

PRELIMINARY / CONTEMPORANEOUS INSTRUCTION

Upon request by any party, the trial judge shall give the preliminary/contemporaneous instruction before opening statements or immediately before or after the testimony of an identifying witness, saving the full model instruction to be given at a later time during the trial. The instruction is set forth at 473 Mass. 1051 (2015).

You may hear testimony from a witness who has identified the defendant as the person who committed (or participated in) the alleged crime(s). Where a witness has identified the defendant as the person who committed (or participated in) the alleged crime(s), you should examine the identification with care. As with any witness, you must determine the credibility of the witness, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification. The mind

does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Generally, memory is most accurate right after the event and begins to fade soon thereafter. Many factors occurring while the witness is observing the event may affect a witness's ability to make an accurate identification. Other factors occurring after observing the event also may affect a witness's memory of that event, and may alter that memory without the witness realizing that his or her memory has been affected. Later in the trial, I will discuss in more detail the factors that you should consider in determining whether a witness's identification is accurate. Ultimately, you must determine whether or not the Commonwealth has proved the charge(s), including the identity of the person who committed (or participated in) the alleged crime(s), beyond a reasonable doubt.