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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

LIONELL THOMAS HUGHES,

Defendant and Appellant.

C073129

(Super. Ct. No. 11F07097)

Following a trial in which two eyewitnesses identified defendant Lionell Hughes as one of two bank robbers, the jury found defendant guilty of second degree robbery (Pen. Code,¹ § 211) with personal use of a firearm (§ 12022.53, subd. (b)), and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The trial court sentenced him to 15 years and 8 months in prison. On appeal, defendant contends it was error to admit the eyewitness testimony identifying him as the robber because such identification was

¹ Further undesignated statutory references are to the Penal Code.

tainted by an impermissibly suggestive photographic lineup. We disagree and shall affirm.

FACTS

On the morning of October 5, 2011, two men entered the Elk Grove branch of JP Morgan Chase Bank. They were yelling that everyone should get down. One man was heavysset and the other was tall and skinny. Both had guns.

The heavysset man, defendant, went to the security guard and disarmed him. While this was happening, the skinny man jumped over a counter. He told the assistant branch manager to give him the money. She explained that a key was needed; she unhooked the key from her pants and attempted to hand it to the robber. He told her to do it. She unlocked two drawers which the robber opened and emptied. He took \$11,000-\$12,000. The two robbers fled and drove off in a white subcompact car. The security guard got his gun and put the clip back in. He ran after the car and fired four rounds, believing he hit it.

At trial, two bank employees identified defendant as the heavysset robber who disarmed the security guard. Both had previously identified defendant in a photographic lineup and a live lineup.

The robbery was captured on surveillance video. The police gave out information about the bank robbery to the media, including video footage and a description of the car. About a week after the robbery, the police received an anonymous tip that the car they were looking for was a Hyundai Sonata and the owner lived in an apartment on Mack Road. The tip included the car's license plate number. The car was registered to defendant.

The police found a Raiders cap and two sweatshirts near the scene of the robbery. This clothing was similar to that worn by the robbers. DNA consistent with defendant's profile was found on the cap and one sweatshirt.

A psychology professor testified for the defense, discussing the problems of eyewitness identification.

DISCUSSION

I

Background

Two bank employees were shown a lineup of six, sequential photographs. Our review of the lineup reveals that each photograph depicts an African-American male who is somewhat heavysset and has some facial hair. Defendant's photograph is number two. His photograph shows less facial hair than others, but it does show some. Both photograph number two and photograph number four show suspects with lighter skin tone due to the lighting. Both bank employees signed a photographic lineup instruction that stated: "The person who committed the crime may or may not be in the group of photographs. You are in no way obligated to identify anyone." Both employees selected defendant's photograph as the heavysset robber.

Before trial, the defense moved in limine to exclude any evidence of the bank employees' identification of defendant as the robber, arguing any in-court identification was tainted by the suggestive out-of-court identification procedure. Defendant argued the photographic lineup was suggestive because of the six pictures of possible suspects, only defendant's picture showed a light-skinned African-American without facial hair. He further argued the identification was unreliable because the witnesses had only a limited opportunity to observe the robber, they were under great stress, and the suspect wore a hat and sunglasses.

The trial court denied the motion. The court noted the suspect had not been described as light-skinned and defendant's skin tone was darker than suggested in the picture due to the lighting. Defendant's picture showed some facial hair and the other

pictures did not show significant facial hair, but only one- or two-day stubble. The court found nothing was suggestive; it was “a pretty good photographic array” of “similar looking” people. Finally, the witnesses had each signed a lineup instruction that emphasized that the robber may or may not be included in the photographs.

II

The Law and Analysis

“Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable. [Citations.]” (*People v. Yeoman* (2003) 31 Cal.4th 93, 123.) “The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] ‘The question is whether anything caused defendant to “stand out” from the others in a way that would suggest the witness should select him.’ [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) “A due process violation occurs only if the identification procedure is ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’ [Citation.]” (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.)

A valid lineup does not require that defendant be surrounded by people “ ‘nearly identical’ ” in appearance. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) Minor differences in hair color or style do not necessarily render a lineup unduly suggestive. (See *People v. Holt* (1972) 28 Cal.App.3d 343, 350 & fn. 2, disapproved on other grounds in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6 [difference in hair color]; *People v. Vessell* (1969) 275 Cal.App.2d 1012, 1017 [different hair styles].) Likewise, courts have found lineups were not unduly suggestive despite differences in the suspects’ complexions or the photographs’ lighting. (*People v. West* (1984) 154 Cal.App.3d 100, 105 [differing color characteristics; defendant’s photo had “red cast”

while others had “yellow cast” or “orange cast”]; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557 [defendant’s picture darker complected than others].)

“We independently review ‘a trial court’s ruling that a pretrial identification procedure was not unduly suggestive.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 698-699.)

Our independent review of the lineup leads us to the same conclusion as the trial court; it was not impermissibly suggestive. We disagree with defendant that his picture shows *no* facial hair. While there are some differences in the appearances of the six men, such differences are inevitable “[b]ecause human beings do not look exactly alike.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) “The question is whether anything caused defendant to ‘stand out’ from the others in a way that would suggest the witness should select him. [Citation.]” (*Ibid.*) We find nothing distinctive that makes defendant stand out. Although he appears to have less facial hair and a lighter skin tone, none of the witnesses described those features of the robber, so they would not suggest the witness should select that photograph.² (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 943 [neither defendant’s “droopy eye” nor discoloration of photograph suggested defendant’s picture should be selected].)

Because defendant has failed to show that the photographic lineup was unduly suggestive, we need not address the People’s alternative argument that the identifications were reliable under the totality of the circumstances. (See *People v. Cook, supra*, 40 Cal.4th at p. 1355.)

² Indeed, one employee who identified defendant as the robber noted the picture appeared more clean-shaven than the robber.

DISPOSITION

The judgment is affirmed.

_____ DUARTE _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ HOCH _____, J.