SUMMARY
November 18, 2021

2021COA138

No. 18CA0435, *People v. McCants* — Criminal Law — Pre-Trial Identification — Out-of-Court Identification

This is an appeal from a conviction of vehicular eluding and reckless driving. At trial, defendant challenged the reliability of a police officer's out-of-court identification of him based on what he contends was an impermissibly suggestive photo array. Relying on *People v. Howard*, 215 P.3d 1134 (Colo. App. 2008), the trial court concluded that a police officer's identification is per se reliable and, therefore, exempt from a reliability analysis as otherwise required by *Neil v. Biggers*, 409 U.S. 188, 196 (1972), and *Bernal v. People*, 44 P.3d 184, 191 (Colo. 2002).

A division of the court of appeals rejects the proposition that a different analytical framework applies when the reliability of a police officer's identification of a suspect from an allegedly suggestive

photo array is challenged, and, to the extent this conclusion conflicts with *Howard*, the division declines to follow it. Instead, the division concludes that the trial court erred by failing to engage in the analysis and make the findings required by *Biggers*, *Bernal*, and their progeny. Therefore, the division remands the case to the trial court for findings related to the suggestiveness and reliability of officer's out-of-court identification of the defendant.

The division also rejects defendant's two other claims of trial error, but agrees that defendant's conviction for reckless driving should have been merged into his conviction for vehicular eluding. Accordingly, the division affirms in part and remands the case for further proceedings.

COLORADO COURT OF APPEALS **2021COA138**

Court of Appeals No. 18CA0435
Arapahoe County District Court No. 16CR1442
Honorable Kurt A. Horton, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Antoine Perria McCants,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE WELLING
Richman and Berger, JJ., concur

Announced November 18, 2021

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Megan A. Ring, Colorado State Public Defender, Mackenzie Shields, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Antoine Perria McCants, appeals his convictions of vehicular eluding and reckless driving.

¶ 2 At trial, McCants challenged the reliability of a police officer's out-of-court identification of him based on what he contends was an impermissibly suggestive photo array. Relying on *People v. Howard*, 215 P.3d 1134 (Colo. App. 2008), the trial court concluded that a police officer's identification is per se reliable and, therefore, exempt from a reliability analysis as otherwise required by *Neil v. Biggers*, 409 U.S. 188, 196 (1972), and *Bernal v. People*, 44 P.3d 184, 191 (Colo. 2002).

¶ 3 We reject the proposition that a different analytical framework applies when the reliability of a police officer's identification of a suspect from an allegedly suggestive photo array is challenged, and, to the extent this conclusion conflicts with *Howard*, we decline to follow it. Instead, we conclude that the trial court erred by failing to engage in the analysis and make the findings required by *Biggers*, *Bernal*, and their progeny. Because we aren't in a position to make the requisite findings in the first instance on appeal, we reverse and remand the case to the trial court for findings related to the

suggestiveness and reliability of the officer's out-of-court identification of McCants.

¶ 4 We reject McCants' remaining contentions of trial error and agree with him that his conviction for reckless driving should have been merged into his conviction for vehicular eluding. Therefore, in the event that the trial court concludes, after making the requisite findings, that the challenged identification by the officer was admissible, then the court shall reinstate the conviction for vehicular eluding (subject to McCants' right to appeal any findings and orders entered on remand) and the conviction for reckless driving shall merge into the vehicular eluding conviction. (The mittimus must be amended accordingly.)

¶ 5 If on remand, however, the trial court concludes that the challenged identification shouldn't have been admitted at trial, then McCants shall be granted a new trial.

I. Factual Background

¶ 6 The testimony elicited at trial supports the following facts. On March 8, 2016, two police officers were on patrol and saw a man leave a liquor store and get into a silver Chevrolet Tahoe with expired tags. The officers attempted to pull the vehicle over as it left

the parking lot, but the driver accelerated away from the patrol car and ran a stop sign. The officers radioed to other officers in the area that the vehicle was eluding and gave its license plate number and a description of the driver.

¶ 7 Officer Jonathan McCants[1] (Officer M.) and his partner were patrolling in an unmarked car when they heard the dispatch and drove in the direction of the vehicle's last reported location. Officer M. observed the vehicle driving nearby and watched as the driver failed to stop at a stop sign, causing traffic in both directions to stop abruptly. The driver then made a left turn and started driving toward Officer M. The driver turned around to look behind him, with his window all the way down, and, as the vehicle passed Officer M., Officer M. was able to see the driver's face and his clothing. Officer M. turned his car around to follow the eluding vehicle, eventually losing sight of it after the driver cut off other vehicles in traffic.

[1] Antoine McCants and Officer Jonathan McCants are not related. To avoid confusion, we will refer to Officer McCants throughout the opinion simply as "Officer M."

¶ 8 Other officers eventually found the vehicle in the parking lot of an apartment complex, but there was no one in the vehicle. The officers observed that the vehicle's engine hood was hot, indicating that it had recently been driven. They also saw mail addressed to "Antoine McCants" in plain view inside the vehicle and observed an unopened beer bottle on the floor of the vehicle.

¶ 9 Officer M.'s partner looked through the police database and located a photograph of McCants. When his partner showed him the photograph, Officer M. identified McCants as the driver of the vehicle he had witnessed between fifteen and twenty minutes earlier. The vehicle, however, was registered to E.M. When contacted, E.M. said that the vehicle had been stolen and that she didn't know McCants. But police eventually found photos on social media of E.M. and McCants together. Later, police also determined that the two were living together at the time of the incident.

¶ 10 About four months after the eluding incident, McCants was arrested and charged with a class 5 felony for vehicular eluding, § 18-9-116.5, C.R.S. 2021; a class 2 traffic offense for reckless driving (second offense), § 42-4-1401(1), (2), C.R.S. 2021; and a class 2 misdemeanor for driving after revocation prohibited

(habitual traffic offender), § 42-2-206(1)(a), C.R.S. 2021. (The driving after revocation charge was dismissed by the People prior to trial.)

¶ 11 McCants' theory of defense at trial was that he wasn't the driver and that Officer M. had misidentified him. At trial, Officer M. testified as to his eyewitness identification of McCants as the driver at the time of the alleged eluding. Officer M. testified that he had a clear view of McCants' face.

¶ 12 The jury found McCants guilty of vehicular eluding and reckless driving. Although the prosecutor conceded at sentencing that vehicular eluding and reckless driving should merge, the court entered both convictions at sentencing.

II. Analysis

¶ 13 McCants raises five contentions on appeal. He contends that the trial court erred by

- finding that Officer M.'s out-of-court identification of him was reliable;
- admitting evidence that he had been pulled over for an unrelated traffic offense while driving the same car that had eluded officers;

- refusing to give his tendered jury instruction telling the jury that a police officer's testimony is no more reliable than a lay witness's testimony;
- failing to conduct an in camera review of Officer M.'s disciplinary and personnel files; and
- failing to merge the conviction for reckless driving into the conviction for vehicular eluding.

¶ 14 We analyze each contention, in turn, below.

A. Out-of-Court Identification

¶ 15 First, McCants contends the trial court erred by refusing to suppress Officer M.'s in-court identification of him following an allegedly unduly suggestive out-of-court photograph identification. Because the trial court didn't make any findings related to the reliability of Officer M.'s identification — and because we conclude that this omission was error — we remand the case to the trial court for further findings.

1. Legal Principles and Standard of Review

¶ 16 Generally, a witness's in-court identification cannot be based on an earlier, unreliable out-of-court identification. *People v. Borghesi*, 66 P.3d 93, 103 (Colo. 2003). This is because a

defendant's right to due process is violated by admitting the results of an impermissibly suggestive identification procedure unless the totality of the circumstances demonstrates that the procedure was sufficiently reliable despite its suggestiveness. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Biggers*, 409 U.S. at 196.

¶ 17 Assessing the reliability of an out-of-court identification from a photograph requires a two-part analysis. *Biggers*, 409 U.S. at 198; *Bernal*, 44 P.3d at 191. First, a court must determine whether the photo array was impermissibly suggestive. *Biggers*, 409 U.S. at 196-97; *Bernal*, 44 P.3d at 191. The defendant bears the burden of proving the array was impermissibly suggestive. If this burden is carried, the prosecution then has the burden to show that, despite the improper suggestiveness, the identification nevertheless is reliable under the totality of the circumstances. *Biggers*, 409 U.S. at 199; *Bernal*, 44 P.3d at 191.

> [T]he factors to be considered in evaluating the likelihood of misidentification include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the 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.

Biggers, 409 U.S. at 199-200.

¶ 18 "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." *Brathwaite*, 432 U.S. at 114. In analyzing the totality of the circumstances, the trial court must balance the photo array's suggestiveness against the indicia of reliability surrounding the identification. *Id.*; *Bernal*, 44 P.3d at 192.

¶ 19 Identification evidence violates due process only when the evidence was a product "of an out-of-court identification procedure that was so suggestive in the totality of the circumstances that it created a very substantial likelihood of misidentification" or unreliable in-court identification. *Bernal*, 44 P.3d at 205 (citing *Brathwaite*, 432 U.S. at 116). Single-photograph displays are disfavored and tend to be suggestive, but they are not per se due process violations. *Brathwaite*, 432 U.S. at 113-14; *People v. Weller*, 679 P.2d 1077, 1083 (Colo. 1984).

¶ 20 The constitutionality of an out-of-court identification procedure is a mixed question of fact and law; we defer to the trial court's findings of fact if they have any record support but do not defer to its conclusions of law. *Bernal*, 44 P.3d at 190. If we

conclude that the trial court erred, we will reverse unless the error was harmless beyond a reasonable doubt. *People v. Martinez*, 2015 COA 37, ¶ 10.

2. The Trial Court Must Make Reliability Findings

¶ 21 The trial court didn't evaluate whether Officer M.'s out-of-court identification passed muster under the two-part analysis set forth in *Biggers* and *Bernal*. Instead, relying on *Howard*, 215 P.3d 1134, the trial court concluded that a police officer's out-of-court identification is per se reliable and, therefore, exempt from a suggestiveness and reliability analysis. This, we conclude, was error.

¶ 22 *Howard* involved a police officer's show-up identification very shortly after "the pursuit and capture of a fleeing or just-apprehended suspect." *Id.* at 1136. The division in *Howard* held that under these narrow circumstances "an identification by an officer while investigating" doesn't involve the same concerns of suggestiveness as "identification by a lay person who, typically, recently witnessed or was the victim of a criminal episode." *Id.* at 1137. The division reasoned that a reliability analysis isn't required under such circumstances because

> [a] police officer: (1) is a trained observer; (2) has a primary interest in capturing the right person to protect the public, his or her integrity, and that of the prosecution; (3) can be expected to be relatively calm, deliberate, and less suggestible when compared to a victim of, or witness to, a recent crime; [and] (4) is familiar with the identification procedure and is unlikely to be startled or distracted by the circumstances or the scene.

Id. at 1138.

¶ 23 As a threshold matter, we aren't persuaded that *Howard* applies to the facts of this case. First, we note that the Attorney General didn't cite — and we haven't found — any published opinion applying *Howard* to bypass applying *Biggers* and *Bernal* to an out-of-court identification by a police officer. Second, we read *Howard* as applying in very limited circumstances — namely, a police officer's show-up identification shortly after the apprehension of a recently fleeing suspect. These aren't the circumstances of Officer M.'s identification of McCants, which was made using a single photo after police were unable to detain an eluding driver. We therefore disagree with the proposition that the trial court was bound to follow *Howard*.

¶ 24 To the extent that *Howard* can be read to stand for the proposition that a different standard and procedure governs a court's suggestiveness and reliability determination when the witness is a police officer, we decline to follow it and conclude that it is inconsistent with the controlling authority, including *Brathwaite*.

¶ 25 In *Brathwaite*, a police officer made an out-of-court identification from a single photograph two days after he originally saw the suspect; the officer also made an in-court identification of the defendant during trial. 432 U.S. at 99-100. The Supreme Court in *Brathwaite* held that, while a witness's status as a police officer is a factor that the court may consider, the court was still required to apply the five-factor reliability analysis from *Biggers* to determine whether the procedure violated due process. *Id.* at 114-17. To put a sharper point on it, in *Brathwaite* the Supreme Court didn't treat police officer identifications as exempt from the *Biggers* framework.

¶ 26 Later, in *People v. Roybal* — which *Howard* doesn't cite or address — a division of our court concluded that "when a police officer testifies as a witness to the commission of an offense, his

identification testimony is subject to the same standards of admissibility as the testimony of any other witness to an offense." 43 Colo. App. 483, 486, 609 P.2d 1110, 1113 (1979). Relying on *Brathwaite* and *Biggers*, the division in *Roybal* reasoned as follows:

> The court must find that an in-court identification which follows an impermissibly suggestive out-of-court procedure (here a single photo display, *cf. Manson v. Brathwaite, supra*) was the product of the witness' own recollection. *But cf. People v. Lopez*, [43 Colo. App. 493,] 605 P.2d 69 (1979). In determining whether the in-court identification has a source independent of a prior, impermissibly suggestive out-of-court identification, the trial court must apply the test delineated in *Neil v. Biggers* . . . .

Id. at 486-87, 609 P.2d at 1113.

¶ 27 We agree with the reasoning of the division in *Roybal*, and we conclude that *Brathwaite* controls Officer M.'s identification in this case and the trial court's reliance on *Howard* was error. Consequently, Officer M.'s out-of-court identification was required to be treated the same as any other witness's identification.[2]

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[2] Certainly, the factors that the division in *People v. Howard*, 215 P.3d 1134 (Colo. App. 2008), relied on to bypass conducting a reliability analysis — such as a police officer's training, motive, lack of suggestibility, and familiarity with the identification procedure,

Therefore, assuming that the use of the single photo was impermissibly suggestive — which it almost certainly was — the reliability of his identification had to be evaluated under the totality of the circumstances test set forth in *Biggers* and *Bernal*. The court didn't make those findings, however.

¶ 28 Because we aren't in a position to make the requisite findings in the first instance on appeal, we must reverse and remand for further findings related to the suggestiveness and reliability of Officer M.'s out-of-court identification. The findings made on remand must be sufficient for a reviewing court to determine whether the procedure was impermissibly suggestive, and, if so, whether Officer M.'s identification was otherwise reliable based on the totality of the circumstances. On remand, the court may, in its discretion, take further evidence in order to make sufficient findings. If, on remand, the trial court determines that Officer M.'s

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id. at 1138 — may, if supported by the record, be appropriate considerations when the court conducts its reliability analysis and makes its finding. *See also Manson v. Brathwaite*, 432 U.S. 98, 115 (1977). They aren't, however, grounds for bypassing the analysis altogether. *Id.*

identification wasn't reliable, it must conduct a new trial.[3] Conversely, if the trial court determines that McCants has failed to prove that Officer M.'s identification was unreliable, his conviction may be reinstated, subject only to McCants' right to appeal that ruling. Because of the latter possibility, we now turn to McCants' remaining claims.

B. CRE 404(b) Evidence

¶ 29 Next, McCants contends the trial court abused its discretion by admitting other act evidence under CRE 404(b). We disagree.

1. Additional Facts

¶ 30 On January 12, 2017, while McCants was out on bond and nearly nine months after the alleged eluding, Aurora Police Officer Jason Chilson saw McCants get into the driver's seat of a silver Chevrolet Tahoe and drive away at a high rate of speed. Officer

[3] The Attorney General doesn't argue that any error in admitting Officer M.'s identification of McCants can be disregarded as harmless (or harmless beyond a reasonable doubt, in the event we determine constitutional error occurred). And we agree that if the trial court erred in admitting Officer M.'s identification of McCants, such an error wasn't harmless, much less harmless beyond a reasonable doubt. Accordingly, if, on remand, the trial court determines that Officer M.'s identification wasn't reliable, then a new trial is required.

Chilson knew McCants from a different case and was aware that he had a revoked license; he, therefore, stopped McCants and issued him a citation. The car McCants was driving on January 12, 2017, was the same car that eluded officers in March 2016.

¶ 31 The prosecution gave notice of its intent to admit the evidence of the January 12, 2017, traffic stop to prove identity. The trial court conducted a *Spoto* analysis and determined that the other act evidence from this traffic stop was admissible to show identity. *See People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). The court concluded that the evidence

- related to the material fact of identity;
- was logically relevant "because the police never stopped the defendant in the underlying case," so the evidence "goes for the purpose of identity, and to show that it is not a result of a mistake"; and
- was "independent of an intermediate inference and helps show identification" and "is not being introduced to show the defendant is a bad person, rather that his behavior . . . is supportive of being aware of his actions and aware that the actions would cause certain results."

2. Legal Principles and Standard of Review

¶ 32 Evidence of other crimes, wrongs, or acts isn't admissible to prove the character of a person. But such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, identity, knowledge, or absence of mistake or accident. CRE 404(b). Other act evidence may be admitted if (1) the evidence relates to a material fact in the case; (2) the evidence is logically relevant to the material fact; (3) the relevance is independent of the prohibited inference that the defendant acted in conformity with a bad character; and (4) the probative value isn't substantially outweighed by the danger of unfair prejudice. *Spoto*, 795 P.2d at 1318.

¶ 33 A trial court has substantial discretion as to the admissibility of evidence, and we review its rulings on evidentiary issues for an abuse of that discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002); *People v. Eppens*, 979 P.2d 14, 22 (Colo. 1999). A court's decision to admit other act evidence will not be overturned unless the ruling was "manifestly arbitrary, unreasonable, or unfair." *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000).

3. Evidence That McCants Drove the Car was Highly Probative of Identity and Not Unfairly Prejudicial

¶ 34 McCants argues that the prior act was only relevant through the impermissible inference that he was a bad driver, and thus was more likely to have committed the charged offense. We disagree.

¶ 35 Rather, evidence that McCants again drove the vehicle that had eluded officers previously was highly probative of his identity and his connection to the vehicle and its registered owner, E.M. *See Spoto*, 795 P.2d at 1314. And this proper inference was wholly independent of any prohibited inference based on bad character or propensity.

¶ 36 Moreover, the evidence wasn't unfairly prejudicial. Unfairly prejudicial evidence is evidence that has an undue tendency to suggest a decision made on an improper basis, including bias, sympathy, anger, shock, or additional considerations beyond the scope of the case's merits. *People v. Dist. Ct.*, 869 P.2d 1281, 1286 (Colo. 1994). This evidence didn't have any such tendency, and any residual unfair prejudice didn't outweigh, much less substantially outweigh, the probative value. We reach this conclusion for three reasons.

¶ 37 First, the prosecutor didn't ask Officer Chilson to provide the details of McCants' interaction during the traffic stop or the reason he was pulled over. Officer Chilson testified, in relevant part, as follows:

> [Prosecutor]: And did you make a stop on January 12th, 2017?
>
> [Officer Chilson]: I did, yes.
>
> [Prosecutor]: Do you see the person that you pulled over here in the courtroom today?
>
> [Officer Chilson]: Yes.
>
> . . . .
>
> [Prosecutor]: Did you learn this person's name?
>
> [Officer Chilson]: I did.
>
> [Prosecutor]: What was it?
>
> [Officer Chilson]: Antoine McCants.

¶ 38 Officer Chilson further testified that the car that McCants was driving that day was a "2012 Chevrolet Tahoe," gave the license plate number, and indicated the vehicle had "temporary tags." Officer Chilson never indicated the reason he pulled McCants over that day, testified about McCants' driving record, or disclosed to the jury the events that led to McCants having a suspended license.

¶ 39 Second, the testimony was very brief. Third, the court gave a limiting instruction to the jury that the evidence of events "occurring on January 12, 2017, is being presented to show identity. You may not consider it for any other reason."

¶ 40 Thus, giving the evidence its maximum probative value and minimum prejudicial effect, as we must on review, we can't say the probative value of this evidence was substantially outweighed by its prejudicial impact. Accordingly, the trial court didn't abuse its discretion by admitting it.

C. Additional Jury Instruction on Credibility

¶ 41 McCants next contends that the court abused its discretion by refusing his request to instruct the jury that police officer identification testimony should be evaluated under the same standard as lay witness testimony. We aren't persuaded.

¶ 42 Defense counsel tendered the following instruction:

> A police officer's ability to identify a person is no more . . . reliable than a layperson's ability to identify a person.

With the instruction, defense counsel cited an unpublished case as the basis for the requested instruction.

¶ 43 The trial court refused to give the defense-tendered instruction for three reasons: (1) the admonition from appellate courts that trial courts generally shouldn't "pull legal principles from case law" and give them as instructions; (2) there is an adequate and appropriate stock jury instruction on credibility that our "[s]upreme [c]ourt has consistently found . . . is sufficient"; and (3) the court "took some pains" during voir dire to explain to the jurors that they "need[] to evaluate the testimony of witnesses based upon what they heard and saw in the courtroom, not based on their occupations," and they all agreed they would do so.

¶ 44 The court ultimately gave the jury the following credibility instruction:

> You are the sole judges of the credibility of each witness and the weight to be given to the witness's testimony. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.
>
> For each witness, consider that person's knowledge, motive, state of mind, demeanor, and manner while testifying. Consider the witness's ability to observe, the strength of that person's memory, and how that person obtained his or her knowledge. Consider any relationship the witness may have to either side of the case, and how each witness might

> be affected by the verdict. Consider how the testimony of the witness is supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence when you evaluate each witness's testimony.
>
> You may believe all of the testimony of a witness, part of it, or none of it.

This instruction tracked the stock credibility instruction. *See* COLJI-Crim. E:05 (2020).

¶ 45 "Whether to issue a particular jury instruction is within the trial court's discretion." *People v. Chirico*, 2012 COA 16, ¶ 7. We agree with the trial court that the general credibility instruction it gave adequately informed the jury of its role in evaluating the credibility of witnesses and their testimony. *People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005) ("Jury instructions must be read as a whole, and if, when so read, they adequately inform the jury of the law, there is no reversible error.").

¶ 46 Because the jury was given a proper general credibility instruction adequately explaining the law, the trial court didn't abuse its discretion by declining to give an additional instruction regarding the credibility of a specific witness. *People v. Theus-Roberts*, 2015 COA 32, ¶ 21 (upholding the rejection of instructions

on eyewitness credibility where a general credibility instruction was given); *see also People v. Rubanowitz*, 688 P.2d 231, 244 (Colo. 1984) ("A general credibility instruction . . . adequately informs the jury of its role concerning the evaluation of testimony, including evaluation of the credibility of any particular witness.").

D. Post-Trial Subpoena of Records

¶ 47 Next, McCants contends that the trial court erred by refusing to conduct an in camera review of Officer M.'s disciplinary and internal files after the defense issued a post-trial subpoena for such records. As discussed in Part II.A above, we are remanding the case for the court to make reliability findings with respect to Officer M.'s identification of McCants. Making these findings will require the trial court to assess Officer M.'s credibility. Because Officer M.'s credibility will necessarily be at issue during the proceedings on remand, the rationale that the trial court applied to decline to conduct an in camera review — that the records may only contain information from a time after Officer M. testified — no longer applies. Based on these changed circumstances (and because we assume that the defense will reissue a similar subpoena in connection with the hearing on remand), we don't need to (and,

therefore, don't) reach the questions of whether defense counsel had authority to issue the subpoena or whether the trial court had authority to do anything other than quash the subpoena.

¶ 48 Furthermore, we offer no opinion as to whether an in camera review or production of the subpoenaed documents will be required in the event that the defense issues a similar subpoena in connection with the proceedings on remand. Instead, the trial court will need to make that determination based on the facts and circumstances before it at the time. *See People v. Spykstra*, 234 P.3d 662, 666 (Colo. 2010); *Martinelli v. Dist. Ct.*, 199 Colo. 163, 170-71, 612 P.2d 1083, 1088-89 (1980).

E. Reckless Driving Conviction

¶ 49 Finally, McCants contends that the trial court erred by failing to merge the reckless driving conviction with the vehicular eluding conviction under *People v. Esparza-Treto*, 282 P.3d 471, 479 (Colo. App. 2011). The People concede — and we agree — that the convictions must merge and the reckless driving conviction must be vacated.

¶ 50 The prosecution charged McCants with one count of vehicular eluding under section 18-9-116.5 and one count of reckless driving

under section 42-4-1401(1), (2). After the verdict, the prosecutor noted that the reckless driving conviction should merge into vehicular eluding at sentencing. But, for reasons that aren't apparent from the record or relevant to this appeal, the court didn't merge the convictions.

¶ 51 A conviction for a lesser offense must merge into the conviction for the greater offense. *Page v. People*, 2017 CO 88, ¶¶ 9-10; *Reyna-Abarca v. People*, 2017 CO 15, ¶ 51. As applicable here, "one cannot commit the offense of vehicular eluding without also committing the offense of reckless driving." *Esparza-Treto*, 282 P.3d at 479. And therefore, "reckless driving is a lesser included offense of vehicular eluding." *Id.* Thus, in the event that the vehicular eluding conviction survives remand, the reckless driving conviction must merge with the vehicular eluding conviction (and the mittimus must be amended accordingly).

III. Conclusion

¶ 52 For the reasons set forth above, we reverse and remand for findings on the suggestiveness of the procedure and reliability of Officer M.'s out-of-court identification. If, on remand, the trial court determines that Officer M.'s identification of McCants isn't

admissible based on the test set forth in *Biggers* and *Bernal*, it shall conduct a new trial. Conversely, if the trial court determines Officer M.'s identification of McCants was admissible based on the test set forth in *Biggers* and *Bernal*, then McCants' conviction for vehicular eluding shall be reinstated, subject only to his right to appeal that ruling.

JUDGE RICHMAN and JUDGE BERGER concur.