[Cite as *State v. Sowder*, 2010-Ohio-1132.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23216
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-3410
v.	:	
	:	(Criminal Appeal from
DANIEL R. SOWDER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 19th day of March, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Daniel Sowder appeals from his conviction and sentence, following a jury trial, for: Felonious Assault, in violation of R.C. 2903.11(A)(1), with a firearm specification; Felonious Assault, in violation of R.C. 2903.11(A)(2), with a firearm specification; Improperly Discharging a Firearm at or into a Habitation, in violation of R.C. 2923.161(A)(1); and Having a Weapon Under a

Disability, in violation of R.C. 2923.13(A)(2). Sowder contends that the trial court erred in overruling his motion to suppress eyewitness identification testimony upon the ground that it was the product of an unduly suggestive photo array.

{¶ 2} We conclude that the photo array identification procedure was not unduly suggestive. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} In late August, 2008, around midnight, Michael Whited was sitting at home amusing himself on his computer, when Sowder, a man Whited had known for four or five years, started shooting at him through a window. Whited was hit multiple times. One bullet passed through his chest, split, and injured his liver, kidney and small intestines. Another went through his stomach, missing his spinal cord by about a half an inch. Whited was hospitalized for two weeks as a result of being shot, and was bedridden at home for two weeks after that.

{¶ 4} Dayton Police Detective Gary Engel prepared, with the aid of a computer, a photospread to show to two persons in the neighborhood who had seen the perpetrator fleeing. The photospread included a photo of Sowder, who had been identified by Whited, and photos of five other, similarly appearing men.

{¶ 5} Engel showed the photospread to Scott Steinbrugee, after first reading the instructions to Steinbrugee. Steinbrugee positively identified Sowder's photograph in seven seconds.

{¶ 6} Engel then separately showed the photospread to Olivia Ogden, Steinbrugee's fiancee. Steinbrugee and Ogden had not had an opportunity to

communicate concerning Steinbrugee's identification. After a while, it became clear to Engel that Ogden was not going to be able to make a positive identification. He then asked her to pick out the photograph that most closely resembled the perpetrator. She picked out Sowder's photograph. Neither at that time, nor at trial, was she able to positively identify Sowder as the shooter.

{¶ 7} Neither Steinbrugee nor Ogden knew, or had seen, Sowder before the shooting.

{¶ 8} After being indicted, Sowder moved to suppress the eyewitness identifications by Steinbrugee and by Ogden (who had not actually identified Sowder). Following a hearing, Sowder's motion to suppress was overruled.

{¶ 9} Following a trial, a jury found Sowder guilty of all charges. He was sentenced to a term of imprisonment aggregating thirteen years, and was ordered to pay restitution in the amount of $132,156.96. From his conviction and sentence, Sowder appeals.

II

{¶ 10} Sowder's sole assignment of error is as follows:

{¶ 11} "THE TRIAL COURT ERRED WHEN IT ALLOWED INTO EVIDENCE MATERIAL THAT SHOULD HAVE BEEN SUPPRESSED, NAMELY THE IDENTIFICATION OF THE DEFENDANT-APPELLANT USING A SUGGESTIVE PHOTO ARRAY."

{¶ 12} In his brief, Sowder addresses alleged infirmities in the procedure used with respect to all three eyewitness: Steinbrugee, Ogden, and Whited, the victim.

The State responds by arguing that the identification of Sowder by the victim, Whited, was outside the scope of Sowder's motion to suppress, so that he has failed to preserve that issue for review. We agree. The following colloquy at the outset of the suppression hearing is clear on this point:

{¶ 13} "MR. FRENCH [representing the State]: A second matter, Your Honor, the motion to suppress that was filed in this case my understanding is limited solely to identification testimony, and it references photo spreads that were shown to – to two witness, an Olivia Ogden and a Scott Steinbrugee. And, then there's a catch all, or any other person in the above-captioned matter.

{¶ 14} "There were actually three witnesses that viewed photo spreads in this case, Ms. Ogden, Mr. Steinbrugee, and the complainant who was actually shot, Michael Whited.

{¶ 15} "I wasn't sure if the scope of this motion was limited to the two named – the two witnesses named in the motion, or if the defense wished to also challenge the photo spread identification of Mr. Whited.

{¶ 16} "So, I just needed that for clarification as to what's all included in this motion.

{¶ 17} "MS. SOUTHER [representing Sowder]: Your Honor, it's just as to Scott Steinbrugee and Olivia Ogden.

{¶ 18} "The complaining was – the individual that was shot actually knows the Defendant. So, it wasn't to that."

{¶ 19} Another preliminary matter to address is Sowder's argument, in his brief, that the fact that Steinbrugee and Ogden knew Sowder before they were

shown the array exacerbated any suggestion that Sowder was the perpetrator:

{¶ 20} "In the case at bar, the fact that the victim and neighbors knew the Defendant-Appellant gives immediate doubt as to the relevance of a photo array. Those individuals personally knew the Defendant-Appellant before they saw the array. Any comment by the detective could have easily triggered the identification of the person they already knew. There is evidence in the testimony that the Detective made suggestive comments about whether the victim and witnesses 'knew anyone on the array.' The Detection [sic] must have known that the witnesses knew their neighbor, the Defendant-Appellant."

{¶ 21} The factual predicate for this argument is belied by the record. Ogden testified as follows at the suppression hearing:

{¶ 22} "Q. And, this individual that you picked out was what number?

{¶ 23} "A. Number one.

{¶ 24} "Q. Okay.

{¶ 25} "And, do you know number one?

{¶ 26} "A. No.

{¶ 27} "Q. You've never seen him before?

{¶ 28} "A. I have never seen him in my life.

{¶ 29} "Q. Okay.

{¶ 30} "You've never been at Michael Whited's place and seen him there?

{¶ 31} "A. No.

{¶ 32} "Q. And, do you know who he is?

{¶ 33} "A. No."

{¶ 34} Steinbrugee testified as follows at the suppression hearing:

{¶ 35} "Q. Okay.

{¶ 36} "And, I just for purposes of clarification, prior to that night did you know this Defendant?

{¶ 37} "A. No, I don't.

{¶ 38} "Q. Had you ever seen or met this Defendant before?

{¶ 39} "A. No, sir, I haven't."

{¶ 40} Sowder cites *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247, and *State v. Garrett*, Montgomery App. No. 22262, 2008-Ohio-3710, for the proposition that "[c]ourts will only set aside a conviction if the procedure used for identification was so impermissibly suggestive as to give rise [to] a substantial likelihood of irreparable misidentification." Sowder's brief, at p. 7.

{¶ 41} Sowder argues that the photo array procedure Engel used in this case was unduly suggestive because Engel "made mention that the suspect may well be on that page of photos." We have found nothing in the record to support this claim. The instructions Engel read to both Steinbrugee and Ogden were that: "This group of photographs may or may not contain a picture of the person who committed the crime now being investigated." Engel specifically denied, at the suppression hearing, having told either Steinbrugee or Ogden that there was a photograph in the array that they should identify.

{¶ 42} Engel did ask Ogden, once it became clear to him that she was not going to be able to make a positive identification, to pick out the photograph in the array that most closely resembled the perpetrator. She picked out Sowder's

photograph. But she never positively identified Sowder as the perpetrator, either when talking with Engel, or later at trial. In other words, she never advanced any farther toward identifying Sowder as the perpetrator beyond having determined that of the six photographs presented to her, his photograph most closely resembled the perpetrator. There is nothing in the record to suggest that Engel steered her toward Sowder's photograph, in particular, or otherwise influenced her choice of Sowder's photograph as the photograph most closely resembling the perpetrator.

{¶ 43} If Ogden had, by the time of trial, gone beyond having identified Sowder's photograph as the one most closely resembling the perpetrator, and had positively identified Sowder as the perpetrator, we could understand an argument, at least, that the procedure of having asked her to pick out one photograph from the array had the suggestive effect of persuading Ogden, over time, that the person depicted in that photograph was, in fact, the perpetrator, but that was not the case here.[1]

{¶ 44} Sowder's argument that the use of a photo array is unnecessarily suggestive when used with eyewitnesses who already know the suspect is not supported by the record. The only remaining argument he makes is that: "[w]ithout the use of a photo array, and certainly without any suggestive comments made by the police with reference to the photo array, there is a question as to whether the eyewitnesses would have been able to accurately identify the Defendant-Appellant as the shooter of the victim." The record does not support an argument that Engel

[1]Although we understand that this argument could be made, we are not required to decide, in this case, whether that argument has merit, and we do not so decide.

made suggestive comments with reference to the photo array. That reduces Sowder's argument to a generic argument against using photo arrays at all.

{¶ 45} We are not persuaded that use of a properly composed photo array, with proper instructions, is inherently more suggestive than simply asking the witness, at trial, whether the witness sees the perpetrator in the courtroom. From the layout of the courtroom, it will be perfectly obvious where the defendant is sitting. Surely, that setting will be generically more suggestive than a properly conducted use of a photo array.

{¶ 46} We conclude that the photo array procedure used in this case was not "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." Sowder's sole assignment of error is overruled.

III

{¶ 47} Sowder's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

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