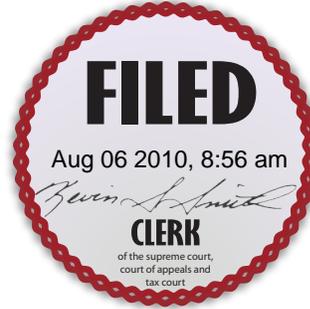


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JULIAN D. GRADY,)
)
Appellant/Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee/Plaintiff.)

No. 02A04-1004-CR-210

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0902-FB-22

August 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Julian D. Grady appeals following his conviction for Robbery,¹ a Class B felony, and Pointing a Firearm,² a Class D felony. Grady contends that the trial court committed fundamental error in admitting the witnesses' pre-trial photo array and subsequent in-court identifications of Grady because the identifications were unduly suggestive. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 22, 2008, Benjamin Busbee, Angela Day, and Andrea Simon were in a store named "Twenty Past Four" in Fort Wayne, Indiana. Busbee and Day were at the store to assist Simon, Busbee's mother, who managed the store. Shortly thereafter, Grady and another male entered the store with firearms and proceeded to rob the store. Grady was "much taller" than the other perpetrator and wore a mask. Tr. p. 90. Nonetheless, the mask did not cover his entire face, exposing his "main features," including his mouth, nose, and eyes. Tr. p. 133. Both men jumped on the counter and ordered Busbee, Day, and Simon to get on the floor. While Day and Simon kneeled down, Busbee lay on his back side looking at Grady. Grady ordered Busbee to stop when he saw that Busbee was looking at him. Grady emptied the cash register while the other perpetrator rummaged around looking for the safe. Both men left through the rear door, and police were notified.

Ten days later, Fort Wayne Police Detective Timothy Vachon met with Busbee, Day, and Simon individually. Detective Vachon provided each of the witnesses with

¹ Ind. Code § 35-42-5-1 (2008).

² Ind. Code § 35-47-4-3 (2008).

two photo arrays, but they were unable to identify anyone in the photo arrays as the perpetrators. The next day, Detective Vachon met with the witnesses, again individually, and showed them three additional photo arrays. Detective Vachon told each victim to look at the photo arrays and see if anyone looked familiar without implying or directing their attention to any particular person in the photo arrays. Busbee, Day, and Simon each identified Grady in a photo array as one of the perpetrators.

On February 4, 2009, the State charged Grady with robbery, a Class B felony, pointing a firearm, a Class D felony, and criminal recklessness, a Class D felony. During trial, the State presented identification evidence to prove that Grady was involved in the robbery. Grady did not object to the admission of the identification evidence. On November 10, 2009, a jury found Grady guilty as charged. On November 13, 2009, Grady was sentenced to ten years for felony robbery and one and one-half years for pointing a firearm to be served consecutively, all executed. The trial court vacated Grady's criminal recklessness conviction. This appeal follows.

DISCUSSION AND DECISION

On appeal, Grady contends that the trial court abused its discretion by admitting the pre-trial photo array and subsequent in-court identifications of Grady because the identifications were unduly suggestive. It is well-established that the decision to admit evidence is within the sound discretion of the trial court and is afforded a great deal of deference on appeal. *Hauk v. State*, 729 N.E.2d 994, 1001 (Ind. 2001). We review evidentiary determinations for an abuse of discretion and will not reverse such decisions

unless the decision is clearly against the logic and effects of the facts and circumstances before the court. *Id.*

It is undisputed that Grady did not object to the admission of the identification evidence at trial. A defendant's "[f]ailure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error upon appeal." *Hyppolite v. State*, 774 N.E.2d 584, 594-595 (Ind. Ct. App. 2002) (quoting *Lewis v. State*, 755 N.E.2d 1116, 1122 (Ind. Ct. App. 2001)), *trans. denied*. Therefore, because Grady did not object to the admission of the identification evidence at trial, he has waived this issue for appellate review. Grady, however, attempts to circumvent waiver by arguing that the admission of the identification evidence constituted fundamental error.

A reviewing court may disregard the defendant's waiver of a particular issue for appellate review and reverse the defendant's conviction only if he has demonstrated the existence of fundamental error. *Purifoy v. State*, 821 N.E.2d 409, 421 (Ind. Ct. App. 2005), *trans. denied*. The fundamental error rule, however, is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Id.* The error must be so "prejudicial to the rights of a defendant a fair trial is rendered impossible." *White v. State*, 846 N.E.2d 1026, 1033 (Ind. Ct. App. 2006), *trans. denied*. The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule. *Purifoy*, 821 N.E.2d at 412. "Fundamental error, therefore, requires a defendant to show greater prejudice than ordinary reversible error because no objection has been made." *Id.*

Grady argues that the admission of the photo array and ensuing in-court identifications of him by witnesses constituted fundamental error because they were unduly suggestive. The Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive. *Harris v. State*, 716 N.E.2d 406, 410 (Ind. 1999). A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances. *Id.* In evaluating the likelihood of a misidentification, the court considers certain factors, which include (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; and (4) the level of certainty demonstrated by the witness. *Williams v. State*, 774 N.E.2d 889, 890 (Ind. 2002). If a pre-trial identification is unduly suggestive, then permitting a witness to identify a defendant at trial would violate the Due Process Clause. *Hyppolite*, 774 N.E.2d at 594. In essence, we must address whether the procedure of identifying Grady through photo arrays was conducted in a fashion that led the witnesses to make a mistaken identification. If it is unduly suggestive, then we address the second question, which is whether the witnesses had an independent basis for in-court identifications so as to make it admissible. *Allen v. State*, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004), *trans. denied*.

Here, we do not find Grady's argument that the photo arrays were unduly suggestive to be particularly compelling. There is no evidence in the record to indicate that the procedures employed by police when showing the witnesses the photo arrays

were suggestive in any manner. There is no evidence that the photo arrays were accompanied by any words, gestures, or other sort of improper communication to emphasize Grady's photograph. Moreover, each of the three photo arrays was shown to the witnesses individually and contained photos of six different persons. All of the photos used in the arrays are of African-American males of approximately the same age, skin tone, and facial features. Grady's photograph was not distinguishable from others with respect to hairstyle, clothing, or any other physical characteristics that caused him to stand out in the photo array, and, thus, Grady did not stand out so strikingly in his characteristics that he virtually was alone with respect to identifying features. Moreover, Grady concedes that there is no evidence that the police attempted to influence the witnesses' identification of him.

Grady argues that the individuals in the photo arrays should have been shown wearing masks because the perpetrator was allegedly wearing a mask during the commission of the robbery, and the lack of a mask in the photo arrays was inherently suggestive. Grady, however, provides no authority in support of this argument. In this case, all three witnesses testified that during the commission of the crime, Grady wore a mask that did not cover his entire face, exposing the "main features" of his face including his mouth, nose, and eyes. Tr. p. 133. Additionally, Grady told one of the witnesses, who was lying on his back during the robbery, to stop looking at him. As a result, all three witnesses unequivocally identified Grady as the perpetrator from the three photo arrays shown to them individually. Given that the mask did not cover any of Grady's distinctive features, it is unlikely that the photo arrays showing individuals without masks

could have confused the witnesses and caused them to identify the wrong person. Indeed, we must question whether a photo array depicting individuals in masks would not be *more* impermissibly suggestive than a standard head shot array.

Further, to the extent that Grady's argument focuses on his height, he has failed to establish how his height is relevant to indicate any suggestiveness. The photos here are head shots, and indicate nothing with respect to a pictured individual's height. Therefore, we are not persuaded that Grady's height has any effect on the pre-trial identification by the witnesses.³

In light of the totality of the circumstances, we conclude that the pre-trial photo identifications of Grady were not unduly suggestive. Grady has failed to point to any specific evidence to indicate any improper police action to support his argument that the photo arrays were unduly suggestive. Additionally, Grady has also failed to demonstrate any blatant violation of basic principles required to establish a fundamental error claim. Having concluded that there is no fundamental error in this case, it is not necessary to address whether the victims had an independent basis for their in-court identifications of Grady. *See Allen*, 813 N.E.2d at 360.

The judgment of the trial court is affirmed.

DARDEN, J., and BROWN, J., concur.

³ Additionally, to the extent that Grady alleges that his exposed face could somehow be linked to potential news coverage of a prior robbery conviction the day before the three witnesses identified him, Grady has failed to show that the witnesses were even aware of his involvement in the prior robbery and has failed to explain how any specific evidence of this prior conviction had any influence on the three witnesses' identification of him.

