IN THE COURT OF APPEALS OF IOWA

No. 1-702 / 10-2090
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELVIS CESAR MEDRANO,
Defendant-Appellant.

Appeal from the Iowa District Court for Buena Vista County, Charles K. Borth, District Associate Judge.

Elvis Medrano appeals from his conviction of assault causing bodily injury.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, David Patton, County Attorney, and James M. McHugh, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

SACKETT, C.J.

Elvis Medrano appeals from his conviction of assault causing bodily injury. He contends the court erred in denying his motion to suppress a photographic identification array as impermissibly suggestive. He also contends the evidence he was the perpetrator or that the victim suffered a bodily injury was insufficient to support the jury's verdict. We affirm.

Background Facts and Proceedings. Around midnight on October 8-9, 2010, Jason Page, a cab driver, picked up a fare in the Alta, Iowa, area and took him to Don Pepe's bar in Storm Lake. Page described the fare as a Hispanic man in his late twenties or early thirties who said his name was Elvis. Around 2:00 a.m., Page was called to pick Elvis up. Page took Elvis to La Juanita's restaurant. Elvis asked Page to return later to pick him up. Page left to pick up another fare at Buena Vista University and took him to La Juanita's. After that fare paid and left Page's cab, Page noticed a man lying on the sidewalk. Doing a double take, Page noticed Elvis either taking off or putting on his shirt. Page called to Elvis from the cab. Elvis walked over, got into the cab, and asked to return to Alta. Page asked if they could wait a minute because he had another fare for Alta, but Elvis said he needed to go because he had just knocked someone out. As they left, Page asked Elvis what had happened and Elvis replied that he had hit someone because that person was "talking smack" about Mexicans.

Nicholas Philips came out of La Juanita's to smoke a cigarette and saw two men fifteen or twenty feet away, arguing in Spanish. He turned to look in the

window of La Juanita's and heard a punch. When he turned back, one man was lying on the ground. The other man walked toward Philips, who asked what happened. The man said the person on the ground had been talking crap about Mexicans. About that time, Page's cab arrived, Page spoke to the man who then got into the cab, and left. Philips went to help the man on the ground; others came to help, too. The man was lying on his back and there was a lot of blood from the back of his head. When a police car came by a few minutes later, Philips flagged it down. Philips explained to the officer what happened, then left for about twenty to thirty minutes.

Philips later went to the police station, where he was shown a photo array[1] and identified the defendant as the man who had been arguing and who left in the cab.

As Page was driving Elvis toward Alta, the dispatcher called on the cab's radio to ask if Page had picked up a fare in front of La Juanita's. Page said yes. The dispatcher asked Page had dropped the person off yet. Page said no. The dispatcher asked where the person was going. Page said he was heading to Alta, but didn't have an address. The dispatcher asked Page if he knew the person's name. Elvis gestured to Page. Page told the dispatcher he did not know the person's name. The dispatcher then confirmed the person was still in the cab. Page said yes. Then Page heard the dispatcher speaking to the police

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[1] Lt. David Doebel of the Storm Lake police talked with Philips and Page at the scene. From Page he got the name Elvis and a description of the person in the cab. From Philips he got a more general description. He returned to the station and "put together the lineup with Elvis and also three other individuals that were similar to him." Lt. Doebel showed the photo array to Philips, but Officer Anderson showed the array to Page.

and telling them the person they were looking for was still in the cab. Before the cab reached Alta, Elvis told Page to stop and let him out. Elvis then walked toward a field at the back of a building. Page left and reported to the dispatcher where he had dropped Elvis off. He later went to the police station, where he was shown a photo array[2] and identified the defendant as the person who had been in his cab. Page told the police he was seventy percent sure of his identification.

On October 10, police arrested Elvis Medrano. He denied having been at La Juanita's the night in question. He said he took a cab to go home in Alta, but the cab driver stopped part way there and ordered him out of the cab.

On December 6, Medrano filed a motion to suppress the photo lineup and corresponding identification, contending none of the other photos in the array were reasonably similar to the defendant and the photo array was impermissibly suggestive, giving rise to a substantial likelihood of irreparable misidentification. Following a hearing on December 7, the court denied the motion to suppress. After discussing the similarities and differences in the four photos, the court concluded the array was not impermissibly suggestive. Further, the court concluded the photo array did not give rise to a substantial likelihood of irreparable misidentification because two separate witnesses identified the defendant from the photos and the defendant's inclusion in the photo array was not based on a physical description given by witnesses, but on statements the suspect said his name was Elvis and he had recently been released from prison.

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[2] Page viewed the same photo array put together by Lt. Doebel as Philips viewed, but Officer Anderson showed Page the array.

A jury trial was held on December 14-15. The jury found Medrano guilty. The court sentenced Medrano to time served and a fine, which the court suspended.

Scope and Standards of Review. Concerning the motion to suppress, because Medrano claims his constitutional rights were violated by the photo array, we review the record de novo based upon the totality of the circumstances. *State v. Manna*, 534 N.W.2d 642, 643 (Iowa 1995); *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995). In our review of the district court's ruling on defendant's motion to suppress, we consider both the evidence presented during the suppression hearing and that introduced at trial. *Cook*, 530 N.W.2d at 731.

We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 6.907; *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999). We will uphold a finding of guilt if "substantial evidence" supports the verdict. *Pace*, 602 N.W.2d at 768. "Substantial evidence" is evidence from which a rational finder of fact could find a defendant guilty beyond a reasonable doubt. *Id.* We review the evidence in the light most favorable to the State. *Id.* We consider not only evidence that supports the verdict, but all reasonable inferences that may be derived from the evidence. *Id.*

Merits. *Motion to Suppress.* The defendant contends the district court erred in denying his motion to suppress the photographic lineup as impermissibly suggestive. The motion to suppress alleged "none of the photos of the three other individuals were reasonably similar to the defendant," and "[a]s a result, the

photo lineup was impermissibly suggestive, and such irregularity gave rise to a substantial likelihood of irreparable misidentification."

In denying the motion to suppress the district court concluded:

> The court concludes this display was not impermissibly suggestive. It consisted of four separate photos. All four photos are of similar quality. All appear to show Hispanic males. Three of the four appear to show individuals of approximately the same age and size. While photos one and two contain some definite distinguishing features from Defendant, photo three is substantially similar to Defendant.

The Iowa Supreme Court has described the analysis to apply to challenges to out-of-court identifications as follows:

> We use a two-step analysis of challenges to out-of-court identifications. First, we decide whether the procedure used for the identification was impermissibly suggestive. If we find that it was, we must then decide whether "under the totality of [the] circumstances the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." The critical question under the second step is whether the identification was reliable. . . .
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> On the question of reliability, we give weight to five factors: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

State v. Taft, 506 N.W.2d 757, 762-63 (Iowa 1993) (internal citations omitted). The court has applied this test to challenges under both the United States and Iowa Constitutions. *Id.*

At trial, Lt. David Doebel of the Storm Lake police department testified he talked with Nick Philips and Jason Page at the scene. From Page he got the name Elvis and a description of the person in the cab. From Philips he got a more general description. He returned to the station and "put together the lineup

with Elvis and also three other individuals that were similar to him." The photos were full-page, black and white. Philips came to the station and viewed the photos. Doebel described the procedure.

> I gave him the photo lineup which consisted of four individuals. Elvis Medrano was the third individual in the lineup. They were—the lineup was a full-page photo of an individual. He turned the page, there was the next person up to four. He looked at the first one, looked at the second one, looked at the third one, who was Elvis. Looked like he was going to say "this is the guy." Then he looked at the fourth one, turned back, said "this is the guy. He pointed out Elvis Medrano

Doebel was not present when the photo array he prepared was shown to Page. Officer Anderson showed the photo array to Page less than an hour and a half after Page was interviewed at the scene. Page identified the defendant. Anderson asked him about how certain he was of the identification and Page said seventy percent.

On appeal, as in his motion to suppress, Medrano argues the array of four photos was impermissibly suggestive because two of the four individuals are "very dissimilar" from the other two and the first two photographs "are so unlike the defendant's photograph that they are not valid for determining the witness's ability to identify the subject." He contends the officers "essentially presented the witnesses with a two photograph lineup."

In *State v. Neal*, 353 N.W.2d 83, 88 (Iowa 1984) the defendant challenged the photo array as impermissibly suggestive because his photo was the only one of an individual of the same height as the perpetrator, only his photograph fit the description of the hairstyle and hair length furnished by the victim, and the facial characteristics of the other individuals varied significantly from his. Our supreme

court did not find the variance in hairstyle, hair length, or facial characteristics merited discussion. *Id.* The court determined the fact that only the defendant was in the height range of the perpetrator did not render the array suggestive. *Id.* The court noted that "even rather startling differences between defendant's characteristics and those of others depicted in a photo display have not resulted in a finding of suggestiveness." *Id*.[3]

In the photo array before us, all the individuals appear to be Hispanic men. They have varying amounts of facial hair, but two photos show individuals with goatees. Three of the four photos show men of the approximate age range of the perpetrator. Lieutenant Doebel said he chose three other individuals "that looked like him" for the array, so he made an attempt to harmonize the photo array. *See State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987). There is no

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[3] The court viewed these cases as supporting its conclusion on suggestiveness:

> *United States v. Mefford*, 658 F.2d 588 (8th Cir. 1981), *cert. denied*, 455 U.S. 1003, 102 S. Ct. 1636, 71 L. Ed. 2d 870 (1982) (suspect was only man in lineup who was within age range described by witness); *United States v. Smith*, 602 F.2d 834 (8th Cir.), *cert. denied*, 444 U.S. 902, 100 S. Ct. 215, 62 L. Ed. 2d 139 (1979) (suspect only person in blue bib overalls matching description of robber); *Haberstroh v. Montanye*, 493 F.2d 483 (2d Cir. 1974) (in display of three photographs, only suspect matched the description); *United States v. Harrison*, 460 F.2d 270 (2d Cir.), *cert. denied*, 409 U.S. 862, 93 S. Ct. 152, 34 L. Ed. 2d 110 (1972) (that defendant was only clean-shaven individual in photo array was not necessarily striking difference as to make him stand out prominently from others); *United States v. Bostic*, 360 F. Supp. 1300 (E.D. Pa.), *aff'd*, 491 F.2d 751 (3d Cir. 1973) (only suspect's photo showed scar on forehead); *Caylor v. State*, 155 Ga. App. 489, 270 S.E.2d 924 (1980) (suspect was only person with cut on nose in photo array but victim said not a factor in identification); *Aker v. State*, 403 N.E.2d 847 (Ind. App. 1980) (suspect was only person shown with a beard but four others had mustaches); *Commonwealth v. Mobley*, 369 Mass. 892, 344 N.E.2d 181 (1976) (suspect's photo was the only one with ski cap similar to one worn by robber).

Neal, 353 N.W.2d at 88.

indication either Lt. Doebel or Officer Anderson conducted the identification in a suggestive manner, such as providing assistance, *see State v. Birch*, 479 N.W.2d 284, 287 (Iowa 1991), naming[4] the suspect, *see Neal*, 353 N.W.2d at 87, or showing the witnesses only one photo, *see State v. Salazar*, 213 N.W.2d 490, 493 (Iowa 1973).

In fact, Lt. Doebel's testimony highlights one aspect of the police procedure that we believe contributes to the accuracy of the identification. His testimony indicates that officers showed the photographs to the witnesses one at a time, rather than all at once. In his brief, Medrano cites to a law review article authored by Iowa State University psychology professor Gary Wells, a recognized expert on eyewitness identification. *See* Gary L. Wells, *Eyewitness Identification: Systematic Reforms*, 2006 Wis. L. Rev. 615 (2006). In that article, Wells recommends that police departments follow a sequential lineup procedure rather than showing witnesses a simultaneous array of possible suspects. *Id*. at 625. Professor Wells explains why the sequential method may reduce misidentifications:

> The psychological experience for the eyewitness is dramatically different using the sequential procedure than it is using the simultaneous procedure. Using the sequential procedure, the eyewitness cannot simply compare one photo to another and decide who looks the most like the offender relative to the others. Although the eyewitness can mentally compare the current photo to those presented previously, the eyewitness cannot be sure what the next photo will look like; maybe the next one will look even more like the offender.

Id. at 625-626.

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[4] In fact, the name "Elvis" was provided by the witness, Jason Page, not the police.

Although only one other individual closely resembles the defendant, when we compare the array before us with the types of differences courts have found not to be suggestive, we conclude the photo array and the identification procedure were not impermissibly suggestive, especially in light of the sequential method used to display the photographs.

Because we have determined the procedure used for identifying the defendant was not impermissibly suggestive, we do not reach the second step in the analysis—"whether under the totality of the circumstances, the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). The identification evidence and its shortcomings or credibility properly were for the jury to weigh. *See Neal*, 353 N.W.2d at 87. We affirm the district court's denial of Medrano's motion to suppress the identification.[5]

Sufficiency of the Evidence. Medrano also contends there was insufficient evidence to support the verdict. He challenges both the evidence that he was the perpetrator and that the victim suffered "bodily injury."

A. Bodily Injury. The jury was instructed the State had to prove the defendant's acts "caused a bodily injury" to the victim, which the court defined as "physical pain, illness, or any impairment of physical condition." Medrano argues there is not sufficient evidence the injury sustained by the victim was a "bodily injury." He acknowledges there was evidence the victim was bleeding from the

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[5] No challenge was made at trial, or in this appeal, to the in-court identification of the defendant by the cab driver, Jason Page, so we need not consider whether the in-court identification had an "independent origin." *See State v. Webb*, 516 N.W.2d 824, 829 (Iowa 1994); *see also State v. Ash*, 244 N.W.2d 812, 814-15 (Iowa 1976).

back of his head, but contends there was no testimony the victim suffered from any illness or impairment of physical condition and he was so intoxicated that he did not feel any physical pain, or did not say he did.

In adopting the Model Penal Code definition of "bodily injury," which was "physical pain, illness, or any impairment of physical condition," the supreme court explained:

> Bodily injury ordinarily refers only to injury to the body, or to sickness or disease contracted by the injured as a result of injury. Injury includes an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm . . . hurt, damage, or loss sustained.

State v. McKee, 312 N.W.2d 907, 913 (Iowa 1981) (citations and internal quotation marks omitted).

Taking the evidence in the light most favorable to the State, we conclude there is substantial evidence from which a rational jury could find the victim suffered a bodily injury. Nicholas Philips, who was outside La Juanita's when the incident occurred, testified he heard the sound of a punch and something hitting the ground. When he turned, he saw the victim lying on his back on the ground and a lot of blood from the back of his head. Officer Anderson "observed [the victim] lying on his back with his head towards the south, and he was unconscious at that time." He saw "one or two spots of blood on the ground." Lt. Doebel went to the hospital to interview the victim about 5:00 a.m. He testified, "I think they had given him a shot, and he wasn't coherent at that time. He was extremely intoxicated as well, and he did have the head injury." He further testified, "There was an injury to the back of the head. I didn't pull his hair apart to look at it, there was just a lot of blood coming from the back of the head, but

nothing really else stood out." On cross-examination, he stated, "I didn't dig through his hair. There was quite a bit of blood." Officer Diekman tried to interview the victim at the hospital around 7:00 or 8:00 in the morning. He testified, "He didn't respond. As far as a conversation, he kind of moaned and turned his head from side to side." Hospital records showed the victim sustained a head injury in the occipital area.

B. Defendant as the Perpetrator. Medrano argues the State failed to prove he was the person who caused the victim's injuries. Medrano suggests the testimony of Jason Page, the cab driver, and Nicholas Philips, who was outside La Juanita's at the time, should be deemed null because they were impossible, absurd, and self-contradictory. *See State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993). Weighing the credibility of witnesses normally is for the jury. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006).

Page had three different opportunities to observe the person in his cab, whom he identified as the defendant. Page says the person told him his name was Elvis. The passenger also was in a hurry to leave the scene because he said he had just knocked someone out. When the passenger heard the radio calls from the cab dispatcher asking if the passenger was still in the cab, he told Page to stop and let him out in the middle of the countryside, where he disappeared behind a building into a field.

Philips observed the man who left the scene and got into Page's cab only for a matter of seconds, just long enough to hear a punch, hear the victim hit the ground, see the person approaching, ask what happened, and to have the

person say the victim "was talking crap about Mexicans." From our review of the testimony, and considering the variations in the testimony of Page and Philips, we do not find their testimony so inconsistent as to warrant our taking the credibility determination away from the jury. We find substantial evidence in the record from which a rational jury could find the defendant was the person who assaulted the victim.

Summary. The district court did not err in refusing to suppress the photographic array as being impermissibly suggestive. We affirm on this claim. We find substantial evidence from our review of the record from which a rational jury could find the defendant was the person who assaulted the victim and that the victim suffered a bodily injury.

AFFIRMED.