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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1400**

State of Minnesota,
Respondent,

vs.

Mika Myron Keali Dalbec,
Appellant.

**Filed July 2, 2018
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-CR-16-2273

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and
Kirk, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this appeal from his conviction of fourth-degree criminal sexual conduct, appellant argues that the district court erred by denying his motion to suppress pretrial identification evidence because the photo lineup was impermissibly suggestive and lacked an adequate independent origin. We affirm.

FACTS

Around 8:40 a.m. on March 8, 2016, A.P.R. left her high school to meet her friends. While taking a shortcut through a wooded area, A.P.R. encountered a man whom she described as wearing a red sweatshirt, khaki shorts, and a baseball cap. The man blocked A.P.R.'s path, picked her up by grabbing her buttocks, and held her tightly against his chest. A.P.R. leaned away from him, and the man put her down. A.P.R. then tried to call one of her friends on her cellphone, but the man took A.P.R.'s cellphone and told her that he would give it back to her if she had sex with him. A.P.R. told him to keep the phone, but the man ended up sliding the phone on the ground to her. A.P.R. then ran to her friends to tell them what had happened. As A.P.R.'s friends were comforting her, the man walked out from the end of the trail. A.P.R. told her friends, "That is him." Her friends, including M.P.P., confronted the man, and he denied touching A.P.R. The man walked to a bus stop across the street and got on a bus heading toward downtown St. Paul.

The next day, A.P.R. reported the incident. Video was downloaded from the bus that the man got on, and photos taken from the video at 9:05 and 9:22 a.m. show a man wearing a red sweatshirt, light-colored shorts, and a dark-colored baseball cap.

Investigators identified the man as appellant Mika Myron Keali Dalbec. On March 20, 2016, Sergeant Johnson interviewed appellant. Appellant was shown a copy of the photos taken from the bus video. When asked if he was the man in the photos, appellant said, “Yes, Sir.” Appellant denied any encounter with A.P.R., but he said that he was familiar with the wooded area.

Sergeant Donohue prepared a photo lineup for A.P.R. and M.P.P. Sergeant Donohue testified that because appellant did not have a booking photo in Ramsey County, another officer gave him appellant’s driver’s license photo, and Sergeant Donohue used that photo as a reference to choose the five other photos in the lineup. Because appellant’s photo had a different colored background than the booking photos, Sergeant Donohue printed the lineup in black and white. He then gave the lineup to another officer.

Two weeks after the complaint, Sergeant Toronto went to A.P.R. and M.P.P.’s high school to administer the lineup. Sergeant Toronto testified that he did not see the lineup before the interview. He administered the lineup by showing one photo at a time and waiting for the witness to say that she was ready to see the next photo. A.P.R. was unable to identify the man who grabbed her. M.P.P. selected photo number five, which was appellant. Sergeant Toronto noted that M.P.P. looked at photo number five longer than the other photos. M.P.P. indicated on the lineup form that her certainty was seven out of ten and that she was more than 50% sure. After the lineup, another officer asked M.P.P. for a physical description of the person she saw. M.P.P. said he was 5’10” or 6’0” tall, was 18-20 years old, and was wearing a red sweatshirt, brownish cutoff pants, and a red cap.

Appellant was charged with one count of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(c) (2014). Appellant moved to suppress the photo lineup identification evidence, arguing that it was unnecessarily suggestive. The district court denied the motion. At trial, M.P.P. testified that she was not 100% sure that the man in the courtroom was the man that she identified. She indicated that appellant looked different now. Sergeant Johnson also indicated that appellant looked different because he was now wearing “good-sized” glasses. Appellant was found guilty and was sentenced to 60 months in prison.

This appeal follows.

D E C I S I O N

This court employs a two-part test for determining whether evidence of a witness’s pretrial identification must be suppressed: (1) whether the pretrial identification procedure was unnecessarily suggestive, and, if so, (2) whether, under the totality of the circumstances, the identification evidence was reliable. *State v. Young*, 710 N.W.2d 272, 282 (Minn. 2006). The first inquiry turns on whether the identification procedure unfairly singled out the suspect. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). If so, we then ask whether the identification is nonetheless reliable under the totality of the circumstances. *Id.* Even if we were to find that the district court erred by admitting the identification evidence, “a finding of constitutional error in a criminal trial does not require a new trial if the state can show beyond a reasonable doubt that the error was harmless.” *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996).

Appellant argues that the photo lineup was unnecessarily suggestive because the other photos were of individuals who do not resemble appellant, appellant was the only individual smiling in his photo, appellant's skin tone was darker than all but one other individual, and appellant was the only individual who looked like he was around the age of 18. Appellant cites no authority for why these arguments render the lineup unnecessarily suggestive, but in similar challenges to photo identification procedures, this court has held the procedures were not unnecessarily suggestive.

“A photographic display need not be comprised of exact clones of the accused. It is sufficient if all the people in the display bear a reasonable physical similarity to the accused.” *State v. Yang*, 627 N.W.2d 666, 674 (Minn. App. 2001) (quotations and citation omitted), *review denied* (Minn. July 24, 2001). The Minnesota Supreme Court has held that a lineup was not unnecessarily suggestive when the suspect was the only one wearing a blue shirt in the lineup and the witnesses had recalled that the suspect was wearing a blue shirt at the time of the crime. *State v. Cruz-Ramirez*, 771 N.W.2d 497, 511 (Minn. 2009). In another case, when two suspects were the only ones wearing jail clothes in a lineup, the procedure was not unnecessarily suggestive. *State v. Duncan*, 312 Minn. 17, 21-22, 250 N.W.2d 189, 193-94 (1977).

The district court found that the police took numerous measures to avoid an unnecessarily suggestive lineup, including following the “double blind procedure”¹ and

¹ Sergeant Donohue, who put the lineup together, and Sergeant Toronto, who administered the lineup, were not involved in the investigation. Sergeant Toronto did not know any of the parties involved in the case and did not see the lineup before he administered it.

printing the lineup in black and white so that the background colors would not differ. The district court also explicitly found that “all [of the] men are African American with similar facial features, facial hair, and similar hair styles. Furthermore, the state also provided the dates of birth of the five men used in the lineup. Four of the five men pictured in the lineup were born within four years of the defendant.” These findings counter appellant’s arguments, and appellant offers no persuasive reasons for us to conclude that the district court’s findings were erroneous. The procedure used to identify appellant was not unnecessarily suggestive.

Affirmed.