

## RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2596-14T2

STATE OF NEW JERSEY  
IN THE INTEREST OF I.P.,

A Juvenile.

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Submitted October 18, 2016 – Decided March 1, 2017

Before Judges Rothstadt and Sumners.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Docket No. FJ-20-  
1128-14.

Joseph E. Krakora, Public Defender, attorney  
for appellant I.P. (Michele A. Adubato,  
Designated Counsel, on the brief).

Grace H. Park, Acting Union County Prosecutor,  
attorney for respondent State of New Jersey  
(Milton S. Leibowitz, Special Deputy Attorney  
General/Acting Assistant Prosecutor, of  
counsel and on the brief).

PER CURIAM

I.P.<sup>1</sup> appeals from an adjudication of delinquency for acts  
which, if committed by an adult, would constitute second-degree

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<sup>1</sup> Pursuant to Rule 1:38-3(d), we use initials to protect the  
identity of the juvenile and minors involved in these proceedings.

robbery, N.J.S.A. 2C:15-1(a). I.P. was sentenced to a one-year probationary term along with conditions.

On appeal, I.P. raises the following arguments:

POINT I

THE VICTIM'S IDENTIFICATION OF THE JUVENILE MADE UNDER THE IMPERMISSIBLY SUGGESTIVE PROCEDURES UTILIZED BY SCHOOL PERSONNEL SHOULD HAVE BEEN SUPPRESSED.

POINT II

THE ADJUDICATION OF DELINQUENCY OF I.P. FOR SECOND[-]DEGREE ROBBERY WAS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE AND MUST BE VACATED.

After reviewing the record in light of the contentions advanced on appeal, we affirm.

I.

On the first day of trial, Judge Robert Kirsch conducted an evidentiary hearing on I.P.'s Wade<sup>2</sup> motion to suppress the victim, J.G.'s out-of-court identification of I.P. on the basis that it was impermissibly suggestive. The State presented testimony from J.G. and Mario Mendo, a security guard at the school J.G. attended. The defense presented testimony from the school's vice-principal, Wilnes Jilus.

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<sup>2</sup> United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

At approximately 7:30 a.m. on May 2, 2014, while J.G., then seventeen years old, was walking to school, two high school-age males on bicycles rode past him and then returned to confront him. J.G. immediately recognized one of them, who was standing less than a foot away in front of J.G., as a former classmate who sat in front of him in English class the previous 2012-2013 school year. However, J.G. did not know his name. The former classmate asked J.G. if he had his school-issued iPad, and J.G. handed over his book bag, which the other male took and pulled out the iPad. When the former classmate demanded the device's password, J.G. initially gave him an incorrect password, but J.G. revealed the correct password after he threatened to punch J.G. After the iPad was unlocked, the two males rode away on their bikes. As J.G. ran to school, he briefly turned around and saw his former classmate shake hands with a current schoolmate, whose name he also did not know.

Upon arriving at school, J.G. reported that a former classmate stole his iPad. J.G. did not know his name, but mentioned that I.W., a current student at the school, might know him because she sat next to him in their English class and constantly had arguments with him. I.W. was summoned to Jilus' office, and when questioned, she did not remember who sat next to her in the English class.

J.G. next recalled that right after the incident he saw the individual who robbed him shake hands with a current student, who attended J.G.'s school. J.G. was then asked to look through a binder containing the school's student photo identification cards (student IDs), and identified T.H. as the student who greeted his assailant. T.H. was brought to Jilus' office, and acknowledged to Mendo that when he walked to school that morning he had spoken to someone he only knew as Loco. However, I.W. subsequently told Mendo that Loco's first name was I. J.G. was not present during Mendo's conversations with I.W. or T.H.

With that information, Mendo surmised that Loco's real full name was I.P., and retrieved a student ID binder to show J.G. a picture of I.P. Mendo flipped through the binder that contained between ten to twelve student IDs per page, until he stopped on a page, and J.G. immediately identified I.P. with "one-hundred-percent" certainty as the person who robbed him. The police were notified, and later that day, J.G. confirmed his identification of I.P. when a detective showed J.G. the same student ID that he picked out earlier.

At the hearing, J.G. identified I.P. in-court and confirmed his out-of-court identification of I.P. as the individual who robbed him. J.G. testified that, at the time of the five-minute

long incident, I.P. had on "a grey crew neck and [wore his hair in] short little dreads, [which were] sticking out[.]"

Jilus' testimony for the defense established that the school's records revealed J.G. and I.P. were in English class together for only eight days during the fall of the 2012-2013 school year. Jilus also stated that after J.G. described the former student who robbed him, he believed I.P. was the culprit, whereby he showed J.G. only I.P.'s student ID. J.G. then identified I.P. as the person who robbed him.

Following the parties' summation, Judge Kirsch rendered an oral decision denying I.P.'s Wade motion. The decision was confirmed in a comprehensive written Statement of Reasons issued on July 24, 2014. After analyzing the admissibility of out-of-court identifications as set forth in State v. Henderson, 208 N.J. 208 (2011), and State v. Chen, 208 N.J. 307 (2011), the judge determined that the school officials who conducted the identification procedures "are not 'government' or 'police' actors for the purpose of determining the admissibility of the identification evidence." He further reasoned that the conduct by Jilus and Mendo, as private actors was "not optimal" but they did not show I.P.'s student ID to J.G. under "highly suggestive circumstances" such that the identification was unreliable, and

the kind of harm that is guarded against by Chen, supra, 208 N.J. at 327.

Nevertheless, the judge still decided to conduct an evidentiary hearing to determine the reliability of J.G.'s identification of I.P. After assessing the system and estimator variables prescribed in Henderson, supra, 208 N.J. at 288-89, the judge determined that J.G.'s identification of I.P. was reliable. In particular, he found that: J.G. had ample opportunity to observe I.P. as he stood a foot away and did not shield his appearance during the five-minute robbery; J.G. immediately recognized I.P. as a former classmate despite not knowing his name; and J.G. identified I.P. with one hundred percent certainty. Citing State v. Herrera, 187 N.J. 493, 509 (2006), the judge found that J.G.'s "prior familiarity with [I.P.] was a crucial factor in establishing the overall reliability of the identification." Thus, Judge Kirsch decided that the identification was admissible because I.P. did not satisfy his burden of proving there was a substantial likelihood of irreparable misidentification.

Immediately after the Wade motion was denied, the trial commenced and continued on two additional hearing dates. Testimony presented by the State's witnesses, J.G., Mendo, and Jilus, need not be summarized as it mirrored the testimony they provided during the motion hearing. T.H., who did not testify at the hearing but

did for the State at trial, bolstered the State's evidence against I.P. by stating that he greeted I.P. while walking to school the morning of the incident.

I.P. did not testify, but presented an alibi defense through the testimony of his mother and thirteen-year-old sister, both of whom claimed that I.P. was home when the alleged robbery occurred at 7:30 a.m. They stated, respectively, that on the morning in question, I.P. was home, having just woken up, when the mother, sister, and I.P.'s two brothers left the house at 7:35 a.m. or 7:40 a.m. to go work or school. The mother testified that normally the children would have left the house twenty minutes earlier to go to school, but she woke-up almost two hours late that particular day. The mother also claimed that at 8:15 a.m. or 8:20 a.m., she spoke to I.P. on the home's telephone landline when she called from the restaurant she owned and operated. She further testified that after she received a call later that morning from the detective investigating the robbery, she called I.P. at home and he told her that he had been home all morning. I.P.'s mother and sister also claimed that at the time, he did not wear his hair in "dreads."

Also testifying on behalf of I.P. was his former probation officer who supervised him prior to the incident. She stated that

when she saw I.P. a month before the robbery, his hair was neither in dreadlocks nor in short braids, but was "close to his head."

On August 5, 2015, Judge Kirsch issued an order and written decision adjudicating I.P. of delinquency for acts which, if committed by an adult, would constitute second-degree robbery. He found that the State's witnesses gave credible, compelling, and corroborating testimony regarding the identification of I.P. as one of individuals who robbed J.G. In particular, the judge noted that based upon J.G.'s specific recall of details that his iPad was taken from him with threats of bodily injury; he was a "candid and credible witness, and accord[ed] his testimony great weight." He also stressed that T.H., who bore no animus towards I.P. and had no motive to implicate I.P., gave credible testimony confirming J.G.'s contention that T.H. shook hands with I.P. moments after the robbery took place.

With respect to I.P.'s witnesses, the judge did not assign much credibility to their testimony concerning I.G.'s hairstyle and I.G.'s whereabouts the morning of the robbery. The probation officer was not able to specify I.P.'s hairstyle on the date of the robbery. I.P.'s mother and sister, unlike the State's witnesses who corroborated J.G.'s testimony, had a motive for not telling the truth – they did not want I.P. adjudicated delinquent. Moreover, the judge found that their "testimony was not credible



given the hectic nature of their morning routine, especially while running late[,]" and significantly, they could not account for what I.P. did after they left him in the house to go to school or work.

On the day the written decision was filed, and after the parties reviewed it, I.P. made an oral motion for a new trial pursuant to Rule 3:20-1, arguing that the court's ruling was against the weight of the evidence. Judge Kirsch denied the motion for the reasons he found I.P. delinquent in his written decision. Subsequently, on August 20, 2015, I.P. was sentenced to twelve months of probation conditioned on completion of the Voorhees Residential Program.

## II.

On appeal, I.P. contends Judge Kirsch erred in not suppressing J.G.'s out-of-court identification because the school officials' showing J.G. a single photo, without having him view other student IDs, was impermissibly suggestive. He asserts the police compounded the situation by also showing the one photo, rather than conducting an independent identification process in accordance with the Attorney General Guidelines.<sup>3</sup> I.P. argues

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<sup>3</sup> Although not specifically cited, I.P. was apparently referring to Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001), <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> .

that, since identification was the key issue in the case, admitting the "[out-of-court] identification . . . mandates reversal of the adjudication of juvenile delinquency." In addition, I.P. argues the judge's adjudication is not supported by sufficient credible evidence and he should have granted his motion for a new trial. He cites the lack of evidence corroborating that he robbed J.G., the credibility of his alibi witnesses, and the impermissibly suggestive identification procedure.

We have considered I.P.'s contentions in light of the record and applicable legal principles, and conclude they are without sufficient merit to warrant a discussion in a written opinion. R. 2:11-3(e)(2). We discern no abuse of discretion in the admission of the out-of-court identification of I.P., and conclude that the adjudication of delinquency was supported by credible evidence. We affirm substantially for the reasons expressed by Judge Kirsch in his thorough written decisions.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION