STATE OF MINNESOTA
IN COURT OF APPEALS
A09-444

State of Minnesota,
Respondent,

vs.

Leslie Albert Davis,
Appellant.

Filed March 2, 2010
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CR-08-32531

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

On direct appeal from his conviction of first-degree aggravated robbery, appellant argues that the district court abused its discretion by denying his motion for a mistrial after the prosecutor directed the victim to look for his assailant at the table where appellant was seated. Appellant also contends that the district court abused its discretion by admitting another witness's on-scene identification of him. Because the district court did not abuse its discretion by denying the motion for a mistrial, and because there was an adequate independent origin for the on-scene identification, we affirm.

FACTS

Appellant Leslie Albert Davis was tried for first-degree aggravated robbery.

The state's first witness was T.N., who resided near the intersection of Portland Avenue South and East 22nd Street in Minneapolis. At approximately 3:15 a.m. on June 29, 2008, T.N. awoke to hear someone yelling for help. Through her window, T.N. saw a black male with a "bigger build" hitting a "skinny" white male. T.N. did not get a good look at the assailant's facial features, but was able to observe his attire. While the victim held on to his bicycle, the assailant hit him repeatedly and "t[ook] stuff out of his pockets." A third man approached and took the victim's bicycle. T.N. testified that she observed the robbery from a distance of approximately 20 feet. It was dark, but the street lights and the front light of her residence were on.

T.N. called police while watching these events; her recorded telephone call was played to the jury. T.N. stated that the victim was in front of her residence yelling,

"Help. He has my money and my MP3 player." T.N. described the assailant as wearing red pants and a white t-shirt. A second assailant arrived; T.N. described him as wearing dark blue pants and a black or dark blue shirt. T.N. described both assailants as black males in their late 20s or 30s. The second assailant rode away on the bicycle. The police arrived, and the first assailant (who was wearing red pants) fled on foot. The call, which had started at 3:15 a.m., lasted three minutes and 31 seconds.

After the recording was played for the jury, T.N. testified about the on-scene identification she made of Davis. Approximately "one or two minutes" after the police arrived, Davis was brought to T.N.'s residence in a squad car. T.N. was asked whether she could identify him. Davis, who was handcuffed, was removed from the squad car and spotlights were put on him. T.N. observed Davis from a distance of 10 to 15 feet. She noticed that he was wearing a white undershirt, not a t-shirt. T.N. identified him as the first assailant based on his clothing. At trial, T.N. was certain that the man she identified was the assailant who had been wearing the white t-shirt.

The state's second witness was J.A., the victim. J.A. finished his work shift at 3:00 a.m. on June 29, 2008, and began to ride home on his bicycle. When J.A. reached the intersection of Portland Avenue South and East 22nd Street, a man "came out of nowhere," grabbed the frame of J.A.'s bicycle, and attempted to take J.A.'s wallet. J.A. resisted. He noticed that the assailant was wearing red sweatpants and a white t-shirt.

During the struggle, the assailant discovered J.A.'s headphones and MP3 player and yelled to a third person that J.A. was a "cop" and a "narc." J.A., a waiter, attempted

to explain that he was not wearing a wire. J.A. testified that "[t]he defendant" restrained J.A.'s hands behind his back while the third person attempted to take the MP3 player.

After J.A. referenced "[t]he defendant," the following exchange took place:

> Prosecutor: Now, when you say the defendant, do you see the person that was robbing you in court here?
>
> Well, obviously not in the jury box. Would you look at the table here and see if you can identify the person who robbed you and, if you can, tell us?
>
> J.A.: Yes, he is right there.

Davis's counsel objected, and the objection was sustained.

J.A. then testified that he remembered what the assailant looked like because he "g[o]t a good look at him" during his resistance to the robbery. J.A. testified that much of the ten-minute physical struggle was spent "face to face" with the assailant, who, at other times, was behind, on top of, or choking him. J.A. then identified Davis as his assailant, without objection. He later identified Davis as his assailant for a third time, also without objection.

J.A. testified that after the third person had taken his bicycle and ridden away, Davis took J.A.'s wallet. As soon as he took the wallet, a police car arrived. J.A., bleeding from several wounds inflicted during the robbery, ran toward the squad car. Davis "took off over a fence." A police officer went to "head [Davis] off," and J.A. attempted to chase him as well. Davis doubled back, running "right by" J.A., and hopped the fence again. J.A. followed but became too tired to continue. He sat down on the curb and saw Davis jump another fence.

More police cars arrived. J.A. saw the cars go in the direction that Davis had gone. "[L]ess than a minute or two" after J.A. gave up the chase, the police returned. Davis was removed from a squad car within J.A.'s view. Although he was not asked to do so, J.A. said: "That's him," and "I will testify in court that that's him." At the time, J.A. was certain that Davis was the man who had taken his wallet, although he noticed that there was something different about Davis's clothes. At trial, J.A. testified that Davis was wearing a sleeveless shirt, not a t-shirt, after his arrest. J.A. testified that Davis was wearing the same pants as his assailant.

After J.A.'s testimony, and outside the presence of the jury, Davis's counsel moved for a mistrial on the ground that the prosecutor had prompted J.A. to look for his assailant at the table where Davis was seated. The district court ruled that the prosecution had engaged in leading the witness by directing J.A.'s attention to the table. The district court instructed the jury to disregard "any in-court identification of [Davis] made by [J.A.]." The district court also stated that the instruction did not affect any of J.A.'s testimony regarding "previous out-of-court identification of [Davis]."

Officer James Golgart of the Minneapolis Police Department testified that he was dispatched to T.N.'s residence at 3:16 a.m. on June 29, 2008. Officer Golgart, who was less than one block away from that location, arrived 45 seconds to one minute after receiving the dispatch. The officer was flagged down by J.A. Officer Golgart also saw a black male, who was wearing a white t-shirt and red pants. The man in the red pants looked at the officer, then ran to the east. J.A. pointed to the running man and yelled: "That's him. That's who stole—stole my money and beat me up."

Officer Golgart parked his squad car and attempted to catch the assailant on foot. The officer found a bloody white t-shirt in a yard to the east of T.N.'s residence. Officer Golgart then saw Davis sitting on the front steps of a boarded-up duplex at a Portland Avenue address. Officer Golgart testified that he was "100 percent" certain that Davis was the same person whom he had seen fleeing the scene of the robbery. Davis wore a "white muscle shirt" and "red mesh pants . . . with the black stripe on the side." He was sweating, breathing hard, and appeared to be trying to hide. Officer Golgart testified that when he approached, Davis yelled: "Oh, I had nothing to do with that robbery. You guys have the wrong guy. Keep looking." Another officer arrived, and Davis was taken into custody. According to Officer Golgart's dispatch report, approximately three minutes elapsed between his observation of the suspect running eastbound and the apprehension of Davis.

Officer Golgart noticed that Davis had blood on his arms and shoes but had no visible injuries. Davis said that he did not need medical attention and did not give Officer Golgart a "definite answer" as to the origin of the blood.

The officers walked Davis back to the squad car. J.A., who had been sitting on the curb, spontaneously identified Davis as his assailant. After putting Davis in the squad car, the officers shined two spotlights on the car, had Davis step out, and T.N. identified him. T.N. made her identification from a distance of 15 to 20 feet. J.A. also identified Davis in this manner.

A Minnesota Bureau of Criminal Apprehension (BCA) forensic scientist testified that blood was found on the recovered t-shirt and on Davis's tank top, pants, and shoes. The scientist sent a sample from each item to a DNA scientist for further testing.

A second BCA forensic scientist testified that she attempted to extract and profile DNA recovered from the t-shirt and one of Davis's shoes. She did not perform any tests on the samples from the other clothes.[1] There was not enough DNA to complete a profile of the DNA found on the shoe. The t-shirt sample contained a mixture of DNA from two or more individuals, and most of the DNA matched the profile of J.A. It could not be determined if DNA from the t-shirt matched Davis's DNA.

Davis did not testify and offered no evidence.

The jury found Davis guilty of first-degree aggravated robbery, and the district court sentenced him to 78 months in prison. The district court also ordered him to pay restitution to J.A. and the Minnesota Crime Victims Reparation Board.

This appeal follows.

D E C I S I O N

I.

Davis argues that the district court should have granted his motion for a mistrial because no curative instruction could have been sufficient to undo J.A.'s "dramatic" and "persuasive" in-court identification of him. We disagree.

[1] According to Sergeant Ronald Christianson's testimony, there was a miscommunication between the police and the BCA regarding the DNA testing of the clothes.

We review the district court's denial of a motion seeking a mistrial for abuse of discretion. *State v. McCurry*, 770 N.W.2d 553, 558 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007) (quotation omitted). "[T]he district court is in the best position to evaluate whether prejudice, if any, warrants a mistrial." *State v. Marchbanks*, 632 N.W.2d 725, 729 (Minn. App. 2001).

Here, the district court sustained the objection to J.A.'s first in-court identification. J.A. later identified Davis twice from the witness stand; no objection was made to either of these identifications. After J.A.'s testimony, the district court instructed the jury to ignore "any in-court identification" of Davis by J.A.

Some caselaw supports Davis's position that jury instructions may not always be sufficient to cure prejudicial error. *See State v. Caldwell*, 322 N.W.2d 574, 590 (Minn. 1982) (noting that it was "questionable whether, under the circumstances of this case, the [district] court's cautionary instructions could have prevented the jury from reaching conclusions that were unduly prejudicial to appellant"); *State v. Hogetvedt*, 623 N.W.2d 909, 915–16 (Minn. App. 2001) (concluding that striking a portion of testimony and providing cautionary instructions "may not have been effective in reducing . . . prejudice" resulting from police officer's "egregious" testimony that he believed appellant to be guilty of the charged offense), *review denied* (Minn. May 29, 2001). But an appellate court presumes that the jury followed the instructions of the district court. *State v.*

Taylor, 650 N.W.2d 190, 207 (Minn. 2002); *see McCurry*, 770 N.W.2d at 558–59 ("[D]oubts about instructions have not held sway in Minnesota courts, which . . . have adopted a presumption that jurors follow instructions.").

A key issue at trial was whether Davis was the man who committed the robbery. J.A., who viewed his assailant from a closer distance and for a longer time than any other witness, made three in-court identifications of him. J.A.'s in-court identifications may have been highly persuasive, but the jury was instructed to disregard this evidence. Because the jury is presumed to follow the instructions of the district court, and because there is no evidence that the jury failed to follow these instructions, we conclude that the district court did not abuse its discretion by denying the motion for a mistrial.

II.

Davis argues that T.N.'s on-scene identification of him was the product of an unnecessarily suggestive show-up[2] that created a substantial likelihood of misidentification.

The district court denied Davis's motion to suppress T.N.'s on-scene identification; we review this ruling for abuse of discretion. *See State v. Booker*, 770 N.W.2d 161, 168 (Minn. App. 2009) (stating that this court reviews rulings on the admissibility of identification evidence under an abuse-of-discretion standard), *review denied* (Minn. Oct. 20, 2009).

[2] A show-up is "[a] type of pretrial identification procedure in which a suspect is confronted by or exposed to the victim or a witness to a crime." *State v. Taylor*, 594 N.W.2d 158, 159 n.1 (Minn. 1999) (quotation omitted).

We apply a two-part test to determine whether a pretrial identification must be suppressed. *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977)). "The first question is whether the identification procedure was impermissibly suggestive, an inquiry that 'turns on whether the defendant was unfairly singled out for identification.'" *Booker*, 770 N.W.2d at 168 (quoting *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995)). If the defendant was singled out unfairly, "the second question is whether the identification is nonetheless reliable when considered as part of the totality of the circumstances." *Id.*

The Minnesota Supreme Court has noted that it would be unnecessarily suggestive if the police were to single out a suspect "from the general population based on a description given to them by a victim, and then proceed[] to present [the suspect] to the victim, in handcuffs, for identification in a one-person show-up." *Taylor*, 594 N.W.2d at 162. Since *Taylor*, this court has held that show-ups involving singled-out, handcuffed suspects are unnecessarily suggestive. *See, e.g.*, *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004) (holding that presentation of singled-out, handcuffed suspect to witness was unnecessarily suggestive); *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (holding identification procedure was unnecessarily suggestive where "police singled out appellant based on the eyewitness's description, brought appellant back to the scene in a squad car, presented appellant in handcuffs, flanked by a uniformed police officer, told the witness that they thought they had a person in custody who matched the witness's description, and then asked the eyewitness for identification"). It is undisputed that Davis was singled out and presented to T.N. in handcuffs. We

therefore conclude that the show-up identification procedure was unnecessarily suggestive.

But "[i]dentifications which are the product of suggestive procedures may nevertheless be allowed into evidence if the circumstances demonstrate that the witness had an adequate independent origin for the identification." *Jones*, 556 N.W.2d at 912. An appellate court employs five factors in determining whether the witness's identification had an adequate independent origin: (1) the witness's opportunity to view the criminal at the time of the crime; (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 when the identification was made; and (5) the time span between the crime and the identification. *M.E.M.*, 674 N.W.2d at 215.

Opportunity to view the criminal

T.N. saw J.A. struggle with his assailants for at least three minutes. She viewed the crime through her window, from a distance of approximately 20 feet. Although it was dark outside, the street lights and the front lights of T.N.'s residence were on.

Witness's degree of attention

T.N.'s attention was commanded by J.A.'s struggle with his two assailants. She made contemporaneous observations about all three men at the request of the emergency dispatcher.

Accuracy of prior description

T.N. described the first assailant as a black male with a "bigger build" in his late 20s or 30s. Although she could not describe his facial features in greater detail, T.N. told

the emergency dispatcher that the assailant wore red pants and a white t-shirt. Davis is a black male and is 6'3" in height. He was 43 years old at the time of the offense. When apprehended, Davis was wearing a white tank top (not a t-shirt) and red pants with a dark stripe. The difference in shirts is not significant, given the recovery from a nearby yard of a white t-shirt with the victim's blood on it. Nor is the dark stripe on Davis's pants inconsistent with T.N.'s initial description.

Level of certainty when identification was made

T.N. testified that she was "certain" the man she identified on June 29, 2008, was the assailant who had been wearing the white t-shirt. She noticed that Davis's shirt was different and acknowledged that she based her identification on Davis's clothing.

Time between crime and identification

A matter of minutes separated the crime and T.N.'s identification of Davis.

After considering the five identification factors, we conclude that T.N. had an adequate independent origin for her identification of Davis as J.A.'s assailant. *See Ostrem*, 535 N.W.2d at 922 (concluding that totality-of-circumstances test was satisfied where witness had opportunity to view defendant "from relatively close range" in daylight; his attention was focused on defendant and another person; his description given to police was detailed and accurate; and his identification was made "only 48 hours after the crime"). The district court therefore did not abuse its discretion by denying Davis's motion to suppress T.N.'s identification of him.

Affirmed.