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In-Court Identifications Not Hearsay, Are Admissible

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By Cynthia Ford

Sworn witness, in court, subject to jury observation and cross-examination:

> A: "I was there, I saw him run out of the liquor store with a gun in his hand."
>
> Q: "Can you identify the person you saw?"
>
> A: "Yes, he is right over there (pointing), wearing the orange jumpsuit."

This is not hearsay, because of the first requirement of the hearsay definition in 801. This is not an out-of-court statement. The fact that it is an in-court statement means that the hearsay rule does not apply. The dangers of hearsay do not exist: the witness is sworn, the jury can observe the witness as she testifies and use that observation to help decide if she is telling the truth, and opposing counsel has the opportunity to test the identification through cross-examination, ""greatest legal engine ever invented for the discovery of truth."[1] Because the in-court identification is not hearsay, and it is based on the witness' personal knowledge, Rule 802 does not apply and the testimony is admissible.

Out-of-court identifications look like, smell like, hearsay, but are also admissible as non-hearsay

As we have seen in earlier installments, Rule 801(d) operates as an exception not to the hearsay rule (802), but to the hearsay definition of 801(c). M.R.E. 801(c) provides that "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(d) is entitled "Statements which are not hearsay." The statements it lists are all made out-of-court and are offered to prove the truth of the matter they assert. Nonetheless, 801(d)'s magic wand transforms them from clear hearsay to clear non-hearsay and thus beyond the reach of Rule 802. Rule 801(d)(1) lists three types of prior statements, made out-of-court, by people who later come to court as witnesses,[2] which are not hearsay even when offered for the truth of the matter.

The last of these prior statements by witnesses is M.R.E. 801(d)(1)(C):

> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … (C) **one of identification of a person made after perceiving the person.** (Emphasis added).

The Montana Commission Comment to this subsection indicates that, different from the variation between the Montana and federal versions of Rule 801(d)(1)(B), the Montana language of (C) is identical to the then-existing version of F.R.E. 801(d)(1)(C). [3] The Commission gave three reasons for this exception to the hearsay definition, quoting both McCormick and the federal Advisory Committee:

> There is substantial authority for the admissibility of these statements, "often without recognition of the presence of a hearsay problem". McCormick, Handbook on the Law of Evidence 603 (2d ed. 1972). The reasons for admitting these types of statements are first, "the generally unsatisfactory and inconclusive nature of courtroom identification ... "; second, the higher reliability of prior identifications "made at an earlier time under less suggestive conditions" (Advisory Committee's Note, supra 56 F.R.D. at 296); and third, questions as to the reliability of identifications are really concerned with constitutional issues and not a hearsay problem. Id.

The Commission also noted that there were only two Montana cases dealing with the admissibility of out-of-court identifications, and stated that "neither is on point."

Montana Caselaw before MRE 801(d)(1)(C)

The two cases cited by the Commission are State v. Fisher, 54 Mont. 211, 215, 169 P 282 (1917), and State v. McSloy, 127 Mont. 265, 273, 261 P2d 263 (1953). In both, there were pretrial identifications which were recounted at trial, over objection, and the Montana Supreme Court affirmed the admissibility of the

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1 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1367, at 32 (James H. Chabourn ed., Little Brown 1974). See generally Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.")

2 I have previously discussed the admissibility of prior inconsistent statements (801(d)(1)(a)) and prior consistent statements (801(d)(1)(b)) in the two previous issues of Montana Lawyer.

3 The current language of F.R.E. 801(d)(1)(C) is still similar:
"(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: … (C) identifies a person as someone the declarant perceived earlier."

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identifications on appeal.

State v. Fisher was a murder case, in which the two defendants were convicted and sentenced to death for a Butte murder during a "hold-up." The victim, Higgins, was taken to a hospital and lived several weeks before succumbing to septicemia. The police brought the two defendants to his bedside twice, once on the day after the shooting and again a few days later. The first time, Higgins identified O'Neill, one of the men in custody, as the man who shot him (he was not sure about the other man). The Supreme Court opinion reproduces the colloquy between accused and accuser which followed the identification:

> O'Neill responded: "Brother, look here; this is a very serious proposition; be careful, you know, and be sure."
>
> Higgins rejoined:"I am quite sure; it was either you or your ghost."
>
> The second identification occurred at the hospital later in the month, a day or two before Higgins died:
>
> Towards the last of September the appellants, pursuant to a promise made them by the officers, were again taken before Higgins in the St. James Hospital. Higgins had been told that the officers did not wish the appellants inculpated unless they were the guilty parties; yet upon their presentation Higgins said to O'Neill:
>
> "You are the man that laid me here in bed; you are the man that shot me; I am positive of that," –to which O'Neill answered:
>
> "This is a very serious proposition; be careful; are you sure I am the man?"
>
> And Higgins rejoined:
>
> "You are the man."

State v. Fisher, 169 P. 282, 283 (Mont. 1917).

Higgins died before trial, and thus was not a witness; the police officers at the two hospital identifications did testify about those identifications.

On appeal, the defendants contested the admissibility of Higgins' out-of-court identifications, arguing that the prosecution had not laid adequate foundation for a "dying declaration."

The Supreme Court upheld the admission of the identifications, but on grounds different from either "identification" or "dying declaration:" "The evidence was admissible as showing the conduct and declarations of Higgins within the observation of the accused, and their conduct in relation thereto, all touching a matter vital to the issues in this case." State v. Fisher, 169 P. 282, 284 (Mont. 1917). (This seems to be the "res gestae" or "transaction" trump to a specific evidentiary objection, which itself is grist for an entire mill and hopefully would not work today). What is important for our purposes is that the pretrial identification was admissible. Note, however, that Higgins' identifications fail the definition of non-hearsay under M.R.E. 801(d)(1)(C) because Higgins did not testify at trial and was not subject to cross-examination about the pretrial identifications. Thus, today his identifications would be hearsay (and, even if a hearsay exception applied, would violate the defendants' constitutional right of confrontation).

Similarly, the pretrial identification in State v. McSloy was admitted and affirmed on appeal. (McSloy later was overruled on other grounds). The McSloy case involved the rape of a 10 year old boy by a stranger in Anaconda. The stranger had been in a car, talking to a boy named Freddie "Sonny" Martz. The victim, James Connors, knew Sonny and rode his bicycle up to the driver's side of the car. The driver asked James if he wanted a job, which would require driving a bit west of town but would only take a short time. James agreed and got in the car. The driver took Jimmy to a secluded spot, tied him up, and raped him. Jimmy escaped and ran to a nearby home.

McSloy was soon arrested and placed in a lineup. Sonny Martz was brought in and immediately identified McSloy. Sonny testified at trial. In the courtroom (so not hearsay), he identified defendant McSloy as the man who drove Jimmy away. Sonny also testified that the defendant was the same man he had identified in the sheriff's office lineup shortly after the crime. Defense counsel cross-examined Sonny about the identifications, and the prosecutor conducted redirect. Then the victim's father testified about what he saw when Sonny was confronted with the lineup and identified McSloy as the perpetrator.

Error is assigned in permitting Pat Connors, the father of prosecuting witness, to testify as to what he observed when the witness Martz identified defendant in the sheriff's office. He testified: "Mr. Derzay called Sonny Martz into the office where they placed various men in a line-up around the office-men in plain clothes, and these men were mostly dressed for the rodeo-it was about the time of the rodeo here in Anaconda and they were dressed up in western outfits, plaid shirts, etc., and they asked Sonny Martz if he saw the man in here that had offered him the job and the ride, and the boy said, 'That's the man,' and the door to the office was open a little and Mr. Derzay told Sonny to go over and touch the man."

The cases bearing upon this method of proving the identification of defendant are in conflict but the trend of recent cases is to admit such evidence.

State v. McSloy, 127 Mont. 265, 273-74, 261 P.2d 663, 667 (1953). The Montana court followed the trend it described, and held the testimony about the pretrial identification admissible:

> The court did not err in permitting the witness to testify as to what he saw and observed regarding the identification. The only effect of the corroborating evidence is to show that the prosecuting witness identified the accused at a time when there had been no opportunity for the witness to be swayed by any suggestion of others. Defendant's counsel was still privileged to argue to the jury that the witness was mistaken in the identification, and this is so whether one or a dozen persons witnessed the identification.

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> In other words, the correctness of the identification still depends upon the accuracy of the recollections of the one person making the identification.

State v. McSloy, 127 Mont. 265, 275, 261 P.2d 663, 668 (1953). The Court supported its admission of pretrial identifications with an extensive quote:

> Mr. Wigmore in his work on Evidence discusses this question as follows: 'Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out the accused (or other person), then and there in the court-room, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him.
>
> 'The psychology of the situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper (on the principle of § 1129, ante) to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person was then so placed among others that all probability of suggestion (by seeing him handcuffed, for example) is still further removed, the evidence becomes stronger. The typical illustration is that of the identification of an accused person at the time of arrest * * *.
>
> 'This is a simple dictate of common sense, and was never doubted in orthodox practice. That some modern Courts are on record for rejecting such evidence is a telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning.' IV Wigmore on Evidence, 3d ed., § 1130, pp. 208, 210. Many cases are there cited, some taking the one view and some the other. In the note on page 214 the author in criticizing an Oklahoma case excluding such testimony said, 'Courts are lamentably blind to the error of this doctrine, which flies in the face of common experience.'

127 Mont. at 274-75, 261 P.2d at 667-68 (1953).

Thus, before the M.R.E. were promulgated and adopted, the Montana Supreme Court allowed pretrial identifications into evidence, whether through the testimony of the identifier or through the testimony of others who observed the prior identification. M.R.E. 801(d)(1)(C) is consistent with this jurisprudence, but imposes a requirement that the identifier testify at trial.

Montana Caselaw after MRE 801(d)(1)(C)

The "identification exemption" from the definition of hearsay is virtually absent from Montana jurisprudence. I searched Westlaw Next for the term "801(d)(1)(C)" and came up with 20 cases. However, when I read and analyzed these cases, I found that none of them actually applied 801(d)(1)(C) at all. Interestingly, in several of the reported cases a pretrial identification made by a person who later testified at trial could have been admitted simply under Rule 801(d)(1)(C), but that subsection was never discussed in the appellate opinion, and apparently not at trial either. Using this subsection would have greatly reduced the difficulties in these cases, at both the trial and appellate levels. I will discuss the cases in reverse chronological order.

In the 2001 case of State v. Giant, the victim reported to both the hospital and police that she had been attacked by her husband, Giant. Accordingly, the State charged and prosecuted the husband, relying so heavily on the victim's identification that it failed to do any forensic testing of the evidence found at the home. At trial, though, Mrs. Giant surprisingly testified that the attacker was not the husband but her eldest son, and that she purposely misidentified the husband both to protect her son and to punish her husband. The jury convicted the husband, although the only evidence of his guilt was the prior identification (recanted at trial) and the fact that the husband had fled after the attack. Under Montana law, neither piece of evidence standing alone could justify the verdict.[4] On appeal, the issue was whether the combination of the two would suffice.

The Montana Supreme Court approached the problem as one of admissibility of the witness' prior inconsistent statement, rather than of identification. The Supreme Court observed that the rationale for admission of such statements outside the definition of hearsay was similar to that for the admission of pretrial identifications:

> ¶ 18 The original version was initially recommended by the Advisory Committee on Rules of Evidence, Rules of Practice and Procedure of the Judicial Conference of the United States (Advisory Committee). Rules of Evidence for United States

4 "We have previously held that a criminal conviction cannot be sustained where the only evidence of some essential element of the crime is a prior inconsistent statement. State v. White Water (1981), 194 Mont. 85, 89, 634 P.2d 636, 639; State v. Gommenginger (1990), 242 Mont. 265, 278, 790 P.2d 455, 463; State v. Jolly (1941), 112 Mont. 352, 355-56, 116 P.2d 686, 687-88 (holding prior inconsistent statement insufficient for conviction before the current Montana rule was enacted); compare State v. Fitzpatrick (1980), 186 Mont. 187, 195-98, 606 P.2d 1343, 1348-49 (holding prior inconsistent statement of witness admissible as substantive evidence); State v. Woods (1983), 203 Mont. 401, 411-12, 662 P.2d 579, 584." State v. Giant, 2001 MT 245, 307 Mont. 74, 79-80, 37 P.3d 49, 52-53 overruled by State v. Swann, 2007 MT 126, 337 Mont. 326, 160 P.3d 511.
"Further, we have frequently held that evidence of flight is not sufficient in itself to prove guilt. State v. Davis, 2000 MT 199, ¶ 41, 300 Mont. 458, ¶ 41, 5 P.3d 547, ¶ 41; State v. Hall, 1999 MT 297, ¶ 47, 297 Mont. 111, ¶ 47, 991 P.2d 929, ¶ 47; State v. Patton (1996), 280 Mont. 278, 290, 930 P.2d 635, 642; State v. Bonning (1921), 60 Mont. 362, 364-65, 199 P. 274, 275 overruled on other grounds by State v. Campbell (1965), 146 Mont. 251, 263, 405 P.2d 978, 985; State v. Paisley (1907), 36 Mont. 237, 252, 92 P. 566, 571; see also United States v. Flores (5th Cir.1977), 564 F.2d 717, 718-19 (finding flight alone insufficient to infer guilt beyond a reasonable doubt)." State v. Giant, 2001 MT 245, 307 Mont. 74, 80, 37 P.3d 49, 53 overruled by State v. Swann, 2007 MT 126, 337 Mont. 326, 160 P.3d 511.

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> Courts and Magistrates, Amendments to the Federal Rules of Civil and Criminal Procedure, 56 F.R.D. 183, 293 (1973); Blakey, at 6. This version was recommended based on the assertion by modern commentators on evidence that cross examination during trial was sufficient both to remove prior inconsistent statements from the definition of hearsay, and to provide the jury a means to assess the reliability and trustworthiness of these statements. WEINSTEIN'S, §§ 801App.01 [4] at 14-18, [5] at 36-36.3 (Advisory Committee's letter to the Senate Judiciary Committee and clarification after Rule 801(d)(1)(A) was enacted); Blakey, at 41; 56 F.R.D. at 295-96. These commentators asserted that this reasoning was as sound as the rationale behind the other exclusions and exceptions from the hearsay rule. WEINSTEIN'S, § 801App.01[4] at 18; compare Rule 801(d)(1)(C), M.R.Evid., (pretrial identification); … Finally, the original proposal was also supported by findings that prior statements made nearer in time to an incident were more accurate and free from outside influences. MCCORMICK, § 251, at 116 & n.12; WEINSTEIN'S, § 801 App.01[4] at 15-16.
>
> ¶ 19 The Commission Comments to Montana Rule 801(d)(1)(A) indicate that Montana relied on the above rationale behind the original federal proposal in enacting this State's rule. The Comments state that the Commission believed cross examination during trial was sufficient to remove such statements from the definition of hearsay and that to require the prior inconsistent statement be made under trial conditions would defeat the usefulness of the rule. (Emphasis added).

State v. Giant, 2001 MT 245, 307 Mont. 74, 81-82, 37 P.3d 49, 54 overruled by State v. Swann, 2007 MT 126, 337 Mont. 326, 160 P.3d 511d. However, the Court never made the direct connection between 801(d)(1)(C) and the witness' identification of the husband as her attacker. If M.R.E. 801(d)(1)(C) had been used, it clearly would have allowed evidence that the wife had first identified the husband, without having to establish that this was inconsistent with her trial testimony. As always, the proponent should point out that there are two separate bases for admission of the contested evidence
wherever possible.

The Montana Supreme Court also decided an "identification" case in 1996, but again inexplicably made no reference at all to M.R.E. 801(d)(1)(C). Further, the Court wrongly held that the pretrial identification of the father as "the shooter" by his daughter, who testified at trial, was inadmissible. State v. Stuit, 277 Mont. 227, 921 P.2d 866 (1996). Stuit was convicted of felony criminal endangerment. At trial, the investigating police officer testified that he saw bullet holes in the door jamb leading to the children's room. The mother and the daughter told the officer that the father was the shooter. The father's defense was that someone else, who had recently moved from the house, shot the gun.

The mother did not testify at trial, but Shannon, the daughter, did:

> Shannon testified the offense occurred in the month of December 1992. She further testified that she was sitting on the couch with her mother and Stuit when he shot the rifle five times into the wall. Thus, Shannon testified from personal observation as to the shooting, the identity of the shooter, and the approximate date. The admissible testimony from the officer that there were at least seven bullet holes in the wall and door jamb, and that from his experience the five bullet holes in the wall could have been made from someone sitting on the couch in the living room, corroborated her testimony. He also testified that he had recovered a .22 rifle from the bedroom Sharon and Stuit had shared. From Shannon's testimony as to her personal observations and the admissible corroborating testimony of the officer, the State established the occurrence of the shooting and the identity of the shooter.
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> State v. Stuit, 277 Mont. 227, 232, 921 P.2d 866, 870 (1996)

However, the Court held that that part of the officer's trial testimony in which he identified Stuit as the shooter, based on the identification of Shannon before trial, was inadmissible. The Supreme Court applied the general definition of hearsay, but apparently neither counsel nor the Court read any further in Rule 801 than (c):

> Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), M.R.Evid. The police officer's testimony at trial as to the identity of the shooter and the specific date of the offense was admittedly based on out-of-court statements made to him by Sharon McLain and her daughter, Shannon. The officer had no personal knowledge of the alleged incident which had occurred approximately two weeks prior to his investigation.

State v. Stuit, 277 Mont. 227, 230-31, 921 P.2d 866, 868-69 (1996). The State apparently conceded that the pretrial statement of identity was hearsay, and claimed on appeal that Shannon's pretrial identification as admissible under an exception to the hearsay rule, M.R.E. 804(a)(3). The State did not argue at either level that it was not hearsay at all per 801(d)(1)(C). The Supreme Court held that the trial judge had erred in admitting the officer's testimony as to the identity of the shooter. (It found the error to be harmless, and affirmed the conviction).

In fact, if the prosecutor and the Supreme Court had correctly applied M.R.E. 801(d)(1)(C), the jury should have been able to hear both Shannon's in-court identification of her father and, from either Shannon herself or the police officer or both, the fact that on the night of the investigation, Shannon also identified her father as the shooter.

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The opinion does not contain the verbatim testimony of the police officer, so perhaps the problem lay in the phrasing of the question. If the prosecution asked the officer: "Who was the shooter?" a proper and sustained objection would be either (or both—they are the flip sides of each other) "Foundation—no personal knowledge—may I voir dire?" or "Hearsay—may I voir dire?" However, M.R.E. 801(d)(1)(C) clearly would allow these questions from either side: "Did Shannon identify the shooter on the night you first visited the home?" and "Whom did she identify then?" Different from 801(d)(1)(A) and (B), it does not matter whether the identification is consistent or inconsistent with the testimony at trial. Thus, 801(d)(1)(C) authorizes all parties to admit pretrial identifications so long as the identifier does testify at trial.

In State v. Harris, 247 Mont. 405, 808 P.2d 453 (1991), defendant Harris was accused of sexual abuse of two young children for whom she babysat. One of the witnesses at trial was a therapist who specialized in sexual abuse patients, and who had treated both children. The Supreme Court, and presumably the trial court and lawyers, embarked on a difficult and divisive analysis of Montana's hearsay exception for medical diagnosis and treatment (803(4)) and the residual or catch-all exceptions found at the end of Rules 803 and 804.

The opinion, again, totally omits any discussion of Rule 801(d)(1)(C), even though the dissent framed one issue as "Did the District Court err in allowing Ms. Burns [the therapist] to identify the defendant as the perpetrator of the alleged crimes by testifying as to hearsay statements made to her by the victims during the course of therapy?" State v. Harris, 247 Mont. 405, 422, 808 P.2d 453, 463 (1991).

The plain language of Rule 801(d)(1)(B) answers the question: if the identifier testifies at trial (as both victims did), then evidence of pretrial "identification of a person made after perceiving the person" is not hearsay. There is no need to discuss the parameters of any specific hearsay exception, or of the residual exceptions. Ms. Burns should have been able to tell the jury that the victims had identified to her the person or persons who had abused them. The majority of the Supreme Court held just the opposite: "Because Robby was available to identify and did indeed **identify** defendant as the perpetrator of the crime, the hearsay statements to which Burns testified were not the most probative evidence on the matter. As we noted above, Burns' testimony on this issue was merely cumulative, serving only to bolster Robby's testimony." State v. Harris, 247 Mont. 405, 414, 808 P.2d 453, 458 (1991) (emphasis added). The strong dissent also failed to apply the clearest and easiest analysis, 801(d)(1)(C).

In contrast to the dearth of Montana cases, there is a plethora of federal cases interpreting 801(d)(1)(C)

The United States Supreme Court decided the seminal case on identification as non-hearsay in Owens v. U.S., 484 U.S. 556 (1988). A prison guard was assaulted, resulting in a severe head injury and memory problems. The FBI visited him twice in the hospital shortly after the attack. On the first visit, he couldn't remember anything about the incident. On the second visit, he named Owens as the attacker, and then picked him out of an array of photographs. The victim testified at trial, but said that he no longer had had any present recollection of the event. He did remember making the prior identification in the hospital. On appeal, the 9th Circuit upheld both of the defendant's challenges to introduction of the pretrial identification: hearsay and confrontation.

The Supreme Court granted cert to resolve conflicts in the circuits on both issues, and concluded that neither the hearsay rule nor the right of confrontation clause had been violated.

The conviction was affirmed. Discussing F.R.E. 801(d)(1)(C), the Court observed:

> This reading seems even more compelling when the Rule is compared with Rule 804(a)(3), which defines "[u]navailability as a witness" to include situations in which a declarant "testifies to a lack of memory of the subject matter of the declarant's statement." Congress plainly was aware of the recurrent evidentiary problem at issue here-witness forgetfulness of an underlying event-but chose not to make it an exception to Rule 801(d)(1)(C).
>
> The reasons for that choice are apparent from the Advisory Committee's Notes on Rule 801 and its legislative history. The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications. Advisory Committee's Notes on Rule 801, 28 U.S.C. App., p. 717. Thus, despite the traditional view that such statements were hearsay, the Advisory Committee believed that their use was to be fostered rather than discouraged. Similarly, the House Report on the Rule noted that since, "[a]s time goes by, a witness' memory will fade and his identification will become less reliable," minimizing the barriers to admission of more contemporaneous identification is fairer to defendants and prevents "cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." H.R.Rep. No. 94-355, p. 3 (1975). See also S.Rep. No. 94-199, p. 2 (1975), U.S.Code Cong. & Admin.News, 1975, pp. 1092, 1094. To judge from the House and Senate Reports, Rule 801(d)(1)(C) was in part directed to the very problem here at issue: a memory loss that makes it impossible for the witness to provide an in-court identification or testify about details of the events underlying an earlier identification.

U.S. v. Owens, 484 U.S. at 562-63, 108 S.Ct. at 844 (1988). Thus, the Court held that neither the Confrontation Clause nor Federal Rule of Evidence 802 is violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification.

484 U.S. at 564, 108 S.CT. at 845.

WestlawNext reports 411 federal cases which discuss *Owens* and therefore pretrial identifications. (For the purposes of this article, I have not read all of those cases. Obviously, some of them

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are solely about the Confrontation Clause component, while others focus on the rule.) When the search is changed to find for all federal cases discussing 801(d)(1)(C), it brings back 121 cases. The most recent of these sums up the current federal application:

> [E]xtrajudicial witness identifications are routinely used as substantive evidence of guilt." Foxworth v. St. Amand, 570 F.3d 414, 427 (1st Cir.2009) (citing Samuels v. Mann, 13 F.3d 522, 527 (2nd Cir.1993); Fed.R.Evid. 801(d)(1)(C). Moreover, the fact that neither of the Taits identified petitioner in court would not render the evidence insufficient to convict petitioner. "There is no requirement, either in the Constitution or in the usual rules that apply to the admission of evidence, that a witness who makes an extrajudicial identification of a criminal defendant must repeat the identification in the courtroom." Foxworth, 570 F.3d at 427; See also Bugh v. Mitchell, 329 F.3d 496, 505–11 (6th Cir.2003) (upholding the admission of out-of-court statements of a minor victim which were admitted under Ohio Evid. R 801(d)(1)(C) as a prior identification of petitioner, even though victim was unwilling to testify about the statements at trial and did not remember making them).
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> Thomas v. Perry, 2013 WL 1747799 (E.D.Mich. 2013).

The fact that Montana's version of 801(d)(1)(C) was specifically adopted verbatim from the F.R.E. version means that these federal cases will be very helpful to Montana lawyers and judges who are faced with pretrial identification admissibility issues in our state courts.

Pretrial Identifications may be unconstitutional, even if they meet the requirements of M.R.E. 801(d)(1)(C)

Lots of Montana criminal cases do deal with admissibility of formal police-sponsored identifications on constitutional, rather than evidentiary, grounds. The absence of discussion of a hearsay objection probably indicates that both sides understood that these identifications are defined as non-hearsay, but counsel should always consider making raising two grounds rather than just one, if at all possible. Identifications made by witnesses at trial are not hearsay, but if the identifier does not testify at trial, the opponent should object on hearsay as well as constitutional grounds. U.S. v. Owens, supra, dealt with the Confrontation Clause; many other cases raise Due Process objections to government-sponsored identifications.

As an example of the second type of constitutional objection, in State v. Lally, a police officer who unsuccessfully chased two vehicles but saw at least one driver was shown photographs of two suspects, and identified one of them, who was then charged and tried. The photograph the officer-witness identified was a mug shot, labeled "Sheriff's Office, Missoula MT;" the other was a photo shot in a person's living room. The defendant moved to exclude all evidence of the officer's identification. After a pretrial hearing, the judge denied the motion and the Supreme Court affirmed his decision.

Lally's challenge and the Supreme Court decision were both based on the Due Process Clause. Neither made any mention of M.R.E. 801(d)(1)(C), which clearly would have allowed the evidence.

> ¶ 14 A defendant's constitutional right to due process bars the admission of evidence deriving from suggestive identification procedures where there is a substantial likelihood of irreparable misidentification. See Neil v. Biggers, 409 U.S. 188, 196–98, 93 S.Ct. 375, 380–82, 34 L.Ed.2d 401 (1972); State v. Lara, 179 Mont. 201, 204–05, 587 P.2d 930, 931–32 (1978); *63 State v. Higley, 190 Mont. 412, 420–21, 621 P.2d 1043, 1049 (1980); State v. Schoffner, 248 Mont. 260, 265–66, 811 P.2d 548, 552 (1991)….
>
> ¶ 15 We apply a two-part test to determine whether an in-court identification based on a pretrial identification is admissible. We first determine whether the pretrial identification procedure was impermissibly suggestive. If it was, we then determine, based on the totality of the circumstances, whether the suggestive procedure created a substantial likelihood of irreparable misidentification.
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> State v. Lally, 2008 MT 452, 348 Mont. 59, 62-63, 199 P.3d 818, 821. (The Court ultimately held that although the procedure used was possibly too suggestive, in the end, it did not "create a substantial likelihood of irreparable misidentification.") See also, State v. Baldwin, 318 Mont. 489, 81 P.3d 488 (2003); State v. DuBray, 317 Mont. 377, 77 P.3d 247 (2003); State v. Rudolph, 238 Mont. 135, 777 P.2d 296 (1989).

These cases are good reminders that trial lawyers cannot rely solely on the rules of evidence to protect their clients. Even where the M.R.E. appear to allow a piece of evidence, the federal and state constitutions may provide a firmer basis for objection. (In a later piece, I will discuss the most recent U.S. and Montana Supreme Court cases on the right to confrontation).

Conclusion

Montana's version of 801(d)(1)(C) mirrors F.R.E. 801(d)(1)(C), but it does not seem that the Montana rule is used very often in reported cases. It is a good tool to escape from a hearsay objection, and thus avoid a protracted excursion into the numerous hearsay exceptions. By its plain terms, M.R.E. 801(d)(1)(C) applies in both civil and criminal cases, to both sides in any case. (There are additional constitutional considerations when pretrial identifications are used by the prosecution in criminal cases.) Try using it.

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