

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	
v.	:	
	:	
LAWRENCE LAWS	:	No. 18-224
	:	

MEMORANDUM

PRATTER, J.

October 11, 2019

Three men robbed bar owner Michael Rosenberg at gunpoint on February 3, 2017. In connection with that robbery, the Government charged Lawrence Laws with Hobbs Act robbery; using, carrying, and brandishing a firearm during and in relation to a crime of violence; and aiding and abetting.

Mr. Laws moves to suppress Mr. Rosenberg’s identification of him from a photographic array. Mr. Laws also asks the Court to suppress alleged incriminating statements Mr. Laws made after having invoked his right to counsel. This Memorandum addresses the request for suppression of the victim’s identification.¹

Following an evidentiary hearing and oral argument, and upon review of the briefing and applicable case law, the Court denies Mr. Law’s challenge to the photographic array identification.

FINDINGS OF FACT

The Court finds the following facts:

During the early morning hours of February 3, 2017, after the Mermaid Bar had closed, Mr. Rosenberg and another gentleman were walking to Mr. Rosenberg’s Jeep. Mr. Rosenberg was the owner of the Mermaid Bar, which was located on Germantown Avenue in Philadelphia.

¹ The ruling with respect to the alleged incriminating statements will be addressed separately.

As Mr. Rosenberg approached his Jeep, an assailant jumped out of the vehicle. Mr. Rosenberg fled down the street, but two other individuals caught him. The three assailants brought Mr. Rosenberg back to and then into the bar, stealing money from Mr. Rosenberg outside of the bar and also from an envelope inside the bar's cash register. The assailants forced Mr. Rosenberg downstairs to the basement where more money was located. Inside the Jeep, the assailants left a BB gun that appeared to be an assault rifle.

A few hours after Mr. Rosenberg was robbed, Detective James Sloan of the Northwest detectives of the Philadelphia Police Department interviewed Mr. Rosenberg. In the interview, Mr. Rosenberg stated that three people robbed him at gunpoint. According to Mr. Rosenberg, one of the assailants was a light-skinned male, about 22 or 23 years of age. Mr. Rosenberg also described the assailant as approximately 5 feet 6 to 7 inches tall and about 150 to 160 pounds. Mr. Rosenberg explained that the assailant wore a light-colored hoody and had a silver revolver. Mr. Rosenberg also stated that he had seen this assailant at his bar before. He also told the detective that the assailant spoke to Mr. Rosenberg during the attack, during which the assailant referred to Mr. Rosenberg by name. Mr. Rosenberg further said that the assailant appeared to be the perpetrator in charge. He said that the assailant volunteered that the assailant's mother was white and lived in Chestnut Hill.

During the interview with Detective Sloan, Mr. Rosenberg also explained that one of the perpetrators had told Mr. Rosenberg that Mr. Rosenberg somehow had offended someone. Mr. Rosenberg suggested to the detective that the individual allegedly wronged could have been a David Spicer, someone he had previously flagged at the bar for stealing a bottle from the bar. However, Mr. Rosenberg did not suggest that Mr. Spicer robbed him.

About seven weeks later, Task Force Officer Paul Gurcio conducted an identification

interview of Mr. Rosenberg at Mermaid Bar using a photographic array. FBI Special Agent Percy Edward Giles III accompanied Officer Gurcio during the interview to oversee that the interview was conducted in accordance with FBI policy. Officer Gurcio was assigned to the Mermaid Bar robbery and compiled the photographic array.

At the evidentiary hearing before the Court, Special Agent Giles testified to how the array was prepared. The photographic array contained six color photographs of African American men, all displayed individually on 8.5” by 11” pieces of paper. The photograph array was assembled from the Philadelphia Police Department’s imager system. The system contains a database of Commonwealth of Pennsylvania identification photographs. To create an array, an officer enters a subject’s information into the system, for example, the subject’s social security number or date of birth, causing the system to produce the subject’s most recent photograph available in the system based on prior contact with the Commonwealth. The system also populates additional biographical data about the subject that is already in the system, including for example, height, weight, eye color, hair, facial features, body markings like tattoos and scars, and race. The officer then clicks a button which causes the system to produce similar images. To populate these similar images, the system relies on the photograph generated and the biographical and descriptive data of the subject of interest in the system. The system produces many pages of photographs, and the officer selects comparative photographs to include in the array. The policy dictates that a suspect’s photograph can never be presented first in the order of the array. Moreover, no officer has the discretion to alter the brightness, lightness, shading, or intensity of the color of any photograph presented in the array.

In this case, Officer Gurcio entered the descriptive information of Mr. Laws, the subject, into the imager system. Officer Gurcio then took five additional photographs from those presented

by the system to include alongside Mr. Laws' photograph in the six-photo array. Mr. Laws' photograph was second in the order with the others appearing in random order in the array.

Before Mr. Rosenberg viewed the photographs, Officer Gurcio gave him the following instructions:

- 1) It is just as important to clear innocent persons from suspicion as it is to identify guilty persons.
- 2) Individuals depicted on the photographs may not appear exactly as they did on the date of the incident because features such as hair style and facial hair are subject to change.
- 3) A photograph of the person who committed the crime may or may not be among the photographs presented in the array.
- 4) If the witness sees a photograph of the perpetrator, tell the investigator. The investigator will continue showing the witness the remaining pictures. If the witness sees a subsequent picture that makes the witness reconsider a prior identification, tell the investigator. After the witness has seen all of the photographs, if the witness wants to see one or more photographs again, the investigator will show them again.
- 5) Whether or not the witness identifies a photograph as the perpetrator, law enforcement will continue to investigate the incident.
- 6) The witness need not pick anyone or be certain if he or she does pick someone.

Mr. Rosenberg was shown the photographic array and identified Mr. Laws as his assailant. After Mr. Rosenberg chose the photograph of Mr. Laws, Special Agent Giles and Officer Gurcio asked Mr. Rosenberg how sure he was of his choice. Mr. Rosenberg responded that he was certain of his decision. The officers asked Mr. Rosenberg to write his statement down. On the photograph of Mr. Laws, Mr. Rosenberg wrote: "He took my gun. He is the one who robbed me." The written statement is signed and dated for March 27, 2017 at 3:30 PM.

Of the six photographs in the photographic array, Mr. Laws argues that the photograph of him was the lightest.

During the interview, Mr. Rosenberg also told Special Agent Giles and Officer Gurcio that

a woman had visited Mr. Rosenberg and had told Mr. Rosenberg that someone named Larry had robbed Mermaid Bar. Mr. Rosenberg did not mention choosing (and there is no other evidence to suggest otherwise) the particular picture out of the array based on the lightness of the skin of the photographed individual, the brightness of Mr. Laws' photograph, or the photograph being that of a "Larry" who allegedly robbed Mermaid Bar. There is no evidence that Mr. Rosenberg had any information about the names of any of the men whose pictures were in the array. There is no evidence before the Court that Mr. Rosenberg demonstrated any reservation or ambiguity when making the identification.

FBI Special Agent Faith E. Greenawalt was assigned to this case and in June of 2018 interviewed Mr. Laws. During that interview, Special Agent Greenawalt told Mr. Laws that other individuals had identified Mr. Laws and placed Mr. Laws at the scene of the Mermaid Bar robbery.²

DISCUSSION

Mr. Laws seeks to suppress Mr. Rosenberg's out-of-court identification of Mr. Laws from the photographic array. Mr. Laws also seeks to suppress Mr. Rosenberg's anticipated in-court identification based on the alleged impermissible out-of-court identification. The Court denies Mr. Laws' motion.

Mr. Laws argues: (1) a photographic array of only six photographs is unduly suggestive; (2) Mr. Laws' photograph stands out starkly because Mr. Laws is the only "light-skinned" individual; (3) the photograph of him is much brighter than the other photographs; (4) of all the photographs, Mr. Laws is the only person staring straight into the camera; and (5) a woman told Mr. Rosenberg before the photographic identification interview that a man named Larry had

² The Court has included here only such factual findings as are pertinent to the ruling on the suppression of Mr. Rosenberg's identification.

robbed the Mermaid Bar. The Government asserts the photographic array was not suggestive and was reliable.

An identification procedure that is both unnecessarily suggestive and creates a substantial risk of misidentification violates due process. *See U.S. v. Brownlee*, 454 F.3d 131, 137 (3d Cir. 2006) (noting that a photographic identification will be set aside only if the array is unduly suggestive and the photographic array creates a substantial risk of misidentification). As the Supreme Court has explained, a photograph is unduly suggestive when the witness “is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent ... courtroom identification.” *Simmons v. U.S.*, 390 U.S. 377, 383-84 (1968). A photographic array can be unduly suggestive “when police attempt to emphasize the photograph of a given suspect, or when the circumstances surrounding the array unduly suggest who an identification witness should select.” *U.S. v. Lawrence*, 349 F.3d 109, 115 (3d Cir. 2003). “But unnecessary suggestiveness alone does not require the exclusion of evidence.” *Brownlee*, 454 F.3d at 139. Even if the identification was suggestive, the ultimate issue is whether the identification was reliable. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (“Reliability is the linchpin in determining the admissibility of identification testimony.”) The reliability of a photographic array depends on the totality of circumstances. *Brownlee*, 454 F.3d at 139.

Here, the circumstances surrounding the array were not unduly suggestive nor did the officers attempt to emphasize or otherwise focus on Mr. Laws’ photograph. All of the photographs presented to Mr. Rosenberg were of similar size and composition. The similarly aged individuals depicted therein had sufficiently similar features. Mr. Laws’ photograph was second in the order of all the photographs. *See Lawrence*, 349 F.3d at 115 (“If his was the first photograph shown, a defendant might argue that showing his/her photo first was unfair. Similarly, a defendant could

argue that it is unfair to show his/her photo last, after a witness has been unable to identify anyone else.”) Although Mr. Laws contends that the number of photographs used in the array favors a finding of suggestiveness, even Mr. Laws concedes that the number of photographs alone does not constitute a *per se* indication of undue suggestiveness. (Def.’s Mot. to Suppress, p. 4). Indeed, the officers specifically instructed Mr. Rosenberg that the assailant may not be depicted in the photographs shown. From the evidence presented, the officers could not, and did not, manipulate the photographs presented. Nor was any evidence presented that Special Agent Giles or Officer Gurcio encouraged Mr. Rosenberg to choose Mr. Laws’ photograph or discouraged him from the others.

Finally, no evidence was presented that Mr. Rosenberg relied on the brightness of Mr. Laws’ photograph, that Mr. Laws was the only “light-skinned” individual in the array, that Mr. Laws was the only individual looking away from the camera, or that the photograph he chose was one of a “Larry” when making the identification.³ Simply put, any purported or theoretical suggestiveness (and the Court is not concluding that there was any suggestiveness) had no effect on Mr. Rosenberg.

Even if the photographic array was suggestive, which it was not, the identification was reliable. In determining reliability of an identification, the Court considers (1) the witness’ opportunity to view the suspect; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the suspect; (4) the level of certainty demonstrated by the witness during identification; and (5) the length of time between the crime and the identification. *Brownlee*, 454 F.3d at 138. These factors are weighed and balanced against each other in making

³ At oral argument, Mr. Laws also challenged the methodology of how the photographic array was put together. However, counsel for Mr. Laws conceded that he has not proffered any case law that questions the specific methodology that was used in this case. Thus, the Court declines to decide whether the particular methodology deployed by the Philadelphia Police Department violates due process.

a reliability determination.

Here, Mr. Rosenberg was the victim of an intense personal crime during which he was forced to travel from his Jeep back to his bar and down to the bar's basement. Mr. Rosenberg had the opportunity to view the assailants during this time. Mr. Rosenberg spoke to Mr. Laws during the robbery. Thus, Mr. Rosenberg had the opportunity to view the suspect and was sufficiently attentive throughout his encounter with his perpetrators.

Mr. Rosenberg's initial description of his assailant occurred within hours of the crime. During the interview with Detective Sloan, Mr. Rosenberg identified several descriptive features of his assailant. Mr. Rosenberg also stated he recognized his assailant as a former patron of the Mermaid Bar. These facts support the accuracy of Mr. Rosenberg's prior and subsequent description.

Mr. Rosenberg then identified Mr. Laws' photograph less than two months after the crime had occurred. *See Neil v. Biggers*, 409 U.S. 188, 201 (1972) (finding that under the totality of circumstances, even a seven-month delay between the crime and identification did not raise a substantial likelihood of misidentification). Mr. Rosenberg was sure of his identification and signed the photograph of Mr. Laws, writing "He took my gun. He is the one who robbed me." There was no evidence suggesting Mr. Rosenberg equivocated or hesitated in the slightest when identifying Mr. Laws as an assailant. Consequently, the remaining factors demonstrate the reliability of the out-of-court photographic identification, and under the totality of circumstances, the Court finds the photographic identification admissible.

Mr. Laws solely relies on the supposed inadmissibility of the out-of-court identification by Mr. Rosenberg to support his application to exclude an anticipated in-court identification by Mr. Rosenberg. However, for the same reasons the Court denies the motion to suppress the

photographic identification, the Court will permit the Government to seek in-court identification by Mr. Rosenberg of Mr. Laws at trial.

CONCLUSION

For the reasons set forth in this Memorandum, the Court denies this portion of Mr. Law's motion to suppress. An appropriate order follows.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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ORDER

AND NOW, this 11th day of October, 2019, upon consideration of Mr. Laws’ Motion to Suppress (Doc. No. 51), the Government’s response thereto, and following a hearing held on September 26, 2019, and September 30, 2019, **IT IS ORDERED** that Mr. Laws’ Motion to Suppress (Doc. No. 51) is **DENIED IN PART** and **RESERVED IN PART** for the reasons set forth in the accompanying Memorandum.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE