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1 FOR PUBLICATION

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3
4 IN THE SUPERIOR COURT
5 FOR THE
6 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

6 COMMONWEALTH OF THE
7 NORTHERN MARIANA ISLANDS,

8 Plaintiff,

9 v.

10 JOSEPH A. CRISOSTOMO,

11 Defendant.

) CRIM. CASE NO. 13-0049

) ORDER DENYING DEFENDANT'S
) MOTION TO SUPPRESS
) IDENTIFICATION

12
13 I. INTRODUCTION

14 THIS MATTER came before the Court on September 4, 2013 on Defendant's motion to
15 suppress identification and for an additional evidentiary hearing on the matter. The evidentiary
16 hearing was held before the Court on September 10, 2013. At both hearings, Defendant Joseph A.
17 Crisostomo was present and represented by Janet King. The Commonwealth was represented by
18 Chief Prosecutor Shelli Neal and Assistant Attorney General Brian Flaherty. Based on a review of
19 the filings, oral argument and applicable law, the Court denies Defendant's motion.

20 Defendant Crisostomo has been charged with First Degree Murder in violation of 6 CMC
21 §§ 1101(a)(1) and (3); Kidnapping, in violation of 6 CMC § 1421(a)(2)(B); Sexual Assault in the
22 First Degree, in violation of 6 CMC § 1301(a)(1); Robbery, in violation of 6 CMC § 1411(a);
23 Theft, in violation of § 1601(a); Assault and Battery, in violation of 6 CMC § 1202(a); and
24

1 Disturbing the Peace, in violation of 6 CMC § 3101(a). The jury trial for this matter is set for
2 October 15, 2013.

3 Defendant moves to suppress the pretrial voice identification made by Joanne Castro
4 wherein she identified Defendant's voice on an audio recording made the night of the crime.
5 Defendant argues that the voice identification procedure used was unduly suggestive, thus violating
6 his constitutional rights to due process of law.

7 Suppression of voice identification is an issue of first impression in the Commonwealth.

8 II. LEGAL STANDARD

9 "When identity is an issue, the Due Process Clause enables the defendant to suppress any
10 out of court identification secured by violating the defendant's rights." *Commonwealth v. Cabrera*,
11 Crim. No. 01-0477 (NMI Super. Ct. May 30, 2002) (Order Granting Motion for Suppression of
12 Identification at 1). An identification procedure violates a defendant's due process rights when it is
13 unduly suggestive and creates a very substantial likelihood of misidentification. *Neil v. Biggers*,
14 409 U.S. 188, 198 (1972); *Commonwealth v. Ngiratebl*, 3 CR 820, 824 (Trial Ct. 1989). Voice
15 identification procedures are entitled to the same due process protections as photographic or line-up
16 identification procedures. *United States v. Pheaster*, 544 F.2d 353, 369 (9th Cir. 1976).

17 The defendant bears the initial burden of demonstrating that the identification procedure
18 used was unduly suggestive. *United States v. Lawrence*, 349 F.3d 109, 115 (3d Cir. 2003), *cert.*
19 *denied*, 124 S. Ct. 2925 (2004). Once the defendant meets this initial burden, the prosecution must
20 demonstrate that the identification was "nevertheless reliable," given the totality of the
21 circumstances. *See English v. Cody*, 241 F.3d 1279, 1283 (10th Cir. 2001); *United States v. Meyer*,
22 359 F.3d 820, 824 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 112 (2004); *and Pheaster*, 544 F.2d at
23 369. The court weighs the following factors to determine whether the totality of the circumstances
24 indicates that the identification is reliable:

1 [1] the opportunity of the witness to view the criminal at the time of
2 the crime, [2] the witness' degree of attention, [3] the accuracy of the
3 witness' prior description of the criminal, [4] the level of certainty
demonstrated by the witness at the confrontation, and [5] the length of
time between the crime and the confrontation.

4 *Neil*, 409 U.S. at 199-200.

5 This totality of circumstances analysis is conducted on a case-by-case basis, with careful
6 review of the individual facts of the case in question. *Simmons v. United States.*, 390 U.S. 377, 384
7 (1968). No due process violation exists if the defendant is unable to show that the procedure was
8 impermissibly suggestive or if the totality of the circumstances points to a reliable identification
9 despite the suggestive procedure. *Meyer*, 359 F.3d at 824. The jury decides the appropriate weight
10 to give to the identification where there is no due process violation. *United States v. Hill*, 967 F.2d
11 226, 230 (6th Cir. 1992).

12 **III. ANALYSIS**

13 In this case, Ms. Castro listened to a recording made the night of the crime and identified the
14 voice of the assailant as Defendant. While the Court finds that the identification procedure used
15 was unduly suggestive, the totality of the circumstances indicates that the identification was
16 nonetheless reliable.

17 *A. Suggestive Nature of the Identification Procedure*

18 Defendant argues that the identification procedure was unduly suggestive for several
19 reasons. First, Ms. Castro knew that Defendant Crisostomo was the topic of the meeting wherein
20 she identified the voice. Ms. Castro was asked about specific phrases used by Defendant before she
21 listened to the recording. Second, information about a 911 call made on the night of the murder had
22 been widely publicized, and Ms. Castro had already provided tips to law enforcement linking
23 Defendant Crisostomo to the murder. Thus, Ms. Castro would have suspected that the voice on the
24 recording was Defendant Crisostomo's before even hearing the recording. And third, Ms. Castro

1 was only provided with one voice sample, and that sample was distressing. Defendant likens this
2 procedure to a one-person line-up, or one-person photograph array, which has been disfavored by
3 the U.S. Supreme Court. *See Neil*, 409 U.S. at 199.

4 “The great danger of suggestive identification procedures is that the memory of a witness
5 may be manipulated so that the mental image derived from the identification procedure supplants
6 that derived from the witness’ own experience.” *Pheaster*, 544 F.2d at 370-71. In this case,
7 Defendant suggests that the converse is true, that the witness, due to the suggestive nature of the
8 identification procedure, superimposed her own past experiences onto the recording.

9 The Court finds that Defendant meets the initial burden of demonstrating that the
10 identification procedure was unduly suggestive. The likelihood of misidentification increases when
11 a witness is provided only one sample. *See Simmons*, 390 U.S. at 384. In this case, Ms. Castro was
12 asked whether the voice on the recording was one she recognized. Instead of listening to the single
13 sample against a clear backdrop, Ms. Castro’s attention was directed to Defendant when she was
14 questioned, before she heard the recording, about phrases commonly used by the Defendant. It was
15 unnecessary for the law enforcement officer to engage in this line of questioning before Ms. Castro
16 identified the voice. Thus, the procedure was unduly suggestive.

17 Finding that the procedure used in this case was unduly suggestive, the Court moves to an
18 analysis of the totality of the circumstances surrounding the identification procedure.

19 *B. Totality of the Circumstances*

20 The totality of the circumstances surrounding the identification procedure indicates that the
21 identification was reliable, despite the suggestive nature of the procedure.

22 In this case, Ms. Castro, the identifying witness, was not present at the time of the crime.
23 Instead she made her identification by listening to a recording of a 911 call made by the victim.
24 Ms. Castro’s opportunity to hear the criminal at the time of the crime was limited to the sounds

1 preserved in the recording. *See Neil*, 109 U.S. at 199. The Court heard testimony that the recording
2 was about four minutes long and contained four voices, the voices of the victim and an unknown
3 male assailant on one end of the line, and the voices of the female 911 dispatcher and a male DPS
4 officer on the other. The unidentified male voice was quieter than the voice of the victim, but still
5 audible. Thus, Ms. Castro had the opportunity to hear the voice of the assailant, and this factor
6 weighs in favor of a finding of reliability.

7 Ms. Castro listened to the recording of the 911 call in a workroom at the Commonwealth
8 Bureau of Investigation office. The recording was played on a laptop computer with external
9 speakers hooked up. “Witnesses who listen to a crime that has been ‘memorialized on tape,’ [. . .]
10 are in a position to offer uniquely reliable testimony” because they are listening to the events in an
11 office, and can give their full attention to the recording. *Brown v. Harris*, 666 F.2d 782, 786 (2d
12 Cir. 1981) (internal citations omitted). Ms. Castro was not distracted while she listened to the
13 recording. Thus, this factor, the witness’ degree of attention, weighs in favor of a finding that the
14 identification was reliable. *See Neil*, 109 U.S. at 199.

15 Ms. Castro did not give a prior description of the criminal, as the first time she heard the
16 recording was on February 17, 2013. *See Neil*, 109 U.S. at 199. In a case where the identifying
17 witness first observed the criminal at the time of the crime, this factor would help the court assess
18 the degree of familiarity the witness had with the criminal. In a case such as this one, where the
19 identifying witness was asked to listen to a recording and tell the authorities whether she recognized
20 a voice, the relevant inquiry is how familiar the witness is with the person she identified as the
21 speaker. Ms. Castro was in an intimate relationship with Defendant Crisostomo for about seventeen
22 years. She is abundantly familiar with Defendant’s voice. Further, Ms. Castro explained that she
23 was familiar with Defendant Castro’s voice in circumstances similar to the recorded event.
24 Therefore, this factor indicates that the identification was reliable.

1 Ms. Castro was very certain at the time of the identification. Not only did she communicate
2 verbally that she was certain, multiple witnesses testified that she had a physical reaction
3 immediately upon hearing the recording. This degree of certainty supports a finding of reliability.
4 *See Neil*, 109 U.S. at 199.

5 Ms. Castro was not present at the scene of the crime. Thus, the appropriate length of time to
6 consider is how long it had been since Ms. Castro had heard Defendant Crisostomo's voice, rather
7 than the length of time between the crime and the identification procedure. *See Neil*, 109 U.S. at
8 199-200. Ms. Castro testified that her relationship with the Defendant ended around December of
9 2006, and that she had no conversations with Defendant between December 2006 and the
10 identification procedure on February 17, 2012. This factor weighs against a finding of reliability.

11 The totality of the circumstances demonstrates that, despite the suggestive procedure, the
12 identification was reliable. While it had been several years since Ms. Castro had heard Defendant's
13 voice, she is very familiar with it based on their seventeen-year, intimate relationship. Ms. Castro
14 gave her full attention to the recording, and was very certain in her identification. Even though Ms.
15 Castro's attention may have been drawn to Defendant prior to the identification procedure, there is
16 ample evidence that given the totality of the circumstances, her identification was still reliable.
17 Accordingly, there was no due process violation. The Court leaves this matter to the jury to
18 determine the appropriate weight to give the identification.

19 **IV. CONCLUSION**

20 In accordance with the above analysis, Defendant's motion to suppress the pretrial
21 identification is **DENIED**.

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IT IS SO ORDERED this 12th day of September, 2013.



JOSEPH N. CAMACHO
Associate Judge