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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re EFRAIN H., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EFRAIN H.,

Defendant and Appellant.

F071316

(Super. Ct. No. JJD068108)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Michael B. Sheltzer, Judge.

Holly Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Peña, J.

Appellant Efrain H., a minor, appeals from the juvenile court's judgment declaring him a ward of the court. Following a contested hearing on a petition under Welfare and Institutions Code section 602, appellant was found to have committed the crimes of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a) [count 1]); receiving stolen property (Pen. Code, § 496d, subd. (a) [count 2]); and resisting, obstructing, or delaying a peace officer (Pen. Code, § 148, subd. (a)(1) [counts 4 & 5]). Appellant argues his due process rights were violated when the trial court admitted evidence regarding appellant's identity as the perpetrator of counts 1 and 2. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At around 9:40 p.m., on August 1, 2014, Frankie Fernandez was watching television with his brother Marco, and Marco's live-in girlfriend Sabrina, when he heard the sound of a car starting. From the distinctive sound of a squeaky belt, Mr. Fernandez knew the car being started was his. Mr. Fernandez immediately headed outside, where he saw his car being driven away.

Mr. Fernandez gave chase. He ran to the passenger door and attempted to open it, but was thwarted when someone inside the car locked the door. During this chase, Mr. Fernandez was able to look through the car's window. He saw two minors inside of his car. The passenger was wearing a black hat and a black shirt. The driver was wearing a black shirt with red markings. Mr. Fernandez was unable to see the minors' faces and conceded that only one small light was illuminating the scene as he chased after his car.

At around 10:40 p.m. that same night, Porterville Police Department Detective Tyson Tashiro responded to a reported vehicle fire at the Tule River. Detective Tashiro found the burning vehicle matched the description of Mr. Fernandez's recently stolen car. Detective Tashiro also noticed some shoe prints on the ground and followed them from the vehicle to a bridge near the road. Upon reaching the bridge, Detective Tashiro saw three juveniles, including appellant, walking toward the bridge and the scene of the

burning vehicle. Detective Tashiro detained the juveniles and, ultimately, requested Mr. Fernandez come to the scene to identify his vehicle and the suspects.

When Mr. Fernandez arrived, he was first asked to, and did, identify the burned vehicle as his stolen car. Detective Tashiro then read Mr. Fernandez the Porterville Police Department's photo lineup admonishment, which is typically used for field identifications, and asked him whether he could identify any of the juveniles. All three of the juveniles were presented at the location where the burning car was found, standing in handcuffs, with headlights shining on them.

Based on the fact that appellant was wearing a black T-shirt with a red design, Mr. Fernandez identified appellant as the person driving his car when it was stolen. According to Detective Tashiro, Mr. Fernandez stated he was "100 percent sure" appellant was the driver. Mr. Fernandez also identified one of the juveniles as the passenger in the car when it was stolen, relying on the fact he was wearing a black T-shirt. Mr. Fernandez confirmed at trial that he had clearly seen the driver's T-shirt when he was chasing his car, and had made his identifications based on the fact the suspects were wearing the same clothing as the minors who took his car. Mr. Fernandez did not identify the third juvenile as someone involved in the theft. Although he could not rule out the possibility of a third suspect due to his car having tinted rear windows, he confirmed that he only saw two people in his car when it was stolen.

Only one objection to the identification testimony was made. During Detective Tashiro's testimony, defense counsel objected on the ground that Mr. Fernandez had already testified and "[t]his is not testimony that would refute anything the victim said." During closing arguments, defense counsel also objected that the prosecution misstated the record by arguing Mr. Fernandez was "100 percent sure" of his identifications. No objection alleged the identification procedures violated due process.

Based upon Mr. Fernandez's identification, including the fact that he was unable to identify one of the three juveniles presented as a suspect, the juvenile court found

counts 1 and 2 of the petition to be true. As a result, appellant was deemed a ward of the court.

This appeal timely followed.

DISCUSSION

Standard of Review and Applicable Law

Appellant bears the burden of showing unfairness in the procedures leading to his identification as a demonstrable reality, not just speculation. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) “““In deciding whether an extrajudicial identification is so unreliable as to violate a defendant’s right to due process, the court must ascertain (1) ‘whether the identification procedure was unduly suggestive and unnecessary,’ and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances.””” (*People v. Carter* (2005) 36 Cal.4th 1114, 1162-1163 (*Carter*).) “[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.) If the procedure was not unduly suggestive, we need not reach the question whether the identification was nevertheless reliable. (*Carter, supra*, 36 Cal.4th at p. 1164.)

“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.” (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)

Appellant Failed to Timely Object

Appellant raised no due process objection to the trial testimony identifying him as the driver, nor did he move to exclude the evidence. His arguments on appeal are thus untimely and have been forfeited. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) While appellant contends the issue was argued before the juvenile court, and thus any

failure to formally object should be overlooked, the record does not support this position. The objection allegedly preserving this issue identified by appellant was not to the procedures underlying the identification process, but to the prosecutor's summary of Mr. Fernandez's confidence regarding the identifications. Such an objection goes to the weight of the evidence, not its admissibility. Moreover, coming during closing arguments, this objection was untimely even if proper. (*Ibid.* [challenge following the prosecutor's case-in-chief untimely].)

Even if we overlook the timeliness issue, however, appellant's argument is unpersuasive. While appellant makes multiple arguments as to why Mr. Fernandez's identification is unreliable (e.g., the circumstances by which Mr. Fernandez saw the car thieves, the juvenile's location and distance from the car when detained, and potential conflicts between Mr. Fernandez's trial testimony and his prior statements), these arguments are only relevant if the identification procedures are unduly suggestive. (*Carter, supra*, 36 Cal.4th at p. 1164.) With respect to this threshold question, appellant contends he was in handcuffs, near the location of the car, and with a light on him. We conclude that these facts do not demonstrate the procedures were unduly suggestive. (See *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359-1360 [curbside lineup not unduly suggestive]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 ["the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification"]; *In re Richard W.* (1979) 91 Cal.App.3d 960, 969-970 [single-person show-up of suspect in handcuffs, in the back of a patrol car, near the scene of the crime not unduly suggestive].) Mr. Fernandez was able to distinguish between the two suspects he could identify and a third, which he could not. Thus, even when considered together, the overall circumstances were not unduly suggestive. (*In re Carlos M., supra*, 220 Cal.App.3d at pp. 386-387.)

DISPOSITION

The judgment is affirmed.