

Simply filing a motion to suppress identification does not preserve complaint for appellate review.[In the Matter of T.N.H.](13-2-1)

On March 13, 2013, the San Antonio Court of Appeals held that to preserve a complaint for appellate review, the record must show that the appellant made his specific complaint known to the trial court by a timely request, objection, or motion, and that the trial court ruled on the request, objection, or motion.

¶ 13-2-1. **In the Matter of T.N.H.**, MEMORANDUM, NO. 04-12-00123-CV, 2013 WL 979123 (Tex.App.-San Antonio, 3/13/13).

Facts: In the afternoon on January 13, 2011, Jose Rodriguez and Paul Medellin were walking with three other friends to New Guilbeau Park to play basketball. Rodriguez and Medellin, fifteen and sixteen years old respectively, had been released early from high school due to the final exam schedule. They both testified they were released from school between 11:00 a.m. and 12:30 p.m. Medellin stated they went to play basketball at about 2:00 or 2:30 p.m. As Rodriguez and Medellin were walking about 30 feet behind the rest of the group, two older teenagers ran up behind them and demanded to know whether they “had anything.” Medellin stated they asked whether they had any “money or weed.” They appeared to be about seventeen or eighteen years old. Neither Rodriguez nor Medellin knew them. The taller individual started going through Medellin's backpack without his permission and took his sweats. The shorter individual took the headphones that Rodriguez had around his neck and, when Rodriguez pulled away, he pointed a handgun at Rodriguez's chest from approximately two feet away; the gun was partially covered by a cloth, but Rodriguez could see it was an automatic handgun. The taller individual then came over and took Rodriguez's iPod and cell phone from his pockets. As the robbers walked away, Rodriguez saw the taller individual give Rodriguez's cell phone to the shorter one. Rodriguez and Medellin informed their friends that they had just been robbed at gunpoint. They went to the home of a friend whose step-father was a policeman, and he called in the robbery.

During the next two weeks, Rodriguez discussed the robbery at school and described the person who held the gun on him to see if anyone knew him. He described the robber as short with a mole under his eye and a tattoo on his hand. A classmate overheard the description and said it sounded like a student named “T* * *.” Rodriguez told his sister Denise, who then found a photo of “T* * *” on Facebook and showed it to Rodriguez; he immediately recognized it as the person who pointed the gun at him. Rodriguez's mother called the investigating detective and provided him with the possible suspect's information. The detective obtained a school photo of “T* * *,” identified as T.N.H., and presented it as part of a 6-photo lineup to Rodriguez and Medellin. Rodriguez picked out the photo of T.N.H. as the person who held the gun on him; Medellin was unable to make an identification from the same photo lineup.

An original petition was filed alleging that T.N.H., sixteen years old at the time, had engaged in delinquent conduct by committing the felony offense of aggravated robbery and seeking a determinate sentence. TEX. PENAL CODE ANN. § 29.03 (West 2011); Tex. Fam.Code Ann. § 53.045(a)(7) (West Supp.2012). T.N.H. waived his right to a jury and proceeded to an adjudication hearing before the trial court. Rodriguez testified to the events of the robbery as stated above and identified T.N.H. in court as the shorter individual who pointed the gun at him during the robbery. Rodriguez confirmed that the person in court (T.N.H.) was the same person he picked out of the photo lineup and stated he was certain of his identification. Medellin gave the same version of events as Rodriguez. Medellin testified that Detective Van Geffen showed him a photo lineup but stated he was unable to identify any of the photos as the people who robbed them. At trial, Medellin was unable to identify T.N.H. as one of the robbers. Medellin testified that during the robbery he focused on the gun, not on what the two individuals looked like, and that he saw the gun even though it was partially wrapped in some cloth.

Detective Russ Van Geffen testified that he investigated the robbery. He received a phone call from Rodriguez's mother about a possible suspect identified by Denise Rodriguez and he determined the suspect, T.N.H., was enrolled in school. He contacted the Northside Independent School District (NISD) school police and they created a photo lineup of six photographs which he showed to Rodriguez and Medellin; Rodriguez identified T.N.H. as the robber who held the gun on him. Medellin also viewed the lineup, but was unable to make an identification.

During the defense case, Martha Fernandez, an assistant principal in charge of attendance at Taft High School, testified concerning T.N.H.'s attendance records that she had obtained from Holmes High School, where T.N.H. was enrolled on the day of the robbery, January 13, 2011.^{FN1} That day was an NISD exam day and the record shows T.N.H. was present for his third period exam from 8:50 a.m. to 10:25 a.m. The next period from 10:35 a.m. to 12:10 p.m. was scheduled for the fifth period exam; T.N.H.'s fifth period class was his lunch period. No attendance is taken during lunch. The regular exam-day lunch period was from 12:10 p.m. to 12:30 p.m. and, thereafter, the students were released for the day; the buses started running at 12:30 p.m. On exam days, the students were able to pick up a sack lunch.

FN1. T.N.H. had subsequently transferred to Taft High School.

T.N.H. also called Lisa Hahne, an assistant principal who oversaw all the attendance records at Holmes High School, who testified that on exam days students like T.N.H. who have fifth period lunch are allowed to leave at 10:25 a.m. after their third period exam; a sack lunch is available in the school cafeteria. The school does not keep attendance records for fifth period lunch. She had no way to confirm whether T.N.H. stayed at school after 10:25 a.m., nor whether he rode the bus on January 13, 2011. She stated that T.N.H. could not have ridden the school bus

until 12:30 p.m., but agreed there are many city buses that run near the school or he could have gotten a ride with someone.

Finally, T.N.H. testified that on January 13, 2011, he rode the bus to Holmes High School in the morning, took his third period exam, had lunch in the cafeteria during fifth period, waited around for the school buses, rode the bus home, arrived home between 1:10 p.m. and 1:20 p.m., and stayed at home. He testified that students are not allowed to leave campus early unless they have a parent note and he did not have a note that day. T.N.H. stated he rides the bus for 30 minutes to and from school every day. He agreed there is a city bus stop near the school. On cross-examination, he admitted that he would sometimes leave campus without permission, but stated that on exam days the security was extra tight, with the school police officer and teachers blocking the exits the whole time. T.N.H. testified he knew nothing about the robbery on January 13, 2011 and did not have a gun. He stated he had never been to the basketball park where the robbery occurred. He admitted practicing for a quinceañera at a house near the park, but only on Fridays from December until the end of January 2011.^{FN2}

FN2. January 13, 2011 was a Thursday.

At the conclusion of the adjudication hearing, the court found the allegation of delinquent conduct to be “true” and supported by the evidence. The court determined that disposition was necessary, and committed T.N.H. to the Texas Juvenile Justice Department for a determinate term of eight years, with a possible transfer to the Texas Department of Criminal Justice. T.N.H. now appeals.

On appeal, T.N.H. raises three issues, asserting the in-court identification by Rodriguez was tainted by an impermissibly suggestive photo lineup, the evidence is factually insufficient to prove T.N.H.'s identity as the person who robbed Rodriguez at gun point, and the court erred in denying his motion for new trial based on newly discovered evidence.

Held: Affirmed

Memorandum Opinion: T.N.H. argues Rodriguez's in-court identification of him was tainted by an impermissibly suggestive pretrial identification procedure, i.e., the photo lineup. *See Loserth v. State*, 963 S.W.2d 770, 771–72 (Tex.Crim.App.1998) (in-court identification is unreliable and thus inadmissible when it has been tainted by an impermissibly suggestive pretrial photographic identification, and 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) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). T.N.H. asserts the photo lineup was unduly suggestive because it only had one photo of a person with a birthmark. T.N.H. has a mark under his left eye.

A defendant may challenge the admissibility of evidence in either of two ways: (1) by objecting to the admission of the evidence at the time it is offered at trial and requesting a hearing outside the presence of the jury; or (2) by filing a pretrial motion to suppress evidence and having it heard and ruled on before trial. *Holmes v. State*, 248 S.W.3d 194, 199 (Tex.Crim.App.2008). Here, T.N.H. did neither. He filed a pretrial motion to suppress the identification evidence as impermissibly suggestive and unreliable, but did not obtain a ruling on the pretrial motion. During trial, T.N.H. raised no objection to Rodriguez's testimony concerning his identification of T.N.H. in the photo lineup or his testimony identifying T.N.H. in court. To preserve a complaint for appellate review, the record must show that the appellant made his specific complaint known to the trial court by a timely request, objection, or motion, and that the trial court ruled on the request, objection, or motion. TEX.R.APP. P. 33.1(a); *Ross v. State*, 678 S.W.2d 491, 493 (Tex.Crim.App.1984).

Conclusion: Because T.N.H. did not obtain a ruling on his motion to suppress or object to the identification evidence at trial, T.N.H. has failed to preserve this issue for review. TEX.R.APP. P. 33.1(a); *Aguilar v. State*, 26 S.W.3d 901, 905 (Tex.Crim.App.2000); *Samarron v. State*, 150 S.W.3d 701, 704 (Tex.App.-San Antonio 2004, pet. ref'd).