

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT WAYNE WILL,

Defendant-Appellant.

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UNPUBLISHED

April 30, 1999

No. 207092

Genesee Circuit Court

LC No. 96-054818 FC

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to a prison term of ten to thirty years, to be served consecutively with time imposed for violation of his parole. Defendant now appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his motion to suppress Marianna Rosasco's identification testimony on the basis that the photographic lineup was impermissibly suggestive. We disagree. We review a trial court's decision regarding a motion to suppress identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J., with Mallett, J. concurring), 318 (Boyle, J., with Riley, J. concurring); 505 NW2d 528 (1993).

A suggestive lineup is not necessarily a constitutionally defective lineup. *Kurylczyk, supra* at 306. To sustain a due process challenge on the basis of a pretrial identification procedure, a defendant must show that the pretrial identification procedure was "so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Id.* at 302. See also *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968); *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *Kurylczyk, supra* at 302. If the pretrial identification procedure was impermissibly suggestive, testimony regarding that identification must be suppressed, but an in-court identification by the same witness still may be allowed if an independent basis for the in-court identification can be established. *Id.* at 303; *Gray, supra* at 114-117.

Defendant asserts that the photographic lineup was impermissibly suggestive because his image in the photograph appears smaller than that of the individuals in the other photographs. However, where the individuals depicted in a photographic lineup are “fairly representative of the defendant’s physical features,” other differences such as differences “in the composition of the photographs” have been found not to render a lineup impermissibly suggestive. *Kurylczyk, supra* at 304-305. See *People v Dean*, 103 Mich App 1, 8-10; 302 NW2d 317 (1981) (holding that a photographic lineup was not impermissibly suggestive merely because the defendant’s photograph was taken from a vertical angle while the photographs of the other people in the lineup were taken from a horizontal angle); *People v Thornton*, 62 Mich App 763, 768-769; 233 NW2d 864 (1975) (holding that a photographic lineup was not impermissibly suggestive where the defendant’s photograph showed only his head and shoulders while the other six photographs were full body shots); *People v Cantrell*, 27 Mich App 210, 211-212; 183 NW2d 401 (1970) (holding that a photographic lineup was not impermissibly suggestive where the photograph of the defendant was slightly larger than the other six photographs and where the defendant’s photograph had two holes in it).

Here, our examination of the photographic array reveals several differences among the photographs, including the difference of which defendant complains. However, defendant has advanced no causal link to indicate why the manner in which his image stood out from the others was suggestive of his identity as the perpetrator or why it was more suggestive than other differences in the array. Defendant does not argue that the physical characteristics of the other individuals in the photographic lineup were dissimilar to his physical characteristics. The difference in defendant’s photograph did not provide the witness with an external characteristic on which to base a selection of defendant “rather than on the basis of defendant’s looks.” *Kurylczyk, supra* at 305. Because we agree with the trial court that the photographic array was not suggestive of defendant’s identity as the perpetrator, it follows that the trial court did not clearly err by finding that the photographic lineup was not so impermissibly suggestive as to lead to a substantial likelihood of misidentification. Therefore, we need not address whether there was an independent basis for Rosasco’s in-court identification of defendant.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Martin M. Doctoroff

/s/ Helene N. White