

NO. 23734

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
JOACHIM CUELLAR, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT  
(REPORT NO. F-98468)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Joachim Cuellar (Cuellar or Defendant) appeals the August 14, 2000 Judgment entered by District Court Judge Jeffrey Choi convicting him of Indecent Exposure, Hawaii Revised Statutes (HRS) § 707-734 (1993). More specifically, Cuellar challenges the court's June 19, 2000 denial of the second half of his April 6, 2000 Motion to Suppress Eyewitness Identification and/or Photographic Lineup Identification (M/S). We affirm.

CHRONOLOGY OF CASE

On April 6, 2000, Cuellar filed the M/S. In this M/S, Cuellar asked the court

to issue an order precluding the complaining witness herein from testifying at trial regarding her identification of Defendant as the person who allegedly exposed himself to her and/or as to her pre-trial identification of a photograph of [Cuellar] as that of the person who allegedly exposed himself to her, on the ground that the pre-trial photographic line-up shown to the complaining witness was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

In other words, Cuellar sought to suppress the testimony of the complaining witness about (a) her pre-trial identification of his picture in a photographic lineup and (b) her identification of him at trial.

Most participants appeared for the hearing on the M/S on June 5, 2000, but the hearing was continued at the request of Cuellar and/or his counsel.

The trial and the hearing on the M/S were both held on June 19, 2000. The M/S was decided on that date. The trial was continued to August 14, 2000, and Cuellar was found guilty and sentenced on that date.

#### BACKGROUND

At the trial on June 19, 2000, the primary witness (Witness) for Plaintiff-Appellee State of Hawai'i (the State) was 16 years old. Witness testified that, on June 17, 1999<sup>1</sup>, at around 1:00 p.m., she was walking alone to meet a friend when a vehicle driven by a man stopped next to her. In her words, "[F]irst he drove past me and turned on the park street. . . . Then he came back out and pulled up next to me and asked me if I knew where Micah something lived." Witness looked at the man when he asked the question. Witness was "standing about a foot from the car, and was kind of leaned

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<sup>1</sup> June 17, 1999, was a Thursday.

over . . . [b]y the passenger window." Witness responded, "I don't know where that person was, but I think there's a Micah that lives up the road[.]" After looking at a barking white Chihuahua located in the back seat, Witness looked back at the man and "noticed he wasn't wearing any pants" and was "[t]ouching his private parts." She was able to see his penis. She then "stepped back from the car."

Witness testified that the car was an old, four-door blue Nissan. She added that the man "had black curly hair. He had kind of tanned skin, and he had a T-shirt, and he was overweight." After she walked away, the man "sat there for a little while" then "pulled away slowly." After around five minutes, Witness saw the car coming toward her from the opposite direction and heard the car stop about 10 feet behind her. She turned around and saw the man looking at her in his rearview mirror. After he drove off, she ran to her friend's house and, as she knocked on the door, she noticed the same man "driving slowly, looking back and forth." After the man drove away for the third time, Witness ran across the street from her friend's house and asked the lady who lived there if she could use her phone to call her mom. Witness' mom picked her up and as they drove down the road, they came across police officers responding to a fire. After they reported the incident to the

officers, Officer Daryl Fernandez (Officer Fernandez) told them they would be contacted at a later date. Then they picked up Witness' friends and Witness told them everything that happened.

At trial, Witness testified that "[w]hen [she] talked to [Cuellar] on the road," she "memorized what his face looked like[.]" Witness identified Cuellar as the man she saw in the blue Nissan sans pants and touching his penis.

Upon cross-examination, Witness testified that after the postponement of the hearing on June 5, 2000, she and her mother waited for Cuellar to leave the courthouse. Her mother then drove up to Cuellar when he walked over by the intersection because her "mother wanted to see what he looked like." Witness agreed that she did not notice Cuellar earlier when he walked past her.

Officer Fernandez testified that on June 17, 1999, at around 2:00 p.m., while responding to a fire call, he was contacted by Witness. He testified that Witness "told us that there was an incident with a man that happened maybe about, uh, ten minutes prior to our arrival about him showing his private parts to her." Officer Fernandez told her he would contact her at a later time because he was assigned to traffic control. On June 24, 1999, Officer Fernandez contacted Witness and she

"described the male, the vehicle, and that there was a dog in the car." She described the vehicle as a blue Nissan four-door, the dog as a black Chihuahua with white spots, and the man having "[s]hort . . . black curly hair, fair complexion, no mustache, . . . and a pot belly." On July 17, 1999, Officer Fernandez arranged a photographic lineup and "asked [Witness] if [she] could pick out the suspect[.]" Witness had been informed that the police had arrested a suspect in her case and that a picture of this suspect would be in the lineup. She testified:

A. I was -- at first I -- I pointed out right away and I said, "I think that's him." And Officer Fernandez said, "Well, you have to be totally hundred percent sure. Are you sure that's the man?"

And then I looked at him for a little while more, and I said, "Yes. This is the one."

Officer Fernandez subsequently told her, "[t]hat's the man we picked up."

One of Witness' friends testified that on June 18, 1999, at some time in the afternoon, she saw "[a] guy in a blue Nissan with a [Chihuahua] in it that was going slow" and towards her. She observed the license number of the vehicle and informed the police of that number. She described the man in the car as having "dark and kind of wavy short hair" and a fair complexion but could not recall whether he had a mustache or beard. The friend told the police that she would not be

able to identify the suspect in a photo lineup and she in fact was not able to do so.

On June 19, 2000, after the State rested, the court decided the M/S as follows:

[M]y initial inclination is to suppress the, um, photo lineup but to admit, um, Miss Nelson's, uh, in-court identification essentially because I find her to be one of the most credible witnesses it's been my pleasure to observe over the last seven years, and I'm convinced that she had adequate, um, opportunity to, um, support her testimony here in court today.

At the other end with regard to the photo lineup, I think, um, the procedure -- nothing to do with Miss Nelson, but the procedure which was followed, um, particularly not so much because, um, of the fact of mustaches on the other five people in the lineup because Mr. Cuellar in this -- at this point in time in the 24th appears to have the beginnings of a mustache.

But that situation, um, combined with the fact the police officer improperly told, um, the . . . witnesses that the suspect was, in fact, in this group . . . suggested to her that that's the one[.]

The court suppressed the testimony relating to the photograph lineup identification but did not suppress the in-court identification.

At the continuation of the trial on August 14, 2000, the defense called Jean Ellen Kristanko (Kristanko) as a witness. Kristanko testified that she was the office clerk at the Leilani Community Association, that Cuellar owned a lot in the Leilani subdivision, and that Cuellar spoke to her "[m]aybe a month or two months before" June regarding his lot and assessments because he wanted to make payments on the assessments due. She further testified that she closed at noon on both June 17, 1999, and June 18, 1999, and did not see

Cuellar on June 18, 1999. Defense counsel subsequently argued that

[t]he relevance of Ms. Kristanko's testimony is simply that it is somewhat corroborative of Mr. Cuellar's account of what he was doing in Leilani on Friday, June 18th. He went there to collect these papers regarding the lot that he owns there. And he recalls, as he recalled at the time he was interviewed by the police officer, after leaving The Long House that day that he did have a brief, passing encounter with a young woman who he saw on the roadway. It seems clear enough that that is [Witness' friend]."

Cuellar testified that he lived in the Nanawale Estates in Pahoia for 25 years along with his wife. He worked as a truck driver until he had a lumbar injury on October 2, 1990, which left him partially temporarily disabled. When asked if he had seen Witness before, Cuellar denied ever meeting her and exposing himself in her presence. Cuellar could not recall exactly what he was doing on June 17, 1999. However, on a typical day he would either visit some friends, watch specific programs on television, or care for his animals. On Thursdays, at 2:05 p.m., he "religiously" watched "WCW Thunder Wrestling pro wrestling." He testified that on Friday, June 18, 1999, he "went to Leilani to get a -- a -- one of those sheets that they make regarding our assessment fees and such." He went there "between 11:00 and 12:00." On the way home, he saw and waved to a man driving the Nanawale Association truck. He also saw a "little white girl" kicking a coconut down the street who turned around to look at Cuellar as he drove by.

Upon cross-examination, Cuellar testified that he owned a dark blue Nissan and a black and white Chihuahua.

At the conclusion of the case on August 14, 2000, the following was stated:

THE COURT: Not a hard case to decide. As I indicated in ruling on the motion, [Witness] is one of the most credible witnesses I've ever had the pleasure to evaluate. And all of the circumstantial evidence that the defendant has raised in his behalf, while suggestive of a possible defense, and while containing grains of truth, do not raise a reasonable doubt in my mind. So Court has no difficulty in finding him guilty as charged."

Mr. Cuellar, you have anything you want to say before we decide what penalty is appropriate?

THE DEFENDANT, MR. CUELLAR: It's just bull shit, that's all it is.

The court sentenced Cuellar to 30 days' imprisonment and ordered him to pay \$25 to the criminal injuries compensation fund. Cuellar's sentence was stayed pending this appeal which was filed on September 7, 2000.

#### BURDEN OF THE MOVANT/APPELLANT AND STANDARD OF REVIEW

The applicable rule was announced in Simmons v. United States, 390 U.S. 377, 384[, 88 S. Ct. 967, 971, 19 L. Ed.2d 1247] (1968) as follows:

(W)e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

State v. Padilla, 57 Haw. 150, 153-54, 552 P.2d 357, 360 (1976)  
(footnote omitted).

When the defendant [in trial] challenges admissibility of eyewitness identification on the grounds of impermissibly suggestive pretrial identification procedure, he or she has the burden of proof, and the court, trial or appellate, is faced



with two questions: (1) whether the [pretrial identification] procedure was impermissibly or unnecessarily suggestive; and (2) if so, whether, upon viewing the totality of the circumstances, such as opportunity to view at the time of the crime, the degree of attention, the accuracy of prior description, the level of certainty, and the elapsed time, the witness' identification is deemed sufficiently reliable so that it is worthy of presentation to and consideration by the [trier of fact].

These two questions [are questions of law but they] involve determinations of fact. The trial judge's findings on [the questions of fact] whether express or implied, must be affirmed on appeal unless they are clearly erroneous.

State v. Tuua, 3 Haw. App. 287, 289-290, 649 P.2d 1180, 1183 (1982) (citations omitted).

"[Appellate Courts] review a ruling on a motion to suppress *de novo* in order to determine whether it was right or wrong as a matter of law. State v. Navas, 81 Hawai'i 113, 123, 913 P.2d 39, 49 (1996)." State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997).

#### QUESTIONS PRESENTED

There being no relevant facts in dispute, the question is whether the circuit court was right or wrong (a) when it implicitly concluded that the impermissibly suggestive pre-trial photographic identification procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, and (b) when it, upon viewing the totality of the circumstances, expressly concluded that the witness' identification was sufficiently reliable to be worthy of presentation to and consideration by the trier-of-fact.

## DISCUSSION

Cuellar's position is that "[o]nce [Witness] had selected Cuellar's photo and then seen him at court on the day [the] trial had been continued, the risk of irreparable misidentification at trial was substantial." In other words, Cuellar contends that the impermissible photo lineup combined with the permissible observation of Cuellar by [Witness] on June 5, 2000, when the hearing on the M/S was postponed, gave rise to a very substantial likelihood of irreparable misidentification.

Viewing the totality of relevant circumstances, including those specified in Tuua, supra, we conclude that the court's decision was right. The court decided that [Witness] was a credible witness and nothing in the record indicates otherwise. [Witness] had ample opportunity and motive to look at Cuellar's face during the incident. Her eyes were no more than the width of the Nissan automobile from Cuellar's face. Nothing inhibited her view of Cuellar's face. While Cuellar asked her the question and she answered, she looked directly at Cuellar's face. She also gave a good description of his blue four-door Nissan and his black and white Chihuahua.

## CONCLUSION

Accordingly, we affirm the district court's August 14, 2000 Judgment convicting Cuellar of Indecent

Exposure, HRS § 707-734 (1993), and sentencing him to 30 days' imprisonment and to pay \$25 to the criminal injuries compensation fund.

DATED: Honolulu, Hawai'i, September 7, 2001.

On the briefs:

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