Roll Call Reporter

Photographic Arrays and the Inclusion of Unique Features Such as Tattoos

Question: If a suspect is described as having a neck tattoo, is a photo array in which only one person has a visible neck tattoo impermissibly suggestive?

Answer: **Yes. When the presence of a tattoo is at the center of the witness's description, law enforcement officers must include pictures of individuals with tattoos in generally the same area as the suspected perpetrator to avoid creating a suggestive photo array.**

Case: *Malik Small v. State of Maryland**
Court of Appeals of Maryland
Decided June 24, 2019

*(UPDATE: This case affirms the Maryland Court of Special Appeals' decision dated March 1, 2018, which was the subject of the March 2018 Roll Call Reporter).

The Armed Robbery, Shooting, and Description of the Suspect

Ellis Lee was waiting at a lighted bus stop in Baltimore City at approximately 2:00 a.m. on June 27, 2015. A man, who was covering part of his face with his T-shirt, pointed a gun at Mr. Lee and told him to hand over his money. Once it became clear

that Mr. Lee did not have any money, the man told Mr. Lee to run and then opened fire, striking Mr. Lee once in his right lower calf muscle as he fled. Mr. Lee stopped briefly to call his family, and eventually sought help at a nearby fire station. Mr. Lee was transported by ambulance to the Johns Hopkins Hospital emergency room. Baltimore City police officer Kenneth Howard, who was later joined by detectives Joel Hawk and Matthew DiSimone, met with Mr. Lee at the hospital and interviewed him. Mr. Lee described his attacker as a black male, light skin, approximately five feet eight inches tall, regular build, and short haircut. He said the man was wearing blue jeans and a light colored T-shirt, the bottom of which he used to cover part of his face. Mr. Lee said that he had seen the man twice before at the Staples where he worked and that he recognized the man's voice. Importantly, he said that the man had a block-cursive letter tattoo with the letter "M" in it on his neck.

The First and Second Photo Arrays

Later that same morning, after Mr. Lee was released from the hospital, he was transported to the police station where he viewed two photo arrays. Both arrays were drawn from a Baltimore City Police Department mugshot database. For the first array, Detective DiSimone purposely did not include neck tattoos in the database search. In the array, which was shown to Mr. Lee at 8:30 a.m., Malik Small ("Small") was the only person featured with a neck

tattoo. The tattoo, shown from the front, displayed a block-cursive "M". Mr. Lee indicated that Small's photo "may" depict the man who shot him, but said that he was not sure. He said he was about "80%" sure that Small was the assailant. The detectives indicated on the array that no positive identification had been made.

The officers then presented Mr. Lee with a second photo array roughly three hours after the first. A different photo of Small was used in this array and all the photos showed persons with neck tattoos of various content. Small's photo, however, was only one of two that had lettering in the tattoo, and the only one to show a block cursive "M". Small was the only person whose photo was used in both arrays. When he was shown the second photo array, Mr. Lee selected Small's photo, stating, "That's him. That's who shot me." He wrote under the photo: "This is the same tattoo and face I remember robbing me and the man I remember shooting me. I also remember him from coming into my job on two different occasions." Mr. Lee was "100%" certain of his identification. Two weeks after his photo identification, Mr. Lee called Detective DiSimone to report seeing a man on a dirt bike who he thought might be his assailant. Detective DeSimone dismissed this identification, and told Mr. Lee that the assailant (Small) had already been arrested and charged.

The Arrest, Motion to Suppress, Conviction, and Appeal

Small was arrested shortly after the photo identification and charged with numerous offenses, including attempted robbery, second degree assault, and reckless endangerment. He moved to suppress the identifications made from the photo arrays, contending that the arrays were unconstitutionally suggestive and unreliable. The court suppressed the identification made from the first array because Detective Stanley Ottey, the detective who administered the first photo array, was not available to testify at the suppression hearing. As to the second photo array, although the circuit court was troubled by the suggestiveness of Small's photo being the only one included in both arrays and by Mr. Lee's testimony at the suppression hearing that he was now only 70% sure of his identification, the court found by clear and convincing evidence that the second photo identification of Small was reliable. As a result, the identification was admitted at trial. Small was found guilty of multiple charges and sentenced to eight years of incarceration. He appealed to Maryland's intermediate appellate court, the Court of Special Appeals.

The Decision by the Court of Special Appeals

The Court of Special Appeals held that the inclusion of Small's photo in the first photo array showing the distinctive "M" tattooed in cursive in his neck—where no other person had a visible neck tattoo—coupled with the fact that Small was the only person whose photo was repeated in the second array, rendered the identification procedure impermissibly suggestive. The court concluded, however, that the totality of the circumstances surrounding Mr. Lee's identification of Small—including recalling the unique features of his tattoo from encounters at his place of work—made it sufficiently reliable to overcome the suggestive nature of the identification procedure and thus prevented the violation of Small's rights under the Due Process Clause. Small asked Maryland's highest court, the Court of Appeals, to review the case, and the court agreed.

The Decision by the Court of Appeals

In the Court of Appeals, Small again contended that the circuit court erred in denying his motion to suppress evidence of the second photo array because the identification procedure violated his right to due process of law. The State countered that the circuit court properly denied the motion to suppress and the Court of Special Appeals properly affirmed.

The Court of Appeals agreed with the State and affirmed the decisions of the circuit court and Court of Special Appeals. In doing so, the court restated

the two-step analysis applied by courts when a defendant challenges the admissibility of an extrajudicial (out of court) identification procedure. This analysis was established by the Supreme Court in *Manson v. Braithwaite* and adopted by the Court of Appeals of Maryland in *Jones v. State.* The analysis, or inquiry, is called for *Manson-Jones'* framework.

The framework seeks to determine whether the challenged identification procedure was so suggestive that any identification made was unreliable. In step one, the circuit court must evaluate whether the identification procedure was suggestive. Any identification procedure is deemed suggestive when the police essentially give the witness a clue about which person or photograph to identify as the perpetrator during the procedure. If the court determines that the procedure was not suggestive, the inquiry ends, and evidence of the identification is admissible at trial. If the court determines that the identification procedure was suggestive, the evidence of the identification is not automatically excluded. Rather, the court proceeds to the next step, in which the court weighs whether, under the totality of the circumstances, the identification was reliable.

As to step two, the "reliability" step, the Supreme Court, in *Neil v. Biggers*, identified five factors that may be used to assess reliability: (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; (4) the level of certainly demonstrated by the witness at the identification; and (5) the length of time between the crime and the identification. These factors are not exclusive and, ultimately, reliability is determined by the totality of the circumstances.

The Court of Appeals of Maryland follows this approach. And, in this case, the court agreed that the second photo array was suggestive. Suggestiveness was found because Small was the only person whose photo was included in both arrays and he was the only person included who had an "M" tattoo on his neck.

Despite the suggestiveness, however, the Court of Appeals agreed with the Court of Special Appeals and circuit court that the identification of Small in the second photo array was reliable. Reliability was based on Mr. Lee's prior familiarity with Small, including recognizing his tattoo from Staples; Mr. Lee's opportunity to view Small at the time of the crime due to the street light illumination; Mr. Lee's degree of attention (he was only a foot away from Small and spoke with him); the accuracy of Mr. Lee's descriptions of his attacker; and the relatively short lapse of time between the crime and the photo arrays. An additional, critical factor in finding reliability was Small's distinctive neck tattoo. Although the angle of the photo in the first array showed the "M" in Small's tattoo, the photo in the second array included a profile view that showed the entire "LYM" tattoo. Since Mr. Lee was not 100% certain that the person in the first array was the shooter, the court concluded that his far more positive identification in the second array was not influenced by the photo in the first array. In sum, the totality of the circumstances established the reliability of Mr. Lee's photo identification, despite the suggestiveness of the photo array procedure. As a result, Small's conviction was upheld.

Note: The court rejected an invitation by Small's attorneys and others who joined them to abandon the legal framework established in the *Manson-Jones* cases and endorse a revised approach first recognized in New Jersey in 2011. That approach utilizes many factors that experts believe impact a witness's ability to identify the perpetrator of a crime. The Court of Appeals of Maryland, while declining the invitation to change Maryland law, encouraged circuit courts to be guided by all the circumstances before them, and recognized that some, or all, of the factors looked at by New Jersey courts, could be relevant to a Maryland court's determination. Finally, all law enforcement

agencies must be in compliance with § 3-506.1 of the Public Safety Article of the Maryland Code. This statute outlines specific eyewitness identification procedures over a variety of media. The statute requires that law enforcement officers ensure that each "filler" photograph resembles the description of the suspected perpetrator "in significant physical features, including any unique features." In this case, the officers should have included other persons with tattoos visible on their necks in both arrays. In some states, the police will alter the photographs shown so that each person has a similar tattoo. This is a dangerous practice and is not required in Maryland. However, when the presence of a tattoo is at the center of a witness's description, law enforcement officers must include pictures of people with tattoos in generally the same area as the suspected perpetrator to avoid creating a suggestive photo array.

By John F. Breads, Jr., Director of Legal Services, Local Government Insurance Trust