

OPINION TESTIMONY RELATING TO AGE¹

As a general rule, witnesses can testify only as to facts known by them. This rule ordinarily does not permit a witness to provide opinion testimony. However, an exception to this rule allows a witness to provide an opinion as to a person's age.

In this case the State has presented evidence that **[insert name of lay witness]** made observations of **[insert name of alleged victim]**. According to the witness, their opinion relating to **[insert name of alleged victim]** was based upon observations and perceptions that they made of **[insert name of alleged victim]**. It is your function to determine whether that opinion is reliable and believable or whether it is based on a mistake or for any reason not worthy of belief.

The State has the burden of proving each element of the offense beyond a reasonable doubt, including satisfying any age requirement. Speculation about age is not permitted.

In order to assist you with this process, I will instruct you on specific factors you may consider in this case to determine whether the witness' limited opinion testimony is reliable and what weight, if any, you should give to this particular limited opinion testimony. In making this determination, you should consider the observations and perceptions on which the testimony was based, the witness' ability to make those observations and perceptions, and the circumstances under which the limited opinion testimony was made.

The specific factors² you may consider among any other factors you deem appropriate include:

(1) The distance of the witness to the person whom they observed. A person is easier to observe when close by. The greater the distance between a witness and the individual whom they are observing, the higher the risk of mistake. In addition, a witness' estimation of how far they were from the individual being described may not always be accurate because people tend to have difficulty estimating distances;

¹ A Rule 104 hearing shall be conducted upon request where the Court will state on the record its findings as to whether a sufficient foundation exists for the proposed lay opinion testimony. See State v. Gerena, 249 N.J. 304, 307 (2021).

² It is for the Court to determine which factors, if any, to include in the instruction to the jury when lay opinion testimony is presented concerning the estimation of a child's age.

(2) The amount of time a witness has to observe an event may affect the reliability of their testimony. Although there is no minimum time required, a brief or fleeting observation is less likely to produce an accurate opinion than a more prolonged exposure to the individual. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did;

(3) Any observed activity of the person – i.e., what was the person doing at the time of the observation and whether that activity is consistent with the person’s estimated age;

(4) whether the witness made any physical comparisons of the observed individual with the height or size of nearby objects or other person(s);

(5) whether the witness testifies to a range rather than a specific age;³

(6) whether the observed individual is of a similar age as the witness, i.e., a witness may have a greater ability to assess the ages of persons who are their chronological peers;

(7) whether there is corroborating proof of the observation testimony; and

(8) the totality of the circumstances.

You are not bound by such witness’s limited opinion testimony, but you should consider each opinion and give it the weight to which you deem it is entitled, whether that be great or slight, or you may reject it entirely.

You and you alone are the sole factfinders in this case. Speculation about age is not permitted. As the sole judges of the facts, you are to determine the credibility of the various witnesses, as well as the weight to be afforded to their testimony to determine whether the State has proven beyond a reasonable doubt all elements of the offense(s) charged, including the age of the alleged victim(s).

³ In some cases, an expert might be necessary, such as in child pornography cases where the witness is estimating age from a video or picture. See State v. May, 362 N.J. Super. 572, 594-95 (App. Div. 2003).