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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0183

Jermaine Octavious Stansberry, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 17, 2009
Affirmed
Collins, Judge*

Hennepin County District Court
File No. 27-CR-02-070442

Jermaine O. Stansberry, MCF Stillwater, 970 Pickett Street North, Bayport, MN 55003 (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, 80 South Eighth Street, Minneapolis, MN 55487 (for respondent)

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

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Seeking postconviction relief, appellant challenges his convictions of second-degree (intentional) murder, first-degree aggravated robbery, and prohibited person in possession of a firearm. The convictions stem from the robbery of a University of Minnesota football player and the shooting of his teammate in downtown Minneapolis on September 1, 2002. After being identified by eyewitnesses, appellant was arrested and charged. Appellant argues that the district court (1) denied appellant's due-process rights by failing to suppress unreliable photographic lineup identification evidence; (2) abused its discretion by admitting evidence of appellant's prior convictions for impeachment purposes; and (3) erred by finding that appellant was not entitled to a new trial based on ineffective assistance of counsel. We affirm.

D E C I S I O N

Appellate courts "review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). When reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence, which we reverse only if the postconviction court abused its discretion. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

I.

Appellant Jermaine Stansberry first argues that the district court erred by admitting the photographic lineup identifications because the process was unreliable and unnecessarily suggestive. 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. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). The first inquiry focuses on whether the procedure was unnecessarily suggestive. *Id.* Whether an identification procedure is unnecessarily suggestive depends on whether it unfairly singles out the defendant for identification. *Id.* If so, the second inquiry is whether the identification was reliable under the totality of the circumstances. *Id.* Minnesota courts apply five factors to evaluate the totality of the circumstances:

> (1) The opportunity of the witness to view the criminal at the time of the crime; (2) The witness' degree of attention; (3) The accuracy of the witness' prior description of the criminal; (4) The level of certainty demonstrated by the witness at the photo display; [and] (5) The time between the crime and the confrontation.

Id. (citing *State v. Bellcourt*, 312 Minn. 263, 264-65, 251 N.W.2d 631, 633 (1977)). We review de novo whether a person has been denied due process. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

Suggestibility

Stansberry asserts that the witness identifications should have been suppressed because their suggestiveness violated his right to due process. He argues that the procedure employed was unnecessarily suggestive because the photographs used in the photographic array were selected based on the resemblance to Stansberry rather than the resemblance to the witnesses' descriptions of the shooter; the officers conducting the photographic lineup knew which photograph was that of Stansberry; and although witnesses indicated their confidence level, confidence is not related to reliability.

Stansberry contends that eyewitness identification is among the least reliable evidence commonly admitted at trial and that recent scientific research has shown that eyewitness identifications are often unreliable. And although they have not been adopted by Minnesota courts and were not presented to the district court to aid in its analysis in this case, Stansberry urges us to apply six rules that should be followed during identification procedures, arguing that such rules will prevent unnecessary suggestiveness: (1) the lineup should include only one suspect with the others being fillers; (2) the fillers should resemble the witness's description of the suspect; (3) the witness should be cautioned that the suspect may not be in the lineup; (4) the lineup should be presented sequentially rather than simultaneously; (5) the officer conducting the lineup should not know the identity of the suspect; and (6) a statement should be obtained from the witness indicating the witness's level of confidence.

Here, the procedure used to present the photographic lineups to witnesses was described by one of the participating officers. According to the officer, the lineups were

created by uploading Stansberry's picture into a computer, which searched for photographs of men with similar characteristics such as age, weight, height, and facial hair. The computer then printed out the lineup with six photographs in random order. At a Rasmussen hearing, the officer testified that he always showed lineups in the same way, telling witnesses: "I have a series of photographs here that I'd like you to look at. You may or may not recognize anyone in here. Just take your time, and see if you recognize anyone, and how." The presentations of the photographic lineups were not recorded.

In the memorandum denying postconviction relief, the district court found that the photographic lineup procedure did not "single out" Stansberry and was not unnecessarily suggestive. In support of this finding, the district court stated that the officers presented a computer-generated lineup consisting of persons with similar characteristics, placed in random order; did not indicate the suspect's identity or confirm that the suspect's photograph was among those displayed; and informed the witnesses that the array may or may not have included a photograph of someone they recognized.

Based on our careful review of the record, we agree with the postconviction court that the photographic lineup process was not unnecessarily suggestive, and the district court did not deny Stansberry his due-process rights by admitting the witness identifications.

Reliability

Stansberry recognizes that Minnesota courts follow the two-step process outlined in *Ostrem* but urges us to adopt a *per se* rule that requires suppression of unnecessarily suggestive eyewitness identifications without examining reliability under the totality of

the circumstances. "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). Therefore, based on Minnesota precedent, even had we found the identification procedure to be unnecessarily suggestive, we would nonetheless decline Stansberry's invitation to adopt a *per se* rule eliminating the need for analysis of reliability.

II.

Stansberry next argues that the district court erroneously permitted the state to impeach him with evidence of his prior convictions.

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

Minn. R. Evid. 609(a). "Under rule 609(a)(1), the prior conviction need not bear directly on veracity, although convictions for some offenses have less impeachment value than convictions for other offenses." *State v. Lund*, 474 N.W.2d 169, 172 (Minn. App. 1991).

> Some of the factors which the trial court would have had to consider in determining whether to restrict the use of each of the more recent prior crimes are: (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 537-38 (Minn. 1978). "[I]t is error for a district court to fail to make a record of its consideration of the *Jones* factors, though the error is harmless if it is nonetheless clear that it was not an abuse of discretion to admit evidence of the convictions." *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007).

A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Whether the probative value of the prior conviction outweighs the prejudicial effect is within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

The convictions in question are felony theft in 1994 and felony drug possession in 2000. At trial, the only reference to the prior theft conviction occurred as follows:

> PROSECUTOR: You've been convicted of felony theft, haven't you?
> [APPELLANT]: No, not that I remember.

Because the theft conviction was denied by Stansberry and the denial was not rebutted by the state, the record before the jury was that Stansberry had not been convicted of felony theft. Thus, there was no erroneous admission of the prior theft conviction.

As to the prior felony drug conviction, Stansberry argues that the district court did not sufficiently show on the record that it had considered the *Jones* factors and that proper application of these factors reveals that the admission of the convictions was not harmless error. Although it is error for the district court to fail to make a record of its consideration of the *Jones* factors, here such a record was made when the district court adopted the state's analysis in its memorandum to the district court. Clarifying the basis

for the admissibility of both convictions, the prosecutor requested that the record reflect the following: "With respect to the prior convictions for impeachment purpose, would it be fair to assume that the Court adopted my argument and analysis of the *Jones* factors that I put in my brief, or my memo, to the Court?" After referring to the memorandum, the district court stated: "That was my understanding, yes." The adoption of the state's memorandum, which fully analyzed the *Jones* factors, is sufficient to show that the district court performed the necessary analysis.

The postconviction court's analysis of the *Jones* factors is summarized as follows: (1) it discussed the impeachment value of the prior theft conviction but not the prior drug conviction; (2) at three years old, the drug conviction fell within the ten-year limit set by Minn. R. Evid. 609(b); (3) felony drug possession is not similar to the presently charged crimes; (4) Stansberry's testimony was important to the case, but admission of the prior conviction did not prevent Stansberry from testifying; and (5) Stansberry's credibility was central to the case because his explanation of the events was contrary to eyewitness accounts and he contended that the witnesses were mistaken or lying, thus the jury was required to weigh Stansberry's version of the events against those offered by the state's witnesses. Based on this analysis, the postconviction court found that each of the factors weighs in favor of admission.

Following review of the record, we agree with the postconviction court's analysis of factors two through five. Further, although the postconviction court did not address the first factor as it relates to the prior drug conviction, the conviction does have some impeachment value because it allows the jury to see the "whole person." *See State v.*

Gassler, 505 N.W.2d 62, 67 (Minn. 1993) (stating that prior-conviction-impeachment evidence allows jury "to see the 'whole person' and thus to judge better the truth of his testimony"). Although the impeachment value of the drug conviction is somewhat diminished because it is not a crime of dishonesty, this factor nevertheless weighs slightly in favor of admission.

In sum, the district court's adoption of the state's analysis of the *Jones* factors supports admission of the prior drug possession conviction; Stansberry's argument that his apparent involvement in the charged robbery was itself sufficient impeachment evidence is without merit because he did not admit to the robbery and the charge was submitted to the jury; and we are satisfied that the postconviction court did not abuse its discretion by concluding that the prior drug possession conviction was properly admitted for impeachment.

III.

Stansberry argues pro se that he received ineffective assistance of counsel because his attorney failed to (1) investigate material facts and to interview and call material witnesses; (2) object to instances of prosecutorial misconduct; and (3) request a jury instruction on a lesser-included offense as promised. "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.'" *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)). Based on our review of the record,

because counsel's representation neither fell below an objective standard of reasonableness nor prejudiced Stansberry, Stansberry's pro se arguments are without merit.

Affirmed.