STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1732

In the Matter of the Welfare of: P. L. R.

Filed September 1, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-JV-07-11368

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

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

James A. Kamin, Acting Chief Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, 701 Fourth Avenue South, Suite 1400, Minneapolis, MN 55415 (for appellant)

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

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

PETERSON, Judge

In this appeal from an adjudication of attempted first-degree aggravated robbery and second-degree assault, appellant argues that the district court erred in (1) denying his motion to suppress pretrial and in-court eyewitness identification evidence and

(2) finding the petition proved based entirely on eyewitness identification despite an alibi. We affirm.

FACTS

At about 4:30 p.m. on August 29, 2007, the victim, a truck driver for a delivery service, drove to a bank in Brooklyn Park to make a money transfer. The victim parked his truck behind a building next to the bank and walked toward the bank. As the victim approached the bank, he saw a young African-American man sitting on a red and black bicycle on the sidewalk. The victim said "hello" and asked "what's up," and the young man responded. The two were three to five feet apart when they spoke.

As the victim walked back to his truck about 25 minutes later, he noticed a bicycle lying in a parking lot behind a store. The victim could not tell whether the bicycle was the same one that he had seen earlier. When the victim was a few feet from the front of his truck, the same young man that the victim had seen on his way to the bank came from behind the truck, pointed a gun at the victim, and demanded his money. The victim responded that he did not have any money and took off running. As the victim ran away, he looked back over his shoulder and saw the assailant running in the opposite direction, toward the parking lot where the bicycle was lying. The victim used his cell phone to call 911 and walked back toward his truck. When the victim got back to his truck about one minute later, he noticed that the bicycle was gone from the store parking lot.

The victim described the suspect to the 911 operator as a "[b]lack male, t-shirt, hair cut real short." The victim estimated the suspect's age to be between 17 and 20 years old. The victim also stated that the suspect was wearing cut-off blue jeans.

Brooklyn Park Police Officer Shawn Fricke responded to the victim's 911 call. The victim described the suspect to Fricke as 17 to 20 years old; about five feet, ten inches tall; weighing from 175 to 200 pounds; and wearing a white t-shirt and below-the-knee denim jeans or cutoffs. The victim described the suspect's gun as a black, semi-automatic handgun and the suspect's bicycle as a red and black, BMX-style bicycle with about 20-inch wheels.

Also responding to the 911 call were Brooklyn Park Police Officer Jeremy Halek of the K-9 unit, with his canine partner Nitro, and Officers Desmond Daniels, Jason Buck, and Robert Roushar. Daniels drove his squad car to 78th and Kentucky Avenues, near the bank. As Daniels approached, a group of people standing in a yard pointed east and said "he went that way." About one-half block north of 78th Avenue, Daniels noticed a red BMX bicycle with black tires lying next to a dumpster. No one was near the bicycle.

Halek and Nitro began tracking in the area where the suspect was last seen running. Just northeast of the attempted-robbery scene, Nitro picked up an air scent, indicating that a person was nearby. As Halek, Nitro, and their cover officers, Buck and Roushar, approached Idaho Lane, Halek saw a black male (later identified as appellant), about 15 to 17 years old, wearing a white shirt and dark pants, and walking very briskly toward Idaho Lane.

When the officers asked appellant where he was going, he said that he was going home and pointed to a house at 7828 Idaho Lane. The people in the house at 7828 Idaho Lane told the officers that appellant did not live there. Based on appellant's nervous

demeanor and the fact that he did not live where he had indicated, Buck believed that appellant was the person who had attempted the robbery. Buck took hold of appellant's hands and raised them to appellant's head. In the process, appellant's shirt came up, and the officers saw a black handgun tucked in the front of appellant's waistband.

Meanwhile, Fricke, who had remained with the victim, received a report that officers had a possible suspect in custody, so he brought the victim to the 7900 block of Hampshire to view two individuals. An officer removed the two individuals from the back seat of a vehicle. The victim told officers that neither of the individuals was the person who had robbed him. Fricke described the two individuals as African-American males, about age 15. Fricke did not recall whether they were handcuffed. The first show-up occurred just a few minutes after Fricke arrived at the attempted-robbery scene.

About 20 minutes after returning to the attempted-robbery scene, Fricke received a second call, informing him of another possible suspect in custody on Idaho Lane. Fricke brought the victim to the location where appellant was being held. When Fricke and the victim arrived, two officers assisted appellant, who was handcuffed, in getting out of a squad car. As appellant was getting out of the squad car, the victim immediately said, "that's the guy." The victim stated this twice. Fricke described the victim as very confident in his identification of appellant.

Appellant, who was 14 years old at the time, was arrested and charged by petition with one count each of attempted aggravated first-degree robbery in violation of Minn. Stat. § 609.245, subd. 1 (robbery with a dangerous weapon), .17 (attempt) (2006); and second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2006) (assault with a

dangerous weapon). Appellant moved to suppress the victim's out-of-court identification and any in-court identification. The district court denied the motion, and the case was tried to the court.

The district court found appellant guilty as charged, adjudicated him delinquent, and committed him to the 90/120 Chisholm House day program. This appeal followed.

D E C I S I O N

I.

When reviewing pretrial orders on motions to suppress evidence, this court may independently review the facts and determine, as a matter of law, whether the district court erred in declining to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The factual findings underlying the district court's decision will be upheld unless clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

In deciding whether a pretrial identification must be suppressed, the court first determines whether the identification procedure was unnecessarily suggestive. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). "Included in this inquiry is whether the defendant was unfairly *singled* out for identification." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted); *see also Seelye v. State*, 429 N.W.2d 669, 672 (Minn. App. 1988) (citing *Neil v. Biggers*, 409 U.S. 188, 196-200, 93 S. Ct. 375, 380-83) (1972)).

Even if an identification procedure was unnecessarily suggestive, the identification is still admissible if the totality of circumstances established that the identification was nonetheless reliable. *Ostrem*, 535 N.W.2d at 921. An identification is reliable if "the

totality of the circumstances shows the witness'[s] identification has adequate independent origin." *Id.* Ultimately, "[t]he test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification." *Id.*

In *State v. Bellcourt*, 312 Minn. 263, 251 N.W.2d 631 (1977), the supreme court adopted five factors for courts to consider in determining whether a suggestive identification is nonetheless reliable. Whether the suggestive identification was reliable depends on: (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. *Ostrem*, 535 N.W.2d at 921 (citing *Bellcourt*, 312 Minn. at 264, 251 N.W.2d at 633).

The district court determined that the identification in this case was suggestive but that the totality of the circumstances established the reliability of the victim's identification of appellant. The state does not dispute the district court's determination that the identification was suggestive. The district court explained its reliability determination as follows:

> First, the witness had a good opportunity to view the person who robbed him. [The victim] told police that he had a good opportunity to view [appellant]. The incident occurred in broad daylight, on a clear, fall day. There was no evidence that [the victim's] view of [appellant] was obstructed.
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> Second, [the victim's] description of the incident to police shows he paid a great deal of attention to [appellant's] appearance. [The victim] identified [appellant] as an African American male, between the ages of 17 and 20, with a short

> faded haircut, wearing a baggy white tee shirt, and short pants that stopped below the knee. [The victim] also noted the gun was a black semiautomatic hand gun and that [appellant] fled the scene on a red and black, BMX style bicycle with 20 inch wheels.
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> Third, many of the details [the victim] provided to police were accurate. [Appellant] is an African American male, with a short faded haircut and when he was apprehended by the police [appellant] had on short pants that ended below the knee and a size XXL baggy white hooded sweatshirt. The police also found a black semi-automatic handgun concealed in [appellant's] waistband and located an abandoned BMX bicycle in the vicinity of where [appellant was apprehended.
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> Fourth, upon seeing [appellant], [the victim] spontaneously identified [appellant] as the individual who robbed him at gunpoint, twice stating, "that is him." Prior to identifying [appellant] as the assailant, [the victim] had previously ruled out two other African American males, one of which was wearing clothing similar to [appellant]. Officer Fricke testified that [the victim] was confident with his identification of [appellant] as the individual who robbed him.
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> Fifth, the time between the incident and the identification was only 30-40 minutes.

The district court properly applied the *Bellcourt* factors to determine that the victim's identification of appellant was reliable and, therefore, did not err in denying appellant's motion to suppress the pretrial and in-court eyewitness identification evidence. *See State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005) (applying *Bellcourt* factors).

II.

In 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 allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989); *see also Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (stating that same standard applies to bench trials as to jury trials when reviewing sufficiency of evidence); *In re Welfare of J.G.B.*, 473 N.W.2d 342, 344-45 (Minn. App. 1991) (reviewing sufficiency of evidence to support delinquency adjudication). The reviewing court must assume that the fact-finder 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). Accordingly, we will not disturb the verdict if the fact-finder, 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).

Appellant's challenge to the sufficiency of the evidence goes only to witness credibility. Appellant first argues that the victim's identification was insufficient to establish appellant's presence at the crime scene.

It is well established that "a conviction may rest on the testimony of a single credible witness" and that identification testimony is "sufficient if the witness expresses a belief that she or he saw the defendant commit the crime." *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). Assessing witness credibility, including a witness's identification of the defendant, is the fact-finder's role. *Id.* In determining the trustworthiness of an eyewitness's identification, the fact-finder must consider the opportunity that the

eyewitness had for accurate and deliberate observation while in the presence of the accused. *State v. Gluff*, 285 Minn. 148, 151, 172 N.W.2d 63, 65 (1969). "[W]hen the single witness' identification of a defendant is made after only fleeting or limited observation, corroboration is required if the conviction is to be sustained." *State v. Walker*, 310 N.W.2d 89, 90 (Minn. 1981) (citing *State v. Spann*, 287 N.W.2d 406, 407-08 (Minn. 1979)).

The victim provided detailed descriptions of the suspect and his clothing, which closely matched appellant's appearance, and accurate descriptions of the suspect's handgun and bicycle. Corroborating evidence included the abandoned bicycle, appellant's possession of the handgun, and appellant's presence near the crime scene on a path that witnesses saw the suspect take.

At oral argument, appellant's counsel claimed that the pants appellant was wearing when arrested were introduced as evidence at either the omnibus hearing or the trial and that the pants would show inconsistencies between appellant's actual appearance and the victim's statements to the 911 operator that the suspect was wearing cutoffs and to the first responding officer that the suspect was wearing below-the-knee cutoffs. But all that was introduced at either hearing was the police inventory sheet that showed that appellant was wearing jeans. The inventory sheet does not state whether the jeans were long or short.

Appellant is attempting to show that the victim's initial statement to the 911 operator was inaccurate because it indicated that the suspect was wearing shorts. But the recording of the 911 call only shows that the victim asked a passerby if the passerby had

seen a "kid," who was wearing "jeans, cutoff," go by on a bicycle. When this is read together with the witness's later statement to the first responding officer that the suspect was wearing below-the-knee jeans or cutoffs, the statement to the passerby could have meant that the jeans were cut off below the knee. The inventory sheet, which does not indicate the length of the jeans, does not contradict the victim's description of appellant as wearing cutoffs.

Appellant also argues that the testimony of his alibi witnesses should be deemed credible as a matter of law and that their testimony establishes that he was at home when the attempted robbery occurred. But the mere production of evidence of an alibi "does not compel a finding to that effect." *State v. Otten*, 292 Minn. 493, 495, 195 N.W.2d 590, 591 (1972); *see also State v. Jones*, 556 N.W.2d 903, 913-14 (Minn. 1996) (holding that there was sufficient evidence to find defendant guilty where the fact-finder had taken into consideration all evidence, including evidence of an alibi). The weight of such evidence is determined by the fact-finder. *Otten*, 292 Minn. at 495, 195 N.W.2d at 591; *see also Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995) (stating that judging witness credibility is the exclusive function of the fact-finder).

The district court explained its rejection of appellant's alibi defense as follows:

> 23. [Appellant] testified that he could not have committed the crime because he was making and receiving phone calls from his house at the time the incident occurred.
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> i. The Attempted Robbery and Assault took place at approximately 4:45 p.m. on August 29, 2007.
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> ii. The following phone calls were made between the cell phones of [appellant's parents] and the home landline in the afternoon and evening of August 29, 2007:

> 1. From [the father's] cell phone . . . to the home phone . . . at 4:50 p.m., 4:54 p.m., and 4:55 p.m.
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> 2. From the home phone . . . to [the father's] cell phone . . . at 4:55 p.m., 5:13 p.m., and again at 5:13 p.m.
>
> 3. From [the mother's] cell phone . . . to the home phone at 5:15 p.m.
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> iii. Each of these phone calls lasted less than one minute. The short length of the calls makes it unclear whether the phone calls were answered by a person or directed to voicemail.
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> iv. [Appellant's father] testified that he called home and spoke to [appellant] several times on the afternoon of August 29th, 2007. [Appellant's father] runs a recording studio out of the basement of his home and was calling [appellant] for help arranging some business appointment.
>
> v. [Appellant's father, appellant's brother, and appellant] testified that [appellant] was the only person home to make outgoing calls from the home phone between 4:55 p.m. and 5:13 p.m.
>
> 24. The Court finds that [appellant's] alibi is insufficient to raise reasonable doubt that [appellant] committed the act on August 29, 2007.
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> i. There is no evidence that [appellant] was the individual making and answering phone calls in the home on August 29, 2007.
>
> ii. [Appellant's father and appellant's brother] testified that [appellant] was the only person in the home, but nobody witnessed [appellant] on the home telephone and the short length of the calls makes it equally plausible that the calls were directed to voicemail.

In appellant's reply brief, citing *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984), appellant argues that the court's statement that appellant's "alibi is insufficient to raise reasonable doubt" improperly placed the burden of proving the alibi on appellant.

> Courts have held that the presence of the accused at the scene of the crime is an essential element of an offense. Therefore, defendant need not prove his alibi beyond a reasonable doubt or even by a preponderance of the evidence. Defendant may succeed by raising a reasonable doubt of his

> presence at the scene of the crime. The question of sufficiency to raise a reasonable doubt is for the jury to determine from all of the evidence.

Brechon, 352 N.W.2d at 750. The district court's statement correctly states the law, and the court did not err in rejecting appellant's alibi defense.

The evidence was sufficient to support the adjudication of attempted first-degree aggravated robbery and second-degree assault.

Affirmed.