

Filed 9/13/17 In re A.N.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.N., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A.N.,
Defendant and Appellant.

B278353

(Los Angeles County
Super. Ct. No. FJ53335)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Totten, Commissioner. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan J. Kline and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court found that 14-year-old A.N. committed felony robbery. On appeal, A.N. contends that the admission of the victim's identification violated due process. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The People's Case

In September 2016, the district attorney filed a juvenile wardship petition (Welf. & Inst. Code, § 602) alleging that A.N. had committed second degree robbery (Pen. Code, § 212.5, subd. (c)).

At the jurisdictional hearing, the robbery victim, Alejandro S., testified as follows. At approximately 8:00 p.m. on August 30, 2016, he exited Belmont High School and was walking home. He was walking along a street that was next to a field with trees. The lighting was low. Three men emerged from behind a tree and approached him. One of the men asked him, “‘Do you have a dollar?’ ” Alejandro said no, and one of the individuals hit him in the face.

Alejandro ran across the street away from the field. When he reached the street corner, the men caught up with him. Two of them held him by the arms while the third man hit him. The men then took Alejandro's phone and wallet out of his backpack. A bystander started screaming, and the men ran off. The robbery lasted about eight minutes. After the incident, a girl approached Alejandro and told him the first name of one of the robbers—it was A.N.'s first name.¹

¹ A.N.'s first name is unusual, therefore, we refer to him by his initials.

The following day, Alejandro went to the administration desk at the high school and reported the robbery. He said a bystander had told him the name of one of the robbers. Shortly thereafter, Police Officer Daniel Chavez interviewed Alejandro. Officer Chavez showed him a yearbook and told him to look for the person who had robbed him. The yearbook portrayed students' photographs with their names underneath. Alejandro picked out A.N.'s photo.

On September 9, 2016, the police showed Alejandro a six-pack photo array. Alejandro identified A.N. in the array. He "recognized him from the yearbook." On September 14, 2016, the police showed Alejandro another six-pack. Alejandro identified co-defendant Darnell R. in the array.

Darnell and A.N. were defendants at the jurisdictional hearing. On the stand, Alejandro identified Darnell as the individual who had hit him on the street corner. Alejandro identified A.N. as one of the two men who had held his arms while Darnell assaulted him.

2. Motion to Dismiss

After the close of the People's case-in-chief, A.N.'s counsel moved to dismiss the petition due to insufficient evidence (Welf. & Inst. Code, § 701.1). Counsel argued the victim's identifications were tainted because of the yearbook procedure, and their admission violated due process. The court denied the motion.

3. The Defense Case

The defense called the school police officer, Officer Chavez, to the stand. On August 31, 2016, Officer Chavez was working at Belmont High School when an administrator informed him that a student, Alejandro, wanted to report an incident. Alejandro told

Officer Chavez that he had been robbed the night prior, and a bystander had identified one of the robbers as an individual with A.N.'s first name. Alejandro could give no further information on the bystander.

School staff told Officer Chavez that a student with A.N.'s first name was a freshman at the high school but they did not have a picture I.D. of him. However, they did have the yearbook for the middle school he had attended. Officer Chavez gave Alejandro the middle school yearbook and told him "to look through the yearbook" and "if you find the person that resembles whoever this person is, let me know." Officer Chavez cautioned Alejandro that the bystander's identification of a person with A.N.'s first name "doesn't necessarily mean [that individual is] a suspect or not, so that's up to you to decide"

Alejandro identified A.N. as the individual who had robbed him and said, "I think it's him, but I'm not sure, it was kind of dark." Alejandro then said, "he looks a lot different now."

4. *The Court's Ruling*

During closing argument, A.N.'s counsel argued that the yearbook identification procedure was unduly suggestive and had tainted Alejandro's six-pack and in-court identifications. The court found that the "six-pack identification" was "tainted by the yearbook," but that Alejandro's "in-court identification was precise, was unequivocal." The court concluded the victim "was making his identification from his recollection," and there was no due process violation.

The court sustained the robbery allegation and declared A.N. a ward of the court under Welfare and Institutions Code section 602. He was sentenced to camp with a maximum confinement time of five years, four months.

DISCUSSION

A.N. contends the yearbook identification procedure tainted the victim's identification, and the admission of this evidence violated due process. The Attorney General argues that A.N. forfeited his evidentiary challenge by not filing a pretrial motion to suppress, or making an objection to the identification evidence when it was introduced. The Attorney General further contends the victim's in-court identification was properly admitted because it was reliable.

Although a defendant's failure to assert a timely objection may result in forfeiture (*People v. Cunningham* (2001) 25 Cal.4th 926, 989), here we will assume A.N.'s evidentiary challenge was preserved. Although defense counsel did not make a pretrial motion to exclude the challenged evidence or object to the evidence when it was introduced, counsel did raise the issue in his motion to dismiss and extensively addressed the issue in closing argument. Defense counsel also created a record of the yearbook identification procedure when he put Officer Chavez on the stand. Finally, the juvenile court ruled on the suggestiveness issue, explaining its reasoning at the close of the jurisdictional hearing. However, even though we overlook the untimeliness of A.N.'s objection, we conclude that the victim's in-court identification was properly admitted.

"A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard" of substantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 556–557.)

“In determining whether a defendant’s right to due process is violated by the admission of identification evidence, we consider ‘ “(1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances.” ’ [Citation.]” (*People v. Clark, supra*, 63 Cal.4th at p. 556.) The factors relevant to our determination “include the opportunity [for] the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.” (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114 (*Manson*).)

If the trial court determines that the identification procedure was legally unfair, then the court must determine “whether the in-court identification will be the product of a source independent of the unfair pretrial identification procedure, in order that the ‘taint’ of that procedure is removed.” (*People v. Rodriguez* (1977) 68 Cal.App.3d 874, 881.) Thus, even if the court finds the pretrial identification procedure was suggestive, the prosecution may still present an in-court identification that is “otherwise reliable.” (*People v. Cooks* (1983) 141 Cal.App.3d 224, 305–307.) If it appears, on the other hand, that the prior identification procedure employed to secure it was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,” the in-court identification is to be suppressed. (*Simmons v. United States* (1968) 390 U.S. 377, 384.)

The People bear the burden of showing by clear and convincing evidence that an in-court identification was “based on the witness’ observations of the accused at the scene of the crime, that is, independent of the suggestive pretrial identification. [Citations.]” (*People v. Cooks, supra*, 141 Cal.App.3d at p. 306.)

A.N. acknowledges that, even when an unduly suggestive identification procedure is used, a subsequent identification is properly admitted if otherwise reliable. He argues that, here, the victim’s in-court identification was not reliable because the victim was “uncertain of the accuracy of his recollection,” it was dark when he was attacked, and the victim “was unable to offer any description of the robbers.”

In fact, although Alejandro was initially “uncertain” when he saw the yearbook photo of A.N., the court found that Alejandro’s identification of A.N. at the jurisdictional hearing was “unequivocal.” The record also does not support the assertion that Alejandro was ever uncertain about his identification of Darnell, the main assailant: Alejandro identified Darnell in the photo array and in court, and did not express uncertainty when he did so.

Although the victim described the scene as “kind of dark,” he also had ample opportunity to observe A.N. during the eight-minute attack. Nor was he “a casual or passing observer, as is often the case with eyewitness identification,” but was in a position to pay a high degree of attention to the men attacking him at close range. (*Manson, supra*, 432 U.S. at p. 115.) With respect to A.N.’s contention that the victim “was unable” to describe the robbers, the record did not establish this fact. There was no evidence that the victim was ever asked for a description of the robbers. We must presume that, had the victim been asked

for a description, he would have been able to give an accurate one.

The procedure was also not so “impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.” (*Simmons v. United States*, *supra*, 390 U.S. at p. 384.) When Officer Chavez gave Alejandro the yearbook, he expressed a neutral admonition that Alejandro should identify the person who committed the crime *if* the person was shown. He further cautioned Alejandro that the bystander’s identification of a person with A.N.’s first name “doesn’t necessarily mean [that individual is] a suspect or not, so that’s up to you to decide” Accordingly, Officer Chavez did not suggest that Alejandro should select any particular photograph. Alejandro also did not testify that his in-court identification was influenced by the yearbook viewing.

Although we find troubling that Alejandro was shown A.N.’s photo with his name listed beneath, that goes to the suggestiveness of the earlier identification procedure which the trial court already found was unduly suggestive. The trial court found the in-court identification nevertheless reliable. Accordingly, we agree with the trial court and conclude the in-court identification was reliable under the totality of the circumstances. (See *Manson*, *supra*, 432 U.S. 98, 116 [“indicators of [the witness] ability to make an accurate identification [were] hardly outweighed by the corrupting effect of the challenged identification.”].)

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.