STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0508

State of Minnesota,
Respondent,

vs.

Kenneth Edward Dean,
Appellant.

Filed April 7, 2009
Affirmed
Stauber, Judge

Hennepin County District Court
File No. CR07109437

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

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

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and

Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that (1) the district court erred in denying his motion to suppress identification evidence that was the product of an unnecessarily suggestive photo lineup and likely resulted in irreparable misidentification; (2) the evidence identifying him as the rapist was insufficient to support his guilt; and (3) the prosecutor committed misconduct by referring to information that was not admitted as substantive evidence. We affirm.

FACTS

Around midnight on July 29, 2005, T.H. was raped in her car by an African American male, who was accompanied by an Asian man. The rape occurred in the parking lot of Folwell Park in North Minneapolis. After the incident, T.H. drove to her boyfriend's house and informed him of the assault. T.H.'s boyfriend then took T.H. to the hospital to be examined. At the hospital, T.H. described the incident to a nurse, and the results of her examination were consistent with the reported sexual assault. While she was at the hospital, T.H. also described the incident to Officer Brandon Bartholomew. Although T.H. told the nurse that her assailant ejaculated, she told Officer Bartholomew that she was uncertain if her assailant ejaculated.

T.H.'s clothing was collected and turned over to police. The results of forensic testing revealed one sperm cell which was taken from the victim's underwear. There was also a stain on T.H's shirt that was indicative of saliva. A DNA profile was obtained from the stain. However, no suspect was immediately identified.

In March 2007, the DNA evidence collected from T.H.'s shirt was matched to appellant Kenneth Dean through a DNA database. A search warrant was subsequently obtained for appellant, and a biological sample collected from appellant confirmed the match with the DNA profile taken from T.H.'s shirt. The DNA match identified appellant as T.H.'s assailant to a very high degree of certainty.

On August 28, 2007, Sergeant Bernard Martinson met with T.H. at her home. T.H. told Sergeant Martinson that she did not know appellant, but indicated that she was confident that she could identify her assailant if she saw his photograph. Sergeant Martinson then proceeded to show T.H. six photographs "in a sequential order, 1 through 6." After viewing all six photographs, T.H. identified the photograph of appellant as the person who assaulted her.

On August 30, 2007, appellant was charged with criminal sexual conduct in the first degree. Appellant subsequently moved to suppress the out-of-court identification. The district court denied the motion, and a bench trial was held on the matter. At trial, T.H. testified that on the date of the alleged rape, she drove to Folwell Park to contemplate the birthday and death of her brother who had been murdered four years earlier. As she sat alone in her car with the windows open and the doors unlocked, T.H. noticed two men walk past her car. Shortly thereafter, T.H. noticed that the men were at her car. T.H. testified that appellant was standing at the driver's side door, and an Asian man was standing at the passenger door. According to T.H., appellant stated that "[i]t's been like two months since I've been with a women and it's going to end now." When

T.H. screamed, appellant flashed a gun and said that if she didn't stop screaming he would shoot her.

T.H. claimed that after being threatened with the gun, she stopped screaming and trying to fight her assailant because she was afraid of being shot. According to T.H., appellant proceeded to open the car door and spin her toward him. T.H. testified that appellant then penetrated her vagina with his penis, and kissed her several places, including her neck and breasts. T.H. further testified that the Asian man entered her car through the passenger side door, put his hands over her mouth, and acted as a lookout. T.H. testified that after about 10 to 15 minutes, the men left. T.H. claimed that when the men left, she heard the Asian man call appellant "Star."

Appellant testified in his defense and denied raping T.H. Appellant also claimed that his nickname is "Duck," and that he did not own a firearm in 2005. Appellant could not explain why his DNA was on T.H.'s shirt.

The district court found appellant guilty of the charged offense. Appellant was subsequently sentenced to 90 months in prison, a downward durational departure from the presumptive sentence of 144 months. This appeal followed.

D E C I S I O N

I.

Generally, evidentiary rulings rest within the sound discretion of the district court. 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).

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.* If the procedure was unnecessarily suggestive, the second inquiry is whether the identification was reliable under the totality of the circumstances. *Id.*

Appellant claims that the photographs used in the photographic array were selected based on a resemblance to him rather than the preferred protocol used in Hennepin County under which the pictures are selected based on the resemblance to the witness's description of her assailant. Appellant argues that when a photo lineup contains photos of individuals similar to the person the police suspect, instead of similar to the witness's description of the perpetrator, the witness will be inclined to choose the person who looks most like the original description, leading to misidentification. Thus, appellant argues that the photo display was unnecessarily suggestive because the display was put together in a way that unfairly highlighted his picture.

Whether an identification procedure is unnecessarily suggestive depends on whether it unfairly singles out the defendant for identification. *Id.* In a photographic

display such as the one at issue here, the requirement is not that every person in the display fit the witness's exact description. *Seelye v. State*, 429 N.W.2d 669, 672 (Minn. App. 1988). Rather, the standard is that "all the people in the display bear a reasonable physical similarity to the accused." *Id.* at 672-73.

Here, the victim was shown six full page photographs of six different individuals one by one. The district court found that the photos were all taken from the neck up, the men were wearing similar clothing, had bald or shaved heads, had similar facial hair, similar skin color, and were all facing the camera with similar expressions. The district court noted minor differences in the appearances of the different individuals, but the court's findings indicate that all of the individuals in the display bore a reasonable physical similarity to appellant. This is the appropriate standard under Minnesota law. *See id.* (stating that all of the people in the display must bear a reasonable physical similarity to the accused). Although Hennepin County may have adopted a protocol aimed at reducing misidentifications by using photo arrays based on a witness's description of the suspect, the fact that this protocol was not specifically followed here does not mean the photo display was unnecessarily suggestive.

Appellant also argues that the photo lineup was unnecessarily suggestive because Sergeant Martinson knew the identity of the suspect, which was inconsistent with the department's procedures. But there is no authority for the position that an officer's slight deviation from the department guidelines results in a per se rule of inadmissibility of the evidence obtained from the failure to follow the preferred protocol. Moreover, there is also no support for appellant's argument that the lineup was unnecessarily suggestive

simply because the officer displaying the lineup knew the identity of the suspect. The photographs were shown to T.H. one-by-one, and there is nothing in the record here to indicate that Sergeant Martinson's knowledge of appellant's identity made the lineup unnecessarily suggestive.

Appellant further argues that the lineup was unnecessarily suggestive because Sergeant Martinson asked the victim "if she knew a Kenneth Edward Dean" before showing her the photos. Appellant argues that such a comment indicates to the victim that her assailant's photograph is in the photo array, negating any possibility in the victim's mind that her assailant's photograph may not be in the array. We disagree. The record reflects that Sergeant Martinson specifically told T.H. that "it was unknown if the suspect was in the lineup at all." As the district court recognized, this is consistent with the preferred practice. Moreover, the fact that the victim did not recognize appellant's name eliminates the possibility that she would identify appellant based on face recognition not traceable to the offense itself. And finally, this court has upheld photo lineups even where the witness has been told that police have "a suspect in mind." *State v. Porter*, 411 N.W.2d 187, 190 (Minn. App. 1987). This is because "[a] witness who has been asked to view a photo display has probably already assumed that a suspect has been found and that one of the photos is of that suspect." *Id.* Accordingly, the photo display was not unnecessarily suggestive, and the district court did not err in admitting the victim's identification of appellant as her assailant. Because the procedure was not unnecessarily suggestive, we need not address the inquiry into whether the identification was reliable under the totality of the circumstances.

II.

When assessing the sufficiency of evidence, the reviewing court is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to permit the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The verdict should stand "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). This court applies the same standard to bench trials as to jury trials when reviewing the sufficiency of the evidence. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999).

Appellant was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c) (2004). To convict appellant of this offense, the state had to prove that appellant engaged in sexual penetration of T.H., and that the circumstances existing at the time of the act caused T.H. to have a reasonable fear of imminent great bodily harm. Minn. Stat. § 609.342, subd. 1(c).

Appellant argues that the evidence was insufficient to support his conviction because there were inconsistencies in T.H.'s stories, such as T.H.'s statement to the nurse that her assailant had ejaculated, and T.H.'s subsequent statement to Officer Bartholomew that she was not sure if her assailant ejaculated. Appellant also claims that

T.H.'s stories were inconsistent because she told the investigating officer that her assailant had pulled her underwear to the side before penetrating her vagina with his penis, but she testified at trial that her assailant failed to pull her underwear to the side, and that his penis penetrated her with her underwear between his penis and her body. Appellant also claims that the faulty identification procedure further supports his claim that the evidence was insufficient to support his conviction.

We disagree. As noted above, the identification procedure was reliable and not unnecessarily suggestive. Moreover, despite a few minor inconsistencies in the victim's reports, the evidence presented at trial supports a finding of guilt. T.H. testified that she was sexually assaulted and she identified appellant as her assailant. If believed, this testimony alone is sufficient to convict appellant of the alleged rape. *See State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977) (recognizing that corroboration of a sexual assault complainant's testimony is not required and that a conviction can rest on the uncorroborated testimony of a single witness). The district court specifically found T.H. to be "highly credible," and the court apparently found appellant's testimony to be incredible. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating that "[b]ecause the weight and believability of witness testimony is an issue for the district court, [the reviewing court] defer[s] to that court's credibility determinations"), *review denied* (Minn. July 15, 2003). In addition to T.H.'s testimony, the state presented DNA evidence linking appellant to the assault. This DNA evidence also demonstrates a very high probability that appellant was T.H.'s assailant. Finally, the treating nurse testified that she examined T.H. after the alleged rape, and the results of her examination were

consistent with the reported sexual assault. Therefore, the evidence was sufficient to support appellant's conviction of first-degree criminal sexual conduct.

III.

Appellant argues that the prosecutor committed misconduct by referring in closing argument to an admission by appellant that the victim described her assailant as having a gap in his front teeth. But appellant concedes that he failed to object to the alleged misconduct at trial. Generally, when a defendant fails to object to a prosecutor's remarks in closing argument, the issue is waived. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). But "[p]lain errors or defects affecting substantial rights may be considered by the court . . . on appeal though they were not brought to the attention of the [district] court." Minn. R. Crim. P. 31.02. Plain error exists if (1) there is an error, (2) that is plain; and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The defendant has the burden of showing that plain error occurred. *Id.* If he is able to do so, the burden shifts to the prosecution to demonstrate that the misconduct which constitutes the plain error did not prejudice the defendant's substantial rights. *Ramey*, 721 N.W.2d at 301-02.

Here, the prosecutor asked appellant on cross examination if he had read reports in which the complainant described her assailant as having a gap between his teeth. Appellant conceded that he remembered such a description and subsequently conceded that he has gaps between all his teeth. The prosecutor then referred to this information during closing arguments to support the proposition that appellant was T.H.'s assailant.

Appellant argues that the prosecutor's references to the gap in appellant's teeth were improper because there was no substantive evidence that the complainant described her assailant as having a gap in his teeth. Appellant argues that because the identification of T.H.'s assailant was the primary issue at trial, the prosecutor's improper references to the gap in appellant's teeth constituted prejudicial misconduct warranting a new trial.

We disagree. The evidence pertaining to T.H.'s description of her assailant as having a gap between his teeth was properly elicited on cross-examination. Moreover, the record reflects that appellant showed the district court his teeth, and appellant apparently has a "big gap between [his] front two teeth." Because this testimony was properly elicited on cross-examination, the prosecutor was free to comment on the testimony in closing arguments. Accordingly, appellant is not entitled to a new trial.

Affirmed.