



On interlocutory appeal, Jose Lozano (“Lozano”) raises two issues, which we restate as:

I. Whether the trial court abused its discretion in denying his motion to suppress pretrial identification evidence drawn from an allegedly impermissibly suggestive photo array; and

II. Whether the trial court abused its discretion in ruling that a hearsay statement concerning an unnamed third party’s purported confession to the crimes with which Lozano has been charged was inadmissible.

We affirm.

### **Facts and Procedural History**

On September 19, 2009, Towand Lane (“Lane”) and his friend Dangelo Toney (“Toney”) went to Club Q-Bo in Indianapolis, where Lane drank four to six shots of tequila. At about 2:00 a.m., Lane left the club and waited in the parking lot while two other friends stood in line to buy food from a mobile taco stand located just outside the club. As he waited, Lane heard Toney arguing with someone. Lane then saw Toney, who had been shot, stumble past him. When Lane turned around, he saw a Latino man between 5’7” and 5’9” with a round face, short dark hair, and a tattoo under his eye. The man shot Lane three times, once in the neck and twice in the side. Although Lane had never seen the man before, Lane saw him for five to seven seconds before falling to the ground.

Toney died as a result of his wounds. Lane and another victim, Jose Garcia, survived the shooting and were transported to the hospital for treatment.<sup>1</sup> Meanwhile,

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<sup>1</sup> Garcia apparently recovered from his injuries, but was subsequently killed.

based on information obtained from other people who were present at the scene, Indianapolis Metropolitan Police Detective Catherine Cummings (“Detective Cummings”) prepared three photographic arrays, each of which contained six photos. One array contained a photo of Lozano, who was the suspected shooter. The remaining two photo arrays each contained a photo of an individual believed to have been otherwise involved in the crime. Although the men depicted in the array containing Lozano’s photos shared many similar physical characteristics, Lozano was the only one pictured with a facial tattoo.

Several hours after the shooting, Detective Cummings interviewed Lane in his hospital room. When Detective Cummings asked Lane to provide a description of his shooter, Lane responded that the person who shot him was a Latino man, between 5’7” and 5’9”, with a round face and short, dark hair. Lane also stated that the shooter had a tattoo under his eye, which Lane believed to be a teardrop. Detective Cummings then showed Lane the three photo arrays she had previously prepared and asked Lane if he recognized anyone. Lane indicated that he did not recognize anyone depicted in the first two photo arrays. However, when Lane viewed the array containing Lozano’s photo, Lane immediately identified Lozano as the man who shot him and stated that he was willing to testify to that effect. In a subsequent statement made to the police, Lane said that he was “85% sure” that the man shown in the photo he selected was the same man who had shot him. Appellant’s App. p. 276.

On November 17, 2009, the State charged Lozano with murder and two counts of Class A felony attempted murder. On August 20, 2010, Lozano filed a “Motion to Suppress Identification Evidence,” arguing that the photo array from which Lane identified Lozano was unconstitutionally suggestive. Appellant’s App. p. 171. After multiple hearings, the trial court denied the motion.

Larry Nash-Aleman (“Nash-Aleman”) was also suspected of being involved in the shooting. Specifically, the State believed that Nash-Aleman ordered Lozano to kill Toney, but as of the time period relevant to this appeal, Nash-Aleman had not been charged in connection with the shooting. At some point during the proceedings in this case, Nash-Aleman told his attorney, Richard Ford (“Ford”), that he received a phone call shortly after the shooting from an unidentified individual other than Lozano who claimed to be the shooter. Ford relayed this information to the State, and the State then disclosed the information to Lozano.

On August 25, 2010, Lozano filed a “Motion to Declare Larry Nash-Aleman Unavailable.” Appellant’s App. p. 197. Through the motion, Lozano sought to introduce Nash-Aleman’s statement that he had “received a telephone call from the shooter shortly after the shooting occurred and that the shooter is not Jose Lozano.” Id. The motion asserted that Nash-Aleman was a “person of interest” in the investigation and that he would refuse to testify unless the State granted him immunity, which the State would decline to do. Id. Consequently, Lozano sought to introduce Nash-Aleman’s statement through Ford’s testimony. The State filed a response to Lozano’s motion and argued that

Nash-Aleman was not unavailable for the purposes of Indiana Rule of Evidence 804 and that his statement was inadmissible on grounds of hearsay, attorney-client privilege, and as a statement made in the course of plea negotiations.

On August 27, 2010, the trial court held a hearing on the motion, at which Lozano called Nash-Aleman to testify. Nash-Aleman invoked his Fifth Amendment right against self-incrimination, and after the State declined to offer him immunity, he was released as a witness. The trial court then took Lozano's motion under advisement. At a hearing held on August 30, 2010, the trial court found that Nash-Aleman was unavailable; however, the trial court ruled that Nash-Aleman's statement was inadmissible because it was hearsay, subject to attorney-client privilege, and made in the course of plea negotiations.

On September 1, 2010, Lozano filed a motion asking the trial court to certify its interlocutory orders denying his motion to suppress and ruling that Nash-Aleman's statement was inadmissible to allow for an immediate appeal. The trial court granted the motion on September 23, 2010, and this court accepted jurisdiction of this appeal on December 3, 2010.

### **Standard of Review**

We review both a trial court's denial of a motion to suppress and its rulings on the admissibility of evidence for an abuse of discretion. Goens v. State, 943 N.E.2d 829, 831 (Ind. Ct. App. 2011); Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). A trial court abuses its discretion if its decision is clearly against the logic and effect of the

facts and circumstances before it. Goens, 943 N.E.2d at 831. In conducting our review, we will neither reweigh the evidence nor assess witness credibility, and we will consider conflicting evidence in a light most favorable to the trial court's ruling. Id. at 831-32; Collins v. State, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), trans. denied. However, we will consider uncontested evidence favorable to the defendant. Goens, 943 N.E.2d at 831; Collins, 822 N.E.2d at 218.

### **I. Identification Evidence**

Lozano first argues that the trial court abused its discretion when it denied his motion to suppress evidence concerning Lane's out-of-court identification of him after looking at a photo array. Specifically, Lozano argues that the out-of-court identification evidence should have been suppressed because it was drawn from an impermissibly suggestive photo array in violation of his right to due process. Under the facts and circumstances presented here, we disagree.

“Due process of law under the Fourteenth Amendment to the United States Constitution requires suppression of testimony about a pre-trial identification when the procedure employed is unnecessarily suggestive.” J.Y. v. State, 816 N.E.2d 909, 912 (Ind. Ct. App. 2004), trans. denied. As the reviewing court, we “must determine whether, under the totality of the circumstances, the identification process was conducted in such a way that it created a substantial likelihood of irreparable misidentification.” Farrell v. State, 622 N.E.2d 488, 493 (Ind. 1993). In evaluating the likelihood of a misidentification, we consider the following factors: (1) the opportunity of the witness to

view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, and (4) the level of certainty demonstrated by the witness. Id. at 493-94. We may also consider (1) the manner and form in which the police asked the witness to identify the suspect and the witness's interpretation of their directives; and (2) whether the police focused on the defendant as the prime suspect, either by their attitude or the makeup of the photo array. J.Y., 816 N.E.2d at 913.

Lane testified that he was able to view Lozano for five to seven seconds in an illuminated parking lot at the time of the shooting. Although it is undisputed that Lane had been drinking at the time of the shooting, Lane's detailed description of the shooter supports an inference that Lane was paying close attention to the perpetrator's appearance. Moreover, Lane's description was relatively accurate. Lane described the shooter as a Latino man with short, dark hair and a round face; Lozano shares all of these characteristics. Lane also stated that the shooter had a tattoo under his eye, which Lane believed to be a teardrop. Lozano has a tattoo under his eye, but it is not in the shape of a teardrop; rather, Lozano's tattoo apparently depicts wording.

With regard to Lane's level of certainty, upon viewing the photo array, he immediately identified Lozano as the person who shot him and said that he was willing to identify Lozano as the shooter in court. Lane later stated that he was eighty-five percent sure that the man shown in the photo he selected was the same man who had shot him. By the time of the suppression hearing, Lane's level of certainty had increased to one

hundred percent. However, Lane testified that after viewing the photo array, he saw Lozano's picture in the newspaper and saw him in person at a pretrial hearing. Thus, the increase in Lane's degree of certainty might be attributable to his subsequent exposure to Lozano.

Detective Cummings testified at the suppression hearing that when she showed the photo arrays to Lane, she did not focus on any one photograph or identify the person she was looking for. Rather, Detective Cummings simply asked Lane if he recognized anyone with any involvement in the shooting. Additionally, Detective Cummings stressed that Lane should not "guess about anything" and that he should be certain of his answers. Tr. p. 133. In short, there is nothing to suggest that Detective Cummings influenced Lane to choose Lozano's photograph.

Although Lane had limited time to view the perpetrator and was apparently intoxicated at the time of the crime, he was able to give police a detailed description of the shooter, and that description matched Lozano's. Upon viewing the photo array, Lane immediately identified Lozano as the shooter with a high degree of certainty, and there is no evidence that anyone influenced Lane in selecting Lozano's photo. Under the totality of the circumstances, we cannot conclude that the identification process in this case created a substantial likelihood of irreparable misidentification.

Nevertheless, Lane argues that the photo array violated his due process rights because the five other photographs were not similar enough to his own. Specifically, Lane argues that, despite the many similarities in appearance shared by all of the men



depicted in the photo array, the photo array was impermissibly suggestive because Lozano was the only individual pictured with a facial tattoo. We disagree.

As an initial matter, we note that Lozano points out that in his statement to police and in his deposition, Lane stated that he recognized Lozano's photo based on the tattoo. However, at the suppression hearing, Lane testified that he was able to identify Lozano due to his hair, hairline, and facial structure, and that the tattoo merely confirmed his initial identification. Tr. p. 21. Thus, Lozano's argument in this regard is a request to view conflicting evidence in a light unfavorable to the trial court's ruling, which we will not do on appeal.

Our supreme court has held that "[t]here is no requirement that law enforcement officers 'perform the improbable if not impossible task of finding four or five other people who are virtual twins to the defendant.'" Farrell, 622 N.E.2d at 494 (quoting Pierce v. State, 267 Ind. 240, 246, 369 N.E.2d 617, 620 (1977)). A photo array is not impermissibly suggestive if the defendant "does not stand out so strikingly in his characteristics that he is virtually alone with respect to identifying features." Id. (quoting Pierce, 267 Ind. at 246, 369 N.E.2d at 620).

In the present case, each of the six photographs shows a Latino man wearing a white shirt and having dark eyes, short dark hair, and similar facial hair. Although Lozano is the only person pictured with a facial tattoo, Detective Cummings testified that when she assembled the photo array, she "was not able to find someone else with a tattoo

on his face who matched all of the other characteristics.”<sup>2</sup> Tr. pp. 132-33. As a practical matter, a photographic array cannot consist of six individuals identical in appearance, and Lozano’s unusual facial marking made it impossible for police to find photographs of other people precisely matching Lozano’s description. Under the facts and circumstances presented here, and given the other similarities among the six photographs included in the array, we cannot conclude that one unusual feature—the tattoo—created a substantial likelihood of irreparable misidentification. See Dumbsky v. State, 508 N.E.2d 1274, 1277-78 (Ind. 1987) (photo array not impermissibly suggestive where witnesses described robber as having blond hair and defendant was the only person in photo array with blond hair). Because the photo array was not impermissibly suggestive, the trial court did not abuse its discretion in denying Lozano’s motion to suppress.<sup>3</sup>

## II. Hearsay Evidence

Next, Lozano argues that the trial court abused its discretion in excluding Nash-Aleman’s statement that an unnamed individual had claimed responsibility for the

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<sup>2</sup> Lozano suggests that this statement is not credible and directs our attention to other photographs apparently pulled from the database Detective Cummings used to assemble the photo arrays at issue here, which Lozano submitted into evidence at the suppression hearing. According to Lozano, the photos are evidence that “there were Hispanic males with tattoos in the system whom she could have used.” Appellant’s App. p. 13. But Lozano ignores obvious differences between these photos and those included in the array. The first photo depicts a man with a facial tattoo; however, he is wearing a black shirt and has no facial hair. Moreover, his hair is longer, his complexion is much darker, and he appears to be considerably younger than the men depicted in the photo array.

The second photo is of Nash-Aleman, who was suspected of being involved in the shooting and appeared in one of the other photo arrays Lane viewed. Detective Cummings testified that she would not place two people suspected of being involved in one case in the same photo array and that she would not place the same photo in multiple photo arrays shown to one witness so as to avoid confusing the witness and drawing undue attention to any one photo. Moreover, although Nash-Aleman has a tattoo under his eye, he is not obviously Latino, his head is shaved, his hairline is tattooed, and he is wearing a red or orange shirt.

<sup>3</sup> Because we conclude that the photo array is not impermissibly suggestive, we need not address Lozano’s argument that any in-court identification by Lane has been tainted by an improper pretrial identification procedure.

shooting, which Lozano sought to admit through the testimony of Ford. One of the bases for the trial court's exclusion of the statement was that the statement was inadmissible as hearsay.

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Boatner v. State, 934 N.E.2d 184, 186 (Ind. Ct. App. 2010). As a general rule, hearsay is inadmissible unless the statement falls within one of the established hearsay exceptions. Yamobi v. State, 672 N.E.2d 1344, 1346 (Ind. 1996).

On appeal, Lozano does not dispute that Ford's testimony regarding Nash-Aleman's statement, which includes the unnamed caller's statement, is hearsay; nor does he argue that Nash-Aleman's statement falls within one of the exceptions to the hearsay rule.<sup>4</sup> Nevertheless, Lozano argues that under the circumstances presented here, due process requires the admission of Nash-Aleman's statement.

In support of this argument, Lozano cites Chambers v. Mississippi, 410 U.S. 284 (1973), for the proposition that "[d]ue process allows for the right to present a defense including the admission of third party culpability evidence." Appellant's Br. at 16. Aside from this conclusory statement, Lozano fails to develop any argument supporting this claim, and it is therefore waived. Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (noting that a party waives an issue on appeal where the party fails to develop a cogent argument), trans. denied; Ind. Appellate Rule 46(A)(8)(a) (argument section of

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<sup>4</sup> Because Lozano does not dispute that Nash-Aleman's statement was hearsay not falling within any of the established exceptions to the hearsay rule, we need not address Lozano's arguments regarding attorney-client privilege and statements made in the course of plea negotiations.

appellant's brief must contain the contentions of the appellant on the issues presented, supported by cogent legal reasoning).

Waiver notwithstanding, we conclude that the trial court's exclusion of Nash-Aleman's statement does not violate Lozano's due process rights. In Chambers, the United States Supreme Court held that, under some circumstances, the Fourteenth Amendment guarantee to a fair trial could override a state's interest in enforcing its criminal rules of evidence. 410 U.S. at 302-03; Davis v. State, 635 N.E.2d 1117, 1121 (Ind. Ct. App. 1994). In Chambers, four months after a murder occurred during a barroom brawl, Gable McDonald swore in writing that he was the shooter. 410 U.S. at 285-88. McDonald later repudiated the confession, but three of his acquaintances were prepared to testify that he orally confessed to them. Id. at 288-89.

At trial, Chambers's counsel called McDonald as a witness and introduced his prior written confession into evidence. Id. at 291. The State then elicited testimony from McDonald regarding his subsequent repudiation of the confession, as well as a fresh denial by McDonald. Id. Based on state evidentiary rules, Chambers was prevented from cross-examining McDonald as an adverse witness and denied the opportunity to present testimony by three other witnesses who would testify that McDonald had confessed to them on separate occasions. Id. at 291-93.

The U.S. Supreme Court held that "under the facts and circumstances of this case" the "exclusion of critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental

standards of due process.” Id. at 302-03. In so holding, the Court emphasized the importance of the accused’s right to present witnesses in his own defense and reasoned that the testimony excluded by the trial court “bore persuasive assurances of trustworthiness[.]” Id. at 302. The relevant indicia of trustworthiness included: “(1) three confessions made spontaneously to close acquaintances shortly after the murder; (2) other corroborating evidence; (3) the fact that the statements were against interest; and (4) the fact that McDonald was available at trial.” Griffin v. State, 763 N.E.2d 450, 452 (Ind. 2002) (citing Chambers, 410 U.S. at 300-02). Our own supreme court has held that “Chambers does not . . . stand for the proposition that the exclusion of hearsay evidence about a single confession, standing alone, violates federal due process.” Id.

Here, there is only one alleged “confession” at issue. But this is not the only reason that the purported confession in this case is far less reliable than McDonald’s multiple confessions to different people in Chambers. Here, there is also a complete lack of corroborating evidence; indeed, the alleged perpetrator was never even identified. Nor could Nash-Aleman’s statement reasonably be viewed as a statement against interest. Rather, Nash-Aleman’s statement that someone other than Lozano committed the shooting would undermine the State’s theory that Nash-Aleman ordered Lozano to kill Toney. And because Nash-Aleman has invoked his Fifth Amendment privilege against self-incrimination and the alleged shooter’s identity has not been disclosed, it is apparent that neither will be available for cross-examination at trial. For all of these reasons, we conclude that the hearsay statement in this case lacks the requisite indicia of reliability to

bring it within the protections of Chambers. Consequently, due process does not require its admission and the trial court did not abuse its discretion in ruling it inadmissible.

### **Conclusion**

The trial court did not abuse its discretion in denying Lozano's motion to suppress or in ruling Nash-Aleman's statement inadmissible.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.