

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

v.

MICHAEL BOYCE,

Defendant.

) **CASE NO. SX-13-CR-092**
)
)
) **CHARGES:**
) **ASSAULT 1ST DEGREE/PRINCIPALS;**
) **ASSAULT 3RD DEGREE/PRINCIPALS;**
) **CARRYING OR USING A DANGEROUS**
) **WEAPON/PRINCIPALS;**
) **UNAUTHORIZED POSSESSION OF A**
) **FIREARM/PRINCIPALS;**
) **DISCHARGING OR AIMING A**
) **FIREARM/PRINCIPALS; POSSESSION**
) **OF AMMUNITION/PRINCIPALS;**
) **FAILURE TO REPORT FIREARMS /**
) **PRINCIPALS**
)

APPEARANCES:

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Christiansted, St. Croix, VI
Attorney for the People

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Attorney for Defendant

MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER comes before the Court on Defendant's Motion to Suppress Identification Evidence (Photo Array) and Request for Evidentiary Hearing With Points and Authority filed on May 8, 2014. The People did not file an opposition to the motion to suppress. The Court held a suppression hearing on September 23, 2014, at which the parties introduced evidence and placed their arguments on the record. For the reasons stated below, the Court will deny Defendant's motion.

I. FACTUAL & PROCEDURAL BACKGROUND

On February 11, 2013, five individuals assaulted and shot another individual in the vicinity of Estate Richmond in Christiansted on the island of St. Croix. The investigating detective met with the victim and took a statement the day after the incident occurred. The victim indicated that he knew several of his assailants by sight and that he would recognize them if he saw them again. The victim: (1) provided physical descriptions of the assailants and what they were wearing; (2) identified several of the assailants by nickname; and (3) identified the "graveyard shop" as a location where some of the assailants hang out.

The detective took this information to the Intelligence Unit of the Virgin Islands Police Department. Based on the information provided by the victim, the Intelligence Unit identified Michael Boyce, Jr. ("Boyce") as a possible suspect. The detective provided Boyce's name to the Forensics Unit. The Forensics Unit pulled a photo of Boyce from his criminal record and inserted it into a photo array of six individuals with similar characteristics.

Seven days after the incident, the victim came in to the Ancilmo Marshall Command Station to look at the photo array prepared by the Forensics Unit. Prior to being shown the photo array, the detective read the following statement to the victim:

You are about to be shown a group of individuals who may or may not have been involved in a Criminal Act under Investigation. Please look carefully at each person. If you can identify the person who committed the Criminal Act, please circle the appropriate number below to indicate the person you have identified. Do not feel obligated to choose any particular photograph unless you are certain about your identification.

Suppression Hr'g, People's Exh. 3.

The victim, after viewing the photo array, circled number 2. Suppression Hr'g, People's Exh. 2. He then wrote the following statement: "The person I pick is number two and he was the one who run me down and shot at me." Suppression Hr'g, People's Exh. 3. At

the suppression hearing, the investigating detective testified that photo number 2 was the picture of Boyce that was pulled from Boyce's criminal record. Boyce was subsequently arrested and charged in relation to the crime. On May 8, 2014, Boyce moved to suppress the identification as violative of his due process rights.

II. LEGAL STANDARD

A pre-trial identification procedure that is so unnecessarily suggestive as to create a substantial likelihood of irreparable misidentification violates constitutional due process. *Garcia v. Government of the Virgin Islands*, 48 V.I. 530, 536 (D.V.I. App. Div. 2006) (citing *Neil v. Biggers*, 409 U.S. 188, 196-99 (1972)). To determine whether an identification procedure violates constitutional due process, courts employ a two-part test. First, the court must determine whether the identification procedure was unnecessarily suggestive. *Richards v. People*, 53 V.I. 379, 387 (V.I. 2010). The burden initially rests on the Defendant to show that a procedure was "impermissibly suggestive". *Ostalaza v. People*, 58 V.I. 531, 549 (V.I. 2013). The court "must assess the degree of suggestiveness presented by the identification procedure actually used in the case, and whether the police had good reason not to use less suggestive procedures." *Potter v. People*, 56 V.I. 779, 789 (V.I. 2012). If the procedure was not unnecessarily suggestive, the inquiry ends there. However, if it was unnecessarily suggestive, the court must then decide whether the identification that occurred was reliable despite the suggestive procedure. *Richards*, 53 V.I. at 387. "[T]he [c]ourt considers the totality of the circumstances to determine whether it was so suggestive as to give rise to a substantial likelihood of misidentification." *Potter*, 56 V.I. at 789. Factors to consider are:

the opportunity of the witness to view the criminal at the time of the crime,
the witness' degree of attention, the accuracy of the witness' prior description

of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199-200.

A reliable identification that is the product of an unnecessarily suggestive procedure is admissible. *See, e.g., United States v. Brownlee*, 454 F.3d 131, 140 (holding that a reliable out-of-court identification was admissible despite the fact that it was the product of a suggestive “show-up” procedure).

III. DISCUSSION

Boyce argues that the photo array procedure used by the police to obtain a pre-trial identification was unnecessarily suggestive and raises a substantial likelihood of irreparable misidentification. Mot. to Suppress Identification Evidence at 1-3. During the suppression hearing, Boyce argued that the photo array procedure used was unduly suggestive because the victim’s description of his assailants provided no basis to include a picture of Boyce in the photo array. Boyce also appeared to argue that the photographs used in the array were not sufficiently similar. Boyce further argued that the police should have used a less suggestive procedure.

The People argued that Boyce failed to raise any issue as to whether the actual procedure used by the police was unduly suggestive. Boyce’s inclusion in the photo array, according to the People, was the product of taking information from the victim and providing it to the Intelligence Unit of the Virgin Islands Police Department.

A. The Presence of a Photo of Boyce in the Array did not Violate any Cognizable Right.

First, Boyce argued that the physical descriptions provided by the victim provided an insufficient basis to include Boyce in a photo array. The situation at hand is similar to the

situation in *Potter v. People*, in which the defendant argued that “the police possessed insufficient evidence to place [defendant] in the photo arrays shown to the two witnesses in the first place.” *Potter*, 56 V.I. at 790. There, the defendant similarly argued at a suppression hearing that the photo array had to have been unduly suggestive because the information contained in the witness statements was insufficient to place the defendant in the array. *Id.* In *Potter*, the Supreme Court of the Virgin Islands held that “the mere presence of [defendant’s] picture within the array did not violate any cognizable right.” *Id.* In this case, the People made a strong showing that Boyce’s inclusion in the photo array was the product of investigative police work based on the victim’s physical descriptions of his assailants as well as the victim’s knowledge of the nicknames and hangout spot of several of his assailants. This Court finds that the presence of a photograph of Boyce in the photo array did not violate Boyce’s rights.

B. The Alternative Procedure Suggested by Boyce is More Suggestive than the Procedure Actually Used.

Boyce also argued that instead of presenting the victim with a photo array, the police should have used a less suggestive procedure. At the suppression hearing, as an example of a less suggestive procedure, Boyce argued that the police could have driven the victim by the “graveyard shop” to see if any of his assailants were present there. If he recognized any of the individuals hanging out at the “graveyard shop” to be an assailant, he could then point out that individual to police. Such a procedure bears a strong similarity to a “show-up” procedure which the Supreme Court of the United States has determined to be inherently suggestive. *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (*overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987)); *Brownlee*, 454 F.3d at 136 (“As the Supreme Court has

acknowledged, a show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime.”). The Court finds that, even if the photo array was found to be suggestive, Boyce has failed to demonstrate that there was a less suggestive procedure that could have been used.

C. Boyce Failed to Show that the Identification was the Product of any Unduly Suggestive Procedures.

Finally, Boyce argued that the photo array itself was unduly suggestive. He questioned the testifying detective as to why only the individuals in 2, 3, and 5 had mustaches. The testifying detective indicated that 6 also had a mustache and that 1 and 4 also appeared to have some facial hair. Boyce also asked if the detective thought that 1, 3, and 4 had lighter skin than 2, 5, and 6. The testifying detective agreed that those individuals appeared to have lighter skin. The array, introduced into evidence as People’s Exhibit 2, contains six individual photographs depicting black men with braided hair and similar styles of facial hair. The individuals appear to be of similar build and age. The individuals have similar complexions though some may have lighter skin. The Court finds that the array itself was not unduly suggestive. *See Potter*, 56 V.I. at 790-91 (citing *United States v. Foote*, 432 F. App’x. 151, 153–54 (3d Cir.2011) for the proposition “that an array was not suggestive when it had pictures of six men of the same race, approximately the same age, same build, and same hair style, even though the length and style of facial hair differed amongst the men.”).

Boyce did not introduce any evidence that the police “intentionally or unintentionally suggested” to the victim which picture to select from the array. *See Potter*, 56 V.I. at 791. Here, the victim knew several of his assailants by sight and told the police that he would recognize them if he saw them again. The investigating detective testified that he did not know Michael Boyce, Jr. Nor did he direct the Forensics Unit as to how the photo array should

be assembled. From the record before the Court, Boyce has failed to meet his burden of demonstrating that the procedure used was unduly suggestive.

IV. CONCLUSION

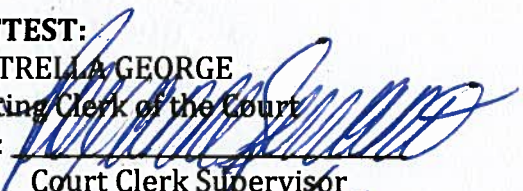
Boyce failed to make the required showing that the pre-trial identification procedure used during the police investigation was unduly suggestive. Therefore, the Court need not address whether the identification, under the totality of the circumstances, was so suggestive as to give rise to a substantial likelihood of misidentification. The Court will deny the motion to suppress the photo array identification. An appropriate Order follows.

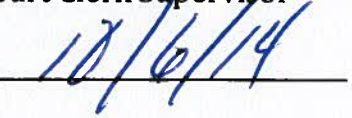
DATED: October 6, 2014



ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 

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ORDER

THIS MATTER comes before the Court on Defendant's Motion to Suppress Identification Evidence (Photo Array) and Request for Evidentiary Hearing With Points and Authority filed on May 8, 2014. For the reasons stated in the accompanying Memorandum Opinion of even date, it is hereby

ORDERED that Defendant's motion to suppress identification evidence is **DENIED**; it is further

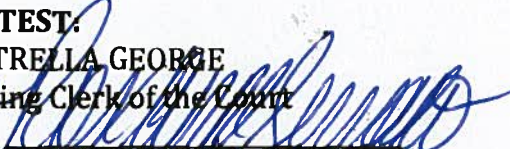
ORDERED that copies of this Order shall be provided to counsel of record.

DATED: October 6, 2014

ATTEST:

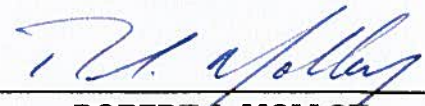
ESTRELLA GEORGE

Acting Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 10/6/14


ROBERT A. MOLLOY

Judge of the Superior Court