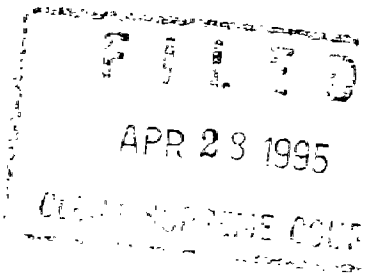
IN THE COURT OF APPEALS OF IOWA

No. 5-149 / 94-583



STATE OF IOWA,

Appellee,

vs.

KEVIN DEMALE JOHNSON,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Johnson appeals his conviction, following a jury trial, of second-degree burglary.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, Annette L. Hitchcock, Assistant State Appellate Defender, and Kevin Demale Johnson Anamosa, pro se, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Paul E. Kittredge, Jr., Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

This case arose out of an incident in which an intruder entered June LeClaire's house and fondled her as she pretended to be sleeping. LeClaire ultimately kicked the intruder and chased him away. The State charged Kevin Demale Johnson with two counts of second-degree burglary, three counts of assault while participating in a felony, and three counts of assault with intent to commit sexual abuse without injury. The trial court denied Johnson's motion to sever counts.

Johnson filed motions to suppress photograph lineup identifications made by LeClaire. Johnson contended the array was impermissibly suggestive. After a hearing, the trial court denied the motion based on its finding the array was not impermissibly suggestive and did not result in a substantial likelihood of irreparable misidentification.

The State dismissed counts IV through VIII, and the case proceeded to a jury trial on the remaining three counts. LeClaire reaffirmed her photo identification and also identified Johnson in person. The jury found Johnson guilty as charged. Both Johnson and his attorney filed motions in arrest of judgment. Defense counsel also filed a motion for new trial. The trial court denied the motions, entered judgment, and imposed sentence.

Johnson appeals. He contends the trial court erred in refusing to suppress an identification procedure based on an impermissibly suggestive photo array. He also seeks a new trial based on newly-discovered evidence. We affirm.

I. Identification Procedure.

The parties agree because defendant is alleging error involving a constitutional right, our review is de novo. *State v. Caya*, 519 N.W.2d 419, 422 (Iowa App. 1994).

Review of an undue suggestiveness claim consists of a two-part analysis. Our first consideration is "whether the out-of-court identification procedure was 'impermissibly suggestive.'" *State v. Rawlings*, 402 N.W.2d 406, 407 (Iowa 1987) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 108-09, 97 S. Ct. 2243, 2250, 53 L. Ed 2d 140, 150 (1977)). If so, we must then examine the totality of the circumstances "to determine whether the procedure gave rise to 'a very substantial likelihood of irreparable misidentification.'" *Rawlings*, 402 N.W.2d at 407 (quoting *Manson*, 432 U.S. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155 (internal quotations omitted)). Short of this, the identification evidence and any shortcomings are for the jury to weigh. *State v. Neal*, 353 N.W.2d 83, 87 (Iowa 1984) (citations omitted).

Defendant claims the photographic array was impermissibly suggestive on three grounds. Each ground will be considered in turn.

A. Alleged Prior Knowledge by Witness.

First, defendant contends the photographic array was impermissibly suggestive because the witness knew two of the six men depicted. However, the witness did not actually know these men, but merely recognized one man from classes at Western Iowa

Technical School, and believed she had seen the other man before. She was not acquainted with either man and did not know their names.

This coincidence does not render the photographic array impermissibly suggestive. Defendant does not suggest the police officer purposely selected photographs of persons the witness knew or had seen, nor does defendant suggest how the police might avoid selecting photographs of persons whom the witness, by chance, has seen before. The witness's slight familiarity with two of the six men depicted did not render the photographic array impermissibly suggestive.

B. Dated Placards.

Defendant next contends the photographic array was impermissibly suggestive because the suspects hold dated placards. Defendant claims his photograph "jumps out" because the date on his placard is closest to the date of the crime.

Even assuming the very small dates were a riveting characteristic of the photographic array, the dates do not impermissibly highlight defendant. The date of the burglary was August 27, 1993. The date on defendant's placard is June 27, 1993. One of the other photographs shows a placard bearing an incomplete date of 06-10-9. The dates on the remaining photographs are November 11, 1992; July 7, 1992; June 6, 1991, and October 14, 1984.

Obviously, all the photographs -- including the photograph of defendant -- indicate an arrest some time before the burglary and assault in this case. There is no

reason to believe a witness would be drawn to identify the photograph of the most recent arrestee, when all of the arrests were prior to the actual incident. Moreover, defendant cannot demonstrate the witness relied on these dates in making the identification. Ms. LeClaire identified defendant within about thirty seconds. The record contains no evidence she even noticed the dates while viewing the photographs. We hold defendant has failed to show dates on the array were impermissibly suggestive.

C. Glasses.

Defendant also claims the photographic array was impermissibly suggestive because defendant was not wearing his glasses in the photograph. However, none of the suspects on the array were wearing glasses. The witness described her attacker as wearing glasses. A photograph showing defendant without his glasses may have served to divert her attention from defendant, rather than impermissibly focusing on him. We hold using a photograph of defendant without his glasses is not impermissibly suggestive.

These aspects of the photographic array, singly or in aggregate, do not rise to the level of impermissible suggestiveness. Our supreme court has viewed the standard as a high one when a photographic array is challenged for "even rather startling differences between defendant's characteristics and those of others depicted in a photo display have not resulted in a finding of suggestiveness." *Neal*, 353 N.W.2d at 86.

Because our de novo review convinces us none of the procedures used to identify defendant were suggestive, we need not discuss the reliability issue. The trial court is affirmed on this issue.

II. Newly-Discovered Evidence.

Defendant asserts in his pro se brief newly-discovered evidence requires a new trial be granted. To prevail on a motion for a new trial based upon newly-discovered evidence, a defendant must show: (1) that the evidence could not have been discovered earlier in the exercise of due diligence; (2) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) that the evidence probably would have changed the result of the trial. *State v. Whitsel*, 339 N.W.2d 149, 156 (Iowa 1983) (citation omitted). In passing on motions for new trial based on evidence newly discovered, the trial court is vested with wide discretion. *State v. More*, 382 N.W.2d 718, 723 (Iowa App. 1985) (citation omitted). Motions for new trials based upon newly-discovered evidence are not favored and should be closely scrutinized and granted sparingly. *State v. Farley*, 226 N.W.2d 1, 3 (Iowa 1975).

Defendant in his brief does not identify any newly-discovered facts supporting his claim. Rather, he relies on evidence already in the record. This evidence was known at the time of trial. Further, defendant fails to indicate how such evidence would have changed the outcome of his trial.

Thus, no record is presented which would justify granting a new trial on the basis of newly-discovered evidence We deny relief for defendant's pro se claim of newly- discovered evidence. Conviction affirmed

AFFIRMED.