



Showing Proof of ID

Why image quality is critical when trying to identify perpetrators of crime using videotape evidence

By Elliott Goldstein

Q How do you prove that the person shown in a crime-in-progress videotape is the accused?

A Crime-in-progress videotapes show the crime scene, the actual occurrence of the crime, and its aftermath. In many cases, the issue is not whether, or how, a crime occurred; it is who committed it.

Proving the identity of the person(s) shown in the videotape is easier if the videotape is of good quality and sufficient clarity, and shows the accused for a sufficient period of time. A lay witness (not an expert witness) who has known the accused personally for a number of years usually provides evidence of identification. This identification witness gives his or her opinion that the person shown committing crimes in the videotape is the accused. However, it is not enough that there be some evidence pointing to the accused's identity. To justify a conviction, the evidence must leave no room for reasonable doubt.

For example, in the 1996 New Brunswick case of *R. v. McHugh*,¹ the only evidence implicating the accused with the alleged shortages of money from the cash "pans" at a supermarket was a surveillance video. Because of the quality of the video, it was impossible to see the person face on. In addition, the frame rate of the videotape (less than the standard 30 frames per second) made it difficult to see the items taken by the person shown, except that she appears to be "fanning currency" in some sequences.

The Crown relied exclusively on the evidence of the supermarket's manager to identify the accused as the person in the video. A voir dire was not requested by the Crown to demonstrate the ability of the store manager to give opinion evidence of identification, nor did the Defence object to the opinions given.

Despite the fact that the store manager had known the accused for 18 years, the Court found that his evidence fell

short of what should be required to identify the accused beyond a reasonable doubt. The store manager failed to describe the characteristics and "thing" that stirred and clarified his memory or recognition of the accused.

Without the accompaniment of objective facts, the store manager's identification was merely an opinion and not a statement of a single fact. While there is no question that the store manager possessed sufficient knowledge of the accused to identify her beyond a reasonable doubt, the actual testimony he gave was not sufficient for that purpose.

The quality of the video may have made the task more difficult since it was impossible to get a view of some of the person's more prominent features. In addition to the accused, four other female employees had keys to the cash office and, therefore, access to the money.

The Court in the *McHugh* case referred to an earlier decision of the Supreme Court of Canada (SCC) in *R. v. Leaney and Rawlinson*.² In the *Leaney* case, the court was dealing with the identification of the accused (*Leaney*), who appeared in a video of a break-and-enter. In *Leaney*, the SCC held that a trial judge could find, without independent evidence (of a corroborating witness), that identification of the accused is established beyond a reasonable doubt if the following holds true:

- evidence of a video of a break-and-enter is properly admissible;
- the video is of sufficient quality to clearly show the accused;
- the presiding judge has an opportunity to see the video over the period of the trial and observe the accused; and
- the judge is satisfied that the person in the video is the accused.

It is very important to note that at no time in the trial of *McHugh* was the

provincial court judge able to match the person in the video with the accused. Therefore, the trial judge could not say that the accused and the female shown in the video were one-and-the-same person.

In late 1996, the Supreme Court of Canada applied the legal principles from the *Leaney* case in *R. v. Nikolovski*³ and held that a "trier of fact" (that is, the jury or, if sitting without a jury, the trial judge) could use a crime-in-progress videotape to determine whether the accused committed the crime. The trier of fact could determine identification solely on the basis of the videotape evidence. That is, opinion evidence from an identification witness was not necessary.

In a somewhat bizarre 1999 Ontario case, *R. v. Pham*,⁴ the Ontario Court of Appeal acquitted an accused charged with mischief after his brother's car was repeatedly vandalized. Two episodes of vandalism were recorded on videotape.

The complainant (that is, the "victim") and his brother began arguing and fighting in mid-1995. The victim's car, a Honda Accord, was vandalized four times between July 1995 and November 1995 while it was parked at his apartment building, at his workplace, and in the parking lot of the shopping plaza across from his apartment building.

During the November 1995 attack, all four tires were punctured and white spray paint was sprayed on the side and hood of the car. Because his car had been vandalized several times before, the complainant had, earlier in the night of November 12, 1995, mounted a video camcorder in the window of his apartment that faced the parking lot and focused the camera on his car. The camera successfully recorded the perpetrator vandalizing the complainant's car.

The complainant said that on viewing the tape, he immediately recognized

his brother, the accused, as the individual vandalizing the car. The complainant testified that the individual on the videotape and the accused had similar running shoes, a similar walk, and a similar shape of face, which is how he was able to identify the individual on the tape as the accused.

Upon his arrest and subsequently at trial, the accused maintained that on the night of November 12, 1995, he was at the apartment of his former girlfriend. That apartment is located in a building adjacent to the parking lot where the complainant's car was vandalized.

On November 21, 1996, the accused was found guilty on two counts of mischief and sentenced to a term of imprisonment of 90 days on each count, to be served concurrently. The accused appealed to the Ontario Court (General Division); that appeal was dismissed on May 26, 1997. The accused then appealed to the Ontario Court of Appeal.

The central evidence at trial against the accused was the videotape from the camcorder, which clearly showed two episodes: the first of a person puncturing the tires of the Honda motor vehicle; the second showing his later return to further vandalize the vehicle by spray painting it. The videotape was played in

open court at the trial and again in the Court of Appeal.

The higher court judges disagreed with the lower court (trial) judge, commenting as follows:⁵

"The recording is of relatively poor quality, which makes it difficult to identify the perpetrator shown vandalizing the complainant's car. The figure shown in the tape is wearing a hood, and his face is entirely hidden from the camera because of the hood and the darkness in the area. His shoes are not evident at all and the court can only conclude that the detailed description of the shoes given by the complainant and repeated by the trial judge results from the complainant's recollection of having seen the shoes on his brother's feet on another occasion rather than it being a description of what is shown on the tape itself. The only identifying feature is the so-called 'loping' run, but I can not comment upon how distinctive that is."

The Ontario Court of Appeal also considered fresh evidence in the form of an affidavit by another person, Long Hoang Bui, who is about the same size

and build as the accused. His evidence was that he had vandalized the complainant's vehicle because he did not like the way the complainant had mistreated his (Bui's) girlfriend. Accordingly, the Ontario Court of Appeal allowed the appeal, set aside the conviction and ordered a new trial.

These cases show the importance of recording high quality and clarity videotapes and being able to match the person in the video with the accused. Simply put, the better the picture, the more likely the conviction. ♦

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Author's Notes

- 1 (Jan. 22, 1996), 172 N.B.R. (2d) 351, 439 A.P.R. 351.
- 2 [1989] 2 S.C.R. 393; 99 N.R. 345; 99 A.R. 291; 50 C.C.C. (3d) 289.
- 3 (1996), 111 C.C.C. (3d) 403 (S.C.C.), [1996] 3 S.C.R. 1197.
- 4 (1999), 124 O.A.C. 154 (Ont. C.A.)
- 5 Ibid.

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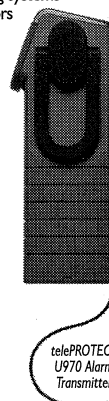
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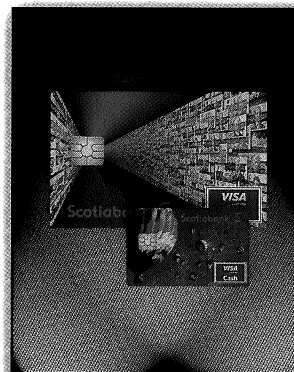
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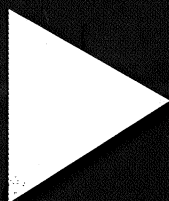


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