

CLERK OF COURT
SUPERIOR COURT

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FOR PUBLICATION

BY David A. Wiseman
DEPUTY CLERK OF COURT

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS)

Plaintiffs,)

VS.)

FERNANDO QUITANO,)

Defendant.)

CRIMINAL ACTION NO: 09-0216

**ORDER DENYING DEFENDANT'S
MOTION *IN LIMINE* TO EXCLUDE
IDENTIFICATION TESTIMONY**

I. INTRODUCTION

This matter came before the Court on February 15, 2011 on Defendant Fernando Quitano's Motion *In Limine* Re: Identification Testimony. Defendant moves for an order precluding the Government from offering any testimony through Officers Norris Kwon and Joseph Magofna concerning their identification of Defendant as one of the individuals recorded on surveillance video perpetrating the offenses charged. (Motion *In Limine* Re: Identification Testimony, hereafter, "Motion.")

Based on the papers submitted and oral arguments of counsel, the Court issued its ruling on the bench on March 1, 2011 DENYING Defendant's Motion to exclude the identification testimony of Officer's Kwon and Magofna for reasons stated on the record and more fully set forth in the following written decision, which shall document said ruling.

Judge David A. Wiseman

By order of the Court, DENIED.

1 **II. FACTUAL SUMMARY**

2 In December 2009, Defendant was charged with, inter alia, armed robbery, assault and
3 battery, and attempted 1st degree murder. Officers Kwon and Magofna were called in to view a
4 surveillance video and made a contemporaneous identification of Defendant as being one of the
5 two masked perpetrators in the video. The Officers knew Defendant because they worked at
6 DOC where Defendant had been previously incarcerated for several years. The Officers
7 recognized Defendant's eyes and his gait.

8 Officers Kwon and Magofna are listed as witness numbers 12 and 13, respectively, on the
9 Government's Witness List. Defendant moves to exclude both Officer Kwon and Magofna's
10 out-of-court and in-court identifications of Defendant on the basis that the out-of-court
11 identification procedure was unduly suggestive. On February 18, 2011, the Government filed its
12 Response to Defendant's Motion in Limine Re: Identification Testimony (hereafter,
13 "Opposition"). The trial began on February 28, 2011.

14 **III. STANDARDS**

15 To determine whether a pre-trial identification violates a defendant's right to due process,
16 the United States Supreme Court has created a two-step test whereby a reviewing court first
17 determines whether the identification procedure was unnecessarily suggestive and, if so, whether
18 the identification itself is nonetheless reliable under the totality of the circumstances. Neil v.
19 Biggers, 409 U.S. 188, 197 (1972); Manson v. Brathwaite, 432 U.S. 98, 114 (1977).
20 Under Biggers and Manson, a pretrial identification procedure violates due process where it: (1)
21 is impermissibly suggestive; and (2) gives rise to a very substantial likelihood of
22 misidentification. Biggers, 409 U.S. at 197; Manson, 432 U.S. at 114.

23 However, even if an identification procedure is impermissibly suggestive, it still does not
24 violate due process if it is nevertheless reliable under the totality of the circumstances, which is
25 examined against five factors identified in Biggers. Manson, 432 U.S. at 114-15.

26 **IV. DISCUSSION**

27 Defendant contends that both testimony of their out-of-court identification on viewing the
28 video and any in-court identification of defendant as appearing in the video if shown in court
29 should be barred on account of the impermissibly suggestive nature of the prior out-of-court
30 identification procedure.

1 **A. Timeliness**

2 The Government first opposes Defendant's motion on timeliness grounds. (Opposition at
3 2.) On February 18, 2011, the Commonwealth filed a response to Defendant's motion in limine
4 that was filed on February 15, 2011. In the Court's amended pretrial order, all motions in limine
5 were to be filed with the Court no later than (10) working days prior to trial. The jury trial was
6 set for February 28, 2011.

7 To determine whether Defendant's motion was untimely filed, Rule 45(a) of the
8 Commonwealth of the Northern Mariana Islands Rules of Criminal Procedure provides for the
9 computation of time. Pursuant to Rule 45, the day that the motion is filed is not counted in the
10 calculation of time, but the last day of the period will be counted. Rule 45(a) states, "[w]hen a
11 period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays,
12 Sundays, and legal holidays shall be excluded in the computation." NMI R. Crim. P. 45(a).
13 Excluding Saturdays, Sundays, and legal holidays, Defendant's motion is considered to be filed
14 eight (8) days before trial. Despite the fact that Defendant filed his motion thirteen (13) calendar
15 days before the date of the jury trial, Defendant's motion is deemed untimely based on the
16 computation guideline set forth in Rule 45 and the Court's amended pretrial order.

17 Accordingly, Defendant's motion is untimely.

18 **B. Unduly Suggestive**

19 Defendant contends that the identification procedure was unduly suggestive because the
20 two officers viewed the video together and made the identification together. (Motion at 2.)

21 When reviewing an out-of-court identification procedure for its constitutionality and its
22 consequent admissibility, the court must first make a determination of whether the police used an
23 impermissibly suggestive procedure in obtaining the out-of-court identification. *Manson v.*
24 *Brathwaite*, 432 U.S. 98 (1977). An identification procedure is unduly suggestive if it "focuses
25 attention on the defendant." *State v. Sterling*, 684 So.2d 74 (La. App. 4th Cir. Nov. 13, 1996);
26 *People v. Hunt*, 19 Cal.3d 888, 894 (1977) (the identification procedure may not suggest in
27 advance of identification by the witness the identity of the person suspected by the police).

28 In this case, the Officers viewed a surveillance video of the crime being perpetrated.
29 After viewing the video the Officers made a positive identification of Defendant. The Officers
30 knew Defendant because they worked at DOC where Defendant had been previously

1 incarcerated for several years. The Officers recognized Defendant's eyes and the manner in
2 which he walked and carried himself.

3 First, it is unclear whether the Officers made their identification of Defendant together.
4 Officer Deon Guerrero testified that he called Officers Magofna and Officer Kwon in one at time
5 to view and identify the person in the video. Even if Officers did view the tape together, courts
6 have held that multiple witnesses may view a video for purposes of identification together. See
7 *Burns v. State*, 923 S.W.2d 233,237-38 (Tex. App. 14th Dist. 1996) (witnesses allowed to view
8 video lineup together); *Rogers v. State*, 774 S.W.2d 247 (Tex. Crim. App. 1989) (identification
9 testimony allowed even where the six witnesses were allowed to confer among themselves after
10 the lineup and before making the identification of defendant).

11 Furthermore, there is no suggestion that the procedure focused attention on Defendant as
12 opposed to others. Officer Deon Guerrero testified that he in no way hinted to the Officers who
13 he suspected was the perpetrator in the video. He further testified that because of his
14 department's identification procedure policies, he made certain the identification procedure was
15 not suggestive.

16 Defendant fails to show how the procedure used focused attention on Defendant as a
17 suspect prior to the Officer's positive identification of Defendant in the video. Accordingly, the
18 out-of-court identification procedure was not unduly suggestive.

19 **C. Reliability**

20 Even where the identification procedure is unduly suggestive, the identification testimony
21 will be allowed if, under a totality of the circumstances, the court determines that identification
22 was reliable. *Manson*, 432 U.S. 98. In *Manson*, the Supreme Court set forth a five-factor test to
23 determine whether an identification is reliable: (1) the opportunity of the witness to view the
24 assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the
25 witness' prior description of the assailant; (4) the level of certainty demonstrated by the witness;
26 and (5) the length of time between the crime and the confrontation. The defendant bears the
27 burden of proving that an out-of-court identification itself is suggestive, and that there was a
28 likelihood of misidentification as a result of the identification procedure. *Johnson v. Sublett*, 63
29 F.3d 926,929 (9th Cir. 1995) (quoting *Stovall v. Denno*, 388 U.S. 293,301-02 (1967)).

1 In this case, Defendant does not present any argument that he was positively identified by
2 the Officers for any reason other than the fact that they recognized him. Reliability is the
3 linchpin in determining the admissibility of a pretrial identification since the identification's
4 reliability is balanced against the danger of its suggestive nature. Mason, 432 U.S. at 114. Here,
5 both Officers Kwon and Magofna have personal knowledge of Defendant. They both worked in
6 DOC during the time Defendant was incarcerated. Both Officers interacted with Defendant
7 while he was in DOC on multiple occasions. Both recognized Defendant's eyes which were not
8 covered by the cloth mask over his nose and mouth in the video. The Officers also recognized
9 the distinct manner in which Defendant walked.

10 Furthermore, the Officers were both very confident in their identification. Officer
11 Guerrero testified that even though no suggestion was made as to who was in the video, there
12 was no hesitation by either Officer Magofna or Officer Kwon in identifying the person in the
13 video as the Defendant.

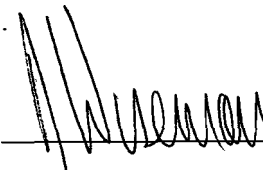
14 The Court finds that procedures utilized by the police in obtaining the identification of
15 Defendant in the surveillance video were not suggestive and sufficiently reliable that, in light of
16 the totality of the circumstances, they would not have led to a substantial likelihood of
17 misidentification. Furthermore, the above facts, which would go to whether the identification
18 was reliable, would be able to be brought out on cross-examination.

19 Accordingly, evidence of the out-of-court identification as well as in-court identification
20 of defendant will be admitted.

21 **V. CONCLUSION**

22 Based on papers submitted to date, and upon consideration of relevant legal authority, the
23 Court DENIES Defendant's motion and will allow both the in-court as well as out-of-court
24 identifications of Defendant in the surveillance video.

25
26 **SO ORDERED** this 1st day of March, 2011.

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29 _____
30 **DAVID A. WISEMAN**
31 Associate Judge