STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0355

State of Minnesota,
Respondent,

vs.

Michael James Bellanger,
Appellant.

Filed May 12, 2009
Affirmed
Lansing, Judge

St. Louis County District Court
File No. CR-07-3052

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Melanie Ford, St. Louis County Attorney, 100 North Fifth Avenue West, Duluth, MN 55802 (for respondent)

Melissa Sheridan, Assistant State Public Defender, Suite 320, 1380 Corporate Center Curve, Eagan, MN 55121 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

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

LANSING, Judge

A jury found Michael Bellanger guilty of attempted car theft based on evidence that included a show-up identification. Bellanger argues that admission of the

identification evidence violated his right to due process and that the apprehending police officer's testimonial reference to recognizing Bellanger violated his right to a fair trial. Because the identification was sufficiently reliable to entrust its consideration to a jury and the district court's decision not to intercede when the officer made the reference is not reversible, plain error, we affirm.

F A C T S

Nina Rescigna and Lance Chamberlin discovered a man sitting in Rescigna's car at about 12:30 a.m., outside Chamberlin's Duluth apartment. When asked what he was doing in the car, the man replied that it belonged to a friend who had given him permission to use it. Rescigna noticed that he smelled of alcohol and that he was slow to respond when Rescigna and Chamberlin asked him to get out of the car. The man complied with Rescigna's request to empty his pockets to ensure that he had not taken anything from her car. After the man got out of the car, Rescigna saw a piece of brick on the driver's seat. Chamberlin's step-sister called the police, and Chamberlin asked the man to wait until they arrived. Instead, the man ran east on Sixth Street. Chamberlin and Rescigna chased him and last saw him as he ran to the right on Sixth Avenue East.

A Duluth police officer on Seventh Avenue East, a couple blocks south of Sixth Street, heard a dispatch report of the incident. The dispatcher described the fleeing man as "a Hispanic male wearing baggie blue jeans, a blue shirt with lettering on it, and white baseball cap." Within a minute of hearing the dispatch, the officer saw a figure running across Seventh Avenue East from an alley parallel to Sixth Street. When the officer drove to the alley, he saw a man who appeared to be either Native American or Hispanic

and who was out of breath from running. He was wearing baggie blue jeans and a blue T-shirt. The shirt had no lettering on it, and he was not wearing a baseball cap. The officer noticed that he wore his hair in a ponytail and that he was someone the officer had seen before. Later, the officer recalled that the man's name was Michael Bellanger.

A second officer, who was headed to the location of Rescigna's car, heard the report that a possible suspect had been stopped. He continued to the location where Rescigna and Chamberlin were waiting and spoke with them. During this discussion, the detaining officer radioed to ask if the man who had been in the car wore his hair in a ponytail. When Rescigna and Chamberlin said that he did, the second officer drove them to the alley where Bellanger was being detained. Rescigna and Chamberlin identified Bellanger as the man who had been sitting in Rescigna's car. Further investigation of the car showed that the steering column's plastic housing had been chipped away on the side where the wiring would allow someone to start the car without the keys. The state charged Bellanger with attempted car theft.

Bellanger requested a pretrial hearing on the admissibility of the show-up identification. Following testimony by both officers, the district court ruled that the show-up identification was admissible.

Rescigna, Chamberlin, and both police officers were witnesses at the jury trial. The officer who brought Rescigna and Chamberlin to the show-up testified that they responded "yes" when asked if they were one-hundred percent sure that Bellanger was the man who had been sitting in Rescigna's car. In addition to the testimony relating to the show-up identification, Rescigna and Chamberlin also recounted their observations of

Bellanger when he was in the car and their description of him to the police. Both Rescigna and Chamberlin made an in-court identification of Bellanger.

The jury found Bellanger guilty of attempted theft of Rescigna's car, and he now appeals.

D E C I S I O N

On appeal, Bellanger raises two issues. First, he contends that using evidence of the show-up identification violated his right to due process. Second, he contends that the apprehending officer's comment that he "recognized the suspect . . . [and] remembered him as Michael Bellanger" deprived him of a fair trial because it impermissibly implied that he was a criminal.

I

Admissibility of identification evidence implicates due process and our review is de novo. *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008) (citing *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005)). Factual findings that underlie the district court's legal conclusions will be sustained unless clearly erroneous. *State v. Kowski*, 423 N.W.2d 706, 708 (Minn. App. 1988). Minnesota courts examine challenges to pretrial identification under the two-part test of *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996). The court first determines whether the procedures were unduly suggestive and, if so, whether the identification is reliable in light of the totality of the circumstances. *Id.*, 556 N.W.2d at 912.

The type of identification procedure used by police in this case—a live, one-person show-up—is not always unduly suggestive. *State v. Taylor*, 594 N.W.2d 158, 161-62 (Minn. 1999). To some degree, however, the "very nature" of a show-up is suggestive. *Id.* at 162. The district court concluded that the show-up procedure was "not ideal," but consolidated the analysis of whether the procedure was unduly suggestive with the analysis of its reliability in light of the totality of the circumstances. The memorandum accompanying its order suggests that the district court assumed that the procedure was unduly suggestive and proceeded to an evaluation of its reliability. For purposes of our analysis, we accept the characterization of the show-up as unduly suggestive and we, therefore, evaluate its reliability.

Reliability turns on a combination of factors: the witness's opportunity to view the person at the time of the crime, the witness's degree of attention, the accuracy of the witness's description before the identification, the witness's level of certainty at the time of the identification, and the time between the crime and the identification. *Manson*, 432 U.S. at 114-16, 97 S. Ct. at 2253-54; *Jones*, 556 N.W.2d at 912. To be barred, identification evidence must be so unreliable that it cannot be entrusted to the "good sense and judgment of American juries, [for whom] evidence with some element of untrustworthiness is customary." *Manson*, 432 U.S. at 116, 97 S. Ct. at 2254.

Applying these five factors to Rescigna's and Chamberlin's identification of Bellanger, only the third factor—the accuracy of the witness's description before the identification—weighs against the identification's reliability. The police officers' pretrial-hearing testimony summarized the description Rescigna and Chamberlin

provided to police. The description was not detailed and differed in a couple of material ways from Bellanger's appearance at the show-up. At the show-up, Bellanger was not wearing a hat and his blue shirt did not have lettering on it, as initially described. This discrepancy is not fatal to its reliability: an officer testifying at the hearing and trial stated that it is common for fleeing suspects to shed identifiable clothing when they know they have been seen. Also, at the show-up, Bellanger had eyeglasses and a ponytail, which was not part of the dispatcher's initial description. At the jury trial, Rescigna and Chamberlin both testified that the man in the car did have glasses and a ponytail, and, according to the police testimony at the hearing and the trial, Rescigna and Chamberlin verified the ponytail to police officers before the show-up was conducted. The only other discrepancy relates to Bellanger's race. The initial description in the police dispatch described the man in the car as Hispanic. Bellanger is Native American. Chamberlin testified that his initial observation was that the man had dark skin and was "possibly Native American." Rescigna indicated that she believed the man was Hispanic because of his dark hair and dark complexion.

The remaining factors weigh in favor of reliability. The testimony at the omnibus hearing suggests that Rescigna and Chamberlin interacted with the man in Rescigna's car over a span of several minutes before he got out of the car. Rescigna's and Chamberlin's testimony at trial was consistent with this suggestion. During the interaction, Rescigna was close enough to smell alcohol on the man. She also carefully watched him as he emptied his pockets. Although it was dark, the car was parked next to a streetlight on Fourth Avenue. Rescigna and Chamberlin both said they were able to get a good look at

him. They had further opportunity to note aspects of his appearance as they pursued him for more than a block on Sixth Street. While Rescigna and Chamberlin talked with Bellanger in the car, they were focusing on him as they made a pointed inquiry about why he was in the car. At the show-up, Rescigna and Chamberlin were virtually simultaneous and immediate in their recognition of Bellanger. They both responded "yes" when asked if they were one-hundred percent certain, and Chamberlin testified that his identification was a careful one, saying: "I wanted to be sure that I was making an honest decision." Very little time had passed—twenty minutes at most—between the incident and the show-up.

While the variations in the initial description are troubling, the evidence of the show-up was not too untrustworthy to present to a jury. *See Manson*, 432 U.S. at 116, 97 S. Ct. at 2254 (suggesting that jury should be allowed to weigh identification evidence except when likelihood of irreparable misidentification is substantial). The jury heard the identification evidence in full detail, including the questionable features that were part of the initial description. Under the circumstances, we conclude that allowing the jury to hear the identification evidence did not violate Bellanger's right to due process.

II

The second issue is whether the apprehending officer's testimony that he recognized Bellanger resulted in an unfair trial because it impermissibly implied that Bellanger had a prior criminal record. Because it was not objected to at trial, we review this evidence under the plain-error doctrine. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). The plain-error doctrine may require reversal if there is error that is plain

and that affects the defendant's substantial rights. *State v. Vick*, 632 N.W.2d 676, 684-85 (Minn. 2001). An error is plain if it is "clear" or "obvious." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002).

Bellanger challenges the following exchange in which the officer described approaching Bellanger in the alley off Seventh Avenue East:

> [PROSECUTOR:] When you stopped the suspect, did you identify him?
> [OFFICER:] I recognized the suspect, but I couldn't place his name until another officer arrived and called him by his first name and I remembered him as Michael Bellanger.
> [PROSECUTOR:] And did you identify him? Did you ask him what his name was?
> [OFFICER:] Yes and he confirmed that.

Bellanger says this exchange "portrayed [him] as the type of person who was often in trouble with the police." He relies on *Strommen*, which discussed similar testimony by an officer. 648 N.W.2d at 686-88. *Strommen* notes that evidence suggesting a criminal history can be unfairly prejudicial because it potentially motivates the jury to punish the defendant for other bad acts, or for being a person of bad character. *Id.* at 687.

Bellanger's case is distinguishable from *Strommen* in two important ways. First, the prejudice in *Strommen* consisted of prior-act testimony elicited from two witnesses; a statement by an officer that he knew the defendant from "prior contacts and incidents" was the less prejudicial of the two. *Id.* at 686-88. The supreme court concluded that the statements, considered together, had a substantial effect on the verdict. *Id.* at 688-89. *Strommen* did not hold, however, that the officer's comment about prior contacts, on its own, was reversible, plain error.

Second, while the testimony of the officer in *Strommen* strongly implied prior bad acts, the officer's testimony about Ballenger did not refer to past "contacts" or "incidents." A juror could reasonably conclude that the officer did not know Bellanger very well, because at first he did not remember Bellanger's name. Finally, the officer mentioned his recognition of Bellanger only in passing. Unlike the exchange in *Strommen*, the prosecutor in this case did not intentionally elicit the testimony and steered the officer's responses away from suggesting a criminal past.

Even in cases in which the specific issue of prior-crimes evidence is raised and thoroughly litigated, the district court has reason to be cautious about intervening in the testimony of a witness, absent objection. *See Vick*, 632 N.W.2d at 685 (stating general rule that "a trial court's failure to sua sponte strike unnoticed [prior-crime] evidence or provide a cautionary instruction is not ordinarily plain error"). The apprehending officer's reference to recognizing Bellanger was slight and ambiguous and was not elicited by the prosecutor. Any intervention by the court risked calling attention to what might otherwise pass unnoticed. The district court's failure to intervene was not reversible, plain error.

Affirmed.