

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted January 30, 2024*

Decided February 14, 2024

*Before*DIANE S. SYKES, *Chief Judge*THOMAS L. KIRSCH II, *Circuit Judge*DORIS L. PRYOR, *Circuit Judge*

No. 23-1837

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*MICHAEL FERRIS,
*Defendant-Appellant.*Appeal from the United States District
Court for the Southern District of Illinois.

No. 4:20-cr-40105

Staci M. Yandle,
*Judge.***ORDER**

Michael Ferris appeals his convictions for sexually exploiting and extorting minor girls, arguing that the court violated his due process rights under the Fifth Amendment by allowing evidence at trial of one victim's identification of him. On appeal, he argues that the photo array and procedures used in the identification were

* We have agreed to decide the case without oral argument because the parties requested that we vacate oral argument, the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. See FED. R. APP. P. 34(a)(2)(C).

unnecessarily suggestive. But, because the victim is independently reliable and the evidence tying Ferris to the crime is overwhelming, any suggestiveness was harmless. We therefore affirm.

Ferris used three Facebook accounts and one Skype account to sexually exploit and blackmail nine minor girls. Pretending to be a minor girl on Facebook, Ferris persuaded the victims to send him sexually explicit images and videos. He extorted many of the victims, threatening to send the images and videos to others unless they agreed to send more material or, in some cases, to allow family members to abuse them.

Ferris became particularly close with a victim we will call K.D. He spoke to her using the Facebook accounts he created under the pseudonyms Christine James and Sammy Gray, plus his account on Skype under the pseudonym Grizzly Bear. (He used the third Facebook account, under the pseudonym Sarah Mansfield, to speak to other victims but not K.D.) K.D. eventually deduced that Grizzly Bear was a man, and Ferris later told her that he was behind the Christine James and Sammy Gray Facebook accounts. Ferris then chatted with K.D. over video for several months. K.D. saw Ferris's face numerous times on video calls and in digital photos that he sent her. The two eventually stopped talking in the days leading up to Ferris's arrest.

Twenty months after K.D. and Ferris stopped talking, K.D. identified Ferris in a photo array. Before seeing the array, K.D. described Ferris as skinny with dark brown eyes and long hair that got shorter over the time they spoke. She also said Ferris had a "scruff" beard that he sometimes shaved. When it was time for the identification, one agent showed K.D. the photo array, while another agent stayed in the room, contrary to written procedure, and sat on the floor away from K.D. The agent with the photo array read instructions to K.D. from a form, telling her to remember that hairstyles or facial hair can change and to ignore any difference in the style of the photographs. But the agent did not read the remaining instructions: "Making a false statement to a federal agent is a crime; it is important to clear innocent persons; the investigation will continue even if she does not identify a person in the lineup; and not to discuss this identification procedure with other witnesses or the media." And the agent failed to note that the photo array may or may not have contained a photo of the suspect. K.D. identified Ferris as the man behind the Facebook and Skype accounts within seconds and noted that the face shape, nose, eyes, and hair color all matched those of the man she had been speaking with. She said she was "100% certain" that Ferris was the man she knew as Grizzly Bear.

Before trial, Ferris moved to suppress K.D.'s identification. He argued that the array was suggestive because he was the only person in it with both long hair and a beard; his photo was clearer and more closely cropped than the others; and the agents did not follow proper procedures (they did not read all the instructions to K.D., show the photos sequentially, or use a double-blind procedure where the agents do not know who the suspect is). Ferris also argued that K.D. was unreliable because she was blind in her left eye and the identification took place at the end of the day, when K.D. said she was tired. The court disagreed. It reasoned that the differences between the six photos were negligible; the agents conducted the identification neutrally enough; and nothing suggested that the identification process had any undue bearing on K.D.'s identification, given that she was 100% sure of her selection.

At trial, apart from K.D., the government provided a plethora of evidence that Ferris was behind the exploitive Facebook and Skype accounts. To begin, the three Facebook accounts used Ferris's IP address. Further, the Sammy Gray account used Ferris's personal phone number and email address as backup. That account also sent a recorded voice message that five witnesses, including Ferris's former roommates, identified as featuring Ferris's voice. The Christine James account uploaded a meme to Facebook the same day that Ferris's personal account uploaded the same meme. And when officers searched Ferris's phone, it was logged into both the Sarah Mansfield and Grizzly Bear accounts. Finally, Ferris had K.D.'s cell phone number and a different victim's child sexual abuse material on his phone.

Additionally, K.D. testified consistent with this evidence. She explained that, although she was blind in her left eye, the vision in her right eye allowed her to see "just fine." K.D. testified that she easily identified Ferris because his face matched Grizzly Bear's, both from the video chats and the photos. She then explained that she was an artist who drew faces from memory and that she knew that Ferris's photo was Grizzly Bear as soon as she saw it. She also testified that she knew that same person who ran the Christine James account ran the Sammy Gray and Grizzly Bear accounts.

Finally, as relevant here, the agent who created the array testified at trial. Ferris's counsel questioned the agent about the ethnicity of the other five men (the agent said he did not know), their varied facial hair (the agent said this was normal practice based on what he had seen), and the difference in the clarity and background of each of the photos (the agent acknowledged differences in background, but not clarity). The agent then explained that he created the lineup 10 months before K.D.'s identification, for use with a different witness.

The jury found Ferris guilty of 25 counts, including sexual exploitation of a child (and attempt), 18 U.S.C. § 2251(a), (e); distribution of child pornography, *id.* § 2252A(a)(2), (b)(1); possession of child pornography, *id.* § 2252A(a)(5)(B), (b)(2); interstate extortion, *id.* § 875(d); and cyberstalking, *id.* §§ 2261A(2)(B), 2261(b)(5). He was sentenced to 900 months in prison.

After trial, Ferris moved for a judgment of acquittal or a new trial, arguing that the court should have suppressed K.D.'s identification. Ferris insisted that the agent who created the array was inexperienced, the agent improperly compared Ferris to men who were apparently Hispanic, and the background of Ferris's photo drew more attention to him than to the other men. The court denied Ferris's motion. It ruled that the other men in the lineup had similar complexions, facial features, and weight, with hair lengths and facial hair that matched K.D.'s description of Ferris.

On appeal, Ferris argues only one issue: That the court should not have admitted K.D.'s identification of Ferris from the photo array. This court reviews that decision *de novo*. *United States v. Vines*, 9 F.4th 500, 506 (7th Cir. 2021). Assessing that ruling involves two steps: First, was the photo array unnecessarily suggestive? Second, despite any suggestiveness, was the witness independently reliable? *See Perry v. New Hampshire*, 565 U.S. 228, 238–40 (2012); *United States v. Sanders*, 708 F.3d 976, 983–84 (7th Cir. 2013). But even if the court's ruling was wrong, we will affirm the judgment if the admission of the identification was harmless. *Sanders*, 708 F.3d at 988.

In his brief, Ferris provides several reasons why he believes the photo array was unnecessarily suggestive—the first step of the analysis. But we need not address that step. Even if he is correct, Ferris cannot succeed on the second step because K.D. was independently reliable. And in any case, the overwhelming evidence showing that Ferris was the perpetrator means that any error in including the identification was harmless. For purposes of the appeal, we assume without deciding that the array was suggestive and move directly to K.D.'s reliability.

K.D.'s reliability outweighs any assumed suggestiveness of the array. *See Neil v. Biggers*, 409 U.S. 188, 198–99 (1972). We review a witness's reliability based on five factors: 1) the witness's opportunity to view the suspect at the time of the crime; 2) the witness's degree of attention when looking at the suspect; 3) the accuracy of the witness's description of the suspect before looking at the array; 4) the level of certainty that the witness demonstrates; and 5) the length of time between the criminal act and

the identification. *Id.* at 199–200. These factors are reviewed based on the totality of the circumstances. *Id.* at 199. Four of the factors favor K.D.’s reliability, so she is reliable enough to overcome any suggestive practices in the photo array.

The first two factors—K.D.’s opportunity to view Ferris during their video calls and her attention at the time—favor K.D.’s reliability. Ferris argues that, because K.D. is blind in one eye, has an attention-deficit disorder, and mostly saw Ferris’s cats during video calls, she is not reliable. But the record undercuts this argument. K.D. testified without contradiction that she could see well out of her right eye; that the video calls, which lasted for hours each day for several months, often displayed Ferris’s face; and that she saw him in digital photos. *See id.* at 200 (finding a witness reliable who had adequate opportunity to view the suspect when they were together for half an hour, in adequate light, and saw each other’s face at least twice). And, refuting Ferris’s contention about her attention-deficit disorder, K.D. testified that she paid a high degree of attention to Ferris’s face, a practice that she regularly follows to draw faces reliably from memory.

The second two factors also favor K.D.’s reliability. She described Ferris accurately before seeing the photo array. And she was sure that her identification was correct. On the identification form, she wrote that Ferris’s “face shape is the same and so is the nose, eyes, and hair color.” She also was “100% certain” that Ferris was the man she spoke to over Skype. Ferris argues that certainty can be affected by suggestive practices, but that concern can be overcome when, as here, the witness is “unwavering in [her] initial descriptions and later identifications of [the suspect].” *See United States v. Clark*, 989 F.2d 1490, 1497 (7th Cir. 1993).

Only the fifth factor may cut against K.D.’s reliability. She identified Ferris in the photo array 20 months after she last spoke with him on Skype. Although the Supreme Court has said that even a seven-month delay can be a “seriously negative factor,” it can be overcome when the witness’s “record for reliability” is strong. *Biggers*, 409 U.S. at 201; *accord United States v. Recendiz*, 557 F.3d 511, 526 (7th Cir. 2009) (two-year delay in identification can be outweighed by the other four factors if they strongly favor a witness’s reliability). Because the other four factors strongly show that K.D. is reliable, the 20-month delay in identification does not outweigh her reliability.

In any case, even if K.D. were not independently reliable, admission of her identification of Ferris in the array would be harmless. Admission is harmless if the “untainted incriminating evidence is overwhelming.” *See United States v. Eads*, 729 F.3d

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769, 778–79 (7th Cir. 2013). Beyond K.D.’s identification, other overwhelming physical, digital, and testimonial evidence tied Ferris to the crime, and Ferris does not persuasively argue otherwise. Four independent witnesses beyond K.D. identified Ferris as the person who left a voice message from one of the accounts used to sexually exploit and blackmail the victims; the four accounts used to commit the offenses were also active on Ferris’s own phone, tied to his personal email address, or connected to his IP address; the same meme that he uploaded to his personal social media account was also uploaded the same day to one of the pseudonymous accounts tied to him; and his personal phone stored K.D.’s phone number and child sexual abuse material from another victim. Given this independent, overwhelming evidence connecting Ferris to the accounts used to abuse and exploit the victims, any error in admitting K.D.’s identification of him was harmless.

AFFIRMED