

No. 1-14-1061

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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. 12 CR 19324
)	
EDDIE CLEMONS,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment affirmed where the trial court properly denied defendant's motion to suppress the victim's identification of him as one of the men who robbed him.

¶ 2 Following a bench trial, defendant Eddie Clemons was convicted of robbery and unlawful restraint and sentenced to two years' probation. On appeal, defendant maintains that the trial court erred in denying his motion to suppress the victim's identification of him as one of the men who robbed him. Defendant contends that the photo array and lineup viewed by the victim were improperly suggestive and should therefore have been excluded. Defendant further

maintains that the victim's in-court identification resulted from the suggestive pretrial identification procedures, and that because the victim's identification was the only evidence tying him to the robbery, his conviction must be reversed. For the following reasons, we affirm.

¶ 3 The events giving rise to defendant's conviction occurred on August 9, 2012, when Reginald Gills was robbed by three men. Defendant and codefendant Derron Skinner were charged by indictment with one count of armed robbery with a firearm; one count of aggravated unlawful restraint with a deadly weapon, to wit: a gun; and two counts of aggravated kidnapping with a firearm. Defendant and codefendant were tried jointly, but Skinner is not a party to this appeal.

¶ 4 Prior to trial, defendant filed a motion to suppress the victim's identification of him as one of the robbers in a photo array and a lineup. At a hearing on the motion, Chicago police detective Brian Drees testified that after he was assigned to investigate the instant robbery in mid-August, he received an incident report from the responding officers containing the victim's descriptions of three individuals. According to Detective Drees, the report indicated one suspect was a "black male, five-eight, about 160 pounds, dark complexion," and he had a "short hairstyle." A second suspect was a "[b]lack male, six-two, about 200 pounds, dark complexion," and he had an unknown hairstyle. A third suspect was a black male, "six feet tall," who weighed about 190 pounds and had "[s]hort hair." None of the descriptions identified dreadlocks, or distinguishing marks or scars.

¶ 5 After looking into other armed robberies in the area, Detective Drees found a "contact card" noting defendant's suspected involvement in a subsequent robbery, on August 11, 2012. The card noted "his presence in that area at that time." Thus, defendant became a suspect in the

instant robbery and Detective Drees compiled a photo array using a computer program, which generates "filler" images of people with similar characteristics based on a prior booking photo of the suspect and his demographics. Using the generated pictures, Detective Drees selected "fillers" and compiled a six-person photo array. On August 16, 2012, Detective Drees advised the victim that he had a suspect and that he would come by the victim's work to show him a photo array. The victim signed a "photospread" advisory form and then identified defendant. The advisory form, the photo array, and the demographics of the six males were entered into evidence as "Petitioner Group Exhibit 2."¹ According to the demographics, all of the individuals are black males between 5 feet 10 inches and 6 feet 1 inch. Five of the males weigh between 165 pounds and 180 pounds, and one male weighs 220 pounds. Defendant is 5 feet 11 inches and weighs 170 pounds.

¶ 6 After defendant's arrest in an unrelated matter, Detective Drees compiled a lineup of individuals in custody with characteristics similar to defendant's. On September 28, 2012, the victim signed a lineup advisory form and then identified defendant as one of the robbers. Defendant was the only individual who appeared in both the photo array and the lineup.

¶ 7 On cross-examination, Detective Drees testified that the victim was not told whom to select in the photo array. Before the physical lineup, the victim was not allowed to see defendant or told whom to choose, and defendant selected where to stand.

¹ Defendant concedes that the exhibits from the hearing were not included in the record on appeal. However, it is uncontested that the photo array advisory form, the photo array, and the accompanying demographics that are contained within the record on appeal correspond to the documents entered as "Petitioner Group Exhibit 2."

¶ 8 The record contains copies of the photo array marked with inventory numbers, but not exhibit numbers. The photo array depicts six males, one of whom is shaved almost bald and the rest of whom have short dark hair. Defendant's hairstyle consists of small twists. Five of the six males have short facial hair. Half of the males are wearing dark colored shirts and the others are wearing white shirts. Defendant's shirt has a collar, as does one of the white shirts.

¶ 9 A color photograph of the physical lineup marked as "PE Ex 9" is contained within the record on appeal. It depicts five black males of average build and similar height wearing black baggy jeans and black sweatshirts. Large white writing appears on the center of defendant's sweatshirt, another participant's sweatshirt depicts a small white logo in the top right corner, and a third male is wearing a white t-shirt underneath his fully unzipped sweatshirt. They all have dreadlocks, which are just above shoulder-length or longer. One of the males has blond dreadlocks, and, with the exception of a few blond locks on defendant, the remaining dreadlocks are all black.

¶ 10 In closing, the State noted that the victim was not told whom to select in either identification and he had signed an advisory form in both. The State then argued that there was no evidence of any improper police conduct and nothing about the actual composition of the photo array or the lineup that was unnecessarily suggestive.

¶ 11 Defendant argued that the photo array was suggestive because his distinctive "twists" made his hairstyle stand out from the other males, who were either bald or had "very short" hairstyles. Defendant maintained that the physical lineup was suggestive because he had some lighter colored dreadlocks in front and he was the only member of the lineup with writing on his shirt.

¶ 12 The trial court denied defendant's motion to suppress identification. Regarding defendant's hair in the photo array, the court noted the twists and that he "probably had the greatest volume." However, the court observed that some of the other males had a "natural haircut that [was] *longer* than what would be considered a buzz-type cut." (Emphasis added.) The court found no evidence of "conduct of the officers that would lead unnaturally or unconstitutionally to [defendant's] identification," and "that his image within that photo spread was not so unduly suggestive as to be unconstitutional." Describing the individuals in the physical lineup as "remarkably similar" in size, height, and "heftiness," the court noted that they all had the same hair and wore black sweatshirts. Although defendant's sweatshirt had writing on it, the court noted one of the other black sweatshirts depicted a logo. In denying the motion, the court stated, "There is absolutely nothing within the lineup which I can find to be unduly suggestive, and certainly the presence of the individual identified in the photo spread and the subsequent actual physical lineup is not one that's ever unconstitutionally prohibited."

¶ 13 At trial, the victim testified that he worked at Margarita's Pizza and was delivering two pizzas and two drinks to the 6500-block of South Harvard Avenue in Chicago on August 9, 2012. He called when he arrived at about 8:55 p.m., and then told the woman who answered the phone that he was outside with the pizza. She responded that someone was downstairs, so he waited in his vehicle until a man without a shirt came to the doorway and motioned for the pizzas. A light was on in the hallway as the victim walked over to the shirtless man. While standing one foot away, he looked directly at the shirtless man. The victim made an in-court identification of defendant as the man in the doorway.

¶ 14 After he "got all the way up on [defendant]," someone emerged from the bushes and put what felt like a gun to his back. While the second person, identified in court as codefendant, held the gun to his back, defendant went through his pockets. With the gun still at his back, they walked him 35-40 feet to a gangway where defendant went through his pockets again. They took about \$48 or \$49, his phone, two pizzas, and two drinks. After removing the victim's vehicle keys from his pocket, codefendant tossed them to a third male, who looked through the victim's vehicle and then threw the keys onto the sidewalk. Codefendant said, "get out of here," and the victim walked away looking for his keys. The events transpired in "a matter of minutes." After the robbery, the victim called the police and returned to work, where he spoke with the responding officers. The victim signed an advisory form before identifying defendant in the photo array on August 16, 2012, and before the lineup on September 28, 2012.

¶ 15 On cross-examination, the victim testified that he described the three individuals to the responding officers. He agreed that he described one of the robbers as a 20- to 24-year-old male, 5 feet 8 inches, 160 pounds, with brown eyes, a dark complexion, and black hair in a short hairstyle. He was wearing blue jeans and blue gym shoes. The male with the gun wore a "fishing bucket hat," was about 22 to 26 years old, 6 feet 2 inches, 200 pounds, and he had a dark complexion, brown eyes, black hair, and an "unknown hairstyle." The third individual was a black male, between 23 and 26 years old, 6 feet, "approximately 109 pounds [*sic*]," with brown eyes, a dark complexion, and black hair also in a "short hairstyle." He was the male "that was standing on the sidewalk," and he was wearing a blue shirt and blue jeans. The victim said that he told the responding officers, and later Detective Drees, that the robber he identified as defendant had dreadlocks. In a phone conversation with the victim before the photo array

identification, Detective Drees indicated that he had a suspect, but the victim did not expect to see one of the individuals involved in the robbery in the array.

¶ 16 Detective Brian Drees's trial testimony was similar to his testimony at the hearing, but it included some additional detail. During his investigation, he learned that defendant was a suspect in two other robberies, which both occurred within about 100 feet of the instant robbery.

Defendant, who was stopped a few minutes after one of the robberies, was named in a contact card and a general offense case report.

¶ 17 On cross-examination, Detective Drees testified that none of the descriptions he had prior to meeting with the victim mentioned dreadlocks, tattoos, or a scar. He included defendant in the photo array because of the contact card and the case report.

¶ 18 On redirect examination, Detective Drees testified that the contact card with defendant's name on it was for a stop on the 6500-block of South Harvard Avenue on August 11, 2012. Defendant's description on that contact card matched the description of one of the robbers in this case, so he included defendant in the photo array.

¶ 19 On recross-examination, Detective Drees testified that the victim mentioned to him that an offender had "either dreads or like corn-rows, or something." However, he agreed that at the hearing on the motion to suppress he testified that, "with respect to the descriptions that were given in this case, none of those descriptions indicate an individual with dreadlocks." He also agreed that although the contact card indicated defendant had a "braided hairstyle" on August 12, 2012, none of the reports he prepared for this case document braids or dreadlocks.

¶ 20 After the State rested, defendant moved for a directed finding. The court found that there was a reasonable doubt regarding the use of a firearm and acquitted defendant of the

corresponding charges, noting that the case would proceed on charges of robbery and unlawful restraint.

¶ 21 Defendant testified that he worked his scheduled shift as an unarmed security guard from 12 to 8 a.m. on the "evening" of August 9, 2012, and that in the hours prior to his shift, he was at home getting ready for work. He denied robbing the victim and then testified regarding his physical appearance on the night of the robbery. Specifically, defendant indicated he had dreadlocks with "gold" in the front, a scar on his forehead and numerous upper body tattoos. On cross-examination, defendant acknowledged he had dark skin and all his tattoos were in black ink.

¶ 22 The trial court found that the victim had "ample opportunity to observe" the individuals involved in the robbery, that he was "conscientious" in what he saw, and his "demeanor and manner" led the court to "believe him strongly." The trial court stated:

"[H]is testimony was so compelling, so compelling, so completely truthful, so utterly factually rich, and so well-founded within the construct of the version of events that he testified to, that I had, I felt I had no choice but to believe him with reference to the identity of the individuals involved in this offense. That's despite the fact that there was some impeachment and also indicating that the two defendants testified, but I, as I said, [the victim] testified in a very highly truthful manner in this Court's view."

¶ 23 The trial court found defendant guilty of robbery and unlawful restraint. Defendant filed a motion for a new trial, which the court denied. After a sentencing hearing, the trial court sentenced defendant to two years' probation.

¶ 24 On appeal, defendant first maintains that the trial court erred in denying his motion to suppress the victim's identification of him. He argues that both the photo array and the lineup viewed by the victim were improperly and overtly suggestive. Regarding the photo array, defendant notes that he is the only individual wearing a dark, collared shirt, and contends that his hairstyle, consisting of short twists, stands out because the other individuals all have shaved or buzzed haircuts. Regarding the physical lineup, defendant notes that although all the individuals in the lineup are wearing black sweatshirts and have dreadlocks, he was the only individual with writing on his sweatshirt and a few "distinctive blond" dreadlocks. Defendant further points out that he is the only individual who appeared in both the photo array and the lineup.

¶ 25 We find that the trial court did not err in denying defendant's motion to suppress the victim's identification of him as one of the robbers. While a trial court's factual determinations made in connection with a motion to suppress will be disturbed only if they are against the manifest weight of the evidence, the trial court's ultimate determination on a motion to suppress is reviewed *de novo*. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). When considering a trial court's denial of a motion to suppress, a reviewing court may rely upon evidence introduced at the trial to affirm the denial of the motion. *People v. Brooks*, 187 Ill. 2d 91, 127 (1999).

¶ 26 Ordinarily, the task of determining whether evidence of questionable reliability is worthy of credit falls upon the trier of fact. *Perry v. New Hampshire*, 565 U.S. ___, ___, 132 S. Ct. 716, 723 (2012). An identification obtained through a police-arranged procedure will survive a due process challenge unless the " 'identification procedure was so [unnecessarily] suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " *Perry*, 565 U.S. at ___, 132 S. Ct. at 724 (quoting *Simmons v. United States*, 390 U.S. 377, 88 (1968)). Considering the

totality of the circumstances surrounding the identification, courts evaluate a due process challenge to an identification based on a two-step inquiry. *Perry*, 556 U.S. at ___, 132 S. Ct. at 724. First, the defendant has the burden of proving that the identification procedure was both suggestive and unnecessary. *Brooks*, 187 Ill. 2d at 126. Then, if the defendant satisfies this burden, the identification may nevertheless be admissible if the State proves that the identification was independently reliable. *Brooks*, 187 Ill. 2d at 126.

¶ 27 With respect to the first step, we find that neither the photo array nor the lineup were unnecessarily suggestive. The individuals depicted in an identification procedure need not be physically identical. *People v. Simpson*, 172 Ill. 2d 117, 140 (1996) (noting the lineup participants had similar general physical features and finding that "[d]efendant's hair style was not so distinctive as to render the lineup suggestive"). When the record lacks clear, un rebutted evidence that the police used suggestive procedures (*Brooks*, 187 Ill. 2d at 126), differences between the individuals' appearance implicate the weight of the identification, rather than its admissibility (*People v. Allen*, 376 Ill. App. 3d 511, 521 (2007); *People v. Denton*, 329 Ill. App. 3d 246, 250 (2002)).

¶ 28 Here, the victim signed advisory forms for both identifications, which indicated that he was not told to select a specific individual, and there is no evidence of suggestive police conduct for either identification procedure. Therefore, the differences in appearance were questions regarding the weight to be attributed to the identification for the trier of fact to resolve.

¶ 29 The males depicted in the photo array and the males in the lineup have similar general features. According to the photo array demographics, which defendant introduced at the hearing, the males are all black and of similar height and weight. The photo array shows five of the six

males have short facial hair, half of them are wearing dark colored shirts, and the others are wearing white shirts. Two of the shirts have collars. The trial court noted that, with the exception of one bald male, all of the individuals in the photo array have short hair. We agree with the trial court that there was no evidence of "conduct of the officers that would lead unnaturally or unconstitutionally to [defendant's] identification," and "that his image within that photo spread was not so unduly suggestive as to be unconstitutional." Regarding the physical lineup, the individuals are all black males of similar height and build. They are all wearing black sweatshirts and have dreadlocks that range in length from just above the shoulders to below shoulder-length. The trial court noted that the lineup was "one of the best it had ever seen." In addition, defendant has not argued that the alleged defects in either identification procedure were unnecessary.

¶ 30 Absent any affirmative evidence of improperly suggestive police conduct, we may not substitute our judgment for the trial court's determination of the weight of the identification testimony. See *Brooks*, 187 Ill. 2d at 126. Considering the totality of the circumstances surrounding the identification, we find that the trial court's factual findings are supported by the manifest weight of the evidence and the trial court's ultimate denial of the motion to suppress was proper as a matter of law. See *Sorenson*, 196 Ill. 2d at 431.

¶ 31 Our supreme court's holding in *People v. Richardson*, 123 Ill. 2d 322 (1988), supports this conclusion. In *Richardson*, the defendant argued that the photo array was suggestive because he was the only individual who was depicted in each of the two series of photos, and he had significantly more hair than the other males. *Richardson*, 123 Ill. 2d at 348-49. The defendant further argued that the physical lineup was suggestive because his "Afro hairstyle" set him apart from the other participants, and two witnesses who participated in the photo identification met a

few days before the physical lineup to discuss their identifications. *Richardson*, 123 Ill. 2d at 349-50. Noting that the individuals in a lineup need not be physically identical, our supreme court found, despite the arguable impropriety of the meeting, the defendant's "Afro" hairstyle was not so distinctive that it rendered the lineup suggestive. *Richardson*, 123 Ill. 2d at 350.

¶ 32 Here, as in *Richardson*, the main allegedly suggestive aspect of the photo array is the hairstyle and defendant is the only individual who appeared in both identification procedures. Given the general similarities between the males discussed above, we find, as in *Richardson*, that defendant's hairstyles—the twists in the photo array and the few blond dreadlocks in the physical lineup—were not so distinctive that they rendered either identification procedure suggestive.

¶ 33 Defendant nevertheless challenges the photo array, arguing that the victim's general description of him, as relayed in the incident report, does not match defendant's actual appearance and omits key prominent features. However, " 'a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification.' " *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 52 (quoting *People v. Slim*, 127 Ill. 2d 302, 308-09 (1989)). Detective Drees testified that according to the incident report, one suspect was a "black male, five-eight, about 160 pounds, dark complexion," and he had a "short hairstyle." Another suspect was a black male, "six feet tall," weighed about 190 pounds, and had "[s]hort hair." As noted above, all of the males in the photo array have short hair, with defendant's in short twists and one participant shaved almost bald. According to the demographics, all the males are black and weigh between 165 and 220 pounds. Although the shortest male is 5 feet 10 inches, the pictures do not depict height. As such, we do not find the two-inch inconsistency between the initial descriptions and the shortest individual in the photo array render it suggestive. Further,

according to the demographics, defendant is a black male who weighs 170 pounds and is 5 feet 11 inches. Thus, defendant's physical characteristics are similar to the victim's initial descriptions of two of the offenders, and we reject defendant's contention to the contrary.

¶ 34 In addition, although not included in the incident reports, at trial, the victim testified that he told responding officers defendant had dreadlocks. The trial court found that the victim testified credibly and assigned significant weight to his identifications despite defendant's testimony. Accordingly, in light of the above discussed similarities between the individuals in the photo array, and the consistencies between the victim's general description of defendant and his physical characteristics, we do not find that the omission of defendant's tattoos, the scar on his face, and the dreadlocks from the incident report show the photo array was suggestive.

¶ 35 We are mindful of defendant's argument that, during the time period relevant to this appeal, Illinois law prohibited suspects in a lineup or photo array from appearing to be "substantially different" from the "fillers" or "distracters." 725 ILCS 5/107A-5(c) (West 2012).² However, in light of the similarities discussed above, we do not find that the differences between the defendant's "short hairstyle" and the four other short haircuts in the photograph render the differences between the individuals "substantial." Defendant's argument is not persuasive.

¶ 36 To further support his contention of suggestiveness, defendant observes that Detective Drees investigated him for reasons unrelated to the victim's descriptions of the robbers. Detective Drees testified that defendant was a suspect because he was stopped within five minutes of a separate robbery, which occurred three days after and 100 feet away from the scene of the instant

² Repealed by Pub. Act 98-1014, § 15 (eff. Jan. 1, 2015).

robbery. Moreover, at trial, he testified that the description of defendant on the contact card from the subsequent robbery matched the victim's description of an offender in the instant case.

Defendant has not explained how the detective's basis for investigating him proves that the photo array was unnecessarily suggestive. Defendant's argument again is not persuasive.

¶ 37 Having found that defendant did not meet his burden at the first step of the due process analysis, we need not address whether the State showed the identification was independently reliable under the second step.

¶ 38 We conclude that the trial court's determination that the photo array and lineup were not unnecessarily suggestive was not against the manifest weight of the evidence, and that the trial court did not err in denying the motion to suppress identification evidence. Given our determination that the motion to suppress identification was properly denied, defendant's contentions that the victim's in-court identification resulted from suggestive pretrial identification procedures and that his conviction must be reversed for lack of identification is not persuasive.

¶ 39 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.