

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0006**

In the Matter of the Welfare of:
B.L.R.

**Filed March 25, 2008
Affirmed; motion granted
Lansing, Judge**

Hennepin County District Court
File Nos. 306389, JV-05-8938

Leonardo Castro, Fourth District Chief Public Defender, Daniel Homstad, Assistant Public Defender, 317 Second Avenue South, Suite 200, Minneapolis, MN 55401 (for appellant B.L.R.)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

LANSING, Judge

The district court adjudicated BLR delinquent following a determination that he aided and abetted theft from a person. On appeal from adjudication, BLR argues that he is entitled to a new trial because the record does not contain a waiver of his right to an

omnibus hearing and because the admission of evidence derived from a photographic lineup deprived him of due process. We conclude that the absence of an on-record waiver of a pretrial hearing on the identification evidence does not require a new trial and that the district court properly admitted the evidence. BLR has withdrawn the remaining issues that were initially raised in this appeal. We affirm.

F A C T S

The state, by petition, charged BLR with a felony count of aiding and abetting theft from a person. At trial, BLR did not dispute that the theft occurred but denied that he was the thief. For purposes of identification, the state relied on the testimony of the victim of the theft, JL, and a police officer who conducted a photographic lineup.

JL testified that the theft occurred around midnight on June 3, 2006, as he was walking home from a friend's birthday barbecue. He had arrived at the barbecue between 5:00 and 6:00 p.m. and had consumed the contents of two to four cans of beer between that time and 10:00 p.m. As JL walked home, he heard the sound of someone running behind him. He turned and saw a man, about six feet away. The man demanded JL's money. JL told him that he had no cash, and the man then told him to give him his wallet. The man approached JL and began grabbing at his pockets. JL reached into his pocket and took out a plastic sleeve that held his credit and debit cards. When the man tried to grab the sleeve, JL held on to it. He then saw a second man running toward him, and he let go of the sleeve and put his hands in the air. The two men took the sleeve of bank cards and JL's cell phone and ran away. JL estimates that thirty seconds elapsed

from the time the first man accosted him until the second man appeared and that the entire incident lasted between fifty and sixty seconds.

After the incident JL returned home and waited for his roommate. When his roommate returned, JL used his cell phone to cancel his bank cards. He reported the theft to the police the next day. After meeting with police on the day of his theft report, JL also met with a police officer ten days later to view a photographic lineup.

At trial JL testified that he provided the police with a recorded statement and that he also provided a description of the two men. He said that he believed that he was asked for a description before he saw the photographs and that he provided his statement after he looked at the photographs. During his trial testimony, JL again described both men but provided a more detailed description of the first. He described the first man as an African-American, with “[k]ind of like a smooth complexion, [and] a wider nose,” and without facial hair. He said that he was wearing dark jeans, white shoes, a baseball hat, a stud earring, a dark “sweatshirt like a hooded sweatshirt,” and that he “looked young.” JL said that he thought that the first man was slightly younger than JL, who was 20 at the time of the theft. In a courtroom identification, JL pointed to BLR as the first of the two men who stole his bank cards and his cell phone.

The police officer who administered the photographic lineup testified that JL identified BLR in the photographic lineup as the first assailant. The officer said that the lineup procedure he used was not a double-blind lineup in which the administering police officer does not have any information about the suspect. He testified that, although it is the normal practice of the Minneapolis Police Department to use a double-blind

procedure, he did not use that procedure in BLR's case because the only officers available to administer the lineup were aware that BLR was a suspect.

Following the trial, the district court found BLR guilty of aiding and abetting theft from a person and adjudicated him delinquent. In oral findings and a nine-page written order, the district court found JL's testimony credible and also found reliable JL's identification of BLR both in the courtroom and at the police station. BLR appeals, challenging the district court's failure to hold an omnibus hearing, the admissibility of the identification evidence, the admissibility of other-crimes evidence, and the sufficiency of the evidence to support the district court's determination that the state proved the charge of theft from a person.

D E C I S I O N

I

We first address BLR's contention that he is entitled to a new trial because the record does not contain a waiver of his right to an omnibus hearing on the admissibility of the identification evidence derived from the photographic lineup. The Minnesota Rules of Juvenile Delinquency Procedure "govern the procedure in the juvenile courts of Minnesota for all delinquency matters." Minn. R. Juv. Delinq. P. 1.01. The interpretation of procedural rules is a legal question, which we review de novo. *See Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

According to the record, neither BLR nor the prosecutor moved for an omnibus hearing on the admissibility of the photographic lineup identification. Significantly, BLR does not dispute that he received a full hearing on his challenge to the lineup evidence

during the trial but contends that the district court's failure to hold a pretrial evidentiary hearing or obtain a waiver of a pretrial hearing entitles him to a new trial. The record indicates that BLR was fully prepared to challenge the lineup evidence at trial and that the district court treated BLR's in-trial objections to the photographic lineup in the same way that it would have handled a pretrial challenge at an omnibus hearing. More than forty pages of the trial transcript consist of testimony related to the photographic lineup, and both attorneys fully argued this evidentiary issue in their closing statements.

The rules, however, instruct juvenile courts to determine at pretrial conferences whether any constitutional or evidentiary issues necessitate an omnibus hearing. Minn. R. Juv. Delinq. P. 11.02 (stating that "[a]t the pretrial conference, the court shall determine whether there are any constitutional or evidentiary issues and, if so, schedule an omnibus hearing pursuant to Rule 12"). But, the rules also state that, "[i]f there is no pretrial conference, constitutional or evidentiary issues shall be raised by written motion of the child's counsel or prosecuting attorney." Minn. R. Juv. Delinq. P. 11.02. In the provision for scheduling the omnibus hearing, the rules again refer to these separate avenues for triggering a pretrial evidentiary hearing. *See* Minn. R. Juv. Delinq. P. 12.01 (stating that "[t]he court shall hold an omnibus hearing . . . any time before trial to determine issues raised pursuant to Rules 6, 10, or 11 upon its own motion or upon motion of the child's counsel or the prosecuting attorney").

The district court conducted a pretrial conference on BLR's theft-from-a-person charge and on two companion charges. The order issued after the pretrial conference relates primarily to a companion charge and to the withdrawal of a certification motion.

The order does not refer to an omnibus hearing. It is, of course, the preferred practice that the district court specifically ascertain whether an omnibus hearing is requested and determine on the record whether that hearing will be scheduled before or in conjunction with the trial. But because the rules contemplate situations in which the parties—not the court—initiate the omnibus-hearing process, we conclude that, absent a motion or an objection, it is not per se reversible error for the district court to fail to schedule a pretrial evidentiary hearing and, instead, to hold the evidentiary hearing in conjunction with the court trial.

The record does not establish that the state notified BLR in writing of its intention to use the lineup evidence at trial, but BLR does not claim that he did not know about the lineup evidence in advance or that he was otherwise prejudiced by the court holding the evidentiary hearing in conjunction with the trial rather than before trial. *State v. Nelson*, 483 N.W.2d 739, 739 (Minn. App. 1992) (indicating that, when prosecutor fails to comply with notification requirement for identification evidence, court need not suppress evidence if defendant's counsel in fact received notice of evidence and defendant was not prejudiced).

Consequently, because there was no motion for an omnibus hearing and because BLR has not shown that he was prejudiced by the court's failure to hold the evidentiary hearing before trial rather than in conjunction with the trial, we reject BLR's argument that the scheduling procedure constitutes reversible error that requires a new trial. *See State v. Grayson*, 546 N.W.2d 731, 736 (Minn. 1996) (stating that defendant claiming

district court erred in admitting evidence has burden of proving both error and resulting prejudice).

II

BLR also argues that the juvenile court deprived him of his due-process rights when it admitted evidence derived from the lineup procedure. Identification evidence must be excluded if the identification procedure is so impermissibly suggestive that it gives rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). Minnesota courts analyze this due-process standard using a two-part test. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). The first inquiry focuses on whether the procedure was unnecessarily suggestive. *Id.* If so, the second inquiry is whether the identification was reliable under the totality of the circumstances. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). The issue of whether a person has been denied due process is reviewed de novo. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

Whether an identification procedure is unnecessarily suggestive depends on whether it unfairly singles out the defendant for identification. *Ostrem*, 535 N.W.2d at 921. We conclude that the photographic lineup in which JL identified BLR did not unfairly single out BLR for identification. The six lineup photographs show young males with dark skin and relatively short hair. None of the youths in the photographs wear earrings or have facial hair. And, while the youths appear to be more than slightly younger than JL, none of the youths is noticeably older or younger than BLR. Although one of the photographs shows a person with lighter skin than BLR and the other youths,

the photographic lineup does not unfairly make BLR stand out or suggest that BLR is the suspected assailant.

BLR argues that he was unfairly singled out because only two of the photographs match the description given by JL. He asserts that only his photograph and one other photograph show youths with smooth complexions and wider noses, who appear to be slightly younger than JL and who appear to be “traditional African Americans”—rather than of Somali or Ethiopian descent. The Minnesota Supreme Court, however, has stated that “a lineup need not use ‘exact clones’ of the accused.” *State v. Roan*, 532 N.W.2d 563, 572 (Minn. 1995). Because all of the young men in the photographic lineup bear a reasonable physical similarity to BLR, BLR’s argument is unpersuasive. *See Seelye v. State*, 429 N.W.2d 669, 672-73 (Minn. App. 1988) (stating that “it is not necessary that every person in the display fit the witness’ description exactly” and that “[i]t is sufficient if all the people in the display bear a reasonable physical similarity to the accused”).

BLR also contends that the identification was unnecessarily suggestive because the officer who administered the lineup did not comply with police department guidelines, which recommend that the photographs be displayed one at a time and that the photographic lineup be administered by an officer who does not know the identity of the suspect. But BLR provides no authority for his argument that failure to adhere to the preferred procedure results in per se inadmissibility of the evidence derived from the procedure. To the contrary, courts have concluded that identification evidence was properly admitted despite an administrator’s failure to comply with departmental guidelines. *See, e.g., United States v. Rattler*, 475 F.3d 408, 413-14 (D.C. Cir. 2007)

(concluding that identification was reliable even though procedure did not comply with Department of Justice guidelines).

The record provides no indication that the officer's knowledge that BLR was a suspect affected JL's identification. And assuming that JL was permitted to compare and contrast photographs, as his testimony indicated, the record does not suggest that this approach would impermissibly increase the suggestiveness of the procedure. We therefore agree with the district court's determination that the identification was not unnecessarily suggestive and did not deprive BLR of his due-process rights.

We also agree with the district court's determination that the evidence does not support BLR's claim that the identification was unreliable under the totality of the circumstances. To determine whether an identification is reliable, courts consider five factors: (1) the witness's opportunity to view the person when the crime occurred, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty the witness demonstrated when identifying the person, and (5) the time elapsed between the crime and the identification. *Ostrem*, 535 N.W.2d at 921.

The evidence relating to each factor supports the conclusion that the identification evidence was reliable under the totality of the circumstances. JL viewed his assailant from close range for at least thirty seconds, and he testified that he was not under the influence of alcohol during the encounter. Although the incident took place at night and the street was not well lit, there is no indication that the lighting affected JL's ability to observe his assailants. There is also no indication that JL was distracted. Additionally,

JL's description of his assailant matches BLR's physical characteristics. And JL testified that when he identified BLR in the photographic lineup he was "quite sure" of the identification and was "definitely confident enough to put my name on it." Finally, the time that passed between the crime and the identification, ten days, was not enough to create a substantial likelihood of misidentification. *See Seelye*, 429 N.W.2d at 673 (holding that photographic lineup conducted within twelve days of crime was reasonably prompt). We therefore conclude that the identification evidence was reliable under the totality of the circumstances and was properly admitted.

III

BLR also raised two other issues in his appeal. He argued that the juvenile court erred when it admitted evidence of other crimes committed by BLR and that the evidence presented at trial was insufficient to support the determination that the state proved the charge of theft from a person.

At oral argument, BLR's counsel withdrew the issue of whether the juvenile court erred when it admitted evidence of other crimes committed by BLR. Because the district court judge stated that he made his decision independent of the evidence of the other crimes committed by BLR, the admission of the evidence provides no basis for reversal. *See State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (noting that, even if district court wrongfully admits evidence, error is not reversible unless there is reasonable possibility that wrongfully admitted evidence significantly affected verdict).

BLR's counsel also stated at oral argument that the defense recognized that, if the identification evidence was properly admitted, the evidence was sufficient to support the

district court's finding of guilt. Therefore, if we concluded that the admission of the identification evidence did not deprive BLR of his due-process rights, he would withdraw the issue of whether there was sufficient evidence to support the offense of theft from a person. Because we have concluded that the juvenile court did not err when it admitted the lineup evidence, the challenge to the sufficiency of the evidence is no longer at issue.

IV

While this case was pending on review, BLR moved to strike a police report from the appendix of the state's appellate brief. The police report was neither filed in the district court nor admitted as an exhibit. Appellate courts may not consider matters outside the record on appeal, and we grant the motion to strike. *See* Minn. R. Civ. App. P. 110.01 (limiting record on appeal to papers filed in district court, exhibits, and transcript).

Affirmed; motion granted.