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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re HECTOR G., a Person Coming Under  
the Juvenile Court Law.

H037269  
(Monterey County  
Super. Ct. No. J44962)

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR G.,

Defendant and Appellant.

Following a combined jurisdictional and probation revocation hearing, the juvenile court found true the allegations that Hector G., a minor, committed the following offenses: robbery (Pen. Code, § 211) with personal use of a firearm (Pen. Code, § 12022.5, subd. (a)(1)); and possession by a minor of a concealable firearm (Pen. Code, § 12101, subd. (a)). The juvenile court also found that the minor violated the terms of his probation. The minor was then committed to the Department of Juvenile Justice (DJJ) for a maximum term of 17 years. On appeal, the minor contends that he was denied due process by an unduly suggestive identification procedure and the juvenile court lacked authorization to impose probation conditions when it committed him to the DJJ. We

agree that the conditions of probation must be stricken. As modified, the order is affirmed.

### **I. Statement of Facts**

Late in the afternoon on February 4, 2011, Jose Guzman Bazan was selling ice cream from his cart near Metz Road in Soledad. Bazan saw the minor walk slowly by his cart. The minor then stood about 20 feet from Bazan. Bazan also noticed a group of people, who had just been dropped off by their ride. Once this group left, the minor returned and asked for some ice cream. As Bazan was reaching into his cart, the minor pulled out a gun and said, "Give me the money. Give me all of the money." Bazan described the minor, as white or Hispanic, about 18 or 19 years old, and wearing red shorts and a black-hooded sweatshirt. During the robbery the minor was about two to three feet away from Bazan, who was able to "get a good look at him."

After Bazan gave the minor his money, which he estimated was more than \$5.00, and his cell phone, the minor made Bazan take off his tennis shoes to see if he had any more money. The minor then took a bag of chips from the cart, told Bazan not to say anything, and ran away. Three or four minutes elapsed from the time the minor asked for money to when he left.

Rosalie Tovar lived about 100 feet from where the robbery occurred. At about 4:40 p.m., she exited her house and saw a man point a gun at Bazan and say, "Give me all your money right now." Tovar ran inside and contacted the police.

At 4:43 p.m. Officer Juan Sanchez received a dispatch to go to Metz Road. He spoke to Bazan, who identified himself as Juan Gonzales Santos. Bazan explained that he gave a false name because he was afraid of the minor and his friends.

Based on the information that he received from Bazan, Officer Sanchez created a photographic lineup. The officer then contacted Bazan about eight or nine hours after the robbery and showed him a set of six photographs. Bazan identified the photograph of the

minor as the person who had robbed him. Though the photograph of the minor was smaller than the others, Bazan testified that he “would have recognized him the same if it were larger, the same.”

On the evening of the February 4, the minor went to the home of his aunt Veronica V., who lived two to three blocks from the site of the robbery. His friend, Dominic R., arrived and joined the minor in his room. When Veronica heard what “sounded like a firecracker” in the minor’s room, she entered the room and found Dominic bleeding from his leg. There was a gun next to Dominic. She asked what happened, and they both said, “[Q]uiet.” Veronica called 911 and requested an ambulance. She then took the gun and put it in a closet. The minor left the house before the police arrived.

When Officer Thomas Marchese arrived at Veronica’s house, she gave him the gun. He then gave it to Officer Daniel Andrada, who found that the weapon was loaded except for one expended round. Bazan testified that this gun appeared to be the weapon that the minor was holding when he robbed him.

## **II. Discussion**

### **A. Photographic Lineup**

The minor contends that he was denied due process by the unduly suggestive identification procedure used in the photographic lineup.

The minor’s counsel brought a motion to exclude any identification of the minor based on the earlier out-of-court identification. At the hearing on the motion, Officer Sanchez testified that he had created the photographic lineup for viewing by Bazan. In creating the lineup, Officer Sanchez used a computer program called Track Net, which allowed him to enter information regarding various options, including height, weight, and hair type and length. He explained that “[t]here’s about 15 different buttons you can push, and it will bring up whatever it matches.” Depending on the number of features

entered for matching, the computer can generate “from 20 to 2,000” photographs. Officer Sanchez did not recall what information he entered into the computer or the number of photographs that the computer generated.

Officer Sanchez picked five photographs that he believed resembled the minor and placed them in the photographic lineup. The individuals in the photographs have similar haircuts and facial features and appear to be close in age, though the minor is the only one who does not have a mustache. Three of the individuals, including the minor, are wearing white t-shirts, two are wearing colored t-shirts, and one is wearing a sleeveless shirt. The minor’s photograph is about half as large as the other five photographs. Officer Sanchez explained that the minor’s photograph was the only photograph that was in the police department’s system, and the computer program did not allow it to be enlarged.

Before Officer Sanchez showed the six photographs to Bazan, he read him the following advisement in Spanish: “You will be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your judgment. [¶] You should not conclude or guess that the photographs contain the picture of the person who committed the crime. [¶] You are not under any obligation to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. [¶] Do not be influenced by the fact that the persons in the photograph may have beards, mustaches, or long hair. [¶] Do not be influenced by the fact that some of the pictures may be in color while others are black and white. [¶] Please do not discuss the case with other witnesses nor indicate in any way that you have or have not identified someone.” Bazan looked at the photographs for “three or four seconds,” circled the minor’s photograph, and said in Spanish, “he did it.”

Following argument, the juvenile court noted that the minor’s photograph was smaller than the other photographs and took the matter under submission. The juvenile court also stated that it would return to the issue after hearing the victim’s testimony.

Bazan testified that he was “sure” that the individual depicted in the minor’s photograph was the person who robbed him. He also testified that one of the photographs was different from the others because it was smaller. However, Bazan asserted that he would have recognized him even if the photograph had been larger.

The juvenile court denied the motion, stating that after “a cursory look at the lineup, you’re not necessarily attracted to any particular photo at the outset, except where your eyes do wander towards the photograph of the person is smaller only because the front-on view is a little bit smaller. . . . [¶] . . . [¶] But looking at Respondent’s A, it does not appear to be unduly suggestive to the degree that you’re trying to suggest to someone who you should pick, because there’s nothing so distinctive, other than the smallness of the photo, that you’re trying to focus in on in this picture only, and nothing else. And the admonition was there.” The juvenile noted some of the differences between the individuals in the photographs, but pointed out “there [are] more similarities in the photograph[s] than dissimilarities. The smallness is the main difference.”

The juvenile court also found that the identification was reliable, observing that “[i]t wasn’t a circumstance or situation where he saw the [suspect] for a split second and the person took off, where one may say, well, he may not have had the opportunity to really look at the face and that might impact him. However he was able to describe how long the person hung out waiting for those that were being dropped off from work left, and had a conversation with him, looked at him.”

A pretrial identification procedure that is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification” violates a defendant’s right to due process of law. (*Simmons v. United States* (1968) 390 U.S. 377, 384.) In determining whether the admission of identification evidence constitutes such a violation, “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. [Citations.] [¶] The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990 (*Cunningham*), relying on *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107, 114.)

This court independently reviews "a trial court's ruling that a pretrial identification procedure was not unduly suggestive." [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 698-699.)

Here, the minor acknowledges that the method of identification was necessary because he was not in custody and, as Officer Sanchez explained, the computer could not have generated a larger photograph of him. He argues, however, that "this does not excuse the suggestiveness of the lineup." We disagree with the minor's characterization of the lineup as unduly suggestive. As the juvenile court noted, the individuals in the six photographs are similar in appearance, that is, skin tone, shape of eyebrows, ears "popping out," and short hairstyle. Moreover, all but one of the photographs have different backgrounds, and two of the individuals appear closer to the camera. These differences lessen the impact of the minor's photograph, which is significantly smaller than the others. Given that Bazan was also instructed that he "should not conclude or guess that the photographs contain the picture of the person who committed the crime," we conclude that the display was not impermissibly suggestive.

Even assuming the photographic lineup was unduly suggestive, Bazan's identification was reliable under the totality of the circumstances. Bazan had ample opportunity to view the minor. Bazan first observed the minor as he walked by his cart.

The minor then stood about 20 feet from Bazan and waited for a group of people to leave the area before he returned to the cart. Standing two or three feet away, the minor asked for ice cream, and as Bazan reached for the ice cream, the minor pointed the gun at him and demanded money. After taking Bazan's money and cell phone, the minor ordered him to remove his shoes and then fled. The robbery took three or four minutes to complete.

The minor argues that Bazan's opportunity to view him was "poor," because Bazan was looking into the cart when the gun was produced and "[a]fter that, his attention was focused on the gun." However, the record does not support the minor's claim that Bazan's attention was focused on the gun. Nor does the record support the minor's claim that the hood of his sweatshirt obscured his face. Thus, we disagree with the minor's conclusion that Bazan's opportunity to view the robber was quite limited.

Regarding the degree of attention that Bazan paid to the robber, the minor argues that Bazan "was not even able to identify the man's race." This argument is not persuasive. Bazan testified that the robber was white or Hispanic. Based on our review of the minor's photograph, this was not an inaccurate description. Moreover, this factor involves whether Bazan paid sufficient attention to the robber to identify him. Bazan testified that he got "a good look at him." Thus, Bazan's attention to the robber was sufficient to make a reliable identification.<sup>1</sup>

Bazan told the police that the robber was 18 or 19 years old, white or Hispanic, and wore a black-hooded sweatshirt and red shorts. The police did not search the minor's room, so it is not known whether the minor possessed these items of clothing. However, the minor is a 15-year-old Hispanic and thus partially met the generic description that Bazan gave to the police.

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<sup>1</sup> The minor also repeats his claim that Bazan was looking at the ice cream cart and gun, and not at the robber. As previously stated, the record does not support his claim.

The minor acknowledges that Bazan positively identified him in the photographic lineup and at the hearing, but he argues that it was the product of an impermissibly suggestive identification procedure. However, the test set forth in *Cunningham, supra*, 25 Cal.4th at p. 989 is controlling. Thus, the certainty of identification remains a factor that this court must consider. Here, Bazan did not express any doubts as to his identification of the minor either in the photographic lineup or at the hearing.

The minor also concedes that the lapse of time between the commission of the robbery and Bazan's selection of the minor's photograph was "relatively short," that is, eight or nine hours after the robbery.

Based on Bazan's ample opportunity to view the robber, his degree of attention to him, his generally accurate, though limited, description of the robber, the certainty of his identification, and the short time between the crime and his identification of the minor, we conclude that Bazan's identification of the minor's photograph was reliable. Accordingly, the photographic lineup did not violate the minor's right to due process.<sup>2</sup>

### **B. Probation Conditions**

The minor contends, and the People concede, that the juvenile court lacked the authority to impose probation conditions after committing him to the DJJ.

Here, the juvenile court imposed discretionary conditions of probation that the minor stay away from Bazan and Dominic R. and their families, residences, vehicles, schools, and places of employment.

In *In re Allen N.* (2000) 84 Cal.App.4th 513, the juvenile court committed the minor to the California Youth Authority, the predecessor to the DJJ, and imposed various probation conditions, including that the minor not have contact with certain individuals.

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<sup>2</sup> Having concluded that the photographic lineup was not unduly suggestive and Bazan's identification of the minor was reliable, we reject the minor's claim that Bazan's in-court identification of him should have been excluded.

(*Id.* at pp. 514-515.) The reviewing court struck the probation conditions, reasoning that “the juvenile court’s imposition of discretionary conditions of probation constitutes an attempt to regulate or supervise the minor’s rehabilitation, a function solely in the hands of [DJJ] after the minor’s commitment. Nor is it of any import, as suggested by the People, that similar parole conditions may be imposed by [DJJ] or that there is not yet a conflict between the conditions imposed by the court and [DJJ]. Simply put, the imposition of probationary conditions constitutes an impermissible attempt by the juvenile court to be a secondary body governing the minor’s rehabilitation.” (*Id.* at p. 516.)

### **III. Disposition**

The discretionary conditions of probation imposed by the juvenile court are stricken. As modified, the order is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Duffy, J.\*

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.