STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2103

State of Minnesota,
Respondent,

vs.

Ohohshecha Defoe,
Appellant.

Filed April 15, 2008
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 06033277

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

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Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.

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

SHUMAKER, Judge

On appeal from his conviction of simple robbery, appellant challenges the admission into evidence of a one-person show-up, arguing that the show-up was impermissibly suggestive. Appellant also raises several arguments in his pro se supplemental brief. We affirm.

FACTS

Around noon on May 16, 2006, a cashier at a Minneapolis bakery was helping customers when she saw a tall, heavyset man wearing a black hat enter the store. After the customers left, the man approached the counter and told the cashier to open the cash-register drawer. Thinking she had misheard the man, the cashier asked, "What?" The man responded, "I'm not kidding. I have a gun. Open the drawer and give me the money." The man was just "a couple feet" from the cashier when he spoke to her.

The cashier opened the register, and the man grabbed the money from the cash register. The register had contained approximately $570, including one $100 bill. After grabbing the money, the man left the bakery, crossed the street, and ran around the corner of another building on the other side of the street.

The cashier immediately called 911 to report the robbery. She explained to the dispatcher that the robber was in his 30s, six-feet tall, weighing 200 to 250 pounds, wearing a light-blue, button-down, long-sleeved shirt, jeans, and a black knit cap, did not have facial hair, and looked Latino. She also told the dispatcher the man ran east when he left the bakery.

Within two to five minutes, Officer Valerie Goligowski arrived at the bakery in response to the 911 call. The cashier again described the robber, explaining that he was perhaps in his late 30s; was six-feet tall and heavyset; had dark hair and eyes; was possibly Hispanic or Native American; was wearing a black knit hat, jeans, and a light-blue, button-down shirt; and was carrying a plastic grocery-store bag.

Officer Eric Shogren was about four blocks from the bakery when the suspect's description was broadcast to officers. Within minutes, he saw a person matching the description. The man, later identified as appellant Ohohshecha Defoe, was within a few blocks of the bakery and was running. When Officer Shogren stopped and got out of his patrol car, Defoe began to run through nearby yards. Officer Shogren reported that he had spotted a possible suspect on the run, and within minutes another officer apprehended Defoe about seven blocks away from the bakery.

When apprehended, Defoe was wearing a blue T-shirt and carrying $566 in cash, including one $100 bill, in his front pocket. Officers also found, inside Defoe's pocket, a payroll stub, revealing that Defoe's gross wages for the year to date, as of May 15, 2006, were $178.26.

When Officer Goligowski learned that police had apprehended a potential suspect in the robbery, she told the cashier that someone had been stopped and asked the cashier if she would be willing to look at that person. Officer Goligowski drove the cashier to the area where Defoe had been stopped. Since Defoe was going to be placed in an ambulance, officers decided that the cashier should view the man as he was walking to the ambulance. The cashier immediately identified Defoe as the man who had robbed the

bakery and noted that he had shed the button-down shirt and cap he had been wearing during the robbery.

Officer Shogren retraced the route that he believed Defoe would have taken from the bakery to the location where he was apprehended. He knew that Defoe had run through a parking lot near the bakery after the robbery, and in that parking lot the officer found a plastic grocery-store bag; a blue, button-down, long-sleeved shirt; and a black knit cap.

Defoe was charged with simple robbery in violation of Minn. Stat. § 609.24 (2004). Before trial, Defoe moved to suppress the identification evidence on the basis that the show-up was impermissibly suggestive. After concluding that the show-up identification was not impermissibly suggestive, the district court ruled that the evidence was admissible at trial. Defoe was subsequently convicted as charged and was sentenced to 30 months in prison. This appeal followed.

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 because the admission of identification evidence that is derived from suggestive identification procedures may violate a defendant's constitutional due-process rights, *State v. Roan*, 532 N.W.2d 563, 572 (Minn. 1995), the facts surrounding the identification must be independently reviewed to determine, as a matter of law, whether the evidence must be suppressed. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

It is well established that one-person show-ups "are permissible identification tools." *State v. Hazley*, 428 N.W.2d 406, 410 (Minn. App. 1988), *review denied* (Minn. Sept. 28, 1988). Although a one-person show-up can be suggestive, the Minnesota Supreme Court "ha[s] held that [it] is not unnecessarily suggestive per se." *Taylor*, 594 N.W.2d at 161-62.

Officer Goligowski testified that she told the cashier that other officers had stopped a person and she asked if the cashier would be willing to look at that person and indicate whether or not he was the robber. The officer did not refer to the individual as a suspect.

When the cashier agreed to view the individual (later identified as Defoe), Officer Goligowski put her in the front passenger seat of the squad car and drove to the location at which Defoe was being detained, just a few blocks from the bakery.

Because Defoe had complained of chest pain, the officers decided that he would be transported by ambulance and that the cashier could look at him as he was being escorted to the ambulance. Before presenting Defoe, Officer Goligowski told the cashier that she could look at him from the front and the side, that he would walk by the squad on his way to the ambulance, and that the officer "just wanted a yes or no, it was him or it isn't."

Accompanied by ambulance and police personnel, Defoe walked past the squad car, and the cashier immediately identified him as the robber.

Defoe argues that this show-up procedure was impermissibly suggestive because there were several squad cars at the location and Officer Goligowski said a person would

walk past the squad in which the cashier was sitting. He contends that the "combination of procedures announced to the witness that this was the person police believed committed the crime."

"When determining the admissibility of identification testimony, the reliability of the identification is critical." *Taylor*, 594 N.W.2d at 161. It is possible that identification procedures the police used were so tainted by suggestion that "the result may be irreparable misidentification." *Id.* To test the reliability of identification, a court uses a two-part test: (1) it determines if the procedure was unnecessarily suggestive; and (2) if the procedure was unnecessarily suggestive, the court determines, under the totality of the circumstances, if there was a substantial likelihood of irreparable misidentification. *Id.*

The first inquiry includes the question of whether the defendant was unfairly singled out for identification. *Id.* The court's focus under this part of the test is "whether the procedure used by the police influenced the witness identification of the defendant." *Id.* In *Taylor*, even though the police conducted a one-person show-up by having the complaining witness look out a second-floor window while the police removed the defendant, in handcuffs, from a squad car, the supreme court found that the procedure was not impermissibly suggestive. *Id.* at 160, 162. The court noted that the defendant was not singled out from the general population based on a description but rather the complaining witness already knew the defendant's nickname, had seen him around the neighborhood at least ten times, and this show-up was primarily to determine whether the defendant and the person the complaining witness knew by nickname were the same person. *Id.* at 162.

Although the procedure here was not identical, it was compellingly similar in various respects. The cashier had a firm description of the robber and stated it in detail twice before the show-up. Defoe was not extracted from the general population based on the description but was found under extremely inculpatory circumstances in the area of the robbery within a very short time after the crime occurred. Like the procedure used in *Taylor*, this show-up was basically confirmatory. This is especially so because Officer Goligowski made it clear to the cashier that she could indicate either that it was or was not the robber and did not try to influence the cashier's determination. It is a tenable conclusion that Defoe was not unfairly singled out and that the identification procedure the police used was not impermissibly suggestive.

Even if we were to conclude that the identification procedure used here was unnecessarily suggestive, the identification would still be admissible if the totality of the circumstances establishes that it was nonetheless reliable. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). An identification is reliable if "the totality of the circumstances shows the witness'[s] identification has adequate independent origin." *Id.* Ultimately, "[t]he test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification." *Id.*

In *State v. Bellcourt*, 312 Minn. 263, 251 N.W.2d 631 (1977), the supreme court adopted five factors for courts to consider in determining whether a suggestive identification is nonetheless reliable. Whether the suggestive identification was reliable depends on: (1) the witness's opportunity to view the perpetrator when the crime was committed; (2) the witness's degree of attention; (3) the accuracy of the witness's prior

description of the criminal; (4) the witness's level of certainty; and (5) the time between the crime and confrontation. *Ostrem*, 535 N.W.2d at 921 (citing *Bellcourt*, 312 Minn. at 264, 251 N.W.2d at 633).

Applying these factors in *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005), we concluded that an identification had adequate independent origin and was reliable because the victim had ample opportunity to observe an intruder during the commission of the crime; the victim was coherent, aware, and attentive during his observation of the intruder; there was no substantial difference between the victim's descriptions of the intruder before and after the show-up; the victim was certain in his identification; and the time between the crime and the identification was minimal. Similarly, in *McDuffie v. State*, we concluded that a show-up identification was admissible because there was no substantial likelihood of misidentification when the victim had the opportunity to view his assailant for several minutes; described the assailant to police and the description matched the appellant, who was apprehended shortly after the crime just a few blocks from the scene of the crime; the victim positively identified the appellant less than a half-hour after the crime; and the victim stated that he was certain of his identification. 482 N.W.2d 234, 236-37 (Minn. App. 1992), *review denied* (Minn. Apr. 13, 1992); *cf. State v. Anderson*, 657 N.W.2d 846, 852 (Minn. App. 2002) (concluding that an identification was not reliable when an eyewitness only saw burglars for five to ten seconds from 15 to 20 feet away, testified that his view was obstructed by a fence with grapevines growing on it, which caused the burglars' features to be "fairly obscured," and provided a description that did not match the defendant).

Here, as in *Adkins* and *McDuffie*, the cashier's identification of Defoe was reliable based on the totality of the circumstances. Like the victims in *Adkins* and *McDuffie*, the cashier had ample opportunity to see Defoe at close range for several minutes. She testified that Defoe was no more than a couple of feet from her at the bakery when he demanded that she open the cash register and then reached across to take the money. She said that she looked directly at him, made eye contact with him, and saw his face clearly. The cashier explained that Defoe was wearing a black knit cap with a hole in it, but the cap was on his head, not pulled down over his face. She had ample time to view Defoe, because she estimated that about three to five minutes elapsed from the time he came to the counter until the time he left the bakery. The lighting was good; it was early afternoon, so the bakery, which according to the cashier has lots of windows, was filled with natural light. The cashier also testified that she has good vision, that she does not wear glasses, and that nothing obstructed her view of Defoe.

Based on her description of the event and her detailed description of Defoe, it can be reasonably inferred that the cashier's degree of attention during the robbery supports the conclusion that her identification was accurate and reliable. The cashier noticed a hole in the black hat and the style of cuffs on the shirt worn by the robber, and she identified the name of the grocery store on the plastic bag. She even had the presence of mind to continue to observe the robber as he left the bakery, crossed the street, and ran around the corner of the building on the other side of the street. And she was able to tell the 911 operator the direction that he ran when he left the bakery.

The cashier's description of Defoe was accurate. She told the 911 operator that the perpetrator was perhaps in his 30s, six-feet tall, weighed 200 to 250 pounds, had no facial hair, and looked as though he may have been Latino. She also described what he was wearing: a light blue, button-down, long-sleeved shirt, jeans, and a black knit cap. Similarly, she told Officer Goligowski, who responded to her call, that the man was perhaps in his late 30s, had dark hair and dark eyes, was possibly Hispanic or Native American, was carrying a plastic grocery-store bag, and was wearing a black knit cap, jeans, and a button-down shirt. Although when he was apprehended, Defoe was not wearing the long-sleeved shirt, hat, or carrying the plastic grocery-store bag, testimony at trial indicates that the other physical characteristics matched Defoe. And even though the cashier's description failed to include several dark and distinctive moles on Defoe's face, it still was accurate with regard to his size and race. An eyewitness's description does not need to include every aspect of an offender's appearance to be reliable. *Cf. State v. Stauffacher*, 380 N.W.2d 843, 847-48 (Minn. App. 1986) (rejecting appellant's claim that the evidence was insufficient to support his conviction, which was based on a witness's identification, when the witness's description did not mention any tattoos and appellant had 33 tattoos), *review denied* (Minn. Mar. 21, 1986).

The degree of certainty that the cashier exhibited when she identified Defoe also supports the conclusion that her identification was reliable. The cashier identified Defoe immediately, before he even reached or passed by the squad car. She did not hesitate, and she was sure of her identification. She testified that as soon as she saw Defoe she recognized him as the robber, telling the court that she was "100-percent sure" of her

identification. Like the victims in *Adkins* and *McDuffie*, the cashier was certain of her identification.

Finally, as in *Adkins* and *McDuffie*, the time lapse between the crime and the confrontation was minimal. The cashier identified Defoe as the robber within nearly half an hour of the crime. The record shows that the cashier called 911 at 12:24 p.m. and that she positively identified Defoe at 1:01 p.m.

Based on all these circumstances, we conclude that the cashier's identification of Defoe had adequate independent origin and is reliable. There was virtually no risk of misidentification here. Moreover, there is very strong inculpatory evidence in this case. Defoe was seen running in the same direction as the robber had when he left the bakery, he was caught a few blocks from the bakery, he fled from police, he was carrying nearly the exact amount of cash that was stolen, and the payroll stub he carried at the time he was apprehended revealed that he had not been paid anywhere near that amount by his employer. The admission of the one-person show-up identification did not violate Defoe's due-process rights.

In addition, Defoe raises claims in his pro se supplemental brief. We conclude that these claims have been waived or lack merit.

First, Defoe makes several arguments related to membership in the Red Lake Band of Chippewa Indians. It is not clear from the briefs that Defoe is in fact a member of the Red Lake Band and his pro se supplemental brief does not point to any evidence in this regard. *See Hecker v. Hecker*, 543 N.W.2d 678, 681 n.2 (Minn. App. 1996), (requiring that material assertions of fact in a brief be supported by citation to the record),

aff'd, 568 N.W.2d 705 (Minn. 1997); *see also State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (refusing to consider portions of pro se briefs that contain only argument and are not supported by the facts on the record).

Defoe seems to claim that the State of Minnesota lacks jurisdiction over members of the Red Lake Band, and therefore that his conviction should be vacated. This argument is misplaced and lacks merit. The State of Minnesota has "authority to enforce its laws in a nondiscriminatory fashion against Indians *off* the reservation." *Bailey v. State*, 409 N.W.2d 33, 34 (Minn. App. 1987); *see also Red Lake Band of Chippewa Indians v. State*, 311 Minn. 241, 247, 248 N.W.2d 722, 726 (1976) ("Minnesota does have authority to require that persons subject to the jurisdiction of the Red Lake Band submit to the governing authority of the State of Minnesota with respect to activities occurring within the territorial limits of Minnesota and *without* the territorial boundaries of the reservation."). Here, the record establishes that the offense occurred in Minneapolis, not on a reservation. Accordingly, even if Defoe is a member of the Red Lake Band, he is subject to the jurisdiction of the courts of the State of Minnesota regarding this offense.

Defoe's supplemental brief also refers to related arguments, contending that the state cannot use his prior convictions to sentence a member of the Red Lake Band and that the convictions cannot affect his right to use or own guns because treaties give tribes hunting and fishing rights. These arguments, however, are not fully briefed, and therefore they are arguably waived. *State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach an issue that was

inadequately briefed); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

Defoe next seems to raise a sufficiency-of-the-evidence claim, contending his conviction should not stand because the state failed to provide DNA testing, video data, and fingerprinting. He also alludes to problem with the time referred to on the receipt of loss from the bakery. Defoe fails, however, to provide citation to the factual record to support most of his claims, and he does not provide any citation to legal authority to support a sufficiency-of-the-evidence claim. Therefore, this argument is waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (holding that a pro se defendant's assertions are deemed waived if they contain no argument or legal authority to support the allegations); *Manley*, 664 N.W.2d at 286 (refusing to consider portions of pro se briefs that contain only argument and are not supported by the facts on the record).

Next, Defoe claims the state should not have been allowed to introduce *Spreigl* evidence against him in the event that he chose to testify at his trial. Again, this argument is not supported by citation to the record and it does not appear to be supported by any relevant legal authority. Thus, he has also waived this argument. *See Krosch*, 642 N.W.2d at 719; *Manley*, 664 N.W.2d at 286.

Finally, Defoe alleges that his attorney "forgot" to introduce evidence during the jury trial. But he does not specify what evidence his attorney should have introduced. Although Defoe provides a citation to the transcript, the pages he cites do not appear to support his argument. He also fails to support this argument with citation to legal authority. Thus, he has arguably waived this issue. *See Krosch*, 642 N.W.2d at 719;

Manley, 664 N.W.2d at 286. Even if this court did not conclude that Defoe waived this issue and even if we could discern what evidence Defoe claims his attorney "forgot" to introduce, his argument would likely fail because Minnesota courts have ruled that the determination of what evidence to be presented at trial "lie[s] within the proper discretion of the trial counsel. Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Affirmed.