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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re D.W., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.W.,

Defendant and Appellant.

E060848

(Super.Ct.No. J248718)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lynn M. Poncin,  
Judge. Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,  
Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and  
Respondent.

The juvenile court found true an allegation defendant and respondent D.W.

(minor) had committed attempted second degree robbery. (Pen. Code, §§ 664, 211.) The court continued minor's probation with a condition that he serve 62 days in juvenile hall with credit for 62 days of time he had already served. On appeal, minor contends the court prejudicially erred in allowing admission of the victim's infield show-up identification of minor. We affirm.

#### FACTUAL AND PROCEDURAL HISTORY

The minor victim testified that on January 19, 2014, around 4:30 p.m., he was walking to his girlfriend's house when he stopped to tie his shoe. He heard people behind him. Three Black, teenaged males came towards him. They appeared older than the victim. Five other individuals were at the park, across the street, approximately 20 feet away from him.

The three individuals came within three feet of the victim, surrounded him, and cornered him against a fence. One wore a gray muscle shirt; another wore a gray shirt and red shorts; and the third had on no shirt, but wore shorts. The individual without a shirt balled up his fist and demanded the victim's cell phone. All three individuals then began demanding his cell phone.

The victim orally refused to surrender his cell phone. The individual wearing the gray muscle shirt then punched the victim on his head. The victim ran off. As he did so, his headphones fell off. They were never recovered.

The victim ran to his friend's house, where he knocked on the door. He turned around and saw the "kid with the gray shirt and red shorts" looking at him. The victim's friend called 911. The victim gave the police a description of the perpetrators. The

victim's friend's brother subsequently also called 911 in order to let the police know which direction the perpetrators were heading.

San Bernardino Police Officer Mark Blackwell testified he was dispatched to the area regarding the report of a strong-arm robbery. Dispatch informed him, "It was a robbery of headphones, three [B]lack males, one wearing no shirt, last seen going through the school." Dispatch further informed Officer Blackwell the suspects were ages 18 to 19 and that the one wearing no shirt had on dark colored pants.

Upon Officer Blackwell's arrival at the nearby school, he observed seven or eight individuals, some of whom matched the description of the suspects reported by dispatch. One of them was not wearing a shirt. All of them took off running when they saw Officer Blackwell. Officer Blackwell pursued and detained all seven or eight individuals with the help of San Bernardino Police Officer Jesse Joyce.

Officer Blackwell contacted the victim soon thereafter. The victim provided Officer Blackwell with an account of what had occurred and a description of the perpetrators. Officer Blackwell told the victim he may have located the suspects and asked if the victim would be willing to attempt to identify the perpetrators. The victim said he would.

Officer Blackwell gave the victim an admonishment that the individuals he would show the victim may or may not be the people who attempted to rob him. He told the victim not to feel any pressure to identify anyone.

Within 20 minutes of the assault, Officer Blackwell drove the victim to a different location where he showed the victim a group of more than five individuals sitting

handcuffed against a curb.<sup>1</sup> All the suspects were Black males who appeared to be around 15 years old.<sup>2</sup>

The victim was seated in a patrol car 10 feet away from the suspects. The victim positively identified the three individuals who attempted to take his cell phone. He specifically identified the suspect who struck him, and the one who followed him afterward. The victim specifically identified minor, the only individual not wearing a shirt, as one of the perpetrators. The victim had no hesitation in rendering the identifications.

Officer Blackwell spoke with minor in the patrol car. Minor said he was playing football when he saw the victim across the street, and “that they all agreed to go get him. [Minor] stated that they jumped over the fence to the school, approached him, and that a subject . . . attacked the victim and demanded his cell phone and that some other subject with a white shirt also struck the victim.” Minor denied being involved, saying “he was just standing by, but that everybody else was . . . yelling ‘Give us the phone, give us the phone.’” Minor said everyone Officer Blackwell had detained was involved. He also admitted running when he first saw Officer Blackwell.

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<sup>1</sup> Officer Blackwell testified that “all the subjects” were present at the infield lineup. The victim testified there were more than five suspects at the lineup. Officer Joyce testified there were approximately seven suspects detained.

<sup>2</sup> Officer Blackwell testified all but one of the suspects were Black. He believed the other suspect was Hispanic. Officer Joyce testified six of the suspects were Black and one was White. Officer Joyce also testified the suspects ranged in age from 12 to 17 years old.

## DISCUSSION

Minor contends the infield lineup was unduly suggestive and, therefore, the admission of the victim's identification of minor was violative of minor's constitutional right to due process. We hold minor forfeited the issue by failing to raise it below. In the alternative, we hold the infield lineup comported with constitutional requirements.

“In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, 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, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.’ [Citation.] It is defendant's burden to demonstrate the existence of an unreliable identification procedure. [Citation.] ‘We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive.’ [Citation.]” (*People v. Lucas* (2014) 60 Cal.4th 153, 235.)

“A due process violation occurs only if the identification procedure is ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’ [Citation.]” (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) Even

“[t]he “single person showup” is not inherently unfair.’ [Citation.] . . . [F]or a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 413, fn. omitted.) A lineup is not unconstitutional where one suspect is “much more distinguishable from the others in the lineup. [Citations.]” (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052) “[T]he federal Constitution’s due process clause is not implicated when the circumstances asserted as creating an improperly suggestive identification procedure were not arranged by law enforcement officers. [Citation.]” (*People v. Thomas* (2012) 54 Cal.4th 908, 931.)

A defendant’s failure to challenge the constitutionality of a lineup identification prior to the completion of the People’s case-in-chief, forfeits the issue on appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) “[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]’ [Citation.]” (*People v. Sijas* (2005) 36 Cal.4th 291, 301, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Minor waited until the completion of the prosecution’s case-in-chief to move for dismissal of the allegation pursuant to Welfare and Institutions Code section 701.1 on the basis that the infield identification was unreliable and the victim failed to identify minor in court. The court denied the motion “based on the fact that [the victim] did identify the minor . . . approximately 20 minutes after the incident while the incident was still fresh in

his mind after he had been given an admonishment by Officer Blackwell, after he had been told that this may or may not be the individuals involved.” Thus, even in his motion to dismiss, minor did not challenge the constitutionality of the identification, but merely challenged the sufficiency of the evidence, in particular, the weight that should be accorded the infield identification. Likewise, during closing argument, minor challenged not the constitutionality of the infield identification, but the weight the identification should be accorded. Thus, minor forfeited appellate challenge to the constitutionality of the infield identification by failing to raise the issue below.

Regardless, the infield identification was not constitutionally infirm. Officer Blackwell detained seven to eight individuals, among whom the victim specifically identified the three individuals, including minor, who participated in the attempted robbery. The suspects were found in the area in which they were reported to be heading. The victim explicitly identified minor as one of the perpetrators. The identification occurred only 20 minutes after the incident. At the time of the identification, the victim was only 10 feet away from the suspects and had a clear view of them. At the time of the incident, the victim was only three feet away from the suspects, giving him sufficient opportunity to observe them. The victim showed no hesitation in rendering the identifications.

The court found the victim “positively identified the [perpetrators], but what was pertinent to the Court is that Officer Blackwell specifically testified that not only did [the victim] identify what they were wearing but what they had done; that Officer Blackwell testified that [the victim] was able to tell him who struck him, who followed him, and that

they were all the ones who demanded the phone when he picked out the three people . . . that he identified. [¶] So it's not just that he identified individuals by clothing. According to Officer Blackwell's testimony, he identified them also by what they had done during the attempted robbery. [Minor] was identified as the person not wearing a shirt." "[A]ccording to [the victim's] testimony, and [minor] again was the one who demanded the phone and had his fists balled up, although [minor] was not the one who struck [the victim] in the head." The infield lineup was not unduly suggestive; therefore, the victim's identification of minor as one of the perpetrators of the attempted robbery was properly admitted.

Minor contends the infield lineup was constitutionally infirm as unduly suggestive, because the victim noted the perpetrator was not wearing a shirt and minor was the only one of those in the infield lineup who was not wearing a shirt. However, to the extent that minor's lack of a shirt could be deemed unduly suggestive, this was not a circumstance arranged by law enforcement officers. (*People v. Thomas, supra*, 54 Cal.4th at p. 931.) Rather, the officers offered the victim a lineup of the suspects as the officers found them. Of the seven or eight suspects, the victim showed no hesitation in identifying the three individuals, including minor, who participated in the robbery.

Minor also complains that the individuals the victim identified as the perpetrators differed from the victim's original description. Minor argues the victim originally reported the perpetrators were 18 or 19 years of age and that minor was wearing pants. Ergo, the identification was unreliable because minor was only 15 years old and was apprehended wearing shorts. First, we note it is unclear from the record who informed

the police the suspects were 18 to 19 years of age. Officer Blackwell testified dispatch informed him the suspects were 18 to 19 years of age. However, although the victim had spoken with dispatch and gave a description of the perpetrators, both the victim's friend and the victim's friend's brother also spoke with the dispatcher.

There is no testimony in this record that the victim informed the police that the perpetrators were 18 to 19 years of age. Rather, the victim merely testified the perpetrators looked older than the victim. Officer Joyce testified the detained suspects ranged in age from 12 to 17 years. Second, it is of little consequence that the victim may have described the perpetrators as being a few years older than they actually were. The victim testified the suspects at the infield lineup all appeared to be around 15 years old; yet, he showed no hesitation in identifying the three perpetrators. Likewise, the fact that the victim described minor as wearing pants when he was found to be wearing shorts is of little consequence. "Shorts" are, in point of fact, an abbreviated way of saying "short pants." Third, the victim's purported misdescription of the ages of the perpetrators and minor's sartorial accoutrements would go to the evidentiary weight of his identification, not its admissibility.

Defendant cites *In re Robert W.* (1977) 68 Cal.App.3d 705 for the proposition that minor's lack of a shirt in the infield lineup was unduly suggestive. *Robert W.* is distinguishable because the defendant in that case "was ordered by a police officer to wear [the victim's] coat in the room at the police station where [the victim was] brought to identify his attackers." (*Id.* at p. 711.) The victim had been accosted by a group of seven or eight persons, one of whom struck the victim in the face and stole the victim's

jacket. (*Id.* at p. 710.) Thus, unlike the lineup in the instant case, the police in *Robert W.* arranged the lineup so as to unduly suggest the defendant was the perpetrator. Here, police did not force any members of the lineup to alter their apparel. Indeed, had the police forced minor to wear a shirt, that would have constituted “arrangement” of the lineup by the police.

Likewise, defendant’s assertion of the unreliability of cross-racial identification relevant to the victim’s identification of minor as one of the perpetrators would go to the weight of the evidence here, not its admissibility. (*People v. McDonald* (1984) 37 Cal.3d 351, 362-369, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914-925.) Here, the court expressly found credible the victim’s identification of minor. The infield lineup was not unduly suggestive and the victim’s identification of minor as one of the perpetrators was properly admitted.

#### DISPOSITION

The judgment is affirmed.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

RICHLI

J.