STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1365

State of Minnesota,
Respondent,

vs.

Matthew Starnes,
Appellant.

Filed December 2, 2008
Affirmed
Shumaker, Judge

Anoka County District Court
File No. K8-06-9414

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

Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant Anoka County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel Foster Bond, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, 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 attempted robbery, assault, and illegal possession of a firearm convictions and sentences, appellant contends that the district court erred in denying his motion to suppress evidence, by certain of its evidentiary rulings, and by denying his postconviction motions. He also contends that the evidence was insufficient to support his convictions and that his defense attorney's assistance was ineffective. Because the district court did not err in its rulings, the evidence was sufficient to support the convictions, and defense counsel's assistance was not ineffective, we affirm.

FACTS

Just after midnight in September 2006, P.S. was closing the restaurant where he worked in Columbia Heights. As he stepped outside, he saw a masked man sitting in a chair approximately five to ten feet away. The man got up and began to approach him with a silver revolver in his hand. P.S. stepped back into the restaurant door, which closed and automatically locked behind him.

The man began to pound on the door, gun in hand, and yelled several times, "Open the f---ing door." P.S. pressed against the wall to avoid being shot at and activated his car alarm. The man shouted at him several times to shut it off. The man left, returned, and then left again to the south. The entire encounter between P.S. and the man lasted approximately five minutes.

P.S. called the police and described the suspect as possibly a black male wearing either a black or dark shirt. When officers arrived at the scene, P.S. gave a more complete description of the suspect as a black man, with black hands or gloves, a black mask covering his face, a hat, a dark-colored hooded sweatshirt with the hood pulled up, between 5'6" and 5'8" tall, and weighing between 130-150 pounds.

At approximately 12:30 p.m., 9-1-1 dispatch notified law enforcement of the attempted robbery, and Officer Harvey was called to set up a perimeter in the area. Officer Harvey came upon a row of apartment buildings approximately one-and-one-half blocks from the restaurant and saw a black male, later identified as appellant Matthew Starnes, walking "tight up against" the apartment building. Starnes appeared to Officer Harvey to be unfamiliar with the area. When Starnes saw Officer Harvey, he hesitated for a moment, and then walked towards the squad car.

Officer Harvey asked Starnes what he was doing, and he replied that he had been visiting someone inside the building. Officer Harvey placed his hand on Starnes's chest in an attempt to gauge his heartbeat and felt what he believed to be an elevated heart rate. He questioned Starnes about where he had been, and noticed burdocks on Starnes's clothing. Starnes indicated that he was visiting a friend in the northwest corner of the building. Officer Piehn then arrived at the scene, and stayed with Starnes while Officer Harvey checked on his story. Officer Harvey discovered that no one knew Starnes in the indicated apartment. When confronted with this information, Starnes attempted to explain that he was on the lower floor of that apartment. However, Officer Harvey discovered that this area was a laundry room.

Meanwhile, Officer Boersma and "Rom," a police dog, started a scent-track from the restaurant. Rom would pick up the scent, lose it, and pick it up again. Eventually, Officer Boersma saw Officer Harvey's squad car and led the dog in that direction. As he and Rom approached, Rom picked up a scent near the bushes. After more tracking, Rom began digging near a fence by these bushes, and Officer Boersma spotted a black glove hanging from a branch. Deputy Olsen of the Anoka County crime lab arrived, picked up the glove, and discovered another black glove with a silver revolver handgun inside of it. These bushes contained burdocks similar to those found on Starnes's clothing and Rom's fur. Later, it was discovered that the DNA found on the revolver matched Starnes's DNA.

Some time between 1:09 a.m. and 1:47 a.m. Officer Harvey detained Starnes and brought him to a show-up identification at the restaurant. P.S. identified him as the robber and claimed to be "80-90%" sure of his identification. Officer Harvey arrested Starnes and transported him to jail. En route, Officer Harvey received a request to return Starnes for a voice, or audio, show-up identification. Officer Harvey asked Starnes if he would participate in the show-up, explained the process to him, and made clear that he could not promise anything to him as a result. Starnes agreed to do the show-up, and they returned to the restaurant where Starnes repeated "open the f---ing door" several times for P.S. P.S. identified the voice as that of the robber. The audio show-up took place approximately 15 minutes after the visual show-up.

The state charged Starnes with attempted first-degree aggravated robbery, second-degree assault, and possession of a firearm by an ineligible person. After an omnibus hearing, Starnes discharged his public defender. At his request, the court appointed him a new attorney to act as advisory counsel and permitted him to reopen the omnibus hearing. At this hearing, with Starnes's permission, counsel took over full representation and moved to suppress the visual and audio show-up identifications, the dog-tracking evidence, evidence relating to Officer Harvey's touching of his chest, and the DNA as fruit of the poisonous tree from an earlier violation of his right to counsel. The district court granted Starnes's motion to suppress evidence related to his heartbeat, but denied all other motions. The admissibility of the dog-track evidence was deferred to the trial court's discretion.

After a trial in which Starnes proceeded pro se with advisory counsel acting in a standby capacity, a jury found Starnes guilty of all three charges. Starnes then made several motions which the district court denied, finding that Starnes waived any objection to the jury because he failed to ask the jurors whether they knew him, and that there was sufficient evidence to convict him of all three counts. Starnes also claimed that his attorney had provided him with ineffective assistance of counsel at his omnibus hearing. The court dismissed this claim as well because Starnes failed to raise any objection or make any record at the time of the hearing. Finally, the court found that Starnes waived any objection to Officer Harvey's testimony as false by failing to object at the omnibus hearing and cross-examining him at trial.

Starnes was sentenced to 60 months for illegal possession of a firearm and 54 months for the attempted aggravated robbery count, to be served concurrently.

D E C I S I O N

Time of Seizure

Starnes argues that Officer Harvey's physical touching of his chest constituted a seizure that was not justified by reasonable, articulable suspicion, and so all evidence gathered thereafter should have been suppressed by the district court. The district court found that Officer Harvey's touching Starnes's chest was a search unsupported by probable cause, but that Starnes was not seized until sometime later. While it is questionable whether Officer Harvey's touching constituted a seizure, we hold that he had a reasonable, articulable suspicion to detain Starnes at that point. Thus, it does not matter whether the seizure took place at that moment or at some later time.

Upon review of a district court's denial of a motion to suppress evidence, we independently review the facts and determine, as a matter of law, whether the district court erred by not suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When the facts are not disputed, we must determine whether a police officer's actions constitute a seizure and, if so, whether the officer articulated an adequate basis for the seizure. *Id.* Here, we assume, *arguendo*, that Starnes was seized when Officer Harvey touched him.

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. If Starnes's seizure was not justified by reasonable suspicion, then he was illegally seized and all the evidence

gathered thereafter must be suppressed. *See Harris*, 590 N.W.2d at 97. The brief seizure of a person for investigatory purposes is permissible if there is a "particularized and objective basis for suspecting the particular person [seized] of criminal activity." *Id.* at 99. This standard is satisfied if the seizure "was not the product of mere whim, caprice or idle curiosity, but was based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Anderson*, 683 N.W.2d 818, 822-23 (Minn. 2004) (quotation omitted). The standard for showing reasonable, articulable suspicion is "not high." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1422 (1997)). This court reviews de novo questions of reasonable suspicion. *See State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

At the reopened omnibus hearing, Officer Harvey articulated the following reasons for stopping Starnes: (1) he was looking for a black male on foot wearing dark clothing; (2) Starnes walked extremely close to the building in a suspicious way; and (3) he looked unfamiliar with his surroundings and hesitated slightly upon seeing the squad car. The determination of reasonable suspicion is based on the totality of the circumstances, and includes "the officer's general knowledge and experience, the officer's personal observations, information the officer has received from other sources, the nature of the offense suspected, the time, the location, and anything else that is relevant." *Kotewa v. Comm'r of Pub. Safety*, 409 N.W.2d 41, 43 (Minn. App. 1987) (quoting *Applegate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987)). Officer Harvey's articulation of his reasonable suspicion was based on proper factors

such as Starnes's location near the scene of a crime, his unusual behavior of walking tight up against the building, his matching the description of the suspect aired over dispatch, and Officer Harvey's knowledge that a crime was recently committed in the vicinity.

The situation here is similar to that in *State v. Berg.* 383 N.W.2d 7 (Minn. App. 1986). There, the court found reasonable, articulable suspicion based on the following circumstances: (1) defendant was a block from a reported theft, (2) walking in the direction indicated as the suspect's flight, (3) at 4:30 a.m. during the winter, and (4) matched the eyewitness descriptions. *Id.* at 10. Similarly, Starnes was seen a block-and-a-half away from the recently reported robbery, at 12:30 a.m., matched the victim's description, and was walking in such a manner and location as to arouse Officer Harvey's suspicion. An officer may make his assessment on the basis of "inferences and deductions that might elude an untrained person." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). Even "innocent activity might justify the suspicion of criminal activity." *State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989).

Starnes's walking late at night close to a building is not criminal activity, but Officer Harvey's knowledge of the foot traffic in the area, coupled with the recent report of a crime nearby, and the description of the suspect as a possible black male in a dark shirt, gave him reasonable, articulable suspicion to stop Starnes to allay his suspicions. Thus, while Officer Harvey's touching Starnes's chest might have been a seizure, it was supported by a reasonable suspicion. The district court did not err when it found that evidence collected after this point need not be suppressed.

Show-up Identification Procedures

Starnes next contends that the trial court erred when it found that the visual and audio show-up identification procedures, though unnecessarily suggestive, did not create a "very substantial likelihood of misidentification" based on the totality of the circumstances. 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, 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) (describing standard of review); *State v. Roan*, 532 N.W.2d 563, 572 (Minn. 1995) (finding that due-process rights may be violated by admission of suggestive identification).

In determining whether a suggestive identification is nonetheless reliable, and so admissible as evidence, courts consider five factors: (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. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) (citation omitted). Against these factors, "the court must weigh the corrupting effect of the suggestive identification." *State v. Blegen*, 387

N.W.2d 459, 463 (Minn. App. 1986) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977)), *review denied* (Minn. July 31, 1986).

Starnes argues that P.S.'s identification did not contain sufficient independent indices of reliability because his assailant's face was obscured by a mask, it was dark outside, and his identification was based on the suspect's clothes. However, the record reveals that (1) P.S. had several minutes to view Starnes from a few feet away in a reasonably well-lit area; (2) P.S. was paying close attention to Starnes, watched him leave and come back, and heard him yell many times from a very short distance; (3) P.S. could not describe Starnes's face because of the mask, but accurately described his race, clothing, appearance, height and weight; (4) P.S. was "80-90%" sure of his identification; and (5) the time between the crime and the show-up was only about one hour.

Based on the totality of the circumstances, P.S.'s identification of Starnes as his assailant was supported by sufficient independent origins of reliability. Although the identification procedures used by the police were unnecessarily suggestive, there are sufficient indicia of reliability here that, on balance, permit the admission of the identification evidence. The district court did not err in admitting P.S.'s identifications of Starnes as his assailant into evidence.

Starnes also argues that Minnesota courts should reject the totality-of-the-circumstances test and instead follow other jurisdictions that have concluded that tainted identification evidence should not be admitted. This court is an error-correcting court, and we decline to reject the totality-of-the-circumstances test. *See State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005) (stating role as error-correcting court).

Sufficiency of the Evidence

Starnes next contends that if the evidence of the initial detention, show-up identification, and DNA were suppressed, there remained insufficient evidence to convict him of these crimes. When considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to support the verdict reached by the jury. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The verdict will not be disturbed if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Even without the DNA and other evidence that may have been suppressed, sufficient evidence remained for the jury to find Starnes guilty of his crimes beyond a reasonable doubt.

The remaining evidence, when viewed in the light most favorable to conviction, supports the jury's verdict. First, the police dog tracked, albeit in a round-about manner, from the scene of the crime to a location near Starnes, and "asserted" near the location of the gloves and gun. Second, P.S. described his attacker as possibly a black man, weighing between 130-150 pounds and standing approximately 5'7" tall, wearing a black shirt, a black mask and possibly gloves, and carrying a silver revolver. Starnes matched P.S.'s description and was found approximately a block-and-a-half from the restaurant. Finally, P.S. testified that his attacker yelled at him to "open the f---ing door" several times, and pounded on the door with a gun in his hand. A gun and gloves were found

near Starnes in an area full of burdocks, and Starnes had burdocks on his clothing. P.S. identified the gun and gloves found near Starnes as those used in the attack.

While dog-tracking evidence, standing alone, is insufficient evidence to convict a defendant, it may be used to corroborate other evidence. *McDuffie v. State*, 482 N.W.2d 234, 237 (Minn. App. 1992), *review denied* (Minn. Apr. 13, 1992). Here, the dog-tracking evidence corroborates the identity of the suspect, his presence at the restaurant, and the suspect's relation to the gun; it does not stand alone. While much of the evidence in this case is circumstantial, "[a] conviction may stand, despite . . . [eyewitness'] failure to identify the defendant, if circumstantial evidence offered is strong enough to exclude any reasonable hypothesis of innocence." *State v. Guy*, 409 N.W.2d 248, 251 (Minn. App. 1987), *review denied* (Minn. Sept. 18, 1987). However, P.S.'s testimony identifying the gloves and gun is direct evidence that those items were used in the crime. Starnes's proximity to them, coupled with P.S.'s description of his attacker and the dog-tracking evidence, forms a complete chain of reasoning that, when viewed in the light most favorable to conviction, is sufficient to uphold the convictions.

In his pro se supplemental brief and pro se supplemental reply brief, Starnes claims that Officer Harvey's inconsistent testimony regarding the contents of the original dispatch, and Officer Piehn's inconsistent statements regarding his interpretation of Starnes's story at the apartment building, mean that his conviction rests upon false evidence. Starnes also contends that Officer Harvey cross-contaminated the gloves and gun with Starnes's DNA. At trial, Starnes vigorously cross-examined the officers about

their statements, testified in his own defense, and presented the argument to the jury that he was framed by Officer Harvey.

An appellate court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Thus, we must assume that the jury believed that Officer Harvey did not falsify evidence or touch the gun after he touched Starnes, and that Starnes concocted his story about visiting a friend in the apartment building. Credibility determinations and the weight to be given to testimony are the traditional provinces of the jury; an appellate court will not generally second-guess those determinations. *State v. Travica*, 398 N.W.2d 666, 670 (Minn. App. 1987). Even though there are some inconsistencies in the state's case, they are insufficient to overturn Starnes's convictions. *Pieschke*, 295 N.W.2d at 584 (finding inconsistencies in state's case do not require reversal of the jury verdict).

In conclusion, even without the identification and DNA evidence, the evidence connected Starnes to the scene of the crime, the person described as committing that crime, and the gun used in the crime. There is sufficient evidence to support the convictions.

Ineffective Assistance of Counsel

Starnes claims that his appointed attorney ineffectively represented him at the omnibus hearing. Starnes had already discharged his public defender, and the trial court appointed him a new attorney to act as standby counsel. At the time of the omnibus

hearing, counsel was fully representing Starnes. Specifically, he contends that counsel should have cross-examined three witnesses in a different manner.

When evaluating an ineffective-assistance-of-counsel claim, this court applies the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (applying the *Strickland* test to claims of ineffective assistance of trial counsel). The appellant must show that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's errors, the result of the proceeding would have been different. *Lahue*, 585 N.W.2d at 789.

Starnes claims that appointed counsel was ineffective at the omnibus hearing by failing to vigorously cross-examine P.S. regarding his allegedly inconsistent descriptions of Starnes, Officer Harvey regarding the description of the suspect he received from dispatch, and Officer Piehn regarding his interpretation of Starnes's statements to Officer Harvey at the time of the seizure. Generally, trial strategy decisions are not subject to appellate review for competency. Trial tactics are inherently discretionary with the trial attorney, and will not be reviewed so long as they were reasonable. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004); *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). Cross-examination is a trial tactic. *State v. Irwin*, 379 N.W.2d 110, 115 (Minn. App. 1985), *review denied* (Minn. Jan. 23, 1986). The record reveals that counsel effectively cross-examined all witnesses brought by the state. There is no showing that his performance fell below an objective standard of reasonableness or prejudiced Starnes.

Due Process

Finally, Starnes contends that the district court deprived him of a fair opportunity to argue and present evidence on his posttrial motions. Starnes has the right to a fair and impartial judge. *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004). However, his allegations that the court refused to hear his evidence or let him speak is not supported by the record. The district court demonstrated that it had read and considered his motions, listened to his arguments, and explained its decisions to him, as shown by more than 30 pages of transcript. In fact, the district court did a laudable job throughout these proceedings of ensuring that Starnes understood the proceedings. This claim is without merit.

Affirmed.