

A woman is on trial for nighttime breaking and entering of a warehouse. The warehouse owner had set up a camera to take infrared pictures of any intruders and testifies that a picture taken at the time of the burglary is a fair and accurate depiction of the warehouse. After an expert establishes the reliability of infrared photography, the prosecutor offers the authenticated infrared picture of the intruder to show the similarities to the woman.

Is the photograph admissible?

- A. No, because infrared photography deprives a defendant of the right to confront witnesses.
- B. No, because there was no eyewitness to the scene available to authenticate the photograph.
- C. Yes, provided an expert witness points out to the jury the similarities between the person in the photograph and the woman.
- D. Yes, to allow the jury to compare the person in the photograph and the woman.

Explanation:

Authenticating physical objects

(FRE 901)

Personal knowledge	Testimony by witness with personal knowledge of object (or that reproduction depicts original object) Most common method of authentication
Comparison	Comparison of object or writing against authenticated specimen by expert or trier of fact
Distinctive characteristics	Testimony on object's appearance, contents, substance, internal patterns, or other distinctive characteristics
Chain of custody	Substantially unbroken account of object's whereabouts from time it was obtained until introduction at trial Required method for authenticating objects that could easily be tampered with or confused with similar item (eg, blood sample)
X-ray images & electrocardiograms	Evidence showing accurate process was used, machine was working properly, machine operator was qualified & chain of custody Required method for authenticating physical representations of things that cannot otherwise be seen

FRE = Federal Rule of Evidence.

All tangible evidence must be **authenticated** before it can be admitted at trial. This requires a prima facie showing that the object is what the proponent claims it to be. For a **photograph**, authentication is often done by having a **witness with personal knowledge** of the thing depicted **testify** that the photograph **fairly and accurately depicts** that thing—just as the warehouse owner testified here (**Choice B**).

But since the **photograph** was taken at night with an infrared camera, it is a representation of something that could **not otherwise be seen** (similar to an X-ray image). As a result, it requires evidence that the process for taking that photograph was reliable—just as the expert testified here. Since the photograph was authenticated, it is admissible to allow an expert witness *or* the trier of fact (here, the jury) to compare the person depicted in that photograph to the woman (**Choice C**).

(Choice A) The Sixth Amendment confrontation clause secures a defendant's right to confront witnesses offering testimonial evidence against him/her in a criminal case. Evidence is **testimonial** if it was made primarily for use in a criminal investigation or prosecution, so a photograph taken *before* a criminal investigation commenced is not testimonial. And even if it was, the defendant can confront the warehouse owner and expert.

Educational objective:

A photograph is generally authenticated when a witness with personal knowledge of the thing depicted testifies that the photograph fairly and accurately depicts that thing. But if the photograph depicts something that could not otherwise be seen, the process for taking that photograph (eg, infrared camera) must be proven reliable.

References

Fed. R. Evid. 901 (authenticating or identifying evidence).

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