

No. 1-10-0181

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 7894
)	
MARCUS THOMPSON,)	Honorable
)	John J. Fleming,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The denial of motion to suppress identification affirmed where defendant failed to show the pretrial identification procedure was impermissibly suggestive, which could give rise to a substantial likelihood of irreparable misidentification.

¶ 2 Following a bench trial, defendant Marcus Thompson was found guilty of vehicular hijacking and sentenced to eight years' imprisonment. Defendant contends the trial court erred in denying his pretrial motion to suppress his identification, which he contends was

based on a suggestive photo array and lineup. He contends there is no independent basis for the witness' identification.

¶ 3 Defendant's conviction arose from an incident on the night of January 4, 2007, in which he drove off in a Chevrolet Malibu left running at a gas station in the 5400 block of South Cicero Avenue. The Malibu was owned by the fiancée of Charles Haynes, who left it running while he talked to a friend about 10 feet away. When his friend alerted him that someone had entered the car, Haynes ran back to the car in time to grab the handle of the passenger-side door. From this vantage point, he had a clear view of the driver, who was wearing a baseball cap and a winter coat. Defendant drove away, and three hours later, the car was found wrecked and abandoned. Haynes relocated to Florida. In 2008, he positively identified defendant from a photo array and at a lineup, as the individual he saw drive the Malibu away on the night in question.

¶ 4 Before trial, defendant filed a motion to suppress identification testimony, alleging that "certain of the witnesses were improperly allowed to view an e-mailed photo-array with no provers or police officers on 3-31-08." He argued that these actions were unnecessarily conducive to mistaken identification, which made certain identification evidence subject to suppression:

- "a) Any reference to the pre-trial identification of the accused by such witnesses who were involved in the improper pre-trial identification[; and]
- b) The in court identification of the accused by such witnesses as were involved in the improper pre-trial identification in as much as such identification is the product of the improper pretrial identification unless the State shows by clear and convincing evidence that the in court identification is not tainted and is fully independent of improper pretrial identification procedures."

¶ 5 Detective Beth Svec testified that on March 31, 2008, she prepared a photo array of five individuals, including defendant, with similar physical attributes and emailed the array to Haynes because he then resided in Florida. In a telephone conversation about the email of the photo array, Detective Svec told Haynes that a DNA match had been made from the baseball cap found in the Malibu. She did not tell Haynes that the DNA match came from one of the individuals depicted in the photo array. On April 7, 2008, she called Haynes, who said he made a "positive identification." Because Haynes was unable to send back the photo array with a marking showing whom he identified, he came to Chicago with a printout of the photo array on April 12, 2008. In Chicago, Haynes positively identified defendant in a lineup. Defendant was the only individual in both the photo array and lineup.

¶ 6 At the suppression hearing, Haynes testified consistently about the identification procedure. He added that he was "absolutely certain" that the individual he identified from the photo array was the one he saw in the gas station, driving away his fiancée's Malibu, while he was talking to a friend about 10 feet away. The gas station was well-lit and he clearly saw the face of the individual "with a hat on" in the driver's seat.

¶ 7 Following arguments of counsel, the trial court denied the motion, finding defendant failed to show that the pretrial identification was unduly suggestive, so as to shift the burden to the State to show an independent basis for the identification. The court noted that although Haynes may have reasonably concluded that the individual with the DNA match was included in the photo array, there was no testimony that Haynes was in any way influenced in making his identification. Finally, the court noted Haynes "had an opportunity then on the night in question to view the offender and his testimony was clear in viewing the pictures that he believed that the defendant was that person."

¶ 8 At trial, Haynes positively identified defendant in court as the individual he observed in the driver's seat of the Malibu, wearing a black-and-white baseball hat and winter coat. The stipulated evidence included forensic evidence that defendant's DNA profile matched one of three profiles recovered from the baseball cap found in the Chevrolet Malibu, and the photo array was admitted into evidence without objection. Defendant rested without presenting any testimony. In finding defendant guilty of vehicular hijacking, the trial court stated, "I remember the testimony of the victim and as to the identification I find it to be clear and convincing and it is corroborated by the DNA."

¶ 9 Defendant filed a motion for a new trial, alleging, *inter alia*, that the court erred in denying his pretrial motion to suppress identification testimony, and in allowing Haynes to testify about his identification from the emailed photo array and to identify him in court. The court denied the motion, and this appeal followed.

¶ 10 In this court, defendant contends that the trial court erred in denying his pretrial motion to suppress his identification because he contends the identification arose from a suggestive photo array and lineup, and lacked an independent basis of recollection. He argues the combined pretrial identification procedure was unnecessarily suggestive because he was the only individual in both the photo array and lineup. Defendant argues "Haynes knew that the DNA belonged to [defendant]" and had the photo array in his possession when he arrived at the police station to view the lineup. He claims these circumstances "spotlighted [him], essentially communicating to Haynes, 'this is the guy,' and thereby causing his misidentification."

¶ 11 As an initial matter, we reject the State's contention that defendant has forfeited this precise contention of error because it was not specifically included in his motion to suppress. Nor did defendant object to the admission of this evidence at trial or include it in his post-trial motion. In his motion to suppress, defendant argued that the pretrial identification procedure

was susceptible to misidentification where Haynes was allowed to view the photo array without any officers present. At the hearing on the motion, Detective Svec testified that defendant was the only individual in both the photo array and the lineup. In his motion for a new trial, defendant alleged that the denial of his motion to suppress was error. Because the trial court heard the evidence at the pretrial motion and considered defendant's arguments for suppression before and after trial, we find the issue is not forfeited. See *People v. Anderson*, 407 Ill. App. 3d 662, 667 (2011).

¶ 12 On a motion to suppress identification testimony, defendant bears the burden of proving that the pretrial identification procedures were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010); accord *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005) (citing *Simmons v. United States*, 390 U.S. 377 (1968)). If defendant meets this burden, the State must then show, by clear and convincing evidence, an independent basis for the identification. *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008). In reviewing the trial court's ruling on a motion to suppress, we accord great deference to the court's factual findings, which are not subject to reversal unless they are manifestly erroneous. The ultimate legal ruling on whether suppression is warranted, we review *de novo*. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006).

¶ 13 Mindful of the hazards in photo arrays, which includes the possibility that a witness is apt to remember the image from the photo array rather than the actual perpetrator (*Simmons*, 390 U.S. at 383-84), and lineup procedures, which can unnecessarily suggest an identification (*United States v. Wade*, 388 U.S. 218, 233 (1967)), we see no error based solely on defendant being the only individual in both the photo array and lineup (*People v. Johnson*, 149 Ill. 2d 118, 148 (1992)). Nor is a lineup procedure invalidated merely because defendant is the only person whose photograph was previously shown to the witness. *Prince*, 362 Ill. App. 3d

at 772, *and cases cited therein*. When a witness is asked to view a lineup, there is almost always an implied suggestion that one of the individuals in the lineup may have committed the crime, which the trial court below duly noted in denying defendant's motion to suppress. See *People v. Williams*, 117 Ill. App. 2d 34, 43 (1969). In order for a defendant to meet his initial burden of suggestiveness, he must come forward with at least some evidence that the identification was the product of something other than the witness' ability to make the identification. We find nothing of the kind in the instant record on appeal. *Johnson*, 149 Ill. 2d at 148.

¶ 14 It is clear that the photo array was employed because Haynes resided in Florida (*People v. Smado*, 322 Ill. App. 3d 329, 336 (2001)). Although Detective Svec told Haynes in their telephone conversation that a DNA match to a named individual was made, Haynes was not told which of the individuals depicted in the photo array had the matching DNA (*People v. Helton*, 153 Ill. App. 3d 726, 733 (1987)). Detective Svec's statement to Haynes about the DNA match merely verbalized the obvious (*People v. Williams*, 117 Ill. App. 2d 34, 43 (1969)). We find the statement was neither unfairly suggestive nor prejudicial to defendant, and the defendant offers no persuasive reason to conclude otherwise. That Haynes had the photo array in his possession when he came to Chicago to view the lineup was a matter of circumstance and not design to suggest an identification at the lineup (*Johnson*, 149 Ill. 2d at 147-48).

¶ 15 Additionally, a copy of the photo array and a photograph of the physical lineup are included in the record on appeal, and we find nothing suggestive in either. *People v. Richardson*, 123 Ill. 2d 322, 350 (1988). The photo array consisted of five photographs of individuals of the same approximate age, skin tone, short hairstyle, and facial hair. Likewise, the photograph of the physical lineup showed five individuals with similar physical attributes and neutral clothing. There is no indication in the record that a suggestion was made to Haynes to

identify defendant in the photo array or at the lineup (*Gabriel*, 398 Ill. App. 3d at 349). Nor do we observe any significant physical differences exist among those depicted in the photo array and lineup so as to "spotlight" defendant (*People v. Love*, 377 Ill. App. 3d 306, 312 (2007)).

¶ 16 Having found that the pretrial identification procedure was not suggestive, we need not reach the question of whether under the totality of circumstances the identification was reliable or whether the State established an independent basis for the in-court identification. *People v. Johnson*, 222 Ill. App. 3d 1, 8-9 (1991).

¶ 17 Defendant failed to carry his initial burden of demonstrating that the pretrial identification was unduly suggestive (*People v. Lacy*, 407 Ill. App. 3d 442, 462 (2011)). The findings by the trial court are consistent with the evidence. On our *de novo* review of the ultimate question, we agree with the trial court's decision to deny defendant's motion to suppress identification.

¶ 18 We affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.