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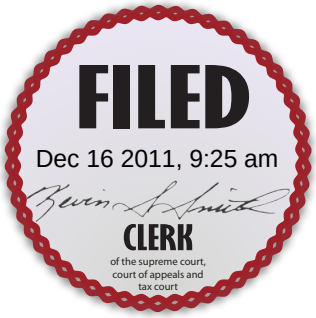

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IN THE
COURT OF APPEALS OF INDIANA

HARVEY BYRD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1106-CR-478
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G02-1005-FB-41990

December 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Harvey Byrd appeals his convictions for Class B felony robbery, Class B felony criminal confinement, and Class C felony carrying a handgun without a license. We affirm.

Issue

Byrd raises two issues, which we consolidate and restate as whether the admission of pre-trial identification evidence was reversible error.

Facts

At approximately 10:30 a.m. on March 17, 2010, Byrd went into the office of a storage facility in Indianapolis. Byrd arrived on foot and continued to talk on his cell phone after he entered the office. Eventually, he spoke with Tabitha Kemper, the property manager, about purchasing a mattress bag. While Kemper was looking up the price of the bag on a computer, Byrd took a gun out of his coat pocket and walked behind the counter to Kemper. Byrd held the gun to Kemper's head, took money from a drawer, forced Kemper under the counter, and left on foot. Byrd was in the office for approximately three minutes and made no effort to conceal his identity. Surveillance cameras recorded Byrd entering the office, talking to Kemper and committing the robbery, and walking away from the storage facility.

In May 2010, the surveillance videos were released to the public, and police received tips identifying Byrd as the robber. Detective John Maloney of the Indianapolis Metropolitan Police Department complied a photo array using a photograph of Byrd

taken in 1999. Although eleven other photographs of Byrd taken between 2002 and 2005 were available, Detective Maloney thought the 1999 picture was the newest because it was undated and at the top of the computerized database. The 1999 photograph was "somewhat different" than the other photographs used in the array because it was brighter and the background was a different color. Tr. p. 23. Kemper identified Byrd in the photo array as the man who committed the robbery.

On May 27, 2010, the State charged Byrd with Class B felony robbery, Class B felony criminal confinement, and Class A misdemeanor carrying a handgun without a license. In a separate information, the State alleged that the Class A misdemeanor carrying a handgun charge should be elevated to a Class C felony based on a prior conviction.

Before the jury trial began, Byrd moved to suppress evidence of the pre-trial identification and any in-court identification by witnesses who were involved in the allegedly improper pre-trial identification process. He claimed that the differences between his photograph and the others and the age of the photograph used in the photo array violated his due process rights. After a hearing conducted immediately before trial, the trial court denied Byrd's motion. At trial, Kemper and Detective Maloney testified about the photo array and Kemper's pre-trial identification of Byrd. Kemper also identified Byrd at trial as the robber. Byrd did not object to this evidence. When the State offered the photo array into evidence, Byrd objected, and the trial court overruled his objection. The jury found Byrd guilty of the first three counts, Byrd admitted to

having a prior felony conviction, and the handgun charge was elevated to a Class C felony. Byrd now appeals.

Analysis

Byrd argues that evidence of Kemper's pre-trial identification of Byrd was improperly admitted because the photo array was unnecessarily and impermissibly suggestive and because the procedure used in creating the photo array was unfair. The State argues that this issue is waived because Byrd only objected to the admission of the photo array after witnesses testified about the photo array and Kemper's pre-trial identification. According to the State, Byrd's failure to object to this testimony deprived the trial court of the opportunity to timely rule on whether testimony about the pre-trial identification was improper.

Byrd contends that he did not sit idly by and assent to the admission of the evidence because he had made his arguments to the trial court the morning of trial at the suppression hearing and that the trial court "had every opportunity to exclude the photo array and subsequent in-court identification at the time defense counsel objected to admission of the array" on the same basis. Appellant's Reply Br. pp. 4-5. We disagree. "A pre-trial motion to suppress does not preserve an error for appellate review; the defendant must make a contemporaneous objection sufficient to preserve the issue for appeal." Scott v. State, 924 N.E.2d 169, 174 (Ind. Ct. App. 2010), trans. denied, cert. denied. "The failure to make such an objection waives any claim on appeal that the evidence was improperly admitted." Id. Our supreme court has explained, "[b]y requiring that an objection be made during the trial at the time when the testimony is

offered into evidence, the trial court is able to consider the evidence in the context in which it is being offered and is able to make a final determination on admissibility." Clausen v. State, 622 N.E.2d 925, 928 (Ind. 1993). Regardless of whether Byrd eventually objected to the admission of the photo array on the same grounds raised in his motion to suppress, he simply did not offer a timely objection to Kemper's and Detective Maloney's trial testimony regarding the photo array and the pre-trial identification. This issue is waived.

Waiver notwithstanding, we address Byrd's arguments regarding the photo array on the merits. "The Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive." Williams v. State, 774 N.E.2d 889, 890 (Ind. 2002). "A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances." Id. "If the pre-trial identification procedure was unduly suggestive, then testimony relating to it is inadmissible." Id.

In evaluating the likelihood of a misidentification, a trial court considers: (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. Id. Other factors a trial court may consider are the manner and form in which the police asked the witness to identify the suspect and the witness's interpretation of their directives and whether the police focused

on the defendant as the prime suspect either by their attitude or by the makeup of the photo array. Parker v. State, 698 N.E.2d 737, 740 (Ind. 1998).

As for Byrd's comparison of his photograph to the other photographs used in the photo array, our supreme court has explained that 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.'" Farrell v. State, 622 N.E.2d 488, 494 (Ind. 1993) (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. (citation omitted).

Here, all six men were African American, had similar hair styles and facial hair, and were wearing crewneck shirts of various colors. Contrary to Byrd's assertions, neither his ears nor his shirt stand out so strikingly that he virtually was alone with respect to identifying features.[1]

Regarding the composition of Byrd's photograph, we are not convinced that the "light color and intensity, lighting tone and subject positioning" are so distinctive that the photo array was impermissibly suggestive. Appellant's Br. p. 8. Although the background in Byrd's picture is lighter than the others, the other backgrounds are not entirely uniform in color. Regardless, our supreme court has rejected a similar argument where the defendant asserted that a photo array was impermissibly suggestive because five of the six backgrounds were grey and the defendant's was light green. See Williams, 774 N.E.2d at 890-91 (concluding there was no doubt that the victim spent enough time

[1] Byrd was wearing a hat that covered his ears during the robbery.

with defendant to be able to identify him nine days later and it was unlikely that the green tint of defendant's background would confuse the victim and cause him to identify the wrong person).

Byrd also argues that the use of an eleven-year-old photograph, as opposed to one of several other photographs taken between 2002 and 2005, was an unfair procedure. Byrd suggests that Maloney intentionally selected the oldest photograph because a 2005 photograph of Byrd was too similar to the other photographs selected for the photo array. At the suppression hearing, Maloney testified that the picture he used was not dated and that he "picked the one that was at the top that [he] considered to be the newest one." Tr. p. 27. Moreover, in referencing the 2005 photograph of Byrd, Detective Maloney testified that, although background of that picture looked more similar to the others used in the photo array, the 2005 photograph looked less like Byrd at the time of trial than the 1999 photograph.

We cannot say that the use of an older picture in and of itself renders a pre-trial identification unfair. This is especially true when considering that in some circumstances an eleven-year-old photograph might be the only available photograph or that a more recent photograph might look less like the suspect at the time the offense was committed. Contrary to Byrd's assertion, we are not convinced that choosing the older photograph rendered the pre-trial identification procedure unfair.

Finally, even when considering the differences in Byrd's photograph and the fact that it was older, we are not convinced that there was a substantial likelihood of misidentification. Byrd arrived at the office when it was daylight and while the lights

were on. No one else was in the store at the time, and Kemper was five to seven feet away from Byrd when they had a conversation about mattress bags. Byrd even explained that he needed one because his girlfriend worked at a hotel and had contracted bed bugs. Further, Byrd was in the store for approximately three minutes before he committed the robbery. Although Kemper initially underestimated Byrd's height and age, she was sure of her identification of him in the photo array. Given these facts, we are not convinced that the composition of the photo array confused Kemper, causing her to identify the wrong person. See Williams, 774 N.E.2d at 890-91. Considering the totality of the circumstances, Byrd has not established that the trial court erred in admitting Kemper's pre-trial identification, including the photo array, into evidence.[2]

Conclusion

Byrd waived his challenge to the admissibility of Kemper's pre-trial identification by failing to timely object. Waiver notwithstanding, the trial court did not err in admitting the photo array into evidence. We affirm.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.

[2] Because we conclude that the trial court did not err in admitting evidence of the pre-trial identification, we need not address whether Kemper had an independent basis for her in-court identification. See Allen v. State, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004) (observing that, where the pretrial identification evidence was properly admitted, it is not necessary to address whether a witness had an independent basis for her in-court identification), trans. denied. It is also unnecessary to address Byrd's argument that, in the absence of the pre-trial identification and the in-court identification, there is insufficient evidence of his identity as the robber.