FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
GLENN REX TYLER,	)	9-112 88-785
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. CR 37260), Harry Perkins, Judge.

Defendant appeals from his conviction, following a jury trial, of first-degree robbery and going armed with intent. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant State Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and Nan Horvant, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J. 180

Defendant-appellant Glenn Rex Tyler appeals his conviction and sentence for first-degree robbery and going armed with intent contending the trial court erred in overruling his motion to suppress any out-of-court identification of the defendant made from a photo array he feels was impermissibly suggestive. We affirm.

Defendant's conviction arose out of an incident involving the robbery of the Drake University's cashier office by two men on June 25, 1987. Jon Ericson, vice president for academic affairs at the university, was led into the office at gunpoint by the older of the two men. The money was gathered and put into a box carried by the younger man. At least three employees observed the robbers in the office. Mr. Ericson was released outside before the two robbers were seen getting into a new black pickup truck. Janielle Hamilton, who saw the robbers get into the truck, took down the license plate number which was traced to Ronald Lee Stewart. This man was positively identified as the older robber.

The driver's license of the defendant was found in Mr. Stewart's possession when he was arrested. A five-picture array was compiled with defendant's photo as number four. Mr. Ericson chose number four as a picture of the younger robber, although he was not as certain as he was when identifying the older robber. The office employee present

during the robbery chose numbers one and four, while another chose number one. At least three other witnesses identified defendant's photo as being the picture of the man who stayed with Mr. Stewart in motels in and around Des Moines in June 1987. Two of the motel registration cards had the name "Glenn Tyler" written on them, and the witnesses remembered the younger man went by the name "Rex." None of the witnesses, however, could positively make an in-courtroom identification of defendant as the younger robber because his photo array picture, license picture, and his appearance the day of the robbery included a beard and mustache. At trial, he was clean shaven.

The defendant bases his impermissibly-suggestive claim having showed, of the five pictures in the photo, his was only one with (a) a black line at the top, (b) gray backside as opposed to white, and (c) his name written on the back.

We consider defendant's claim in two parts. First, we must determine whether the out-of-court identification procedure was "impermissibly suggestive." State v. Rawlings, 402 N.W.2d 406, 409 (Iowa 1987) (citing Mansen v. Brathwaite, 432 U.S. 98, 108-09, 97 S. Ct. 2242, 2250, 53 L. Ed. 2d 140, 150). If so, the totality of the circumstances are examined to determine whether the procedure gave rise to "a very substantial likelihood of irreparable misidentification." Rawlings, 402 N.W.2d at

407 (citing Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968)). Only the first inquiry is necessary in this case.

The differences between defendant's picture and the others in the photo array did not make the out-of-court identifications of the defendant as the younger participant in the robbery impermissibly suggestive. Due process does not require police to obtain photos which eliminate all subtle differences. United States v. Bubar, 567 F.2d 192, 199 (2d Cir. 1977). There need only be a reasonable effort to harmonize the photographs. Rawlings, 402 N.W.2d at 408 (citing United States v. Mefford, 658 F.2d 588, 596 (8th Cir. 1981)).

The officer who put together the five-photo array testified she looked for pictures with facial features, beard and mustache, similar to those in defendant's pictures. She then sent the pictures to the identification lab so the pictures would be black and white polaroids like defendant's. The witnesses who chose defendant's picture from the array testified they did not even look at the back of the pictures so did not notice defendant's photo had a gray background and his name written on it unlike the others. During the hearing on defendant's motion to suppress, the district court noted the black line found at the top of defendant's photo had "really not been placed on there but [was] simply the background . . . ." Again, the

witnesses who chose defendant's photo from the array said they had not noticed the black line or had not placed any significance to it being on the picture. In fact, one witness who was in the office during the robbery chose a different photo from the array. Defendant makes no allegations that the officers made the out-of-court identification procedures impermissibly suggestive verbally or in the way the pictures were handed to the witnesses.

The district court was proper in overruling defendant's motion to suppress the out-of-court identification of his picture from the photo array. Defendant's convictions and sentence is affirmed.

AFFIRMED.