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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/14/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0419
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
VICTOR VALESQUEZ,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-148638-001 DT

The Honorable Pendleton Gaines, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

Pamela J. Eaton Phoenix
Attorney for Appellant

B A R K E R, Judge

¶1 Defendant Victor Valesquez appeals his convictions and sentences for two counts of discharge of a firearm at a structure, one count of aggravated assault, six counts of endangerment, one count of disorderly conduct, and one count of unlawful discharge of a firearm. Defendant maintains: (1) identification evidence used against him was obtained from an unduly suggestive photographic lineup; and (2) his motion for continuance of his sentencing hearing was improperly denied because a third party had recently confessed to the crimes at issue. For the following reasons, we affirm.

Facts and Procedural Background

¶2 In August 2008, Defendant's brother threw a birthday party for his girlfriend at Defendant's home in Buckeye. Defendant's brother, his girlfriend, and Defendant attended, as well as several of the girlfriend's cousins and friends, who arrived in two trucks. The friends and cousins were introduced to Defendant, who wore a white shirt, and his brother, who wore an orange Phoenix Suns jersey.

¶3 About an hour after the girlfriend's cousins and friends arrived, they decided to leave the party. They informed the girlfriend that they were leaving and walked toward their trucks. One of them ("Victim 1") then decided to return to the home to use the restroom. Another person ("Victim 2") accompanied him.

¶14 As they approached the house, Defendant confronted them and asked them where they were going. Victim 1 stated that he wanted to use the restroom. Defendant vaguely accused them of wanting to start trouble, and the victims protested that they would be in and out of the house quickly.

¶15 At that point, Defendant struck Victim 1 in the head with an unopened bottle of beer, knocking him unconscious. Another person ("Victim 3") heard screaming, ran to where Victim 1 was laying, and tried to call 9-1-1. As Victim 3 dialed, Defendant's brother hit him in the face.

¶16 Defendant entered his home and ran into his bedroom where he kept his guns. When he returned downstairs he was carrying a gun in one hand and a long clip in the other. Defendant went to the front of his home and shot his gun up in the air. While other guests were fighting with a fourth victim, Defendant was heard stating to his brother, "Move, I'm going to shoot this mother f-----."

¶17 The girlfriend's friends and cousins eventually retreated to their trucks and started to drive away. Defendant shot at them multiple times. Victim 2 and two other witnesses saw Defendant fire his gun at the truck.

¶18 Six bullets hit a truck driven by one of the witnesses ("Driver 1"). One bullet hit the truck driven by another witness ("Driver 2"). It passed through Victim 2's right thigh,

landing in the left side of his groin after grazing his testicle.

¶9 The police met with the group shortly thereafter at a nearby Walgreen's. Driver 2 described the shooter to one officer as "a bald Hispanic male" and to another as "a bald Hispanic male wearing a white shirt."

¶10 When police arrived at the scene of the crime, someone present at the location photographed Defendant. The police then used a computer to select five similar photographs of suspects to create a photographic lineup. All six people presented in the lineup were Hispanic males of approximately the same age. All had shaved heads. Although Defendant was the only one who was entirely clean-shaven, the other five photographs were of people with little facial hair, or with stubble. Defendant's image showed him wearing a white T-shirt. Another person in the lineup was wearing a white undershirt, one was wearing a white shirt under a black shirt, and another was shirtless. Of the other two people in the lineup, one was wearing a black shirt, and the other was wearing a gray shirt. A police officer presented the lineup to Driver 2 less than five hours after the shooting, and the driver identified Defendant as the shooter. Driver 1 described the person with the gun as having a shaved head, wearing a white T-shirt, and being the owner of the home

where the party was held. Ten hours after the incident he also selected Defendant from the photographic lineup.

¶11 The officer also showed the lineup to Victim 2 after his surgery, and Victim 2 identified Defendant as the person who hit Victim 1. Victim 1 was also shown the lineup as he was recovering in the hospital. He identified Defendant as the party's host from the lineup in "[l]ess than a second."

¶12 Within ten to eleven hours after the incident, two other people who attended the party identified Defendant as the shooter. One said that he did not see the shooter, but he selected Defendant from the lineup as the person who owned the home where the party took place. The second identified Defendant from the lineup "almost immediately" as "the person that she [saw] fire the gun."

¶13 Defendant was charged with eleven felonies, including discharging a firearm, aggravated assault, and endangerment. Defendant claimed the photographic lineup was unduly suggestive and moved to suppress the lineup identification evidence. The court held a hearing pursuant to *State v. Dessuerault*, 104 Ariz. 380, 453 P.2d 951 (1969), and found that the State had shown by clear and convincing evidence that the lineup was not unduly suggestive.

¶14 Defendant was convicted of all eleven felonies. The trial judge set the sentencing hearing for April 3, 2009. Three

days before the hearing, Defendant filed a motion to continue to allow for briefing on the issue of "residual doubt." Defendant wanted to file a motion to vacate judgment on the ground that Defendant's brother had confessed to firing all of the gunshots.

¶15 Although the court denied Defendant's motion, it determined that the sentences would run concurrently based on a variety of factors including "residual doubt" that Defendant was the shooter. The court explained that it denied his motion due to prejudice that would be suffered by the victims, and because "residual doubt" is not an issue to be addressed at sentencing, but instead concerns factual innocence.

¶16 Defendant was sentenced and timely appealed his convictions. We have jurisdiction under Article VI, Section 9, of the Arizona Constitution, and Arizona Revised Statutes §§ 12-120.21(A)(1), 13-4031, and 13-4033(A) (2010).

Discussion

1. Photographic Lineup Identification Evidence

¶17 Defendant appeals the trial court's finding that the photographic lineup identification procedure was not unduly suggestive. We review a trial court's ruling on pretrial identification procedures for abuse of discretion. *State v. Moore*, 222 Ariz. 1, 7, ¶ 17, 213 P.3d 150, 156 (2009).

¶18 The Due Process Clause of the Fourteenth Amendment requires pretrial identification procedures to be conducted in a

fundamentally fair manner that protects the defendant's right to a fair trial. *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46, 38 P.3d 1172, 1183 (2002) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)); see also U.S. Const. amend. XIV, § 1. A procedure will not be unconstitutional simply because it is overly suggestive. *Lehr*, 201 Ariz. at 520, ¶ 46, 38 P.3d at 1183. This is because "[i]t is the likelihood of misidentification" rather than the suggestiveness itself that violates the due process right. See *id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)). If the identification is reliable despite suggestiveness, the procedure is constitutional. *Id.*

¶19 Thus, admissibility of identification evidence is determined by a two-part test. *Id.* The court must assess: "(1) whether the method or procedure used was unduly suggestive"; and (2) if so, if the procedure "led to a substantial likelihood of misidentification" *Id.* Both conditions must be satisfied to exclude the evidence. *Id.*

a. Suggestiveness

¶20 Photographic "lineups need not[,]" and indeed usually "cannot be ideally constituted." *State v. Phillips*, 202 Ariz. 427, 433, ¶ 20, 46 P.3d 1048, 1054 (2002) (quoting *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1184 (1985)). Thus, "the law only requires that they depict individuals who basically resemble one another such that the suspect's

photograph does not stand out." *Phillips*, 202 Ariz. at 433, ¶ 20, 46 P.3d at 1054. For example, in *Alvarez*, it was not impermissibly suggestive for the defendant to be the only one pictured with a facial mole. 145 Ariz. at 372-73, 701 P.3d at 180-81. Nor was it unacceptable for the majority of people pictured to be a different race than the defendant, so long as the basic resemblance requirement was met. *Id.* at 373, 791 P.3d at 181 (holding that photographic lineup comprised of two Hispanic individuals, one of whom was the defendant, and four African-American individuals was not unduly suggestive when the victim had described her assailant as Hispanic with some African-American features). Because the question is whether the procedure is unduly suggestive to the witness, the witness's description of the perpetrator and the witness's reason for picking the defendant from the lineup will be important in determining if a particular characteristic made the lineup unduly suggestive. See *State v. Mead*, 120 Ariz. 108, 111-12, 701 P.2d 1178, 1180-81 (1985) (holding that lineup procedure was permissible even though the defendant was the only one without facial hair when facial hair was not an integral part of the victim's description of the assailant and when no indication that the defendant was selected from the lineup due to his lack of facial hair existed).

¶21 Here, Defendant claims that the photographic lineup – from which he was identified by five different witnesses – was impermissibly suggestive because he was the only person pictured who was (1) bald, (2) clean-shaven, and (3) wearing a white T-shirt. Based on the record, we cannot hold that the trial court abused its discretion by finding that the lineup was not impermissibly suggestive.

¶22 Defendant's characterization of the lineup is not entirely accurate. All of the individuals pictured in the lineup had shaved heads and were nearly bald. Even Defendant's picture showed some indication of stubble on his head. Thus, all of the people pictured had similar hairstyles.

¶23 Similarly, although Defendant appears to be the only one pictured who was entirely clean-shaven, the facial hair shown on the other photographs did not consist of much more than slight stubble. Further, similar to *Mead*, Defendant's lack of facial hair was not an integral part of the witness's description of Defendant, and the record lacks any evidence that Defendant's lack of facial hair caused the witnesses to select Defendant's photograph from the lineup.

¶24 Finally, Defendant's white T-shirt did not make his photograph conspicuous. The Arizona Supreme Court has not expressly held whether showing a Defendant wearing similar clothing to a witness's description in a photographic lineup is

unduly suggestive. See *State v. Ware*, 113 Ariz. 340, 343, 554 P.2d 1267, 1271 (1976) (holding that when the witness noted that the offense had been committed by a person wearing a blue denim jacket, and when the defendant was the only one pictured in the photographic lineup wearing a blue denim jacket, this alone did not require exclusion of the identification because it was nevertheless reliable).

¶25 Here, Defendant's clothing, unlike his lack of facial hair, was something integral to the witnesses' descriptions. Ultimately, however, Defendant's common and non-descript white T-shirt did not make his photograph "stand out" from the others in the lineup. One of the individuals was wearing a white undershirt. Another was wearing a white shirt underneath a black shirt. Another was shirtless, meaning that it could have been Defendant had he removed his shirt. A final person was wearing what may be a grey shirt, but in very dark lighting that makes it difficult to determine whether the shirt is grey or white.

¶26 Other jurisdictions have also held that a defendant wearing clothing matching a witness's description does not necessarily make a lineup unduly suggestive. See *State v. Bowens*, 733 A.2d 977, 984-85 (Conn. App. 2001) (holding photographic lineup not unduly suggestive when the defendant was one of only two people out of eight pictured wearing a hooded

jacket, the clothing that the witness had identified the shooter as wearing); *Thompson v. State*, 884 A.2d 678, 694 (Md. App. 2005) (holding that photo lineup was not impermissibly suggestive even though the defendant was wearing a white shirt and the witness had claimed that the perpetrator was wearing a white T-shirt when "two of the photos in the array depicted people in white T-shirts, and one photo depicted a person in a white T-shirt with a jacket over it"); *People v. Drayton*, 896 N.Y.S.2d 320, 321 (N.Y. App. Div. 2010) (holding that even though the defendant was almost the only one wearing a white shirt in the photo lineup when the victim had described one of the perpetrators as wearing a white shirt, the photographic lineup was not unduly suggestive). Further, we are not aware of any requirement that officers be required to change suspects' clothing prior to photographing them for a lineup to avoid undue suggestiveness, at least when the suspect is wearing something as common as a plain white T-shirt.

¶127 Thus, based on the foregoing, we cannot hold that the trial court abused its discretion by finding the identification procedure acceptable.

b. Reliability

¶128 Even if the photographic lineup were unduly suggestive, it was still permissible because the identification was nevertheless reliable. The reliability of an identification is based on the totality of the circumstances. *Biggers*, 409 U.S. at 199. In assessing the totality of the circumstances, a court will weigh five factors derived from *Neil v. Biggers*: “the opportunity of the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” *Lehr*, 201 Ariz. at 521, ¶ 48, 38 P.3d at 1184 (quoting *Brathwaite*, 432 U.S. at 114). An appellate court may weigh the *Biggers* factors based on information present in the trial record even if the trial court did not explicitly weigh them. *State v. Leyvas*, 221 Ariz. 181, 190 n.6, ¶ 30, 211 P.3d 1164, 1174 n.6 (App. 2009); see also *Biggers*, 109 U.S. 198-201 (reversing trial court’s finding that the identification procedure at issue was unduly suggestive, and holding that the identification was still reliable based on facts present in the record).

¶129 Here again, weighing the *Biggers* factors reveals that the trial court did not abuse its discretion. The witnesses had ample opportunity to view the shooter, as they attended a party

at his home and were introduced to him upon arrival. They were thus already acquainted with Defendant when they later saw him holding a gun and could identify him accurately. Additionally, very little time passed between the crime and the identifications – less than twelve hours for three of the witnesses and as soon as the other two witnesses had sufficiently recovered in the hospital. All of the witnesses were certain of their identifications, and many selected Defendant from the lineup almost instantly.

¶30 The witnesses' descriptions of Defendant as a bald, Hispanic male wearing a white shirt, although not extremely specific, were also not vague enough to raise suspicion as to lack of reliability. Finally, the record does not reveal the degree of attention that the witnesses devoted to observing the victim. But with three factors weighing in favor of the State, and with two factors being neutral, we cannot say that the trial court abused its discretion by allowing evidence of the identification.

2. Motion to Continue Sentencing Hearing

¶31 Defendant also maintains that his sentencing hearing should have been continued to allow him to investigate his brother's confession to the crimes. For this court to overturn a trial court's denial of a continuance, the challenger must show both an abuse of discretion and prejudice to the defendant.

State v. Amaya-Ruiz, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990).

¶132 A criminal defendant has no right to present evidence of residual doubt as a mitigating circumstance. *State v. Speer*, 221 Ariz. 449, 462, ¶ 68, 212 P.3d 787, 800 (2009). Defendant therefore had no right to a continuance to present evidence of residual doubt, so the trial court did not abuse its discretion by declining to grant Defendant's motion. If Defendant wishes to contest his factual guilt due to newly discovered evidence, the proper forum for this dispute is a Rule 32 petition for post-conviction relief.

Conclusion

¶133 For the reasons set forth above, the decision of the trial court is affirmed.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

JON W. THOMPSON, Judge