STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2189

State of Minnesota,
Respondent,

vs.

Dennis Wayne Gilchrist,
Appellant.

Filed February 12, 2008
Affirmed
Willis, Judge

Stearns County District Court
File No. T4-05-20196

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

Jan F. Petersen, St. Cloud City Attorney, Laura L. Gray, Assistant City Attorney, 400 Second Street South, St. Cloud, MN 56301 (for respondent)

John M. Stuart, State Public Defender, Lawrence Hammerling, Deputy Public Defender, Melvin R. Welch, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Willis, Presiding Judge; Peterson, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges his conviction of indecent exposure, arguing that the district court erred by denying his motion to suppress evidence of a witness's pretrial identification of appellant. We affirm.

FACTS

The parties do not dispute the facts of this case. Shortly after 6:00 p.m. on October 1, 2005, a woman called the police and reported that she had seen a man "indecently exposing himself" while he was walking down a street in St. Cloud. Police officers responded to the call approximately 10 minutes later and "made contact with [the witness] by phone." The witness described the suspect as a white male, "in his 70s, wearing an off-white colored pair of pants, a dark belt, and a shirt that was of lighter color than the pants, scruffy, and a little pudgy around the mid-section with white, medium-length hair." The witness identified for the officers the apartment building that she had seen the suspect enter.

The officers entered the apartment building and began knocking on doors. They spoke with tenants in several of the apartments and determined that one tenant, appellant Dennis Wayne Gilchrist, matched the description given by the witness. The officers ran a record check on Gilchrist, learned that he had an outstanding warrant from Hennepin County, and placed him under arrest for that warrant. As the officers were leading Gilchrist, who was handcuffed at this point, to a squad car, the witness confirmed that

Gilchrist was the man she had seen exposing himself. The witness made this identification from approximately 50 feet away and approximately 50 minutes to an hour after the incident.

Gilchrist was charged with misdemeanor indecent exposure, in violation of Minn. Stat. § 617.23, subd. 1 (2004). He moved to suppress his identification by the witness, claiming that it was the result of an "unnecessarily suggestive" show-up procedure. The district court agreed that the show-up procedure was unnecessarily suggestive, but concluded that under the totality of the circumstances, the witness's pretrial identification of Gilchrist was reliable. Accordingly, the district court denied Gilchrist's motion to suppress the identification.

As authorized by *State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980), Gilchrist waived his right to a jury trial and submitted his case to the court on the facts described in the police report but preserved his right to appeal the district court's denial of his motion to suppress the identification. The district court found Gilchrist guilty of indecent exposure. This appeal follows.

D E C I S I O N

Generally, evidentiary rulings rest within the sound discretion of the district court, and this court will not reverse those rulings absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But when reviewing a district court's decision on a pretrial motion to suppress, when the facts are not disputed and the district court's decision is a question of law, this court "may independently review the facts and

determine, as a matter of law, whether the evidence need be suppressed." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

In deciding whether a pretrial identification must be suppressed, this court determines "whether the procedure was unnecessarily suggestive." *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). But even if the procedure was unnecessarily suggestive, the identification is still admissible if the totality of the circumstances establishes that the identification was nonetheless reliable. *Id.* A witness's identification is reliable if "the totality of the circumstances shows the [witness's] identification has adequate independent origin." *Id.* Here, neither party disputes the district court's determination that the show-up procedure was unnecessarily suggestive. The only question before us, therefore, is whether the district court erred by ruling that the identification was nonetheless reliable.

Gilchrist argues first that this court should adopt a per se rule excluding identification evidence when it has been obtained through unnecessarily suggestive procedures. He contends that when it is determined that an identification was unnecessarily suggestive, conducting the second inquiry into whether the identification was nonetheless reliable fails to protect "due process rights" and "creates an unacceptably high risk of wrongful conviction." Gilchrist cites scientific research, sociological studies, changes in policy among law-enforcement agencies, and cases from other jurisdictions in support of his request to change existing law in Minnesota. But the supreme court has repeatedly held that when an identification is determined to be unnecessarily suggestive,

the courts must then conduct a second inquiry to determine whether the identification is nonetheless reliable under the totality of the circumstances. *See, e.g.*, *State v. Young*, 710 N.W.2d 272, 282 (Minn. 2004); *Taylor*, 594 N.W.2d 161; *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996); *Ostrem*, 535 N.W.2d at 921. As an "error-correcting court," it is not our role "to abolish established judicial precedent." *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005).

Gilchrist argues, in the alternative, that the totality of the circumstances here does not establish that the witness's identification was reliable. In determining reliability, we consider five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the degree of attention the witness paid to the suspect; (3) the accuracy of the witness's prior description of the suspect; (4) the degree of certainty the witness demonstrates when identifying the suspect; and (5) the time elapsed between the crime and the identification. *Ostrem*, 535 N.W.2d at 921.

Opportunity to view the criminal and degree of attention

Addressing the first two factors, Gilchrist argues that because the witness did not testify at the evidentiary hearing, there is nothing in the record regarding the opportunity of the witness to view the suspect or the degree of attention the witness paid to the suspect. The district court determined that the witness "had ample opportunity" to view the suspect and "displayed an extraordinary degree of attention" based on the "impressively detailed description of the suspect" that she provided to the officers. The

record supports these determinations, and we conclude that the first two factors weigh in favor of finding the identification to be reliable.

Accuracy of the prior description

Gilchrist contends that the factor of the accuracy of the witness's description does not weigh in favor of a finding of reliability because (1) the witness described the suspect as being in his 70s and as possibly being intoxicated, while Gilchrist is 59 and there is no record evidence that he was intoxicated; (2) there is no record evidence regarding the lighting conditions or whether the witness's view of the suspect was obstructed; and (3) there is no record evidence that Gilchrist was wearing, or had in his possession, clothing that matched the witness's description of the suspect's clothing. First, the witness's description of the suspect as being in his 70s, while Gilchrist is 59, is not a significant discrepancy, and nothing in the record establishes that the witness's description of the suspect as appearing intoxicated was inaccurate. Second, there is no record evidence that the lighting was inadequate or that the witness's view was obstructed, and the witness's detailed description of Gilchrist suggests no problems with lighting or obstructed view. Finally, there is no record evidence that Gilchrist's clothing did not match the witness's description. And Gilchrist cannot show error by speculating about facts. The officers found Gilchrist in the apartment building that the witness had identified, and the officer who testified stated that Gilchrist matched the witness's description. This factor weighs in favor of a finding of reliability.

Degree of certainty

Gilchrist contends that the officer who testified at the hearing was not with the witness at the time of the show-up, and thus, there is nothing in the record regarding the degree of certainty that the witness demonstrated when identifying him. But nothing in the record suggests that the witness expressed any uncertainty or made any equivocation when identifying Gilchrist, and we conclude, therefore, that this factor is neutral.

Elapsed time between the crime and the identification

The amount of time that elapsed between the crime and the witness's identification was approximately 50 minutes to an hour. This court has held that considerably longer intervals did not indicate a danger of irreparable misidentification. *See, e.g.*, *Seelye v. State*, 429 N.W.2d 669, 673 (Minn. App. 1988) (holding that a photographic lineup conducted 12 days after the crime did not indicate a danger of misidentification); *State v. Dillard*, 355 N.W.2d 167, 174 (Minn. App. 1984) (holding that a photographic lineup conducted seven months after the crime did not indicate a "substantial likelihood of irreparable misidentification"), *review denied* (Minn. Oct. 30, 1984). We conclude that the short amount of time that passed between the crime and the witness's identification weighs in favor of finding the identification to be reliable.

As the district court aptly noted, "[t]his is not a case where the description was so amorphous as to include a large number of people" or "a case where the search area constituted several blocks." Gilchrist matched the witness's detailed description, and the officers found him in the apartment building where the witness said that he was. The

totality of the circumstances indicates that although the one-person show-up was unnecessarily suggestive, the witness's identification was nonetheless reliable. The district court did not err by admitting into evidence the witness's pretrial identification of Gilchrist.

Affirmed.