

NO. 23532

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

SIMI TUPUOLA, Defendant-Appellant.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 99-1990)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,  
Ramil, and Acoba, JJ.)

The defendant-appellant Simi Tupuola appeals from the first circuit court's judgment convicting him of and sentencing him for the offense of robbery in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 708-841(1)(a) (1993). On appeal, Tupuola asserts that the pretrial identification procedure employed by police officers -- to wit, the display of a second photographic array to the complaining witness, Richard Moyle, which contained a photograph of Tupuola taken in 1999, after Moyle failed to identify Tupuola from a different photographic array, which contained a photograph of Tupuola taken in 1994 -- was impermissibly suggestive and that, in any event, Moyle's identification of Tupuola was unreliable. Tupuola, therefore, posits that the circuit court erred in denying his motion to suppress the identification.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that the identification procedure was not impermissibly suggestive, inasmuch as the display of two photographic arrays to

Moyle, ten days apart and containing different photographs of Tupuola that were taken five years apart, does not establish that the identification procedure "made it all but inevitable" that Moyle would select Tupuola from the second photographic array. State v. Masaniai, 63 Haw. 354, 365, 628 P.2d 1018, 1025-26 (1981) (quoting Foster v. California, 394 U.S. 440, 443 (1969)). See also State v. Malani, 59 Haw. 167, 578 P.2d 236 (1978) (showing witness a six-photograph array that included defendant's photograph and, subsequently, a twelve-photograph array containing a more recent photograph of defendant not unduly suggestive; witness selected defendant's photograph from both arrays); cf. State v. Kutzen, 1 Haw. App. 406, 409-10, 620 P.2d 258, 260-61 (1980) (use of five-photograph array where witness was to identify four suspects unduly suggestive).

Moreover, even if the identification procedure was impermissibly suggestive, Moyle's identification of Tupuola after viewing the second photographic array remains, nonetheless, sufficiently reliable to be worthy of presentation to and consideration by the jury. Moyle's opportunity to view Tupuola at the time of the robbery was significant; just prior to the robbery he had several "face-to-face" conversations with Tupuola, he looked into Tupuola's face during the robbery as Tupuola took his watch, ring, and money, and observed Tupuola leave the scene after the robbery. Moyle's degree of attention during and after the robbery also favors the reliability of his identification. Moyle's prior description of Tupuola was accurate; he provided a police officer with Tupuola's proper name, his race, and the observation that Tupuola's arms bore homemade tattoos. Moyle's level of certainty in his identification when viewing the second photographic array was absolute, unwavering, and instantaneous.

Moreover, the length of time between the incident and the identification was not so great so as to detract from its reliability. See State v. Araki, 82 Hawai'i 474, 484-85, 923 P.2d 891, 901-02 (1996) (even if two-person field "show-up" identification -- where the suspect and another person were standing at the scene of the crime -- was unduly suggestive, identification was nonetheless reliable); State v. Okumura, 78 Hawai'i 383, 393, 894 P.2d 80, 90 (1995) (in-court identification was unduly suggestive but sufficiently reliable); Masaniai, 63 Haw. at 355-56, 365, 628 P.2d at 1020, 1025-26 (noting that viewing of a line-up by two witnesses who had failed to positively identify defendant from a photographic array previously shown to them "did not undermine the reliability of the lineup identification"); State v. DeCenso, 5 Haw. App. 127, 681 P.2d 573 (1984) (single person show-up identification unduly suggestive but nonetheless reliable).

Therefore,

IT IS HEREBY ORDERED that the first circuit court's judgment of conviction and sentence, filed on May 18, 2000 and from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, March 16, 2001.

On the briefs:

Jon N. Ikenaga (Deputy  
Public Defender), for the  
defendant-appellant,  
Simi Tupuola

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