STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0914

State of Minnesota,
Respondent,

vs.

Shawn Daryl Oestreich,
Appellant.

Filed June 30, 2009
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19-K0-07-003372

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Johnson, Judge.

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

CONNOLLY, Judge

Appellant argues that the show-up identification procedure in this case was unnecessarily suggestive. He also asserts that there should be an exigent-circumstances requirement before law-enforcement personnel can conduct a show-up identification. Because this show-up was not unnecessarily suggestive, the identification was reliable based on the totality of the circumstances, and there is no such requirement under Minnesota law, we affirm.

FACTS

The facts in this case are largely undisputed. On October 18, 2007, T.M. was walking in West St. Paul with a friend, when a white vehicle pulled up next to them and the occupants began talking with T.M.'s friend. As T.M. continued walking home alone, the vehicle pulled up to the curb next to him. T.M. observed a white male driving the car, a black male in the passenger seat, and another white male in the back seat. The man in the passenger seat, later identified as appellant Shawn Oestreich, asked T.M. if he had any money, and T.M. replied that he did not. Appellant then asked T.M. if he could see T.M.'s phone. T.M. explained what type of phone it was, at which point appellant grabbed the phone and told the driver to drive away. This incident occurred at approximately 5:08 p.m.

Soon thereafter, T.M. again encountered his friend, who identified the driver of the car as M.B. Police officers went to a house that M.B. was known to frequently visit. Residents allowed the officers into the residence, where M.B. and appellant were sitting

on a couch in a bedroom. M.B. and appellant were placed under arrest, and the officers found T.M.'s cell phone under a couch cushion.

Sergeant Walter received a telephone call at 5:45 p.m. that evening requesting that he transport T.M. to an address where two people were in custody. Sergeant Walter was not given any information regarding the identity of the suspects. As Sergeant Walter and T.M. arrived at the residence, T.M. identified a car in the driveway as the one involved in the theft. Sergeant Walter informed T.M. that they were going to take some people out of the squad cars, but that the individuals may or may not be suspects in the theft. Appellant was taken out of a squad car in handcuffs, and T.M. immediately identified him as the passenger who had taken his cell phone. T.M. next identified M.B. as the driver of the car. The identification of appellant and M.B. was made at approximately 6:15 p.m.

Appellant was charged with felony simple robbery and theft from a person. On November 21, 2007, an omnibus hearing was held on appellant's motion to suppress the show-up identification evidence. The district court denied appellant's motion to suppress. Appellant waived his right to a jury trial, and a court trial was held. At trial, T.M. again identified appellant as the person who stole his cell phone. Appellant was convicted of theft from a person. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by denying his motion to suppress the show-up identification evidence because it was unnecessarily suggestive and the state failed to prove that the procedure did not cause a very substantial likelihood of

irreparable misidentifications at the show-up and at trial. The state asserts that the district court properly denied appellant's motion to suppress.

"[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the trial court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). "When determining whether a pretrial identification must be suppressed, we apply a two-part test. The first inquiry focuses on whether the procedure was unnecessarily suggestive. Included in that inquiry is whether the defendant was *unfairly* singled out for identification." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotations omitted).

> If the procedure is found to be unnecessarily suggestive, the court must then determine under the totality of the circumstances whether the identification created a very substantial likelihood of irreparable misidentification. However, if the totality of the circumstances shows the witness' identification has an adequate independent origin, it is considered to be reliable despite the suggestive procedure.

Id. (quotations omitted) (emphasis removed).

1. The show-up was not unnecessarily suggestive.

Appellant asserts that the show-up procedure used in this case was unnecessarily suggestive and cites established caselaw incorrectly to support his position. In his brief, appellant states: "In *State v. Taylor*, the Minnesota Supreme Court indicated that singling out a suspect based on a witness description and presenting him to the witness in handcuffs in a one-person show-up is impermissibly suggestive . . . That's what happened here." In actuality, the court in *State v. Taylor* articulated that "[w]hile a one-person

show-up is by its very nature suggestive, the question we must answer is whether the show-up procedure used here was unnecessarily suggestive. It was not." *Id.* at 162. The district court in this case acknowledged that show-up procedures are by their very nature suggestive, but did not conclude, as appellant implies, that this show-up procedure was *impermissibly* suggestive. Rather, the district court determined that, based on the totality of the circumstances, the identification had an adequate independent origin and there was not a substantial likelihood of irreparable misidentification. But, based on the entire record, it appears that the district court could likewise have concluded that the show-up procedure was not impermissibly suggestive because appellant was not unfairly singled out for identification.

In *State v. Taylor*, the victim recognized her assailant as someone she had met several times, and she identified him by name. *Id.* The alleged assailant was arrested and brought to an apartment complex where the victim was staying. *Id.* at 160. He was removed from the squad car in handcuffs so that the victim could view him from a second floor window. *Id.* The victim, appearing very certain, identified this man as the assailant. *Id.* The Minnesota Supreme Court concluded that this show-up procedure was not impermissibly suggestive. *Id.* at 162. The supreme court did indicate, however, that singling-out an individual from the general population based on a description provided by the victim and then presenting him in handcuffs for a one-person show-up would be unnecessarily suggestive "because of the potential for the show-up procedure, by itself, to influence the identification." *Id.* But that was not what happened in *Taylor*, and that is not what happened here.

In this case, as in *Taylor*, a suspect was identified by name. When the officers in this case located M.B., shortly after the theft, he was with an unidentified black man. It was a logical conclusion that this man might have been the individual in the passenger seat who, less than an hour before, stole T.M.'s cell phone. He was not a random person arrested merely because of the physical description provided by T.M.; he was not unfairly singled out. Furthermore, the officer who transported T.M. to the house made no suggestion that T.M. would be seeing the perpetrators, instead stating that "we're going to be taking some people out of the squad cars and it may or may not be one of the suspects that were involved." After appellant was removed from the squad car, "the victim spontaneously identified [appellant] as the passenger who grabbed his cell phone." Although the show-up procedure was suggestive, it was not unnecessarily or impermissibly suggestive.

2. The totality of the circumstances demonstrates that the identification was reliable.

Even assuming that the show-up procedure was unnecessarily suggestive, it is considered reliable if the identification of appellant had an adequate independent origin. *Id.* at 161. Factors to be considered when determining whether an unnecessarily suggestive identification is nonetheless reliable, include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation." *Manson v. Brathwaite*, 432 U.S. 98, 98, 97 S. Ct. 2243, 2243-44 (1977).

A. Opportunity of the witness to view the criminal at the time of the crime

The district court concluded that T.M. had sufficient opportunity to view appellant both immediately before and during the commission of the crime. "The [district] court's factual findings are subject to a clearly erroneous standard of review[.]" *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996). Appellant argues that this finding was clearly erroneous because the state did not introduce any evidence of T.M.'s initial observation of appellant at the omnibus hearing.

It is true that no evidence of T.M.'s initial observation was introduced at the omnibus hearing. However, at trial it was proved that appellant had a short conversation with T.M., and T.M. was close enough to appellant to have the cell phone snatched out of his hand.[1] Therefore, T.M. had a sufficient opportunity to view appellant at the time of the crime.

B. The witnesses' degree of attention

The district court concluded that T.M. was "coherent, aware, and attentive during his observation of [appellant]." Appellant argues that this finding could only have been based on speculation and therefore is clearly erroneous. We disagree. While the basis for the district court's finding that T.M. was coherent, aware, and attentive when he

[1] The totality-of-the-circumstances analysis is generally conducted based on the pretrial record or omnibus hearing testimony as it was in *State v. Lushenko*, 714 N.W.2d 729 (Minn. App. 2006). Eyewitnesses, however, are not often called at the omnibus hearing, and we believe an accurate picture of the factors to be evaluated can be obtained from trial testimony. We are unaware of any authority barring this court from considering that testimony.

observed appellant is not totally clear from the omnibus hearing transcript, there is evidence in the trial record to support this finding.

At trial, T.M. testified in detail about the theft and the conversation that occurred between T.M. and appellant. T.M. admitted that the interaction with appellant was "sort of quick" but that he was "one hundred percent certain" that appellant was the person who stole his cell phone. Moreover, T.M. was focused on appellant throughout the theft of his phone. Based on this testimony, the district court's finding that T.M. was "coherent, aware, and attentive during his observation of appellant" is not clearly erroneous.

C. The accuracy of his prior description of the criminal

The district court did not address this factor in its order, and it does not appear that the omnibus-hearing transcript contains any indication as to T.M.'s description of appellant. But based on the trial transcript, it is apparent that there were discrepancies between T.M.'s original description of appellant and appellant's actual appearance. At trial, T.M. testified as to appellant's appearance: "I believe his head was mostly shaven, if not all, but I couldn't say for sure. . . .I don't remember for sure if he was wearing a hat when the incident happened, but he was wearing a hat when the police brought me to identify him." In actuality, appellant had long hair that was tied back in a ponytail. It would appear that this factor weighs against the reliability of the identification.

D. The level of certainty demonstrated at the confrontation

The district court found that T.M.'s identification of appellant was certain. We agree. Upon seeing appellant exit the squad car, T.M. immediately identified him as the

individual who had taken his cell phone. This assertion occurred without prompting from the officers, and the immediacy of his statement indicates that T.M. was certain about appellant's identity.

E. The time between the crime and the confrontation

There was only a little more than an hour between the time of the crime and T.M.'s identification of appellant. The district court described this lapse as "minimal." Appellant admits that this factor weighs in favor of the reliability of the identification.

T.M. had sufficient opportunity to view appellant and did so with enough attentiveness to make a certain identification of him less than an hour after the crime occurred. Overall, four of the five factors weigh in favor of reliability. Based on the totality of the circumstances, we conclude that there was an independent origin for the identification, even assuming the show-up procedure was impermissibly suggestive, and therefore the district court did not err by denying appellant's motion to suppress. Appellant's further assertion that the in-court identification of appellant was improper is without merit because the show-up procedure was a reliable means of identifying appellant.

3. It is unnecessary to prove exigent circumstances before admitting show-up identification evidence.

Appellant implores this court to create a new test to be used in evaluating the reliability of show-up identification procedures. He asks that we reject the *Brathwaite* reliability test, articulated by the United States Supreme Court and adopted by the Minnesota Supreme Court in *State v. Marhoun*, 323 N.W.2d 729, 733 (Minn. 1982), and

instead adopt a more stringent test that he claims would more adequately protect defendants from the dangers of erroneous convictions based on mistaken eyewitness identification. Under the test advocated by appellant, evidence from show-ups would not be admissible unless the state first demonstrated that there were exigent circumstances.

The Minnesota Court of Appeals is an "error-correcting court," and "it is not the role of this court to abolish established judicial precedent." *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005). We also note that every state but four—Massachusetts, New York, Wisconsin, and Utah—follows the standards set for identification-suppression hearings set by the United States Supreme Court in *Brathwaite*. Lisa Steele, *Identification Law Reform*, 29 Champion 24, April, 2005; *see also State v. Dubose*, 699 N.W.2d 582, 594 (Wis. 2005). New York and Massachusetts have a per se exclusionary rule for unnecessarily suggestive show-ups, and Utah uses a slightly enhanced totality-of-the-circumstances test. *Com. v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v. Adams*, 53 N.Y.2d 241, 400 (N.Y. 1981); *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991). The Wisconsin necessity test advocated by appellant would permit a show-up identification only if the police lacked the probable cause to arrest a suspect or if there were undefined exigent circumstances. *Dubose*, 699 N.W.2d at 594. It is not for this court to establish new law and make Minnesota the fifth state. Therefore, we decline to create an exigent-circumstances requirement for show-up identification procedures.

Affirmed.