 801(d)(1)(C), at 176; *cf.* *People v. Gardner*, 402 Mich. 460, 491, 265 N.W.2d 1, 13 (1978) (third party who witnessed the extrajudicial identification allowed to testify only about the circum-
tion," the fact is retained in his or her memory, so there is no statement or hearsay problem. Once the "recognition" is communicated to a third party, traditional hearsay problems arise.

A closely related but distinct issue important to Missouri courts has been the source of the testimony. An identifying witness may testify about a prior overt identification while a corroborating witness cannot. The Mayhue court avoided the hearsay problem by labelling the evidence as merely "adoptive" testimony. This apparently follows recent Missouri cases suggesting that the identification is merely a fact within the personal knowledge of the identifying witness. The problem with this theory is that not all prior consistent statements by a declarant now subject to cross-examination are treated as nonhearsay.

The Mayhue court analogized the videotaped identification to testimony by the identifying witness rather than corroborating testimony. This distinction is important in some jurisdictions. A theory, not discussed by the court, supporting this view is that the overt act of identification is captured and preserved for later communication directly to the jury. Although there are some problems with this treatment, it appears to be preferable.

Recent decisions in other jurisdictions tend to admit prior identification testimony due to its generally superior reliability to in-court identification. These jurisdictions either ignore conceptual hearsay problems, define the evidence as nonhearsay, or treat the testimony as a hearsay exception. The last two approaches present the best solution to the problem due to divergence from traditional hearsay concepts.

The hearsay rule is not a talismanic vehicle for excluding all unreliable evidence. When prior identifications are less reliable than in-court identifica-

49. See supra notes 26-29 and accompanying text.
50. 653 S.W.2d at 233.
51. See supra note 30 and accompanying text.
52. See supra notes 35, 43 and accompanying text.
53. See supra notes 31-36 and accompanying text.
54. Thus, there is no need to rely on the credibility of third parties. For example, if the videotape machine were automatically set and everyone except the identifying witness left the room, there would be no communication of the identifying act until the tape was later played.
55. There are two problems with treating the tape as testimony by the identifying witness. First, the Mayhue court deleted other oral statements on the tape on hearsay grounds. See supra note 8. These statements would also not have been communicated until a later time if no third parties had been present at the recording stage. Second, an equally strong argument can be made that the videotape itself serves as a corroborating witness. There are merely fewer difficulties in proving veracity due to the mechanical nature of recording and preserving the statement.
56. See supra notes 37, 43 and accompanying text.
57. See supra notes 38-42 and accompanying text.
tions, constitutional limitations and trial judge discretion provide adequate safeguards. First, due process protects against impermissibly suggestive procedures. Second, the sixth amendment is an appropriate mechanism for denying the admission of unreliable corroborating testimony. Finally, the trial judge has discretion to exclude unreliable evidence.

Appellant Mayhue also contended that the videotaped evidence was cumulative as a prior consistent statement. The Mayhue court rejected this argument for several reasons. Although appellant did not cross-examine the witness at trial to impeach her credibility, he pleaded not guilty to the multiple charges, including assault. The prosecution had the burden of proving the victim’s injury under that charge. Because the tape depicted Super’s wounds, it was not cumulative. Second, the videotape had additional probative value for the limited issue concerning certainty of identification. Finally, cumulative evidence of verbal identification is not prejudicial error under Missouri law.

Missouri case law is relatively clear on the cumulative evidence issue. In Baldwin, the Missouri Supreme Court held that an extrajudicial identification was inadmissible because witness credibility cannot be bolstered until assaulted. However, in Buschman, the court held that this evidence was not cumulative because the prior recognition merely proved facts enabling the jury to better weigh the value of the in-court identification.

In Degraffenreid, the Missouri Supreme Court attempted to clarify this issue. Corroborating testimony, unlike testimony by the identifying witness, was held to be cumulative. The court noted that testimony by a third party about a prior identification certainly lends credence to the in-court identifica-

58. See supra notes 34, 44 and accompanying text.
59. See FED. R. EVID. 402; WEINSTEIN'S EVIDENCE, supra note 34, 801(d)(1)(c), at 178.
60. 653 S.W.2d at 233. Mayhue offered no evidence contradicting the identification testimony and claimed that rehabilitation of the witness was unnecessary, since she had not been impeached. Id. at 230.
61. Id. at 235-36.
62. Id. at 233. The Mayhue court emphasized the fact that the tape was admissible to show Super's demeanor and unconditional identification rather than the fact of identification itself. This argument would be more persuasive if the tape focused on Super's face during the identifying act, rather than directly focusing on her only briefly at the end of the tape. See supra note 9.
63. Id. at 234; see State v. Smith, 477 S.W.2d 67, 71 (Mo. 1972); State v. Williams, 448 S.W.2d 865, 869 (Mo. 1970).
64. 317 Mo. 759, 779, 297 S.W. 10, 16 (1927) (en banc) (overruled in State v. Rima, 395 S.W.2d 102 (Mo. 1965) (en banc)).
65. 325 Mo. 553, 560, 29 S.W.2d 688, 692 (1930). The Buschman court reasoned that prior visual contacts with the suspect are relevant because the initial impression in the witness' memory is enhanced by later contact. Thus, they add credibility and reliability to the in-court identification. Id.; see also State v. DePoortere, 303 S.W.2d 920, 924 (Mo. 1957) (confirming Buschman rationale).
66. 477 S.W.2d 57, 62 (Mo. 1972) (en banc).
tion, but it does so in a somewhat different manner than testimony by the identifying witness.

In *State v. O'Toole*, the Missouri Court of Appeals for the St. Louis District held that testimony by an identifying witness was not improper because it was "direct testimony of the witness himself," as opposed to corroboration from a third person. This reasoning was approved by the Missouri Supreme Court in *State v. Quinn*.

The federal rule regarding the issue of cumulative testimony is clear. Federal Rule of Evidence 801(d)(1) was designed to permit as substantive testimony certain types of prior statements by a witness. Paragraphs (B) and (C) specifically allow types of prior consistent statements which traditionally have been regarded as hearsay and cumulative. The rule admitting prior identification evidence does not distinguish between testimony by a corroborating witness and that by an identifying witness, so long as the identifying witness is available for trial and subject to cross-examination.

Other jurisdictions are split as to whether prior identifications are excludable as cumulative. The traditional rule is that prior consistent statements can-

---

67. Judge Holman argued that cumulative testimony was not prejudicial when the in-court testimony was undisputed. Id. at 65 (Holman, J., dissenting). The majority rejected this position because acceptance of the harmless error argument would indirectly abolish all rules against bolstering unimpeached witnesses. Id. at 64.

68. The *Degraffenreid* court relied on two factors to explain why the source of the testimony is important to this issue. First, the court emphasized the fact that the corroborating witness could only be cross-examined concerning the prior identification and not whether the suspect was the person seen committing the crime. Second, the court explained that corroborating testimony lends additional credence to the identification primarily due to the stature and character of the third party witness. Id. at 64.

69. 520 S.W.2d 177 (Mo. App., St. L.D. 1975).

70. *Id.* at 180.

71. 594 S.W.2d 599, 603 (Mo. 1980) (en banc).


73. *FED. R. EVID.* 801 advisory committee note; *see also* *WEINSTEIN'S EVIDENCE*, *supra* note 34, § 801(d)(1), at 100-01.

74. *FED. R. EVID.* 801(d)(1)(B) defines a prior consistent statement as nonhearsay if "offered to rebut an express or implied charge . . . of recent fabrication or improper influence or motive."

75. *See supra* note 44 and accompanying text. However, the recording aspect may affect the federal rule regarding cumulative evidence. *Compare* United States v. Papia, 560 F.2d 827 (7th Cir. 1977) (admitting tape recorded conversations because not like other prior consistent statements) *with* United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976) (refusing to allow prior consistent tape recorded statements when in-court testimony not attacked as recent fabrication), *cert. denied*, 429 U.S. 1045 (1977).

Another jurisdiction has also recognized the unique nature of recorded evidence. *See* Grier v. United States, 381 A.2d 3, 4 (D.C. 1977) (dictum) (previous written or recorded statements not valueless although entirely consistent with testimony since more reliable and more emphatic).
not be introduced absent impeachment. However, courts that treat prior identifications as nonhearsay tend to admit the evidence over cumulative objections for the same reasons.

The *Mayhue* court was probably correct in holding the videotaped evidence was noncumulative under Missouri law. One rationale cited by the court was that prior identification is not impermissible bolstering because it is "direct testimony by the witness himself." As previously discussed, the difficulty is that not all prior consistent statements by a witness available for cross-examination are admissible. Another rationale used by the court was that the visual segment was relevant to the injury element in the assault charge. However, a problem arises because the entire tape was offered and admitted expressly for the limited purpose of proving certainty of identification. A third reason relied on by the court was that the tape had probative value because it demonstrated certainty of identification. This explanation is problematic because it is difficult to distinguish testimony by identifying and corroborating witnesses under the rationale of *Buschman*.

Federal courts and recent cases from other jurisdictions recognize that the normal rules against admitting prior consistent statements should defer to the necessary and desirable evidence of prior identification. Like the hearsay rule, inflexible cumulative evidence rules serve no useful purpose by excluding such evidence.

*Mayhue* further contended that the videotaped identification was prejudiced.

---


78. 653 S.W.2d at 235; *see supra* text accompanying note 70.

79. *See supra* note 36. The *Mayhue* court implicitly recognized this by excluding other oral statements on the tape. *See supra* note 8.

80. 653 S.W.2d at 236.

81. *Id.* at 232-33; *see infra* note 100.

82. 653 S.W.2d at 233.

83. 325 Mo. 553, 29 S.W.2d 688 (1930). Any testimony concerning prior identification, regardless of who delivers it, will lend credibility to the in-court identification under the *Buschman* rationale. The presumed enhanced impression left in the memory of the identifying witness is due to prior contact, rather than the identity of the person testifying about the prior contact.

The Degraffenreid reasoning is perhaps more persuasive. *See supra* note 68. However, an argument can be made that corroborating testimony is less convincing because jurors are required to trust the characters of both the identifying witness and the third party.

84. *See supra* notes 72-77 and accompanying text.
cial and inflammatory. Mayhue claimed that the video portion was highly prejudicial because it emphasized the gruesome wounds of the victim. Mayhue also argued that even if the evidence was not hearsay or technically cumulative, its prejudicial effect substantially outweighed any probative value.

The Mayhue court denied both assertions. The gruesomeness of the tape was due to the gruesomeness of the crime, and such evidence was admissible in the discretion of the trial judge if relevant to any material issue in the case. The grotesque visual display was material to the nature and extent of the victim's injury under the assault charge for which the prosecution had the burden of proof. Further, the weighing of probative value versus prejudicial effect was within the discretion of the trial judge.

Missouri law on this subject is quite clear. Discretion is not abused if visual demonstration of gruesome injuries is relevant to any material issue in the case, and the evidence accurately depicts the physical appearance of the victim. Emotional impact relates only to the weight of the evidence and not admissibility. The use of close-ups does not necessarily mean that the evidence was displayed in an unduly inflammatory manner. Further, a photograph is superior to words as a description of injuries and thus not necessarily cumulative when an in-court verbal description is given.

The federal rule on the exclusion of prejudicial evidence is contained in Federal Rule of Evidence 403. Relevant evidence can be excluded if probative value is substantially outweighed by prejudicial impact and other factors.

85. 653 S.W.2d at 230.
86. Id. at 235.
87. Id. at 236.
88. Id. at 236. The victim testified in court as to the nature and location of her wounds, so Mayhue argued that the visual display was unnecessary to establish the injury element. Id. at 235; see also infra note 100 and accompanying text.
89. 653 S.W.2d at 236.
90. E.g., State v. Burnfin, 606 S.W.2d 629, 630 (Mo. 1980) (photograph showing victim shot three times admissible to prove cause of death and malice); State v. Jones, 515 S.W.2d 504, 506 (Mo. 1974) (photograph showing gunshot wound in head admissible to prove nature and extent of injuries). But cf. State v. Floyd, 360 S.W.2d 630, 633 (Mo. 1962) (photograph of badly decomposed body not admissible when impossible to determine nature of wounds or cause of death).
91. E.g., State v. Lindsey, 507 S.W.2d 1, 3 (Mo. 1974) (allowed convincing and damaging videotaped confession); State v. Hamell, 561 S.W.2d 357, 361 (Mo. App., St. L.D. 1977) (videotaped confession).
92. E.g., State v. Hudson, 521 S.W.2d 43, 47 (Mo. App., St. L.D. 1975) (allowed repeated videotaped closeups of shotgun used to kill baby).
93. See, e.g., State v. Burnfin, 606 S.W.2d 629, 630 (Mo. 1980); Holtkamp v. State, 588 S.W.2d 183, 189-90 (Mo. App., E.D. 1979) (admitted photographs showing defendant's wife's dead body chained with concrete blocks and pulled from creek because no more gruesome than oral testimony); cf. supra note 75 (tape recordings).
94. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
The advisory committee noted that this discretionary balancing process is conducted by the trial judge. If visually gruesome evidence is relevant to a material issue in the case, its admission is generally not reversible error.

Other jurisdictions have admitted visually inflammatory evidence when relevant to a material issue in the case. For example, the Supreme Court of Iowa held that a videotaped deposition of a severely injured witness in a hospital wheelchair was admissible.

The Mayhue court correctly held that visually gruesome evidence is admissible in the discretion of the trial judge to prove any material issue in the case. The court relied heavily on the fact that the video portion was admissible to show injury. The trial judge, however, might have committed reversible error since admission of the entire tape was expressly limited to the issue of certainty of identification. Nevertheless, the evidence might be admissible as

95. See Fed. R. Evid. 403 advisory committee note. The committee said that the effectiveness of a limiting instruction should be considered in this analysis. *Id.* Mayhue declined a jury instruction offered by the prosecution to limit the tape to the issue of certainty of identification. 653 S.W.2d at 235.


99. 653 S.W.2d at 236; see supra note 88 and accompanying text.

100. The Mayhue court could have reversed the case on the issue of prejudice. The problem was that the evidence was expressly offered and admitted for the limited purpose of proving certainty of identification. 653 S.W.2d at 232-33.

The videotape should be treated as bifurcated. The audio portion is relevant solely to identification. The video portion is relevant to the injury element in the assault charge. The Mayhue court relied heavily on the latter fact. However, the evidentiary purpose of the entire tape was expressly limited. This limitation should have effectively excluded the probative value for the injury element from any bearing on the prejudicial balancing analysis. The visual portion possibly should have been severed and struck.
a prior identification demonstrating a fair and accurate depiction of circumstances at the time of identification.\textsuperscript{101}

Mayhue made two contentions as to the use of videotaped evidence in general. First, he claimed that videotaped evidence is inherently prejudicial due to the emotional impact on jurors.\textsuperscript{102} Second, Mayhue argued that, for evidentiary purposes, videotapes should be treated differently than photographs due to dramatic appeal.\textsuperscript{103}

The \textit{Mayhue} court denied that videotapes are inherently prejudicial, noting that modern society exposes persons to visual aids, including videotapes, so often that there is no merit to the claim that they have special appeal. Further, the tape did not automatically favor the prosecution because it was equally plausible that uncertainty in identification could have been demonstrated.\textsuperscript{104} Finally, the court held that videotapes should be considered by the same admissibility standards as photographs.\textsuperscript{105}

Missouri courts have approved the use of videotaped evidence, stating that there is nothing inherently prejudicial about this medium.\textsuperscript{106} Videotaped confessions have often been admitted.\textsuperscript{107} Missouri courts have also held that videotapes are admissible according to the same rules as other demonstrative evidence.\textsuperscript{108} Further, the Missouri legislature has expressly authorized the use

If Mayhue had stipulated or offered to stipulate the injury or identification element, the effect would be uncertain. The evidence would probably still be admissible. \textit{See, e.g.}, State v. Murphy, 592 S.W.2d 727, 730-31 (Mo. 1979) (en banc) (defendant’s gun admissible to negate claim of peaceful disposition despite stipulation that it was murder weapon).

102. 653 S.W.2d at 233.
103. \textit{Id.} at 231.
104. \textit{Id.} at 233. The court noted, without deciding, that the defendant probably should be given the right through some sort of discovery to use the tape as evidence should it prove exculpatory. \textit{Id.} at 234 n.4.
105. \textit{Id.} at 236. The court stated that videotapes are a recognized form of communication and permissible means of presenting evidence in modern society. Further, the court saw no reason to cast doubt on the veracity of videotapes in general or the specific tapes used in this case. Thus, no additional admissibility requirement was imposed. \textit{Id.}

For foundational requirements and admissibility standards for photographs and demonstrative evidence, see G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 416-25 (1978).

106. \textit{See, e.g.}, State v. Lindsey, 507 S.W.2d 1, 3 (Mo. 1974) (en banc) (allowed videotaped confession); State v. Green, 603 S.W.2d 50, 52 (Mo. App., E.D. 1980) (allowed videotape of illegal fencing operations); State v. Hamell, 561 S.W.2d 357, 361 (Mo. App., St. L.D. 1977) (allowed videotaped confession).
107. \textit{See, e.g.}, State v. Hendricks, 456 S.W.2d 11, 13 (Mo. 1970); State v. Lusk, 452 S.W.2d 219, 224 (Mo. 1970). Mayhue’s confession was videotaped and displayed to the jury, but this point was not argued on appeal. 653 S.W.2d at 230.
108. \textit{E.g.}, State v. Hudson, 521 S.W.2d 43, 47 (Mo. App., St. L.D. 1975); see also supra note 105.
of videotapes in two settings.\textsuperscript{109}

Other jurisdictions have increasingly approved the use of videotaped evidence in a variety of criminal contexts.\textsuperscript{110} One controversial area is the use of videotaped depositions in criminal cases.\textsuperscript{111} There is some authority that presentation of the deposition violates the sixth amendment right to confrontation, unless an affirmative showing of unavailability is made.\textsuperscript{112}

Another controversial context where courts are divided involves videotaped reenactment of crimes.\textsuperscript{113} Recently, the Texas Court of Appeals held admission of such evidence to constitute reversible error since videotaped reenactments are posed, inaccurate, and misleading to jurors.\textsuperscript{114} The Texas court argued that this evidence should be excluded when events are easy to understand and testimony is sufficient.\textsuperscript{115}

The \textit{Mayhue} court correctly held that videotapes are not inherently preju-

\begin{itemize}
  \item[109.] The Missouri legislature has expressly authorized videotaped depositions for "essential" witnesses in criminal cases, and this evidence is admissible to the same extent as any criminal deposition. \textsc{Mo. Rev. Stat.} § 492.303 (Supp. 1985). The legislature has also authorized an assigning circuit judge to require an associate circuit judge to preserve the record for appeal by using video recording devices. \textit{Id.} § 478.072. Preserving testimony by videotape may have the unintentional side effect of broadening the scope of review.


  \item[111.] \textit{See, e.g.}, People v. Moran, 39 Cal. App. 3d 398, 405-11, 114 Cal. Rptr. 413, 416-21 (1974) (videotape of preliminary hearing testimony allowed where chief witness died during trial).

  \item[112.] \textit{Cf.} State v. Gettys, 49 Ohio App. 2d 241, 249, 360 N.E.2d 735, 740-41 (1976) (applying Ohio Constitution provision similar to sixth amendment). The Florida Court of Appeals has stated that the right to confrontation is satisfied if the witness is unavailable. Otherwise, the same right would always be violated when transcribed testimony is read in court. Hutchins v. State, 286 So. 2d 244, 246 (Fla. Dist. Ct. App. 1973), \textit{cert. denied}, 293 So. 2d 717 (Fla. 1974). A New York lower court has stated that the right to confrontation is violated if a videotaped deposition is introduced at trial without the testimony of the identifying witness. People v. Higgins, 89 Misc. 2d 913, 916, 392 N.Y.S.2d 800, 802 (N.Y. Sup. Ct. 1977) (dictum).

  \item[113.] \textit{See, e.g.}, Baker v. State, 241 So. 2d 683, 686 (Fla. 1970) (allowed motion picture reenactment); Grant v. State, 171 So. 2d 361, 363-65 (Fla. 1965) (allowed motion picture reenactment), \textit{cert. denied}, 384 U.S. 1014 (1966). But see Peterson v. State, 586 P.2d 144, 154-55 (Wyo. 1978) (not abuse of discretion for trial judge to exclude videotaped reenactment when adequate trial testimony exists); J. \textsc{Wigmore, supra} note 36, at § 798a (advising against permitting videotaped reenactments because artificial reconstruction of events misleads jurors due to errors).


  \item[115.] \textit{Id.} at 415 (citing Eiland v. State, 130 Ga. App. 428, 429, 203 S.E.2d 619, 621 (1973)).
\end{itemize}
Missouri courts, the Missouri legislature, and courts in other jurisdictions have approved their use in a variety of contexts. The admissibility of the evidence should be considered separately for its video and audio components. Foundational requirements for the introduction of the evidence should be the same as for other types of demonstrative evidence.

Many reasons have been suggested for the use of videotaped evidence. First, videotaping confessions may actually protect the defendant's constitutional rights. Second, videotaped depositions are more interesting and may hold jurors' attentions better than the reading of stenographic reports. Third, videotapes enable jurors to better assess demeanor and credibility of witnesses. Fourth, videotapes better preserve evidence for appellate review. Fifth, videotaped lineups may aid in determining whether the procedures have met constitutional criteria. Lastly, videotaped prior identifications may show hesitation or uncertainty and thus prove exculpatory for a criminal defendant.

Mayhue has significant implications for the expanded use of videotapes in criminal trials. First, as a practical matter, all lineups in the future should be videotaped showing both the procedures employed and the identifying witness' facial expression, physical appearance, and gestures. Videotaping is rela-

116. See supra note 110 and accompanying text.
117. See People v. Heading, 39 Mich. App. 126, 132, 197 N.W.2d 325, 329 (1972) (since videotape is combination of sound and video recordings, foundational requirements for both must be satisfied); see also supra note 105.
118. Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972). The court mentioned that if the videotape depicts the suspect as faltering, worn out by interrogation, physically abused, or in other ways acting involuntarily, then the tape protects the defendant's right against self-incrimination. Id.
122. 653 S.W.2d at 234. A "totality of the circumstances" test is used to determine whether procedures are impossibly suggestive. Neil v. Biggers, 409 U.S. 188, 199 (1972); see also supra note 34.
123. See supra text accompanying note 104. For a more detailed analysis of advantages and disadvantages of videotaped evidence, see Barber, Videotape in Criminal Proceedings, 25 Hastings L.J. 1017 (1974); Cunningham, supra note 121; The Use of Videotape in the Courtroom, 1975 B.Y.U. L. Rev. 327.
124. The United States Department of Justice Project Staff undertook a comprehensive study to determine the feasibility of implementing expanded uses of videotapes in criminal trials. U.S. Dep't Justice, Video Support in the Criminal Courts (1975). The study generally recommended further applications of such evidence. Id. at 3-4. The Mayhue court labels the future use of videotapes "inevitable." 653 S.W.2d at 234.

http://scholarship.law.missouri.edu/mlr/vol50/iss1/10
tively inexpensive and should be easily accessible to prosecutors and police officers. The videotape is a strong medium to dramatically enhance presentation of the case.\footnote{See Hendricks v. Swenson, 456 F.2d 503, 508-09 (1972) (Heaney, J., dissenting); M. McLuhan, The Medium is the Message 125 (1967). Mayhue leaves unanswered the question of the extent to which manipulation of camera techniques such as closeups and angles can dramatically enhance presentation of the case before the tapes become too prejudicial.}

Videotaped evidence has many unique advantages. Courts are likely to approve its expanded use in the future. Evidentiary objections to videotapes should be considered separately for the audio and visual aspects of the tape. Foundational requirements should be similar to other types of demonstrative evidence. If either component is inadmissible, the sound can be turned down or the video blacked out to preserve the admissible portion.

Videotapes of the criminal identification process generally should be admissible. Oral statements or nonverbal assertions of identification should withstand hearsay and cumulative objections because prior identification is generally more reliable than in-court identification. The visual portion should not be excluded on prejudice grounds merely due to its gruesome nature so long as the visual display is relevant to any material issue in the case. Generally, if the witness appears gruesome, the tape is admissible to prove the nature and location of wounds. Constitutional limitations of due process and the right to confrontation provide adequate safeguards against the primary concern of impermissibly suggestive procedures in the criminal identification process.

Karl F. Findorff