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ATTORNEY FOR APPELLANT:

VALERIE K. BOOTS
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

MELVIN HALL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1104-CR-190
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Commissioner
Cause No.49G06-1007-FB-55897

October 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Melvin Hall appeals his convictions for robbery as a class B felony[1] and carrying a handgun without a license as a class A misdemeanor.[2] Hall raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in admitting certain identification evidence; and

II. Whether the evidence presented was sufficient to support his convictions.

We affirm.

The relevant facts follow. In the early morning hours of July 17, 2010, Antonyo Tolbert and his cousin Darel Miller were in Tolbert's vehicle, a 2010 yellow Camaro with a black rally stripe, and Tolbert was driving around Monument Circle in downtown Indianapolis. Tolbert drove off of the Circle and stopped at a traffic light at Market Street and Pennsylvania Street. Two men approached the vehicle, pointed guns at Tolbert and Miller's heads, and said to "[g]et the f--- out of the car." Transcript at 48. Tolbert stated "you can have the car" and "just take the car." Id. Tolbert was shaking because he was scared and exited the driver's door of the vehicle. Miller exited from the passenger side of the vehicle, turned to his left so that he was looking towards the driver's side of the car, and observed Hall holding a gun to Tolbert's head and observed Hall's face. Hall went behind Tolbert and entered the vehicle. As soon as Hall and the other assailant shut the car doors, Miller ran down an alley. Tolbert moved toward the

[1] Ind. Code § 35-42-5-1 (2004).

[2] Ind. Code § 35-47-2-1 (Supp. 2007) (subsequently amended by Pub. L. No. 164-2011 § 1 (eff. July 1, 2011)).

rear of his vehicle, heard two or three shots, and went behind another vehicle, braced himself across the hood, and fired four or five shots back in the direction of his vehicle.

Within minutes of the shooting, Indianapolis Metropolitan Police officers arrived at the scene. Police Officer Joshua Taylor, who was driving a fully-marked police vehicle, observed Tolbert's yellow Camaro shortly after 4:00 a.m. on the east side of Indianapolis and observed "two figures" in the car. Id. at 90. Officer Taylor activated his emergency lights and attempted to stop the Camaro, but the vehicle continued "at a very high rate of speed . . . recklessly, with zero regard for any traffic" and "[s]triking curbs." Id. at 91. Officer Taylor estimated that he was traveling about seventy-five miles per hour when he lost sight of the Camaro. He continued to search for the vehicle and after approximately five minutes, he pulled into a "semi training lot" and found the Camaro parked behind a semi. Id. at 95. The vehicle "was still running and both the passenger and driver side doors were open" and Officer Taylor noticed bullet holes on the driver's side of the vehicle. Id. at 96. Officer Taylor asked for additional units and a canine unit and set up a perimeter around the semi lot. Other officers and a police dog arrived at the scene, and an officer and the police dog conducted a search of the area. With the assistance of the police dog, the officers discovered two men, one of whom was Hall, hiding in the overgrown grass and trees in the area.

Detective Benjamin Bierce was assigned to investigate the incident and later in the day took a statement from Miller. Detective Bierce showed Miller two photo arrays, each of which contained six photographs. Miller was unable to identify anyone in the first

array, but was able to identify the photograph of Hall in the second array as the man who had held the gun to Tolbert's head.

On July 20, 2010, the State charged Hall with Count I, robbery as a class B felony; Count II, carjacking as a class B felony; and Count III, carrying a handgun without a license as a class A misdemeanor. At Hall's jury trial, Miller made an in-court identification of Hall and testified that he had previously identified Hall from a photo array as the person who he observed hold a gun to Tolbert's head. Detective Bierce testified regarding presenting the photo arrays to Miller and Miller's identification of Hall. State's Exhibit No. 5 showing the photo array containing Hall's photograph and Miller's signature next to it was admitted into evidence without objection. The jury found Hall guilty on all three counts as charged. The court entered judgment of convictions on Counts I and III but not on Count II due to double jeopardy concerns. Hall was sentenced to sixteen years for his conviction for robbery and one year for his conviction for carrying a handgun without a license, and the sentences were ordered to be served concurrent with each other.

I.

The first issue is whether the trial court abused its discretion in admitting certain evidence. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances." Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

Hall argues that the court erred and committed fundamental error when it admitted into evidence "an impermissibly suggestive pre-trial identification from a photo array and an in-court identification tainted by a risk or irreparable mistake resulting from the improper pre-trial identification." Appellant's Brief at 6. Hall notes that no objection was raised before or at trial but argues that the error was fundamental and so prejudicial to Hall's rights that a fair trial was impossible. Hall specifically argues that Miller's opportunity to view the carjacker at the time of the crime was as brief as three seconds and hampered by the perpetrator's wearing a hood or cap which obstructed part of his face. Hall further argues that Detective Bierce's "words of instruction appear, on the face of the record, to be appropriate and not suggestive of an improper photo array procedure" but that "there can be little doubt that Bierce, knowing Hall had been arrested, was focused on him as a prime suspect" and that "Miller knew that a person suspected to be the carjacker had been arrested . . . and would have assumed the photo of that individual was included in one of the two arrays he was being shown." Id. at 10-11. Hall also argues that a photo in the second array was suggestive in nature, specifically asserting that the photo of Hall "stands out immediately as distinctly different from the others" in that it is "sharper and clearer than the others," that "[o]nly three of the men, including Hall, are wearing black shirts," and that "Hall is the only individual depicted with a full head of hair" and "Hall's very dark hair is shaped around his face exactly like a black skull cap would appear." Id. at 11. Hall argues that the identification of Hall by Miller was unreliable under the totality of the circumstances.

The State argues that Hall raised no objection to any of the identification testimony presented by the State at trial and thus has waived any claim of an impermissible identification on appeal. The State further asserts that "[i]n an attempt to circumvent his waiver of the issue, [Hall] argues on appeal that his impermissibly suggestive identification claim constitutes fundamental error" and that "[h]owever, the Indiana appellate courts have long held that a claim of impermissibly suggestive identification does not constitute fundamental error." Appellee's Brief at 4. In his reply brief, Hall argues that the "cases cited by the State in its attempt to persuade this Court not to reach the merits of Hall's claim do not stand for a rule that impermissibly suggestive identification claims cannot constitute fundamental error." Appellant's Reply Brief at 2.

The record reveals that at trial Hall did not object or otherwise challenge the admission of the photo arrays, Miller's in-court identification of him, or the testimony of Miller or Detective Bierce regarding Miller's identification of him from a photo array. As a result, Hall's claims are waived. See Myers v. State, 887 N.E.2d 170, 184 (Ind. Ct. App. 2008) (holding that the defendant's claim regarding impermissibly suggestive identification tactics and an in-court identification was waived because the defendant failed to lodge a contemporaneous objection to the testimony on that basis), reh'g denied, trans. denied.

Waiver notwithstanding, we cannot say the identification evidence here was improperly admitted. Due process of law requires suppression of testimony concerning an out-of-court identification when the procedure employed was unnecessarily

suggestive. Farrell v. State, 622 N.E.2d 488, 493 (Ind. 1993). The reviewing court must determine whether, under the totality of the circumstances, the identification process was conducted in such a way that it created a substantial likelihood of irreparable misidentification. Id. (citing Harris v. State, 619 N.E.2d 577 (Ind. 1993)). "There is no requirement that law enforcement officers perform the improbable if not impossible task of finding four or five other people who are virtual twins to the defendant." Id. at 494 (internal quotation marks and citation omitted). "It is sufficient if the defendant does not stand out so strikingly in his characteristics that he virtually is alone with respect to identifying features." Id. (internal quotation marks and citation omitted).

"Where a trial court has admitted evidence of pretrial and an in-court identification of the accused by the same witness, the reviewing court must determine whether, under the totality of the circumstances, the pretrial confrontation was so impermissibly suggestive and conducive to irreparable mistaken identification that the accused was denied due process of law under the Fourteenth Amendment." Harris, 619 N.E.2d at 580 (citations omitted). "The reviewing court must first determine whether law enforcement officials conducted the out-of-court procedure in such a fashion as to lead the witness to make a mistaken identification." Id. (internal quotation marks and citation omitted). "If, under the totality of the circumstances, the reviewing court finds the out-of-court procedures were not impermissibly and unnecessarily suggestive, both the evidence of the pretrial lineup and the in-court identification are considered to have been properly admitted by the trial court, and there is no need to proceed further." Id. Factors to be considered in evaluating the likelihood of a misidentification 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. Farrell, 622 N.E.2d at 493-494 (citation omitted).

Here, Miller testified that he exited from the passenger side of the vehicle, turned to his left so that he was looking towards the driver's side of the car, and observed Hall holding a gun to Tolbert's head and observed Hall's face for "what seemed like forever."[3] Transcript at 50. Detective Bierce met with Miller later in the day of the robbery and showed him two photo arrays each of which contained six photographs. The photographs in the second array included a photo of Hall and photos of five other individuals similar in age and skin color to Hall. At trial, Detective Bierce testified regarding the process he used to show a person a photo array, including that he would hold the array in an envelope and initially keep it covered, explain to the person that each array would have six photographs on it, that the person should look at each face and inform him if the person recognized any of the faces, and then he would pull the photo array out and set it in front of the person. Detective Bierce testified that it took Miller "[n]ot long at all" to identify Hall from the photo array. Id. at 148.

[3] The transcript reveals that, when asked how long he saw Hall's face, Miller testified that "[i]t seemed like forever but that was the longest thirty-five seconds of my life." Transcript at 50. On appeal, Hall asserts that this phrase was a transcription error and that Miller's "actual testimony in court was likely 'three to five seconds' rather than 'thirty-five seconds,' based on other strong indicators at trial." Appellant's Brief at 2. n.1. Hall points to the closing arguments in which the prosecutor stated: "Miller said that he slowly turns around sees . . . looks right into the face of []Hall for two to five seconds. The two to five seconds that were the longest two to five seconds of []Miller's life. That is how he remembers the face of Melvin Hall. That is how he was able to identify Melvin Hall as the person holding the gun to his cousin's head in court." Transcript at 168.

Based upon our review of the testimony and the admitted photo arrays, we cannot say that under the totality of the circumstances that Miller's out-of-court identification of Hall was impermissibly and unnecessarily suggestive and thus conclude that there was no error in the trial court's admission of the photo array, Miller's and Detective Bierce's testimony related to the photo array, or Miller's in-court identification of Hall. See Harris, 619 N.E.2d at 580 (holding that the defendant failed to object to the introduction of pre-trial and in-court identification evidence and that the court did not commit fundamental error where under the totality of the circumstances the identification procedure was not so impermissibly suggestive that the accused was denied due process and thus that both the pre-trial evidence and the in-court identification were admissible); Austin v. State, 603 N.E.2d 169, 171 (Ind. Ct. App. 1992) (holding waiver notwithstanding that the trial court properly admitted a witness's identification of the defendant), trans. denied.

II.

The next issue is whether the evidence was sufficient to support Hall's convictions. Hall argues that "[w]ithout the improper identification evidence, insufficient evidence existed to support Hall's convictions." Appellant's Brief at 13. However, we have concluded that the trial court properly admitted Miller's in-court identification and his identification of Hall from a photo array. Further, identification testimony need not necessarily be unequivocal to sustain a conviction. Heeter v. State, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996). Elements of offenses and identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. Bustamante v. State,

557 N.E.2d 1313, 1317 (Ind. 1990). The unequivocal identification of the defendant by a witness in court, despite discrepancies between his description of the perpetrator and the appearance of the defendant, is sufficient to support a conviction. Emerson v. State, 724 N.E.2d 605, 610 (Ind. 2000), reh'g denied. It is the jury's task to weigh the evidence and determine the credibility of the witnesses. Gleaves v. State, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a conviction. Id. Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict. Id.

Here, at trial Miller testified that Hall was the man who held a gun to Tolbert's head in downtown Indianapolis. Miller testified that it was "well lit" in the downtown area, that there were cars behind them, and the street lights were on. Transcript at 50. Miller testified that he saw Hall's face for "what seemed like forever." Id. On cross-examination, Miller indicated that he saw the clothing of the person who had held a gun to Tolbert's head, that the person was a black male, wore black clothing, and had a dark complexion. Miller further indicated that he did not notice if the man had any facial hair and that he had a "black skull cap" on his head. Id. at 58. On re-direct examination, Miller indicated when he exited the vehicle he turned to his left away from the assailant on his side of the vehicle and toward Tolbert and Hall on the driver's side of the vehicle and that he "turned directly looking at [] Hall." Id. at 65. We cannot say that it was unreasonable for a jury to believe the identification testimony of Miller. See Emerson, 724 N.E.2d at 610 (holding it was reasonable for a jury to believe the testimony of

witnesses who identified the defendant as the person who had robbed them). Further, within minutes of the shooting in downtown Indianapolis, police officers arrived at the scene. Officer Taylor observed and attempted to stop the vehicle but lost sight of it after a high-speed pursuit. Approximately five minutes after losing sight of the vehicle, Officer Taylor discovered the Camaro, which was still running, and the passenger and driver's side doors were open. The officers discovered Hall and another man hiding in the overgrown grass and trees in the area. Based upon our review of the record, we conclude that evidence of probative value exists from which the jury could have found that Hall committed the offenses. See id. (holding an in-court identification of the defendant was sufficient to support the defendant's convictions); Miles v. State, 764 N.E.2d 237, 242 (Ind. Ct. App. 2002) (holding waiver notwithstanding that the trial court properly admitted the challenged identification evidence and that the evidence was sufficient to sustain the defendant's convictions), trans. denied.

For the foregoing reasons, we affirm Hall's convictions for robbery as a class B felony and carrying a handgun without a license as a class A misdemeanor.

Affirmed.

BAKER, J., and KIRSCH, J., concur.