STATE OF MINNESOTA
IN COURT OF APPEALS
A09-843

State of Minnesota,
Respondent,

vs.

Abdishakur Mohamud,
Appellant.

Filed May 18, 2010
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-08-64256

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

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

KALITOWSKI, Judge

Appellant Abdishakur Mohamud challenges his convictions of two counts of second-degree aggravated robbery and one count of simple robbery. Appellant contends

the district court erred by denying his motions to (1) sever the robbery of one victim from the robberies of two other victims; and (2) suppress identification evidence obtained at a show-up procedure. Appellant also alleges reversible error because the trial transcript indicates only 11 jurors were individually polled after the jury returned its verdict. We affirm.

D E C I S I O N

On December 27, 2008, two men robbed victim D.H. as he walked along a sidewalk in Minneapolis. Approximately two hours later, two men stole purses from victims L.Y. and K.L. inside the stairwell of their Minneapolis apartment building. Forty-five minutes later, police officers arrested appellant at a gas station as a suspect in the robbery of D.H. An identification show-up procedure conducted at the gas station indicated appellant was also responsible for the robberies of L.Y. and K.L. Appellant was charged with the robberies of all three victims, and a jury found him guilty of two counts of second-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 2 (2008), and one count of simple robbery in violation of Minn. Stat. § 609.24 (2008).

I.

This court reviews de novo a district court's denial of a motion to sever offenses under Minnesota Rule of Criminal Procedure 17.03. *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006). Under rule 17.03, a court must sever joined offenses if those offenses are "not related." Minn. R. Crim. P. 17.03, subd. 3(1)(a). To be related, "joined offenses [must] be part of a single behavioral incident." *State v. Profit*, 591 N.W.2d 451, 460 (Minn. 1999). When determining whether multiple offenses constitute a single

behavioral incident, courts "look to how the offenses were related in time and geographic proximity and at whether the actor was motivated by a single criminal objective." *Profit*, 591 N.W.2d at 460 (quotation omitted).

Here, the district court did not provide its analysis under *Profit*. But we need not reach the issue of whether the robbery of D.H. and the robberies of L.Y. and K.L. constitute a single behavioral incident, because even if the offenses were improperly joined, the error was not prejudicial because evidence of either offense could be admitted as *Spreigl* evidence in the trial of the other offense. *See State v. Ross*, 732 N.W.2d 274, 280 (Minn. 2007) (joinder is not prejudicial if the evidence of each offense would have been admissible as *Spreigl* evidence in the trial of the other offense).

For *Spreigl* evidence to be admissible, the following five conditions must be met:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Id. at 282. *See also* Minn. R. Evid. 404(b).

Appellant does not dispute that in a trial of either of the offenses the admission of evidence regarding the other robbery as *Spreigl* evidence would meet the first four conditions. But appellant argues that because the probative value of the evidence of the L.Y. and K.L. robberies is outweighed by the potential for unfair prejudice, the state fails to satisfy the fifth condition. We disagree.

Evidence regarding the robberies of L.Y. and K.L. has probative value in establishing the perpetrator's identity in the robbery of D.H. *See* Minn. R. Evid. 404(b) (stating that evidence of another crime may be admitted to show identity). According to L.Y., appellant was wearing D.H.'s jacket both when appellant robbed L.Y. and when L.Y. subsequently identified appellant during the show-up procedure. In addition, the evidence of the L.Y. and K.L. robberies shows that appellant had an opportunity to commit the D.H. robbery because the robberies occurred within a two-block radius of each other, placing appellant at the scene. *See id*. (stating that evidence of another crime may be admitted to show opportunity).

Furthermore, the probative value of evidence depends on the "closeness of the relationship between the other crimes and the charged crimes in terms of time, place and modus operandi." *Profit*, 591 N.W.2d at 461 (quotation omitted). "The closer the relationship, the greater is the relevance or probative value of the evidence and the lesser is the likelihood that the evidence will be used for an improper purpose." *Id.* (quotation omitted). The D.H. robbery and the L.Y. and K.L. robberies were very close in time and place, occurring only two hours and two blocks apart from each other. The record also suggests the D.H. and the L.Y. and K.L. robberies share a common modus operandi: (1) the victims targeted in both offenses were in vulnerable situations late at night; (2) the perpetrators of both offenses threatened the victims by implying the perpetrators had a gun; and (3) following both robberies, the perpetrators fled the scene by driving away in a getaway car they had waiting on the side of the street.

In light of the close relationship between the D.H. robbery and the L.Y. and K.L. robberies in terms of time, location and modus operandi, evidence of either of the robberies would have strong probative value in a trial for the other robbery. And because we conclude that this probative value is not outweighed by unfair prejudice to appellant, the joinder was not "prejudicially erroneous." *See id.* at 461.

II.

When reviewing a pretrial order on suppression of 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). "[R]eliability is the linchpin in determining the admissibility of identification testimony[.]" *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). When determining whether a pretrial identification must be suppressed, we apply a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we determine whether the identification procedure was unnecessarily suggestive. *Id.* If the procedure is found to be unnecessarily suggestive, we must determine under the "totality of the circumstances" whether the identification created "a very substantial likelihood of irreparable misidentification." *Id.*

Unnecessarily Suggestive

"[A] one-person show-up "is by its very nature suggestive[.]" *State v. Taylor*, 594 N.W.2d 158, 162 (Minn. 1999). Whether that procedure was unnecessarily suggestive "turns on whether the defendant was unfairly singled out for identification," *Ostrem*, 535

N.W.2d at 921, and "whether the procedure used by the police influenced the witness identification of the defendant." *Taylor*, 594 N.W.2d at 161.

Here, the police officers conducted the show-up procedure at a nearby gas station where appellant was apprehended. The officers properly required L.Y. and K.L. to individually attempt to identify the suspect without conferring with each other. In addition, before beginning the procedure, an officer told the victims he needed "a 100% yes or no answer" and that the victims should be honest if they were not sure.

But the officer improperly informed L.Y. before the show-up that appellant was found with L.Y.'s cell phone. Because we cannot say that this did not influence L.Y.'s identification of appellant at the show-up, we cannot conclude that the show-up was not unnecessarily suggestive.

Totality of the Circumstances

Even if the show-up procedure at the gas station was unnecessarily suggestive, "[i]f the totality of the circumstances shows the witness' identification has an adequate independent origin, it is considered to be reliable despite the suggestive procedure." *Ostrem*, 535 N.W.2d at 921. This court considers the following five factors when determining whether an unnecessarily suggestive procedure creates a very substantial likelihood of irreparable misidentification:

> (1) The opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the photo display; (5) the time between the crime and the confrontation.

Id.

In its pretrial ruling denying appellant's motion to suppress, the district court presumed the show-up procedure was unnecessarily suggestive and admitted the results of the show-up based on the five-factor *Ostrem* test. We agree with the district court that these factors support the conclusion that the show-up identification evidence is reliable: (1) L.Y. had the opportunity to view her robber at very close range and in good light during the robbery; (2) L.Y. testified that she based her identification of appellant at the show-up on the face she remembered seeing during the robbery, not just what appellant was wearing; and (3) L.Y. was very confident in the identification of appellant that she made less than two hours after the robbery. We conclude that the district court properly admitted the out-of-court and in-court identification evidence based on the show-up procedure because it was reliable under the totality of the circumstances.

III.

Appellant argues that his constitutional right to be tried by a 12-person jury was violated because the reporter's transcript indicates the clerk only individually polled 11 jurors after the jury returned its guilty verdicts. We disagree.

Appellant did not assert this claim below and thus, the district court did not address it. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But "[we] may deviate from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Id.* Here, because the issue did not arise until the reporter's transcript was prepared for this appeal,

and because both parties have briefed the issue, we will consider appellant's argument in the interests of justice.

The Minnesota Constitution guarantees felony defendants "the right to a jury by 12 members." Minn. Const. art. I § 6. The United States Constitution guarantees criminal defendants the right to a unanimous verdict; a corollary to the right to a unanimous verdict is the right to have the jury polled. *Burns v. State*, 621 N.W.2d 55, 61-62 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). "The purpose of jury polling is to ensure that each of the jurors approves of the verdict as returned [and] that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.* at 62 (quotation omitted). Notably, appellant here does not contend that a juror was coerced or induced to sign a verdict to which he or she did not agree.

Another jurisdiction has recently addressed the identical issue presented here. *See State v. Diaz*, 224 P.3d 174 (Ariz. 2010). In *Diaz*, the reporter's transcript indicated that only 11 jurors were polled, and the defendant challenged his conviction on the ground that his right to a 12-person jury had been violated. *Id.* at 175. The Supreme Court of Arizona rejected his argument. *Id.* at 177-78. The Arizona court noted that the record showed "the jurors were repeatedly instructed that their verdicts must be unanimous and reflect agreement by 'all 12' jurors." *Id.* at 177. The court reasoned that when "the record reflects no comment by the trial court, other jurors, the bailiff who was in charge of the jury, other court staff, or counsel, that a juror was missing," it could not conclude that only 11 jurors participated in determining the verdict. *Id.* at 178.

Here, as in *Diaz*, the record supports the conclusion that 12 people sat on the jury at all times. Specifically, after giving the jury instructions, the district court noted the inclement weather conditions that jurors were facing during their commute to the courthouse the following morning and stated that " . . . we'll schedule things at nine o'clock tomorrow morning. But, obviously, if somebody gets tied up getting in here, we're not going to start until we have all 12 of you." And as in *Diaz*, it is not reasonable that the judge, all of the lawyers, the court reporter, the judicial clerks, the other jurors and deputy sheriffs present in the courtroom would fail to realize the jury was only comprised of 11 people. It is equally unlikely that the judge and lawyers would not have noticed the clerk's failure to individually poll one of the jurors sitting in the jury box. As noted by the *Diaz* court, the much more likely explanation for why the transcript shows the clerk only polled 11 jurors is either a recording error (the reporter failed to record the question to and response from the juror) or a transcription error (the reporter failed to transcribe from her notes the polling of the juror). *See id.* at 177.

Based on our review of the record and the reasoning in *Diaz*, appellant has failed to establish that only 11 jurors participated in the determination of his guilt. Therefore, we conclude that the omission of one juror from the reporter's transcript of the jury polling does not establish a constitutional violation.

Affirmed.