

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: State of Delaware v. Luis Sierra
I.D. No. 1006013865

Submitted: March 18, 2011

Decided: April 5, 2011

On Defendant Luis Sierra's Motion to Suppress.

DENIED.

Dear Counsel:

INTRODUCTION

In this capital murder case, Defendant Luis Sierra's ("Defendant") Motion to Suppress arises from a witness's June 15, 2010 out-of-court identification of Defendant as the perpetrator of a murder; the witness was shown an array of six photographs and identified Defendant as the perpetrator. Defendant argues that this photographic array was unduly suggestive, in violation of his due process rights.

Upon review of the facts, the law, and the parties' submissions, Defendant's Motion to Suppress is **DENIED**.

FACTS AND PROCEDURAL HISTORY

On June 12, 2010, the Wilmington Police responded to the scene of a homicide.¹ During the course of the investigation, an unidentified witness ("Witness") was located and transported to the police department for an interview; at the time of the murder, Witness was in the driver's seat of a vehicle, while the victim was standing adjacent to the passenger side of the vehicle.² The victim was engaging in a drug transaction with Defendant and other suspects, but the exchange deteriorated into a drug robbery; during this robbery, the victim was shot and killed.³

On June 14, 2010, a suspect was detained by the police; this suspect offered a statement identifying Defendant as a perpetrator to the murder, and this suspect identified Defendant from a six photograph array.⁴ The police then presented the same six photograph array to Witness, who also identified Defendant as a perpetrator.⁵

A suppression hearing was held on January 24, 2011. During this hearing, the State called Detective Michael Gifford, of the Wilmington Police Department.⁶ Detective Gifford testified that Witness described Defendant as follows:

[Witness] later described two more [perpetrators], one of which was later identified as [Defendant], as a very light-skinned black male, about 22 to 25 years of age, medium build, about five 10 to five 11, a full shaped-up chin-strapped beard, dark shirt wrapped around his head, armed with a revolver, wearing a white t-shirt.⁷

¹ Def.'s Mot. to Suppress at 1.

² *Id.*

³ *Id.* at 1-2.

⁴ *Id.* at 2.

⁵ The photographic array was also shown to another witness, but that witness did not identify anyone in the array. *Id.* at 3.

⁶ Transcript of Hearing of Jan. 24, 2011 at 5 [hereinafter "Tr. at ___"].

⁷ *Id.* at 7.

Based on this description, Detective Gifford generated a photo array through the computer program called “Image Query;” this program was created by the Delaware State Police.⁸ Detective Gifford described the process of generating the lineup as follows:

[Y]ou enter the name of the subject that is your target of your investigation. For instance, it was entered Luis Sierra. At that point in time, a picture comes up of Luis Sierra. Based on that, you click on his photo and then blocks come in. For instance, Luis Sierra has a beard, so I want subjects with a beard, brown eyes, whatever the case may be, within a certain age range. I believe they automatically set a[n] age parameter. I believe it’s plus or minus three years. It’s set with the computer. You can extend that.

At that point in time, after those characteristics are entered, you hit select. Six windows pop up. One of those windows will be Luis Sierra, which is in a red bock. Then there will be five other pictures. If the pictures do not match, for instance, they have a goatee instead of a beard, you click on that picture and another one comes up. And you keep clicking through the pictures until either you run out of pictures or until you find the ones that closely resemble that person.⁹

After the instant photographic array was produced, Detective Gifford presented it to Witness; Detective Gifford testified that, “within possibly three seconds,” Witness identified Defendant as the perpetrator.¹⁰

CONTENTIONS OF THE PARTIES

Defendant argues that the array shown to Witness was “unduly suggestive and that, under the totality of the circumstances, the witness’s in-court identification would be unreliable.”¹¹ Defendant notes that the Court must engage in a two-tiered analysis to determine: 1) whether the out-of-court identification was impermissibly suggestive, and 2) if the array was unduly suggestive, whether the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.¹² Defendant contends that, before allowing Witness to

⁸ *Id.* at 8.

⁹ *Id.* at 11.

¹⁰ *Id.* at 12.

¹¹ Def.’s Supplemental Br. at 2.

¹² Def.’s Mot. to Suppress at 3-4.

make any in-court identification of Defendant, the Court must determine if such identification would be reliable if Witness's out-of-court identification was the product of an unduly suggestive photographic array.¹³ Defendant notes the five factors to consider when determining the reliability of a witness's in-court identification: 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 witness and the confrontation.¹⁴

With respect to his argument that the photographic array is suggestive, Defendant makes the following points: 1) witness described the suspect as a "light skinned black male with a chin strap beard," and only Defendant and one other individual in the array were "light skinned black males;" 2) based on the ethnic and facial features of the individuals in the array, there are only four photographs of individuals consistent with Defendant's ethnic and facial features; 3) Defendant facial characteristics are dissimilar with three other individuals in the lineup in that three other individuals have either a full head of hair or a receding hairline, which would "tend to make [Witness] focus on 1, [Defendant], and 6 because they have similar facial feature[s] and hair;" 4) the individual in photograph number one should be eliminated because he is not looking directly at the camera, and given that Witness described the suspect as having brown eyes, witness "would likely ignore number 1 when try[ing] to identify his eyes because he is not looking directly at the camera;" 5) the photograph of Defendant "shows more of his beard, neck and shoulders giving that photograph more emphasis on his beard."¹⁵ In short, Defendant argues that "only one of the six photographs depicts an individual who[se] facial characteristics match the description of [Defendant] given by [Witness]."¹⁶

With respect to the reliability factors cited by Defendant, Defendant asserts as follows: 1) Witness had "little or no interaction" with Defendant; 2) Witness told police he did not know about the drug transaction or participate in the drug transaction, consequently, "it can be inferred he didn't pay much attention to the suspects when they were discussing the drug deal with the

¹³ *Id.* at 4.

¹⁴ *Id.* (citing *Neil v. Bigger*, 409 U.S. 188, 199 (1972)).

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 6.

victim;” 3) Witness’s description of Defendant is not accurate given that Witness described Defendant as a “light skinned black male,” although Defendant is a Hispanic male; 4) the State has not produced any discoverable material that addresses Witness’s level of certainty; and 5) the crime “lasted only a minute or two so the interaction was brief.”¹⁷ Thus, Defendant contends that allowing Witness to make an in-court identification of Defendant “will create a substantial likelihood of irreparable misidentification.”¹⁸

The State responds that “the pictures are all of light skinned males, brown eyes, of the same approximate age with beards and less defined mustaches.”¹⁹ The State argues that, unless a photographic array “directs a witness’s attention to a particular photo, and in effect says ‘this is the man,’” the array is not unduly suggestive.²⁰ With respect to Defendant’s specific points alleging that the array was unduly suggestive, the State notes as follows: 1) the lineup contains no indication of the ethnic origin of any person within the array; 2) the hair characteristics are irrelevant to the identification, as the witness described Defendant as having a shirt wrapped around his head and would not be evaluating the photographs for hair features; 3) there is apparently no case law on the issue that the individual in photograph one was not looking directly at the camera, but, “[s]uffice it to say photograph 1 is a light skinned male with brown eyes and a beard and a less defined mustache and the fact that photograph 1’s brown eyes are not looking straight at the camera does not make it unduly suggestive;” and 4) there is no authority to support Defendant’s allegation that a photograph that may not show the bottom portion of the beard is *per se* unduly suggestive.²¹ In essence, it is the State’s position that the photographic array “contained photographs that were fairly representative of the defendants’ physical features and thus sufficient to reasonably test identification.”²²

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 8.

¹⁹ State’s Resp. at 3.

²⁰ *Id.* (citations omitted).

²¹ *Id.* at 3-5.

²² *Id.* at 5. *See also* State’s Supplemental Br. at 3 (“In conclusion, the photo lineup of [Defendant] contained photographs that were fairly representative of the defendant’s physical features and thus sufficient to reasonably test identification.”).

STANDARD OF REVIEW

An identification procedure “will not pass constitutional muster where it is ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’”²³ The bare fact that an identification process is suggestive is insufficient to give rise to a due process violation; rather, “the unnecessarily suggestive identification procedure must also carry with it the increased danger of an irreparable misidentification.”²⁴ Even when a line-up is impermissibly suggestive, if it is reliable, evidence of the identification will not be excluded at trial.²⁵

As a threshold question, the Court must first ascertain if the identification was the result of impermissibly suggestive procedures. There is no due process violation if the identification procedure was not suggestive;²⁶ such a determination is “invariably fact-driven.”²⁷

Assuming that an identification procedure was impermissibly suggestive, the Court must then determine the reliability of the identification; factors to consider include:

the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of [the witness’] prior description of the criminal, the level of certainty demonstrated [by the witness] at the confrontation, and the length of time between the crime and the confrontation.²⁸

²³ *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

²⁴ *Id.* (citing *Manson v. Braithwaite*, 432 U.S. 98 (1977)).

²⁵ *Id.*

²⁶ *Martin v. State*, 561 A.2d 993, *1 (Del. 1989).

²⁷ *Richardson v. State*, 673 A.2d 144, 147 (Del. 1996).

²⁸ *Id.* at 148 (quoting *Manson*, 432 U.S. at 114); *see also Walls v. State*, 560 A.2d 1038, 1042 (Del. 1989) (“Once the trial judge determines that a pretrial identification of a defendant is impermissibly suggestive, a question is always raised about whether a subsequent in-court identification of the same person is tainted and rendered unreliable.”); *Collier v. State*, 549 A.2d 699, *3 (Del. 1986) (“The first issue which must be determined, therefore, was whether, in view of the totality of circumstances, the manner in which the photographic array was composed was impermissibly suggestive. In so doing, we conclude the Court need not address the second issue, that of the reliability of the identification, because we do not find that there was anything impermissibly suggestive about the photographic array or the manner in which it was handled.”).

Ultimately, “[t]he resolution of [the reliability of a pretrial identification] requires a determination, by the trial judge[,] of ‘whether under the “totality of the circumstances” the [in-court] identification was reliable even though the [prior] confrontation procedure was suggestive.’”²⁹

DISCUSSION

The Court has reviewed the instant photographic array. Although there are (necessarily) slight variations in the physical characteristics of each individual depicted, this Court concludes that the array was not “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”³⁰

As stated, determinations on the alleged suggestive nature of a photo array are “invariably fact-driven.”³¹ However, Delaware case law provides some guidance in evaluating a photo array. In *Barnard v. State*, the witness, a Wilmington Police officer, described the perpetrator as “a dark complected black male with corn rows and some kind of beard.”³² The defendant alleged that the photo array shown to the officer was unduly suggestive because, of the six individuals depicted, the defendant was the only one with braids (or “corn rows”).³³ This Court found that the array was not unduly suggestive, and that determination was affirmed by the Supreme Court of Delaware.³⁴ In concluding that this Court had not abused its discretion, the Supreme Court noted this Court’s findings that “the braids were not very noticeable” and “the persons in the array had very similar facial characteristics.”³⁵

Defendant’s reliance on *State v. Mullins* is misplaced.³⁶ In *Mullins*, the Court observed that “four out of six photographs [in the array] did not resemble the victim’s description [of the defendant] at all.”³⁷ By contrast, in this case, all of the photos resemble Witness’s description of Defendant’s

²⁹ *Walls*, 560 A.2d 1042 (quoting *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

³⁰ *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

³¹ *Richardson v. State*, 673 A.2d 144, 147 (Del. 1996).

³² 879 A.2d 602, *2 (Del. 2005).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 1999 WL 169350 (Del. Super. Ct. 1999).

³⁷ *Id.* at *3.

physical characteristics. Further, in *Mullins*, three of the individuals depicted were “significantly older” than Defendant,³⁸ whereas in this Case, Detective Gifford testified that the computer program selected only individuals within three or five years of Defendant’s age, based on Defendant’s date of birth.³⁹

In the instant lineup, all individuals depicted have very similar skin tone and facial characteristics.⁴⁰ Put simply, Defendant’s contention that “four of the five individuals personally selected [to be included in the array] by [Detective Gifford] are not similar in appearance” to Defendant is belied by the array.⁴¹ Thus, this Court rejects Defendant’s first three contentions, asserting, in essence, that the individuals depicted have appreciably disparate skin complexion, facial characteristics, and apparent ethnic origins.⁴²

Moreover, all individuals depicted in the array have beards; in fact, photos one, two (Defendant), five, and six have strikingly similar beards.⁴³ Likewise, the photos in the array are virtually identical in scale and orientation; that is, each photo shows approximately the same proportion of the individual’s face and shoulders.⁴⁴ Therefore, this Court rejects Defendant’s contention that the “shows more of [Defendant’s] beard, neck and shoulders giving that photograph more emphasis on his beard.”⁴⁵

Finally, the State appears to be correct in that there is no Delaware case law addressing Defendant’s assertion that photo one should be eliminated from consideration based on the direction in which that individual is looking.⁴⁶

³⁸ *Id.* (“Indeed, photos 1, 2, and 5 are of individuals eleven years older, eight years older, and six years older than the victim’s estimated age of her assailant. The individuals depicted are appear to be much older than sixteen years old.”).

³⁹ Tr. at 51.

⁴⁰ Def.’s Mot. to Suppress Ex. A.

⁴¹ Def.’s Supplemental Br. at 4.

⁴² Def.’s Mot. to Suppress at 4.

⁴³ *See id.* Ex. A.

⁴⁴ Although it is arguable that photos two (Defendant) and three show a marginally greater proportion of the individuals’ shoulders, this distinction is virtually imperceptible. *See id.* In no sense could this distinction be considered to “give rise to a very substantial likelihood of irreparable misidentification.” *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (citation omitted).

⁴⁵ Def.’s Mot. to Suppress at 3-5.

⁴⁶ *See State’s Supplemental Br.* at 3. This Court also notes that, even if *arguendo* Defendant’s contention was meritorious and the direction of photo one’s eyes compromised its utility in this array, the Supreme Court has found that a photo array

Nonetheless, this Court notes that the individual depicted in photo one has similar skin tone complexion, facial characteristics, hair characteristics, and facial hair characteristics as Defendant.⁴⁷ Further, notwithstanding the fact that this individual's eyes are cast to the left, the viewer is still afforded a clear and complete image of this individual's eye color and shape. Thus, Defendant's contention is without merit.

In short, the instant photo array discloses that Defendant's image was contained within an array of five other individuals of quite similar physical characteristics. There is nothing to support the contention that the instant array was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁴⁸ Indeed, this Court finds that the array was not suggestive, much less "impermissibly suggestive."⁴⁹ It necessarily follows that there was no "increased danger of an irreparable misidentification,"⁵⁰ and, consequently, no due process violation.⁵¹

consisting of only three individuals is not unduly suggestive. *Galloway v. State*, 840 A.2d 641, *1 (Del. 2004) ("The trial court acknowledged that the presentation of only three photographs was suggestive, but determined that it was not unduly suggestive under all the circumstances. . . . We agree with the trial court's analysis."). Indeed, the Supreme Court has very recently confirmed that, under certain circumstances, an array consisting of only one photo is not necessarily impermissibly suggestive. *Chattin v. State*, 2011 WL 987752, *3 (Del. 2011) ("[The defendant] claims that the identification procedure using a single photograph was unduly suggestive. [The defendant's] claim is without merit. [The identifying witness] was an eyewitness to the November 8, 2008 shooting. He identified [the defendant] three times: in his initial statement to police, at the hospital when shown the photograph, and when testifying at trial. The record reflects little likelihood that the single photograph photo identification led to a misidentification."). In the instant case, even if photo one was eliminated from consideration, this array would still contain five photos, all of which depict individuals similar in appearance. *See supra* text accompanying note 40.

⁴⁷ Def.'s Mot. to Suppress Ex. A.

⁴⁸ *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

⁴⁹ *Id.* (citation omitted).

⁵⁰ *Id.* (citing *Manson v. Braithwaite*, 432 U.S. 98 (1977)).

⁵¹ *See supra* text accompanying note 26.

For the reasons stated above, Defendant has not established that the instant photo array was so impermissibly suggestive as to amount to a violation of due process. Accordingly, Defendant's motion to suppress is **DENIED**.⁵²

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary

⁵² Having found that the instant photo array was not impermissibly suggestive, this Court need not reach the issue of the reliability of the identification. *See supra* text accompanying note 26.