STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2437

State of Minnesota,
Respondent,

vs.

Ronald L. Jenkins,
Appellant.

Filed December 16, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 05045647

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 520 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUDSON, Judge

Appellant Ronald L. Jenkins challenges his conviction of being a prohibited person in possession of a firearm. Because the district court did not err in finding that appellant's statements to police were voluntary, and because there is insufficient evidence of prosecutorial misconduct or ineffective assistance of counsel, we affirm.

FACTS

A little before 8:00 a.m. on July 24, 2005, a shot was fired through a guest's door at the Radisson Hotel in Plymouth following an apparent dispute over drugs. Thirty seconds later another shot was fired, not outside the door but from further away. A hotel maintenance worker, J.J., was in the lobby of the hotel and started walking toward the sounds. When J.J. opened the door to a stairwell near the elevators, he saw a thin black man holding a gun. The man looked upset and had blood on his face. According to J.J., the man had on a blue or white shirt, white sneakers, and blue shorts.

When Police Officer Goodwin arrived at the scene, she saw a man, later identified as appellant Ronald Jenkins, running near highway 494. Officer Goodwin was approximately one city block from appellant and saw what appeared to be a black handgun in his left hand. Goodwin told appellant to stop and face her with his hands up; appellant complied but had nothing in his hands. When asked where he had thrown the gun, appellant stated that he did not have a gun but had thrown down his cell phone. Appellant was wearing a camouflage baseball cap, a blue t-shirt, jean shorts, and was wearing only one shoe—a black shoe with red lettering on it. Officer Goodwin

handcuffed appellant and placed him in the squad car, at which point she noticed that appellant had puncture wounds and scratches on his left arm and face. When asked how the injuries occurred, he stated that three black males at the hotel, who were inside a car, had shot at him. Appellant complained that he felt his face was burning and his eyes hurt. Officer Goodwin called for paramedics, who treated appellant for his injuries, but he was not transported to the hospital because his injuries were non-life-threatening and appellant told the paramedics that he did not want to be transported at that time. Upon arresting appellant, Officer Goodwin testified that appellant did not seem to be intoxicated but appeared to be under the influence of a narcotic. A different officer, however, testified that appellant smelled of alcohol and appeared intoxicated. Officer Goodwin also testified that throughout the morning, appellant asked approximately three times why he had been shot by the officer. Appellant was never tested for alcohol or drugs.

Following his arrest, appellant was taken to a park about six miles away for a series of "show-ups" in front of eight to ten witnesses. The show-ups began around 10:10 a.m., and ended around 11:00 a.m. It had been 45 minutes since appellant was placed in the squad car. Appellant complained again that his face was burning. Officer Goodwin again contacted the paramedics, who arrived and washed appellant's eye, whereupon they found a metal fragment in his eyelid. At the suggestion of one of the officers, appellant was taken to the hospital. Appellant's behavior at the hospital was uncooperative, and he would not let the doctor treat him. One of the police officers who accompanied appellant testified that appellant was given water at his request. Appellant,

however, testified that he was not only denied water, but that a police officer kicked him in the knee and threatened him.

Upon leaving the hospital, appellant was taken to the police station for interrogation. Officer Goodwin and the appellant gave conflicting testimony about whether the air conditioning was left on in the squad car during the numerous hours between appellant's arrest and the interrogation. Appellant stated that it was not left on and the windows were closed, but he was not certain. Officer Goodwin stated that the squad car had air conditioning on while appellant was in it.

Appellant was interrogated at the police station at approximately 2:30 p.m. He had been awake all night. At least one of the interrogating officers testified that appellant did not appear to be intoxicated, although appellant told the interrogating officers that he had been doing cocaine all night. Appellant again asked for water numerous times, and officers testified that he was given "full" cups of water five times. During the interrogation, appellant again asked for medical assistance because his eye hurt; appellant was told that he would have his medical needs attended to once he answered their questions. Appellant repeatedly asked whether someone had been hurt, and expressed concern over having possibly hurt somebody at the hotel.

When appellant was first arrested, he told officers that black men were chasing him at the hotel, but he later stated that he told that story because he did not want to be kept sitting in the squad car anymore and because he did not feel well. He then told officers a different story. He testified at trial that he only told police this story because he thought it would "get him out of the situation." Appellant testified that it was actually an

acquaintance who was the shooter, but he did not want to identify the person because he feared it would subject him to physical violence.

Before trial, defense counsel moved to suppress the show-up identification procedures; the district court denied the motion. At trial, the court allowed the "show-up" identifications to be entered into evidence over defense counsel's objections. J.J. testified that before he identified appellant at the show-up, the police told him they were "going to take [him] to a spot . . . where [he] could see it was the person that they had found, the person with the gun in [his] hand." J.J. also testified that the police told J.J. that "that was him, that they had found him" before he made the identification and that the police never showed him any other suspects. Defense counsel did not renew the objection to the show-up identification after J.J. testified.

Appellant was convicted of possession of a firearm by a prohibited person. On June 14, 2007, appellant filed a postconviction petition alleging ineffective assistance of trial counsel because, among other things, trial counsel did not renew the objection to the show-up identification after J.J. testified about the police officers' impermissible remarks. At the postconviction hearing, appellant's trial counsel stated that it may have been an error for her to not renew her motion to suppress J.J.'s testimony after learning that the show-up procedure was possibly overly suggestive. However, counsel went on to explain that it was her understanding that the district court did not agree with her that the show-up procedure was impermissibly suggestive. Appellant's trial counsel testified that she tried to call J.J.'s credibility into question in other ways. Additionally, appellant's trial counsel was questioned as to why she did not call T.C.—a potentially

exculpatory witness—to testify on behalf of appellant at trial. She testified that because of the theory she created for the defense, T.C.'s identification or lack of identification of appellant was irrelevant.

On September 27, 2007 the district court denied postconviction relief. This appeal follows.

D E C I S I O N

I

Appellant argues that his statements to police were involuntary and therefore should have been suppressed. A confession is admissible only if it is freely and voluntarily made. *State v. Wilson*, 535 N.W.2d 597, 603 (Minn. 1995). Where evidence suggests a defendant's custodial statement may be involuntary and should be suppressed, a district court should make specific factual findings at the omnibus hearing. *State v. Buchanan*, 431 N.W.2d 542, 551 (Minn. 1988). A reviewing court will not reverse those factual findings unless they are clearly erroneous but will "make its own independent evaluation of whether the waiver was knowing, intelligent and voluntary, based on the facts as found." *Id*. at 552. When determining the voluntariness of a statement, a court must look at the totality of the circumstances. *State v. Merrill*, 274 N.W.2d 99, 106 (Minn. 1978). Physical deprivations such as a lack of food are a factor in considering whether a confession was voluntary. *State v. Moorman*, 505 N.W.2d 593, 600 (Minn. 1993). Finally, the requirement that a statement be made voluntarily is aimed at deterring improper police conduct during interrogations. *State v. Williams*, 535 N.W.2d 277, 287

(Minn. 1995). A finding of coercive police activity is a prerequisite to concluding that a statement was involuntary. *State v. Riley*, 568 N.W.2d 518, 525 (Minn. 1997).

Appellant argues that his statements were not voluntary because (1) he was intoxicated and under the influence of cocaine; (2) he was suffering from an eye injury and was kept awake for over 24 hours; (3) the length and conditions of the confinement and interrogation were impermissible, specifically his eye condition, his unanswered requests for water, and the lack of air conditioning in the squad car created unacceptable interrogation conditions; and (4) he was promised that his cooperation was "golden" and that such cooperation "goes a long way." Appellant further argues that the "unmistakable message" of the police interrogation tactics was that no help would be available to him (for medical assistance or otherwise) until he answered the police officers' questions.

Intoxication

Appellant argues that his statements were not voluntary because he was intoxicated and/or under the influence of cocaine when he made them. Intoxication is one among many factors to be considered. *State v. Kulseth*, 333 N.W.2d 635, 637 (Minn. 1983). The district court found that although there was some testimony that appellant was moderately intoxicated, "as the time progressed, he became less intoxicated." The record supports the district court's findings. Specifically, we note that a review of the transcript of the interrogation indicates that while appellant did not remember many of the events of the evening, he did remember some. He changed his story several times and admitted to changing his story. Likewise, the audio version of the interrogation indicates that while appellant may have been intoxicated at some point during the evening, he was

not intoxicated by the time police questioned him on the record. Contrary to appellant's claim here on appeal, he was coherent and spoke clearly, and his speech was not "slow." On this record, the district court's findings were not clearly erroneous.

Coercive police activity

A finding of coercive police activity is a prerequisite to concluding that a statement was involuntary. *Riley*, 568 N.W.2d at 525. Appellant argues that he was "coerced" when the police "ignored" his medical condition. Specifically, appellant argues that his statement was coerced because the police did not give him medical attention when he requested it a fourth time during the interrogation. The record does not support appellant's claims. Appellant was provided medical attention three times before he made statements to the police. Moreover, he was combative on the occasions he did receive medical assistance; at one point, appellant turned down medical assistance altogether. In fact, it was at the direction of a police sergeant that appellant was taken to the hospital for a second time. Appellant further argues that because he was not given water upon request, his statements were not voluntary. Here, again, the record does not support appellant's claim. Appellant was given water during the course of police custody. Although the district court conceded that it took the officers too long to bring the water, it also found "[t]here were no stress-creating techniques."

Length and condition of interrogation and confinement

Here again, appellant argues that his statements to police were not voluntary because of the condition of the interrogation, i.e., that he was not given water and was questioned while purportedly intoxicated and sleep deprived and he was forced to sit in a squad car with no air conditioning for an extended period of time. Appellant's requests for water as well as his claim that he was intoxicated at the time of the interrogation have previously been addressed and found to lack merit. Appellant's claim that he was forced to sit in a squad car without air conditioning is directly contradicted by Officer Goodwin's testimony and more importantly, by the district court's explicit finding that appellant was, in fact, placed in an air conditioned squad car. And while it appears from the record that appellant had been awake for an extended period of time, under the totality of the circumstances, we cannot say that the conditions of the interrogation were so egregious as to make appellant's statements involuntary.

Use of promises and threats

Coercive conduct may include promises, express or implied, that elicit a confession. *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). Manipulative or overpowering police techniques that deprive a suspect of the ability to make an autonomous decision to speak, or that would make an innocent person confess, render a confession involuntary. *State v. Ritt*, 599 N.W.2d 802, 808 (Minn. 1999). Here, appellant argues that the police made implied promises by stating that his cooperation was "golden." Appellant further argues that the police used "manipulative tactics" by not answering appellant's questions about whether he had hurt anyone. But this does not rise

to the level of police coercion. *Cf. State v. Garner*, 294 N.W.2d 725, 727 (Minn. 1980); *Moorman*, 505 N.W.2d at 600 (distinguishing *State v. Garner*, and holding that interrogating officer's telling accused that evidence linked him to murder, when, in fact, it did not, did not render confession involuntary because additional misconduct of threats or physical intimidation was absent). Here, as in *Moorman*, the police did not use threats; nor did they tell appellant they had evidence against him. They merely refused to answer his questions, which is a legitimate police interrogation technique.

The district court found that no stress-inducing techniques were used and that, under the totality of the circumstances, appellant's statements to the police were voluntary. These findings are well-supported by the record, and we affirm the district court's determination that appellant's statement to the police was voluntary and properly admitted into evidence.

II

Appellant argues that the prosecutor committed misconduct by suggesting appellant "tailored" his trial testimony to fit the evidence admitted at trial, and that the district court erred when it did not give a curative instruction. There are two distinct standards for determining whether prosecutorial misconduct is harmless error; serious error will be found "harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error," while for less serious misconduct, the standard is "whether the misconduct likely played a substantial part in influencing the jury to convict." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (citing *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000)). *But see State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn.

2006) (stating that supreme court has more recently applied "streamlined approach," applying only the harmless-beyond-a-reasonable-doubt standard).

Although defense counsel did not object contemporaneously to the prosecutor's reference to appellant's testimony, defense counsel did object after final jury instructions were provided to the jury. At that point the jury had already been deliberating for three hours. The trial court noted the objection but took no action. Whether the prosecutor acted improperly in his final argument to the jury is largely a matter within the sound discretion of the trial court. *State v. Fossen*, 282 N.W.2d 496, 503 (Minn. 1979). Appellant cites to *State v. Mayhorn* for the proposition that a prosecutor cannot, without evidence of tailoring, argue that the defendant tailored his testimony to fit the state's case. 720 N.W.2d at 790–91. But appellant's trial testimony differed from his previous statements to the police. He changed his story at least three times before giving a fourth version at trial, and he admitted at trial that the different stories were "lies." These inconsistent statements were admitted at trial as substantive evidence against him.

Appellant argues that he did not amend his story to "fit *all* the evidence," as suggested by the prosecutor in closing argument. This is true, but his ultimate story at trial did fit at least some, if not all, of the evidence against him. By stating at trial that it was a *friend*, not he, who did the shooting and it was a *friend*, not he, who was running from police, appellant negated some of his prior statements in which he inculpated himself. In this way, appellant's trial testimony certainly fit at least some of the evidence against him.

On this record, we conclude that the prosecutor's remarks were proper argument on appellant's credibility because they were based on appellant's contradictory versions of events, inviting the inference that he either lied to the police or perjured himself at trial. Accordingly, we hold the prosecutor's remarks harmless beyond a reasonable doubt.

Appellant also argues that the district court abused its discretion by failing to give a curative instruction. First, we note that defense counsel did not request a curative instruction. Second, while the district court did not give a curative instruction sua sponte, appellant's counsel did address the prosecutor's claim at closing argument. Before an appellate court reviews unobjected-to trial error, there must be (1) error; (2) that is plain; and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious. *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). "[W]hen the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden [shifts] to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Here, appellant's counsel did not ask for a curative instruction, and the district court had no reason to give a curative instruction sua sponte because the prosecutor's remarks were proper argument on appellant's credibility. For that reason, the district court's failure to give a curative instruction was not plain error. Moreover, the prosecutor's remarks were isolated and not representative of closing argument in its entirety, and appellant's counsel had the opportunity to rehabilitate appellant's credibility

during closing argument. Thus, there was no prejudice to appellant because his substantial rights were not affected.

On this record, we conclude that the prosecutor did not commit misconduct, and the district court did not err by failing to give a curative instruction.

III

Appellant also argues that the district court erred when it allowed the jury to review an audiotape of appellant's statements to police during its deliberations. Whether the district court erred in applying Minn. R. Crim. P. 26.03, subd. 19 (1) and (2) (2006) (regarding materials that may be taken to the jury room and requests by the jury to review evidence) is reviewed for an abuse of discretion. *State v. Wembley*, 712 N.W.2d 783, 787 (Minn. App. 2006), *aff'd*, 728 N.W.2d 243 (Minn. 2007).

Appellant argues that the district court "did not even exercise any discretion" when it allowed the jury to listen to the taped statements during deliberations and merely relied on a section of its "Benchbook." That argument is contrary to the record. The district court did review the "Benchbook," but it also considered *State v. Wembley* at length. The district court listened to the parties' arguments, noted the pertinent case law, and exercised its discretion by allowing the jury to play the tape during deliberations. We conclude that the district court did not abuse its discretion because its decision was based on sound reasoning and the record before it.

IV

Appellant argues that the district court erred when it admitted the "show-up" identifications of appellant. 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).

When determining whether a pretrial identification must be suppressed, we apply a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) (citing *Simmons v. United States*, 390 U.S. 377, 381, 88 S. Ct. 967 (1968)). "The first inquiry focuses on whether the procedure was unnecessarily suggestive." *Ostrem*, 535 N.W.2d at 921 (citing *State v. Marhoun*, 323 N.W.2d 729, 732 (Minn. 1982)). Second, the court determines whether, in the light of the totality of the circumstances, the identification is nonetheless reliable. *Ostrem*, 535 N.W.2d at 921.

Unnecessarily suggestive procedure

Appellant argues that the show-up was impermissibly suggestive because the police told J.J. that they were going to take him to a spot where he could see the person they apprehended—the person with the gun. While 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), it does not follow that police may taint the identification by instructing a witness that they have in custody "the person with the gun." This defeats the purpose of the identification procedure.

We first examine whether appellant was unfairly singled out for identification. *Taylor*, 594 N.W.2d at 161–62. 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.* at 161. 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 Minnesota Supreme Court held that the procedure was not impermissibly suggestive. *Id.* at 160, 162.

The show-up procedure here was similar to *Taylor* in some respects. J.J. had a firm description of the shooter and stated it in detail before the show-up. As in *Taylor*, appellant was not extracted from the general population based on a description, but was found under extremely inculpatory circumstances in the area of the gunshots within a very short time after the crime occurred. And like the procedure used in *Taylor*, this show-up was basically confirmatory. But in *Taylor*, the police did not tell the witness that they were going to show him the person that they had found, "the person with the gun in [his] hand" (i.e. – the guilty person). Here, the police told J.J. first that "they had found him" before J.J. made the identification. We conclude that this procedure was unnecessarily suggestive and impermissibly influenced the witness identification of appellant. However, this does not end our examination. Under *State v. Ostrem*, we must

still determine whether, in the light of the totality of the circumstances, the identification was nonetheless reliable. 535 N.W.2d at 921.

Totality of the circumstances

Whether a suggestive identification is 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. *Id.* (citation omitted).

Applying those factors here: (1) J.J. had the opportunity to view the perpetrator immediately after the shots were fired, and saw the gun in the man's hand; (2) J.J. looked directly at the man with the gun and gave a fairly detailed description to the police; (3) J.J.'s description was very similar to appellant's appearance on the night in question (particularly the blue shorts, the cuts on the arm, and the physical description of appellant); (4) J.J. was certain the appellant was the same man he had seen in the stairwell; and (5) there was only an hour and a half between the time J.J. saw the perpetrator and the time he identified appellant.

The identification procedure used by the police *was* impermissibly suggestive, but we conclude that application of the *Ostrem* factors demonstrates that the identification was nonetheless reliable. Accordingly, the district court did not abuse its discretion by admitting the show-up identification into evidence.

V

Appellant argues that his trial counsel provided ineffective assistance by, among other things, failing to renew the objection to the show-up procedure once J.J. testified and by failing to call an exculpatory witness. A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

> The defendant must affirmatively prove that his counsel's representation "fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

Appellant contends that his trial counsel's performance fell below an objective standard of reasonableness by (1) failing to properly object to the show-up identification testimony, (2) failing to renew the objection after J.J. testified that the police made "suggestive comments," and (3) failing to investigate, interview, or subpoena a potentially exculpatory witness who was standing near appellant when a shot was fired.

An attorney could have legitimate reasons for not objecting to certain testimony and for not raising a certain defense, and this court should not second-guess the attorney's decisions after trial. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that appellate courts do not review matters of trial strategy for competency). Appellant's trial counsel testified

at the postconviction hearing that "it may have very well been an error" not to object or renew her objection to J.J.'s show-up testimony. Throughout the hearing, in fact, she admitted several times that she "may have" made errors in her representation and that her client "may" well deserve a new trial. But these admissions alone do not meet the burden of proof for a claim of ineffective assistance of counsel. It appears that appellant's trial counsel had a trial strategy, and she testified to that effect. Appellant must prove that, *but for* these unprofessional errors, the outcome of trial would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Appellant has failed to meet this burden.

Appellant further argues that if his trial counsel had called the "exculpatory" witness (T.C.), it may have eventually led to other exclusions of evidence. Which witnesses to call at trial and what information to present to the jury are generally questions that lie within the proper discretion of trial counsel, but on this record the testimony of T.C. had the potential to put appellant in a different place at the time of the offense. A trial counsel's failure to call a witness is prejudicial if that witness's testimony had the potential to cast doubt on a defendant's involvement in the offense. *See Montgomery v. Petersen*, 846 F.2d 407, 415 (7th Cir. 1998) (finding prejudice from counsel's failure to call a witness "whose missing testimony would have been exculpatory)."

We conclude that representation by appellant's counsel fell below an objective standard of reasonableness when she failed to call a potentially exculpatory witness. Nevertheless, appellant failed to prove that *but for* this error the outcome of his case would have been different because the other evidence of appellant's guilt was strong.

Specifically, appellant's credibility was severely damaged when he gave three different accounts of his story to the police, and a fourth account at trial; appellant was near the site of the offense immediately after it occurred and was seen by police running away; appellant was positively identified by several witnesses; and appellant repeatedly expressed concern to police about having possibly hurt someone. On this record, we cannot conclude that appellant has shown prejudice from counsel's errors.

Affirmed.