

## Review of Recent Juvenile Cases (2010)

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

---

### **In court statement by witness identifying respondent with, "I'm not positively sure, but I think so." held to be factually sufficient. [In the Matter of N.K.M.](10-4-4B)**

**On September 1, 2010, the San Antonio Court of Appeals held that the presence of corroborating facts or circumstances connecting the accused to the crime, when coupled with a less-than-certain eyewitness identification, may be sufficient to support the jury's finding of identity.**

¶ 10-4-4B. **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-complected" and the other as "light-complected." The dark-complected 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-complected young man held a gun on Carter while the dark-complected young man kicked the front door in; they took Carter inside where she was instructed to lie down on the floor. The light-complected young man pointed the gun at Carter's head while the dark-complected 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-complected 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-

completed 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.

In the second case, N.K.M. asserts the evidence is factually insufficient to support the jury's finding that he is one of the persons who committed the aggravated kidnapping and aggravated robbery against Ethel Carter. N.K.M. contends that Carter's identification of him as the perpetrator was " 'so weak' as to render the evidence factually insufficient." The State concedes that Carter's identification was less than positive but contends there is other corroborating evidence that, when combined with Carter's identification, is sufficient to support the jury's verdict.

**Held:** Affirmed

**Memorandum Opinion:** N.K.M. asserts the in-court identification testimony by Carter was "so weak" that it is factually insufficient to support the jury's finding that he was a perpetrator of the aggravated kidnapping and aggravated robbery against Carter. It is well established that the State must prove beyond a reasonable doubt that the accused is the person who committed the alleged offense. *Johnson v. State*, 673 S.W.2d 190, 196 (Tex.Crim.App.1984); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex.App.-Austin 2000, pet. ref'd). The identity of the accused as the perpetrator may be proved by direct or circumstantial evidence, or by inferences drawn from such evidence. *Roberson*, 16 S.W.3d at 167. We apply the same sufficiency standards to both direct and circumstantial evidence. *Id.*; *McGee v. State*, 774 S.W.2d 229, 238 (Tex.Crim.App.1989). A witness's less than positive identification of the defendant goes to the weight of the evidence. *Valenciano v. State*, 511 S.W.2d 297, 299 (Tex.Crim.App.1974).

N.K.M. asserts that Carter's identification of him was too uncertain to constitute factually sufficient evidence. During trial, when Carter was asked if she saw either the dark-complected or the light-complected young man in the courtroom, she replied, "It's him." When asked to say it louder, Carter stated, "I think that's him over there," and described the clothing N.K.M. was wearing in court. When the prosecutor asked Carter if she was sure that was one of the boys inside her house, she replied, "I'm not positively sure, but I think so." She testified he was the light-complected one whose mask had been

pulled up. Carter also testified about her pre-trial identification of N.K.M. from an "eyes-only" photo lineup. Carter stated she picked out N.K.M.'s photo, but wrote a note on the back stating, "I think this is the person, but I'm not quite sure." Detective Murray testified that when Carter picked out N.K.M.'s photo, she initially said, "this is him, this is the one," but then she wrote on the back of the photo that she was "not quite sure." Murray explained that he then showed Carter the photo from Wagner High School "just to put her mind at ease." When Carter saw the school photo, she stated, "those are the shorts, those are the shoes," and became nervous and started shaking and tearing up. Detective Murray testified that, in his opinion, Carter wrote the note stating she was "not sure" about the identification because she had been threatened during the robbery and was afraid of retaliation.

An uncertain in-court identification is not, by itself, sufficient to support a guilty verdict. *Anderson v. State*, 813 S.W.2d 177, 179 (Tex.App.- Dallas 1991, no pet.) As the State points out, however, the presence of corroborating facts or circumstances connecting the accused to the crime, when coupled with a less-than-certain eyewitness identification, may be sufficient to support the jury's finding of identity. *Id.*; *Redwine v. State*, 305 S.W.3d 360, 367 (Tex.App.-Houston [14th Dist.] 2010, pet. filed); *Swartz v. State*, 61 S.W.3d 781, 788-89 (Tex.App.-Corpus Christi 2001, pet. ref'd); *United States v. Hawkins*, 658 F.2d 279, 289 (5th Cir.1981) (when there is other evidence of identity, the tentative nature of the in-court identification is not fatal).

Here, there was other evidence connecting N.K.M. to the robbery at Carter's home. Barella positively identified N.K.M. with complete certainty as the masked assailant who threatened him at around the same time on the same evening as the robbery at Carter's house. Barella's house is on the opposite end of the same street as Carter's house. This evidence shows that N.K.M. was in the area of Carter's house at the time of the robbery--wearing a ski mask. In addition, the photo of N.K.M. taken the next morning at school matched Carter's description of the blue clothes and shoes the light-complected assailant wore, and Carter confirmed the matching clothes when she saw the school photo. Moreover, Carter's emotional reaction to the school photo showing N.K.M.'s full body corroborates her uncertain identification.

Finally, N.K.M.'s own statements connected him to the events of April 22, 2009. When Detective Murray interviewed N.K.M. in the presence of his father, N.K.M. admitted being a "hard core" member of the Crips gang. Murray testified that in his experience the Crips' colors are light blue. When asked about the photo of him taken at Wagner High School on April 23, 2009, N.K.M. stated that he remembered that because he got called in to the principal's office for wearing the blue colors at school. N.K.M. explained that he told the principal that he had put those clothes on the night before. When his father objected that he was only a "wannabe" gang member, N.K.M. corrected him in the presence of Detective Murray, stating that he is "hard core, everyone at the school knows it, that he doesn't have to wear blue every day because everybody knows it, [and] that he only wears the blue when he intends to go out and hurt somebody."

**Conclusion:** Combining the pre-trial and in-court identifications by Carter with the corroborating facts and circumstances in the record, we conclude that the evidence of N.K.M.'s identity as the perpetrator of the aggravated kidnapping/robbery against Carter is factually sufficient to support the jury's verdict. The identity evidence is not "so weak" as to render the verdict "clearly wrong and manifestly unjust." *Lancon*, 253 S.W.3d at 705. Based on the foregoing reasons, we affirm the trial court's judgment in both cases.