

Jury Instruction – Witness Pretrial Preparation

You have heard testimony about (insert name of individual, ie. Prosecutor, detective/investigator and/or defense counsel) speaking to a witness about the case at some point prior to the witness testifying at trial. The law permits (name of person) to speak to a witness about the case before the witness testifies and permits (name of person) to review with the witness the questions that may be asked at trial, including questions that may be asked on cross-examination. Speaking to a witness about their testimony is a normal part of preparing for trial. It is not improper as long as there is no suggestion made to the witness that the witness depart from the truth.

(INSERT IF APPLICABLE)

You have also heard testimony that a witness read or reviewed certain materials pertaining to this case before the witness testified at trial. The law permits a witness to review certain materials as long as there is no suggestion made to the witness that the witness depart from the truth.

(INSERT IF APPLICABLE – PRIOR PHOTO IDENTIFICATION)

The law provides an exception to this rule when it pertains to a witness being shown photographs that may have been used in an attempt to identify a suspect on a prior occasion. In such a situation, our court procedures caution against (a prosecutor, detective/investigator and/or defense counsel) showing a witness photographs that a witness may have previously reviewed to identify an alleged suspect.¹ That is because research has shown that certain

¹ See State v. Washington, 256 N.J. 136, 165 (2024). “Prosecutors can ask witnesses whether they recall having been shown a series of photos, making an identification, and signing and dating a photo in an array. Witnesses can be asked how confident they were at the time. They can be advised that the prosecutor may show them photos at trial and ask if they can identify the suspect and confirm their signature. Such

suggestive identification procedures such as showing a witness a photograph of an alleged suspect multiple times, showing the witness only a single photograph of a suspect or offering confirmatory feedback can affect the reliability of an identification whether it is done early on during an investigation or later during trial preparation. However, when good cause has been shown, the State is permitted to present to a witness a photograph or photographs during pre-trial preparation.

Here, the State presented the testimony of (insert name). You will recall that there was testimony that this witness, on a prior occasion before trial, identified the defendant as the person who committed the alleged offense. You will also recall that during trial preparation, (insert name) showed this witness (a photograph, photographs).

Ultimately, it is for you to determine whether the identification is reliable. In so doing, you should consider the circumstances under which the photographs were shown to the witness during trial preparation, including whether the witness was exposed to any information such as confirmatory feedback that may have affected the independence of their identification. You should also consider the factors discussed in the Court's previous instructions to you on (In Court Identification, Out of Court Identification or In-Court and Out-of-Court Identification) in determining whether a particular identification made by a witness is accurate and, thus, worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the witness's in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the

exchanges would need to be disclosed in writing to defense counsel." State v. Washington, 256 N.J. 136, 165 (2024) (citing State v. Watson, 254 N.J. 558, 588 (2023)). "In those ways and other ways, witnesses can be prepared without viewing any photos they previously saw. To be clear, prosecutors may not in any way confirm that the witness identified the defendant in the earlier identification." Washington, 254 N.J. at 165.

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offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the in-court identification(s) is/are the product of an impression gained during the witness pretrial preparation, the identification should be afforded no weight.² The ultimate issue of the trustworthiness of an identification is for you to decide.

² In-Court and Out-of-Court Identification charge.