

Rules and Procedures

Rule 330

November 8, 2004

Rule 330 - PROCEDURES FOR COLLECTION AND PRESERVATION OF EYEWITNESS IDENTIFICATION EVIDENCE

To standardize the procedures for using eye witness identification evidence. Specifically, this rule will establish standard protocol for utilizing various eyewitness identifications from photo lineups, live lineups, show-ups and other methods that rely upon the recollection of a percipient witness to determine the identity of an offender. Its provisions are effective immediately, superseding all previously issued rules, regulations, procedures, orders, directives, and training bulletins on this subject.

General Considerations: Nationwide, eyewitness identification procedures have been the subject of considerable study and criticism. Erroneous identifications have been cited as the most frequent cause of wrongful convictions. The Boston Police Department recognizes the need to maintain the public's confidence in the fairness of our investigative procedures. While our current procedures are constitutionally sufficient and accepted by all Massachusetts and federal courts, improvement and standardization will result in greater confidence in the fairness of our investigations in general, and eyewitness identifications in particular. Adoption of a standard method will improve the quality of investigations and enhance the professional image of the Boston Police Department. The most notable procedures adopted by the rule reflect the latest developments of the National Institute of Justice, Technical Working Group for Eyewitness Evidence. While some of the procedures are new, the principles remain the same, to protect the suspect's constitutional right of due process by avoiding unnecessarily suggestive identification procedures

Investigations are dynamic endeavors with limitless variables. Officers may not be able to incorporate every aspect of the rule in every situation. In those situations where it is impracticable to incorporate some component of the rule, the investigator is required to use his best professional judgment and employ a practice that affords substantially similar protections of the suspect's due process rights. In such circumstances the investigator must document any deviation and articulate the reason why the standard procedure could not be used.

Boston police officers should be particularly mindful of the difficulty some witnesses may experience after witnessing, or having been a victim of, a crime. As always the victim/witness should be treated cordially and professionally. They should also be provided with contact information for the officers or detectives who will be assigned to the case, in the event that they may have additional information or concerns regarding the case.

Section 1. Key Considerations. Most important in any eyewitness evidence procedure is to ensure the following:

That the witness is informed that the person who committed the crime may or may not be in the lineup;

That the witness is informed that it is just as important to clear innocent persons from suspicion as it is to identify guilty parties;

That the witness is informed that regardless of whether an identification is made, the police will continue to investigate the incident;

That the witness, when making an identification, expresses his/her certainty in his/her own words, which are then documented in an investigative report.

Section 2. Definitions- Types of Eyewitness Evidence:

Show-ups – A field identification procedure used when a prompt display of a suspect to a witness is required. Soon after the crime is committed a witness may be brought to the location where a suspect is detained; the suspect may also be transported to the witness, although it is preferred to transport the witness if circumstances permit.

Field View – Police arrange for a witness to view a group of people in a public place. It is less suggestive than the show-up and may occur well after the commission of the crime being investigated. There must be several people in the area who generally look like the suspect (i.e. age, race, general physical description).

Line-ups- may be either photo or live line-ups. The suspect, or his/her photo, will be included with additional individuals, or photos, and the witness will view them sequentially, one individual or photo at a time.

Photo books or Digital Imaging System compilations – These are collections of photos that a witness may view when other investigative methods have failed to identify a suspect. This technique should be used only after other investigative techniques have failed, or are not possible to conduct. Any identification that results should be cautiously evaluated.

Composite – A sketch based upon a witness description is a form of evidence that may be a beneficial investigative tool, but should not be relied upon as “stand alone” evidence, as it is unlikely to rise to the level of probable cause without some other evidence.

Section 3. Show-ups In the immediate aftermath of a crime, where a description is available, and a suspect is located, police may consider conducting a show-up during which the victim or witness, with a fresh memory of the event, is able to view a person who matches the description of the suspect.

A. Considerations. Generally, a show-up should be conducted within two hours of the commission of the crime, unless otherwise dictated by the circumstances (i.e. medical

treatment or recent sighting). Officers must have reasonable suspicion to detain a suspect for a show-up. The suspect may also consent. It is preferable, when operating without reasonable suspicion, unless time is a critical element in the investigation, to take a photo of the suspect with his/her consent, and then assemble a photo line-up to show the witness.

B. Witness preparation. Separate witnesses and get a detailed description of the suspect(s) from each prior to the show-up. Keep witnesses separate until the show-up has been completed. Instruct them not to discuss the identification procedure with other witnesses. Prior to conducting the show-up tell the witnesses that you are taking them to look at someone. Do not comment further. Do not state that the person matches the description. Tell the witnesses that the person may or may not be the perpetrator, and that the investigation will continue, whether or not an identification is made. Advise the witnesses that it is just as important to free the innocent from suspicion, as it is to identify offenders. Tell the witnesses that they will be asked to make a statement of certainty, in their own words, if they make an identification.

C. Viewing. To conduct the show-up, transport the witness to the suspect whenever possible. If there are multiple suspects and/or witnesses, show each suspect separately to each witness separately. Officers should present the suspect/s to the witness/witnesses just as the officer found him/her.

If the suspect is transported to the witness, or otherwise detained in a police vehicle, remove the suspect from the police vehicle, if it is safe to do so, prior to the show-up procedure. Present the suspect to the witness/witnesses just as the officer found him/her. Effective security measures must be taken, but those that are less evident to the witness should be used when possible. Remove handcuffs, if possible without undue risk, or at least try to conceal the handcuffs, if it not safe to remove them. Avoid having the suspect surrounded or held by officers, if reasonable. Do not bring a suspect to the residence of a witness, unless it was the scene of the crime. If the suspect is brought back to the scene of the crime, be careful not to contaminate the crime scene. Bring him/her only close to the area, but not within the crime scene itself.

Note. In order to avoid possible contamination of forensic evidence, articles of clothing that have been discarded by a suspect in flight should not be placed back on his body. The witness can view the article of clothing, however, if the viewing can be done without risk of contamination.

D. Post-viewing. After the show-up, ask the victim how certain, in his/her own words, he/she is of any identification made. Document in an investigative report the exact words that he/she uses. Do not ask him/her to quantify their certainty in terms of percentages (e.g., "90% sure"). Expect, however, that witnesses will sometimes respond with a degree of certainty expressed as a percentage, and the witness' statements, including the percentage, must be recorded. Remind the witness not to talk to other witnesses about the identification, and not to talk with anyone who might disclose the information, such as the media, without checking with the investigator first.

E. Documentation. Document the fact of an identification on the 1.1 incident report only if necessary to provide probable cause for an arrest. On a separate investigative report, describe the time of the offense, the basis for reasonable suspicion to detain the suspect for a show-up (or consent), time and location of show-up, witness precautions, circumstances of show-up (cuffed or not, number of officers around suspect, etc.), exact words of witness describing certainty, identity of witnesses, and sequence of witness and suspect viewing, when there are multiple witnesses and suspects. Record the names of all officers involved in the identification process.

In cases where no identification is made, this fact must be documented and described in the same manner as for identifications. If a witness does not identify a suspect, but becomes emotional, or states that he/she is frightened upon seeing the suspect, that should be included in the description of the circumstances.

Section 4. Field View The field view ideally will result in an "in person" viewing of the suspect, but precautions should be taken to avoid an actual confrontation between the victim and the suspect. If identification is made, efforts should be made to identify other people present at the scene.

A. Considerations. There is no time limit as to when this procedure can be used. Since the witness should be able to view several people, it should be equivalent to a line-up. There is no reasonable suspicion requirement, since the police are merely putting the witness in a location where he/she may have the opportunity to see the suspect. This procedure can be used in most public places, but should never be used in a courtroom without prior coordination with the prosecutors who will likely coordinate with defense counsel and the judge.

B. Witness preparation. Separate the witnesses and get a detailed description from each prior to the field view. Keep the witnesses separate until the field view has been completed. Instruct them not to discuss the identification procedure with other witnesses. Prior to conducting the field view, tell the witnesses that you are taking them to a location to look at people. Do not comment further. Do not state that any person matches the description. Tell the witness not to assume that the perpetrator will be present, and that the investigation will continue regardless of whether the witness sees the perpetrator. Advise the witnesses that it is just as important to free the innocent from suspicion, as it is to identify offenders. Remind the witness not to discuss the procedure with other witnesses. Tell the witnesses that they will be asked to make a statement of certainty, in their own words, if they make an identification.

C. Viewing. Be sure that there are several people who match the same general characteristics as the suspect at the location before taking the witness there. For multiple offender cases, if possible, pick a location where only one offender will be present when the witness is brought there.

D. Post-viewing. After the field view, if the witness has made an identification, ask him/her to state how certain he/she is, in his/her own words. Document in an investigative report the

exact words that he/she uses. Do not ask him/her to quantify their certainty in terms of percentages (e.g., "90% sure"). Expect, however, that witnesses will sometimes respond with a degree of certainty expressed as a percentage, and the witness' statements, including the percentage, must be recorded. Remind the witness not to talk to other witnesses about the identification, and not to talk to anyone who may disclose the information, such as the media, without checking with the investigator first. Provide contact information, and advise the witness to contact you with any other information that he/she may be able to add.

E. Documentation. Document the fact of an identification on the 1.1 incident report only if necessary to provide probable cause for an arrest. On a separate investigative report, record the date and time of the offense, the date, time, and location of the field view, and witness precautions. Record the circumstances of the field view (i.e., number of people around suspect, how many resembled suspect in terms of age, height, build, hair, clothes, etc.). Record the exact words of witness describing certainty of any identification made.

In cases where no identification is made, this fact must be documented and described in the same manner as for identifications. If a witness does not identify a suspect, but becomes emotional, or states that he/she is frightened upon seeing the suspect, that should be included in the description of the circumstances.

Section 5. Photo and Live Line-ups Photo and live line-ups must be conducted in a manner that ensures accuracy, reliability, fairness, and objectivity. Live line-ups generally give rise to additional rights. In some instances, the suspect has a right to have counsel present for the live line-up procedure. Therefore, all live line-ups must be coordinated through the district attorney's office and the prosecutor for the particular case should be present to interact with defense counsel.

A. Considerations. Photo and live line-ups are conducted in the same way. Therefore, the following principles apply to both procedures.

B. Assembling the Line-up. Include only one suspect in each identification procedure. Select fillers who generally fit the witness' description of the perpetrator. Complete uniformity is not required. Avoid fillers that so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the fillers. Create a uniform appearance between suspect and fillers with respect to any specific features, such as scars, tattoos, etc., by artificially adding or concealing the particular feature. For multiple witnesses, show the photo or live line-up separately, and re-position the photos or persons in each line-up. Ensure that no writing or information about previous arrests will be visible to the witness. Review the line-up to ensure that the suspect does not unduly stand out.

Photo line-ups. For each identification procedure include a total of 8 photos consisting of seven (7) fillers, plus one (1) suspect. Select photos that resemble the suspect's description or appearance at the time of the incident. Once the photos are selected the investigator/administrator shall mark the back of each photo with a sequential number, and

record the order in which they are to be shown. Preserve the photos in their original condition, or if that is not possible, make high quality copies.

Live line-ups. For each identification procedure include a minimum of four (4) fillers, plus one (1) suspect, for a minimum total of five (5) people. The maximum number should be a total of eight (8) people, consisting of seven (7) fillers, plus one (1) suspect. Preserve the presentation of the line-up via videotape and photograph the procedure.

C. Witness Preparation. Give the witness the Witness Preparation Form (BPD Form 2986) and read it to him/her. If the witness is not fluent in the English language, have the form read to him/her by a person capable of translating the form. If the witness can read his or her native language and there is a form prepared in that language, the witness should be given that form in addition to having the form read to him/her. If no translator is available to read and discuss the form and there is a time sensitive exigency, the witness may read the form without having it read to him/her. In all cases, the officer administering the lineup shall determine if the witness understands the instruction. The administrator shall proceed with the lineup only when satisfied that the witness does understand. The administrator shall:

Ask the witness to view a group of photos/individuals Tell the witness that it is just as important to clear innocent persons from suspicion as it is to identify guilty parties. Tell the witness that the person who committed the crime may or may not be in the line-up. Tell the witness that individuals depicted in the line-up may not appear exactly as they did on the date of the incident and that features such as hairstyle and facial hair are subject to change. For photo line-ups advise the witness that the person's complexion may appear different in the photo than in person, (i.e. either lighter or darker). Inform the witness that regardless of whether an identification is made, the police will continue to investigate the incident. Explain that photos/individuals are in a random order, and will be shown sequentially, one at a time. Do not state how many photos/individuals will be shown. Instruct the witness to view all photos/individuals and to take as much time on each as needed. Inform the witness that if he/she recognizes anyone, to state which photograph he/she recognizes and how he/she recognizes the individual. Tell the witness that he/she will be asked to make a statement of certainty, if he/she makes an identification. Inform the witness not to tell other witnesses that he/she has or has not identified anyone.

D. Viewing. "Blind" administration procedures should be used whenever possible to eliminate accusations of influencing the witness. A Boston Police detective or detective superior officer, not familiar with the identity of the suspect in the procedure, should instruct the witness and administer the procedure. The administrator may be involved in other aspects of the investigation as long as he/she had no role in preparing the procedure and does not know which photo/individual is the suspect.

The administrator of a photo line-up, after having properly instructed the witness, will place the photo pack in front of the witness. The witness will be instructed to look at each photo for as long as he/she wants. Then he/she is to place that photo face down on the table. The

administrator of a live line-up, after having properly instructed the witness, will have each individual to be viewed come into the viewing area one at a time, and remain as long as the witness needs. The individual may be instructed to turn and step forward as necessary, as long as all movements are uniform for each individual. The administrator should not say anything to the witness, nor make any gestures that may distract the witness while viewing the procedure. If the witness recognizes a photo or individual, he/she may so indicate, and state the level of certainty in his/her own words and state how he/she recognizes that individual, but should be instructed to look at the remaining photos or individuals. If the witness makes an identification, the administrator should not make any comment about the identification. The administrator should request that the witness sign and date the back of a copy of the photo selected. If the witness requests to view the procedure a second time, the administrator should ask if the witness was able to make an identification from the original viewing. If the witness is unable to make an identification, but feels that it would be helpful to see it again, then it is permissible to repeat the procedure by placing the same photos/individuals, in a reshuffled order, in front of the witness. If this scenario occurs, it must be clearly documented. The specific statement of the witness, as to his/her ability or inability to identify someone from the first viewing, as well as subsequent identification, or lack thereof, must be documented.

E. Post Viewing. After the viewing, if the witness has made an identification, ask him/her to state how certain he/she is, in his/her own words. Document in an investigative report the exact words that he/she uses. Do not ask him/her to quantify their certainty in terms of percentages (e.g., "90% sure"). Expect, however, that witnesses will sometimes respond with a degree of certainty expressed as a percentage, and the witness' statements, including the percentage, must be recorded. Remind the witness not to discuss the identification process with other witnesses, or with anyone who could divulge the information to other witnesses.

F. Documentation. Document the fact of an identification on the 1.1 incident report only if necessary to provide probable cause for an arrest. On a separate investigative report, record the results of the photo or live line-up, including the time, date, investigating officers, administering officer, witness, and witness statement regarding identification. Investigators should be prepared to account for any deviation from the standard sequential photo or live line-up procedure. Record any non-identification, noting the specific words of the witness. Ensure that the witness/victim signs and dates the front of any photo selected during the procedure.

Section 6. Photo Books and Digital Imaging System. Generally, other investigative methods should be pursued before resorting to viewing of large numbers of photographs or computer images. When using photo book or imaging system compilations, the investigator should be extremely cautious before taking any action on the basis of the identification alone.

A. Viewing Preparations. Ensure that identifying information is available for all individuals, and that the images are contemporary. Images should be selected by specific characteristics (i.e. race, age, sex, etc.). Show images individually either by computer, or by removing from a photo book.

B. Witness Instructions. With the witness separated from other witnesses, instruct the witness that he/she will view a "collection of images." Do not refer to them as mug shots. If asked, explain that the police department has photos on file for a variety of reasons (e.g., driver's license photos from the Registry of Motor Vehicles, firearms and hackney license photos, and even photos of officers not in their uniforms). Provide instructions as in Section 5C. Because the nature of the photo book/digital imaging system is such that the investigating officer does not know who the suspect is, there is no need to use the blind administration procedure.

C. Documentation. In an investigative follow-up report, record the results of the photo book/digital imaging system, including the time, date, investigating officers, administering officer, witness, and witness statement regarding identification. In such circumstances the investigator must document any deviation and articulate the reason why the standard procedure could not be used. Record any non-identification, noting the specific words of the witness. Ensure that the witness signs and dates the back of a copy of any photo selected.

Section 7. Composites. Composite sketches may be useful in developing information, but alone are not sufficient to rise to the level of probable cause. When the investigator determines that a composite sketch could be valuable, he/she should take the usual precautions of separating witnesses, and have each witness individually work with the person compiling the composite. The witness should state, in his/her own words, how accurately the composite reflects how the suspect appeared during the crime, and a report should be prepared regarding the composite procedure.

Note:

* Amended by SO 13-042, issued 10/1/2013, the last sentence in Section 5, paragraph F will read: "Ensure that the witness/victim signs and dates the front of any photo selected during the procedure."