STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1645

State of Minnesota,
Respondent,

vs.

Ararso Umare Mumad,
Appellant.

Filed October 15, 2018
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-17-2846

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Christina I. Warren, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

A Hennepin County jury found Ararso Umare Mumad guilty of simple robbery based on evidence that he took a person's cell phone in the parking lot of a grocery store.

Before trial, Mumad moved to suppress evidence that the owner of the cell phone identified him in an array of photographs presented by a police officer one day after the robbery. The district court denied the motion. We conclude that the photographic identification procedure was not impermissibly suggestive. Therefore, we affirm.

FACTS

In the late afternoon of January 30, 2017, the Minneapolis Police Department received a report that a man was robbed of his cell phone in the parking lot of a grocery store in south Minneapolis. Two officers drove to the scene and spoke with the man, A.Y. He told the officers that two men approached him, that the taller of the two men hit him in the back and put his hands in A.Y.'s pockets, and that the shorter man, who had a knife in his hand, took his cell phone. The officers arrested the taller man, who still was at the scene. The shorter man had fled before the officers arrived.

Sergeant Ali was assigned to investigate the incident. He reviewed police reports stating that a witness had identified the shorter man as "Ararso." Because Sergeant Ali previously had served as a police officer in the neighborhood of the grocery store, he had a "good idea of who that person might be." Sergeant Ali interviewed the taller man, who was in custody. Sergeant Ali also went to the grocery store to speak with a store employee who had witnessed part of the incident. The store employee told Sergeant Ali that the man who took A.Y.'s cell phone is of Oromo ethnicity, is relatively short, is missing teeth, and is named Ararso. This information strengthened Sergeant Ali's belief that the shorter man who robbed A.Y. was the man named Ararso with whom he was familiar, Ararso Mumad.

The day after the incident, Sergeant Ali went to A.Y.'s home to interview him and ask him whether he could identify the shorter man in an array of photographs. Before doing so, Sergeant Ali compiled photographs of five men with characteristics similar to Mumad. He did so using an existing photograph of Mumad and a software program that found other booking photographs of men without glasses and with similar skin tone, complexion, hair color, and facial hair. When Sergeant Ali met with A.Y., he told A.Y. that the suspect may or may not be in the photographic array and allowed A.Y. to view each photograph, one at a time. A.Y. said that the man in the sixth photograph in the array was the shorter man who robbed him. The sixth photograph was a photograph of Mumad.

On February 2, 2017, the state charged Mumad with simple robbery, in violation of Minn. Stat. § 609.24 (2016). The state later amended the complaint to add a charge of first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subd. 1 (2016).

Before trial, Mumad moved to suppress the evidence of A.Y.'s pre-trial identification of him as the shorter man who robbed him. Mumad argued that A.Y.'s identification of his photograph was flawed because Sergeant Ali did not follow proper procedures when presenting the array of photographs to A.Y. At an omnibus hearing, the state presented the testimony of Sergeant Ali, who testified, as described above, about his investigation, his presentation of the photographic array to A.Y., and A.Y.'s identification of Mumad as the shorter man who robbed him. After considering the parties' letter briefs, the district court denied Mumad's motion. The district court reasoned that the photographic array was not unnecessarily suggestive.

The case was tried to a jury over three days in June 2017. The state called four witnesses: A.Y., the store employee who witnessed part of the incident, one of the police officers who responded to the initial report, and Sergeant Ali. Mumad did not testify and did not introduce any other evidence. The jury found Mumad guilty of simple robbery but not guilty of first-degree aggravated robbery. The district court sentenced Mumad to 33 months of imprisonment. Mumad appeals.

D E C I S I O N

Mumad argues that the district court erred by denying his motion to suppress evidence of A.Y.'s pre-trial identification of Mumad as the shorter man who robbed him.

A pre-trial identification of a defendant is inadmissible if the procedure that led to the identification "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968); *see also State v. Roan*, 532 N.W.2d 563, 572 (Minn. 1995). This rule of exclusion is analyzed in two steps. *See Manson v. Brathwaite*, 432 U.S. 98, 110, 97 S. Ct. 2243, 2251 (1977); *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). The first question is whether the identification procedure was impermissibly suggestive, an inquiry that "turns on whether the defendant was unfairly singled out for identification." *Ostrem*, 535 N.W.2d at 921. If the identification procedure was impermissibly suggestive, a second question arises: whether the identification is nonetheless reliable when considered as part of the totality of the circumstances or, on the other hand, whether the identification created "a very substantial likelihood of irreparable misidentification." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted). This court applies an abuse-of-

discretion standard of review to a district court's ruling on the admissibility of identification evidence. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

In this case, Mumad argues that the procedure used by Sergeant Ali was impermissibly suggestive in two ways: first, that the photographic array was not limited to men of the same ethnicity, and, second, that the photographic array was not administered using the "double blind" approach.

A.

Mumad first contends that Sergeant Ali "failed to ensure that the photographic array consisted of men who were of East African descent, and more accurately, Oromo." Mumad did not make this argument to the district court in his letter brief. Instead, he argued that Sergeant Ali assembled photographs based on his own knowledge of Mumad's appearance, not on the descriptions provided by witnesses. The district court nonetheless found that the photographs in the array "are sufficiently similar and nothing about the Defendant's photograph makes it stand out more than the other photographs."

In presenting a photographic array to an eyewitness, an officer must avoid any suggestion that "unfairly single[s] out" any particular person. *Ostrem*, 535 N.W.2d at 921. A law-enforcement officer "need not use 'exact clones' of the accused" and need not "exactly follow the description of the suspect." *Roan*, 532 N.W.2d at 572. It is sufficient that the photographs in an array have a "reasonable physical similarity to the accused." *Seelye v. State*, 429 N.W.2d 669, 672-73 (Minn. App. 1988). The caselaw does not require that all photographs in an array be of persons of the same race or ethnicity as the suspect. *See State v. Yang*, 627 N.W.2d 666, 674 (Minn. App. 2001) (concluding that photographic

array was not impermissibly suggestive where defendant was only Hmong person among five Asian persons), *review denied* (Minn. July 24, 2001); *Seelye*, 429 N.W.2d at 672-73 (concluding that photographic array was not impermissibly suggestive where defendant was only American Indian alongside Caucasians with sufficient physical resemblance among them); *see also State v. Caya*, 519 N.W.2d 419, 422-23 (Iowa Ct. App. 1994) (concluding that photographic array was not unduly suggestive where defendant was of mixed race because four of six persons had similar skin tone and hair); *State v. Jaeb*, 442 N.W.2d 463, 466 (S.D. 1989) (concluding that photographic array was not unduly suggestive where defendant and two others were Native American and because five persons had similar age, hair, and complexion).

Our review of the photographs in the array, which were exhibits at the motion hearing, confirms the district court's finding that the other photographs in the array are of persons who are reasonably similar to Mumad in physical appearance. All five of the other photographs in the array are of men who are quite similar to Mumad in age, skin tone, hairstyle, lack of facial hair, and general appearance. Given the argument made by Mumad in the district court and the evidence in the record, the district court did not err by concluding that the photographic array was not unduly suggestive on the ground that it did not include more photographs of men of an East African ethnicity.

B.

Mumad also contends that the photographic identification procedure was flawed because Sergeant Ali both selected the photographs and presented them to A.Y. Mumad contends that Sergeant Ali should have employed the so-called "double blind" approach,

in which the officer who presents the photographic array to the suspect is unaware of which photograph is the actual suspect. Again, Mumad did not make this argument to the district court in his letter brief. Nonetheless, the district court commented, "It may have been preferable for a different officer to conduct the lineup . . . ." But the district court concluded that "there is nothing improper or suggestive" about the manner in which Sergeant Ali presented the photographic array to A.Y.

Sergeant Ali testified at the motion hearing that he selected the photographs and that he alone went to A.Y.'s home to administer the photographic array. Mumad's attorney did not develop evidence concerning whether Sergeant Ali should have done otherwise. Later, at trial, Sergeant Ali testified on direct examination that he was aware of the policy of the Minneapolis Police Department that generally requires a division of labor between the officer preparing a photographic array and the officer who presents it to an eyewitness so that the officer presenting the array does not know which photograph is the suspect and, thus, is unable to unfairly influence the eyewitness. But Sergeant Ali also testified at trial that the policy contains an exception for the situation in which no other officer is available. Sergeant Ali testified at trial that he did not utilize the double-blind approach because he could not find another officer who did not already know that Mumad was the suspect. But Mumad did not introduce this evidence at the motion hearing.

Although the double-blind approach is preferred by the Minneapolis Police Department, it is not required by the caselaw concerning restrictions on photographic identification procedures. *See State v. Ferguson*, 804 N.W.2d 586, 605 (Minn. 2011) (P.H. Anderson, J., concurring). Accordingly, the photographic array in this case is not

impermissibly suggestive simply because Sergeant Ali both prepared the array and presented the photographs to A.Y. In addition, the absence of any inappropriate suggestion by Sergeant Ali is discernable in the audio-recording of his conversation with A.Y., which was admitted into evidence at the motion hearing. That evidence reveals that Sergeant Ali presented the photographs to A.Y. in a folder and allowed A.Y. to view only one photograph at a time. The district court stated, "Based on the audio recording of the lineup and in-court testimony, Detective Ali did not conduct the lineup in a way that unnecessarily singled out the Defendant." Having listened to the audio-recording and reviewed the transcript, we conclude that the district court did not abuse its discretion in making that determination.

Thus, the district court did not err by determining that the photographic identification procedure was not impermissibly suggestive. In light of that determination, it was unnecessary for the district court, and is unnecessary for this court, to consider whether the photographic identification procedure created a very substantial likelihood of irreparable misidentification. In sum, the district court did not err by denying Mumad's motion to suppress the state's evidence of A.Y.'s pre-trial identification.

Affirmed.