

## Review of Recent Juvenile Cases (2010)

by  
The Honorable Pat Garza  
Associate Judge  
386th District Court  
San Antonio, Texas

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**In motion to suppress in-court identification, officer's statement to witness that a "person of interest" was in the photo lineup did not give rise to a "very substantial likelihood of irreparable misidentification." [In the Matter of N.K.M.](10-4-4A)**

**On September 1, 2010, the San Antonio Court of Appeals held that respondent failed to show by clear and convincing evidence that the in-court identification of respondent was unreliable due to a impermissibly suggestive pre-trial procedure.**

¶ 10-4-4A. **In the Matter of N.K.M.**, MEMORANDUM, No. 04-09-00717-CV, 04-09-00718-CV, 2010 WL 3443210 (Tex.App.-San Antonio, 9/1/10).

**Facts:** On April 22, 2009, at approximately 11:00 p.m., Oscar Barella was sitting in his garage working on a hobby when he noticed a young man standing there pointing a gun at him. Barella confronted the young man, demanding, "what are you going to do, are you going to shoot me for what, over what? ... So you can get caught, go to jail and be somebody's bitch, take it up the a\* \*?" The young man's demeanor changed and he backed off. Barella stood up, realized he was quite a bit taller than the young man, and again demanded, "are you going to shoot me, go ahead, go ahead." The young man turned and fled. Barella chased him on foot, and saw him jump into the open passenger door of a Dodge Magnum which sped off. Barella wrote down the license plate number and called 911. When officers arrived, Barella described the young man as having "light skin," about 5 feet 6 inches tall, 150 pounds, and wearing a dark colored light jacket and dark ski mask. Barella told the officers that he had focused on the young man's eyes the entire time, and he was sure he could pick out the young man if he ever saw his eyes again. Barella stated the encounter lasted about two minutes.

At approximately 11:30 p.m., while the officers were still at Barella's house, a call came in that some other officers had spotted the Dodge Magnum about one-half mile away and were giving chase. The two suspects crashed the car, bailed out, and ran into a wooded area where they escaped. When the Dodge Magnum was processed, officers determined it had been stolen from Timothy Downey on April 15, 2009. Downey testified that he was carjacked at gunpoint in his driveway by one person, but there was at least one more person involved because a vehicle was blocking his driveway at the time.

Later that same night of April 22, 2009, at approximately 12:00 or 12:30 a.m., Ethel Carter was sitting inside her parked car reading a newspaper and waiting for her daughter to arrive with a key to the front door. Carter's house is at the other end of the same street where Barella lives. Two young men wearing gloves and masks approached Carter's Mercedes Benz which was parked in the driveway. Carter could see their eyes, nose, and mouth under the masks; she described one young man as "dark-complexioned" and the other as "light-complexioned." The dark-complexioned young man pointed a gun at Carter's head and asked whether she had a safe or any jewelry or guns inside the house. The light-complexioned young man held a gun on Carter while the dark-complexioned young man kicked the front door in; they took Carter inside where she was instructed to lie down on the floor. The light-complexioned young man pointed the gun at Carter's head while the dark-complexioned young man ransacked the house. Carter was told to face the floor and not look at them. They assured her they were not going to hurt her unless she called the police, at which point they would come back to kill her. At one point during the incident, the light-complexioned young man had his mask pulled up and Carter saw some of his face; she realized,

"he's just a kid." The young men took the keys to Carter's Mercedes Benz and tied her up before they left in her car. When the police arrived, Carter described the young men to Bexar County Sheriff's Detective Kenneth Murray, stating the dark-complected one was wearing dark pants or jeans, [FN1] and the light-complected one was wearing blue shorts and blue and white tennis shoes.

FN1. Detective Murray testified that Carter described the dark-complected young man as wearing "dark shorts, dark socks and tennis shoes."

Detective Murray had a "person of interest" in mind who he believed was connected with another series of robberies in the area. Murray went to Wagner High School the next morning and asked for a picture of the young man of interest. Murray obtained the photo, and then asked the principal to call the young man up to the main office so he could compare his clothing with Carter's description. The young man arrived wearing dark shorts and black socks. He was accompanied by another young man wearing blue basketball shorts, blue and white tennis shoes, and a glove on his left hand. A camera took a photo as each young man entered the school office. A few days after the robbery, Detective Murray went to Ms. Carter's home and showed her a series of photo line-ups. Carter was unable to pick out anyone from the full-face photo displays. Carter did, however, pick out N.K.M. from a six-person "eyes-only" photo lineup--although she was "not quite sure." After she picked out N.K.M.'s photo from the lineup, Detective Murray showed Carter the photo of N.K.M. taken at Wagner High School the morning after the robbery when he was wearing blue basketball shorts, blue and white tennis shoes, and a glove on one hand. Carter confirmed that the blue tennis shoes and blue shorts matched what the light-complected young man was wearing the night of the robbery. When Detective Murray later showed the same "eyes-only" photo lineup to Barella, he picked out N.K.M. with no hesitation. Barella "had no doubt whatsoever" about the identification.

The State charged N.K.M. in two separate cases with engaging in delinquent conduct by committing aggravated assault with a deadly weapon against Oscar Barella and aggravated kidnapping/aggravated robbery against Ethel Carter. N.K.M. pled "not true" in both cases, and they were tried jointly before a jury. N.K.M. filed a motion to suppress the photo identification evidence, which was denied. After hearing the trial evidence, the jury found that N.K.M. engaged in delinquent conduct by committing aggravated assault with a deadly weapon against Oscar Barella, and by committing aggravated kidnapping and aggravated robbery with a deadly weapon against Ethel Carter. The State sought determinate sentences in each case. The court adjudicated N.K.M. as having engaged in delinquent conduct as alleged in both cases, found a need for disposition, and committed N.K.M. to TYC for concurrent determinate sentences of 20 years in each case, with a possible transfer to the Texas Department of Criminal Justice. N.K.M. now appeals.

**Held:** Affirmed

**Memorandum Opinion:** An in-court identification is inadmissible when it has been tainted by an impermissibly suggestive pre-trial photo identification procedure. *Gamboa*, 296 S.W.3d at 581; *Loserth*, 963 S.W.2d at 772. The appellant bears the burden to show by clear and convincing evidence that the in-court identification is unreliable. *Madden v. State*, 799 S.W.2d 683, 695 (Tex.Crim.App.1990). The test is whether, considering the totality of the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Gamboa*, 296 S.W.3d at 582 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)); *Loserth*, 963 S.W.2d at 772. In assessing reliability under the totality of the circumstances, the court considers the following factors *de novo*: (1) the witness's opportunity to view the appellant at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the appellant; (4) the witness's level of certainty at the time of the confrontation; and (5) the length of time between the offense and the confrontation. *Gamboa*, 296 S.W.3d at 582 (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)); *Loserth*, 963 S.W.2d at 772.

As the State points out, there was conflicting testimony at the suppression hearing as to whether Detective Murray informed Barella there was a "person of interest" in the six-person photo lineup. Murray testified at the hearing that before he showed Barella the photo lineup, he stated, "[t]hat I had a series of six photographs I wanted him to look at. That I wasn't sure if anybody in the six photographs were [sic] the actor involved, but at least one of them was a person of interest." Murray stated he did not suggest who Barella should pick out. Barella testified that before he showed him the photo array, Murray told him, "Well, I'll show you a lineup. All it is is [sic] just a focus on their eyes. You take a look at it and pick out the person you think it may be." Barella stated that Murray did not indicate who he thought it was, but also

did not tell him the person may not be in the line-up. Murray just asked him, "is he in this lineup?" On cross-examination at the hearing, Barella was asked whether he recalled the detective telling him a "person of interest" was in the photo spread, and Barella answered "No."

At a suppression hearing, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990). We must view the evidence in the record, and all reasonable inferences, in the light most favorable to the trial court's ruling, and must sustain the ruling if it is reasonably supported by the record and is correct on any applicable theory of law. *Villarreal*, 935 S.W.2d at 138. Applying that standard of review, we must assume the trial court made implicit fact findings in support of its denial of the motion to suppress, and that it chose to believe Barella's testimony that Murray did not mention a "person of interest" being in the photo lineup.

Even assuming that Murray did tell Barella that a "person of interest" was in the photo lineup, and that Murray's statement was "impermissibly suggestive," we conclude that N.K.M. failed to carry his burden to prove the identification procedure gave rise to a "very substantial likelihood of irreparable misidentification." *Madden*, 799 S.W.2d at 695 (appellant has burden to show by clear and convincing evidence that in-court identification is unreliable due to impermissibly suggestive pre-trial procedure). Assessing reliability under the *Biggers'* factors, the record shows that Barella viewed his assailant for approximately two minutes, and paid close attention to the young man's eyes during the entire encounter. Barella testified that he could not see the young man's whole face because of the ski mask, but he "focused on his eyes" throughout the whole two-minute scenario. Barella explained that it was just his reaction--"I looked him in the eyes, and that's all I could see." While Barella's opportunity to observe the young man was somewhat limited by the ski mask, his degree of attention to a particular facial feature, the eyes, was very high; moreover, that high degree of attention was sustained for a two-minute period. When the officers arrived, Barella told them he could identify the young man if he saw his eyes again. Murray showed Barella the "eyes only" six-person photo lineup only a few days after the incident. Barella studied each of the six photos for a few seconds, and "focused right on" Number 6, which was N.K.M. Barella testified he was certain that Number 6 was the young man in his garage. As to the accuracy of Barella's description of his assailant, there was very limited evidence presented at the suppression hearing from which the accuracy of his description could be determined.

**Conclusion:** Weighing the *Biggers'* factors against the "corrupting effect" of the presumably suggestive pre-trial identification, we conclude that Barella's high degree of attention to his assailant's eyes for the entire encounter, his absolute certainty of his identification of N.K.M. from the photo array, and the short time period between the incident and the pre-trial identification all weigh heavily in favor of his in-court identification being reliable. *Loserth*, 963 S.W.2d at 773-74. Accordingly, the trial court did not err in denying N.K.M.'s motion to suppress the identification evidence.