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Eyewitnesses – not always infallible

Panel looking for ways to make the identifications of crime suspects more reliable

By JANET ELLIOTT

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AUSTIN - Barbara Hervey sits on the top criminal appeals court in Texas. But her interest in the subject of eyewitness identification dates to her days as a law student when she was robbed at gunpoint.

It was in the late 1970s when Hervey and two friends were held up on the San Antonio Riverwalk. They were able to get the license plate of the car in which the gunman and his two companions fled and flag down a nearby police officer.

Their quick action helped police, who stopped the car about 10 minutes later. But when Hervey was presented with the suspects, she found herself struggling to identify them.

"I could only recognize one. I had been too busy looking at the gun," she said. "Quite frankly, I was urged to identify the other two, but I could not do it."

Hervey, a Republican, is one of several members of Gov. Rick Perry's new Criminal Justice Advisory Council who believe Texas needs to consider ways to improve the reliability of eyewitness identifications.

"I appreciate when people raise the issue of questionable identity," Hervey said.

One change being discussed is to use a so-called "blind presenter," someone not involved in the investigation, to show the photo or live lineup to a victim or witness. Since the presenter doesn't know who the suspect is, there are no suggestive expressions or comments to influence the witness.

A more controversial change involves presenting photos to a witness one-by-one instead of simultaneously in a photo spread. Some studies have found that witnesses are less likely to make a selection — either correctly or incorrectly — when photos are shown sequentially.

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Faulty eyewitness testimony has been implicated in a number of cases where convictions were overturned after DNA evidence was tested.

"In 75 percent of the nation's first 164 DNA exonerations, at least one mistaken eyewitness contributed to the wrongful conviction," said Stephen Saloom, policy director of the Innocence Project at the Benjamin N. Cardozo School of Law in New York City.

Cantu witness at issue

A flawed identification is at issue in the possible wrongful execution of Ruben Cantu, who was put to death in 1993. The Houston Chronicle reported last month that the lone eyewitness to a 1984 murder-robbery has recanted.

The witness, Juan Moreno, identified Cantu only after San Antonio police officers showed him Cantu's photo three times. He said he felt pressure by police to identify Cantu, even though he knew it was wrong.

Bexar County District Attorney Susan Reed has reopened the case.

Hervey was an assistant in the Bexar County DA's appellate section in 1993 when she wrote a letter to the head of the state's pardons and paroles division opposing Cantu's request for a 30-day reprieve and commutation. She said at the time that there was no new evidence to cast doubt upon his guilt.

Hervey said the Cantu case has raised the issue of eyewitness evidence to the public and those who work in criminal justice.

"We really are looking at these issues very seriously," she said.

Perry formed the criminal justice council in March to make recommendations regarding changes in legal procedures to better protect the rights of both victims and the accused. He named nine members in June and asked for their initial recommendations in early 2006.

Testing procedures

Sen. Rodney Ellis, D-Houston, is chairman of the Actual Innocence Subcommittee of the governor's council. His panel is recommending the state begin a pilot project in four locations to test simultaneous and sequential identification procedures. The suggested locations are El Paso, Wichita Falls and Bell and Caldwell counties.

"The key step is to start somewhere," said Ellis, who also is chairman of the board of the national Innocence Project. "I want to help create a greater public awareness of these issues and try to gather some political support."

Perry will consider the council's recommendations when he gets them next month, said his press secretary Kathy Walt.

"He established the council, as he said at the time, to get recommendations to enhance public confidence in the criminal justice system," said Walt. "He's aware that (eyewitness identification) is one of the issues they're looking at."

Working with police

During this year's legislative session, Ellis did not get a hearing on his bill to require that witnesses be shown photographs one at a time and must state whether the individual shown is the offender before viewing the next photograph. The bill would prohibit the person who administers the lineup from knowing which photograph represents the suspect.

Charley Wilkinson, political and legislative director for the Combined Law Enforcement Association of Texas, said officers would be unlikely to support changes that could hurt their ability to solve

crimes.

"Anything that would promote a better, clearer system of getting to what actually happened and who actually did it would have to be supported by people seeking justice," he said.

"If the new system, however, that's being imposed would in any way hamper law enforcement's ability to jog the memory of a victim or would any way hamper law enforcement's ability to get at the truth, then the officers would worry about that."

Christian Meissner, a professor of psychology and criminal justice at the University of Texas at El Paso, has done research into sequential and simultaneous lineups. He found that people shown photos one at a time are less likely to make an identification.

"We are seeing in our data a reduction in false identification, which is a positive step, but also a reduction in correct identification. The question becomes how much of a cost in correct identification are we willing to accept," he said.

Meissner said the key is to find techniques that will reduce false identifications but not influence correct identifications.

Finding a neutral party

Using a blind or neutral tester to show lineups is less controversial but has been slow to gain acceptance, said Gary Wells, a psychology professor at Iowa State University in Ames who has studied eyewitness identification techniques for 30 years.

"There's a failure to realize how fragile memory can be and how easily it can be to cue witnesses into mistaken identification," said Wells.

He compared the concept of a blind presenter to a drug study where neither the patient taking the medication nor the person examining the patient know whether the patient received the drug or the placebo.

In addition to a neutral presenter, Wells said, witnesses should be required to state their level of certainty about an identification. And, he added, police should not be allowed to keep showing a witness a suspect's photo in different lineups.

"That by nature is suggestive. It gives away the so-called correct answer," he said.

In 2001, New Jersey became the first state to adopt eyewitness evidence guidelines issued by the U.S. Department of Justice. Then-state Attorney General John J. Farmer Jr. used his authority to implement the use of blind presenters and sequential lineups.

New Jersey satisfied

Farmer acted after a New Brunswick man was freed from prison following new DNA findings that showed he had been wrongly convicted in the rape of a Rutgers University student. The New Jersey Supreme Court also pushed for the change.

"Our Supreme Court indicated to us we needed to find a way to make the use of eyewitness evidence better or change our court rules and our evidence rules to make it very difficult to use (eyewitness identification) unless we had significant physical corroborating evidence," said Lori Linskey, a deputy attorney general with the Division of Criminal Justice in Trenton, N.J.

Linskey said there was an initial backlash when law enforcement agencies complained they didn't have enough personnel to meet the blind presenter requirement. Police also worried that the sequential lineups might result in guilty individuals escaping justice.

The division spent six months training the officers. Nearly 600 New Jersey law enforcement agencies that responded to a survey

indicated overall satisfaction with the guidelines. "I think the anticipation of the change was far more difficult," she said. "The sky hasn't fallen. Witnesses are still making ID's, criminals are being prosecuted."

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