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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2237**

State of Minnesota,
Respondent,

vs.

Thomas Lee White,
Appellant.

**Filed January 25, 2011
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-09-26639

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Michael K. Walz, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Renee Bergeron, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his burglary conviction, arguing that the district court committed reversible error in admitting show-up identification evidence that was unnecessarily suggestive and unreliable. We affirm.

DECISION

Appellant Thomas Lee White argues that the district court violated his due-process rights by admitting pretrial show-up identification evidence. This court reviews de novo whether a defendant has been denied due process. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). The admission of pretrial identification evidence violates due process if the procedure “was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Id.* at 83-84. In determining whether a pretrial identification must be suppressed, this court applies a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). We determine whether the identification procedure was unnecessarily suggestive, and if so, whether the identification created “a very substantial likelihood of irreparable misidentification” under the “totality of the circumstances.” *Id.*

Unnecessarily Suggestive

Whether the show-up procedure was unnecessarily suggestive “turns on whether the defendant was unfairly singled out for identification,” *id.*, and “whether the procedure used by the police influenced the witness identification of the defendant.” *State v.*

Taylor, 594 N.W.2d 158, 161 (Minn. 1999). “[A] one-person show-up is by its very nature suggestive.” *Id.* at 162.

Here, a witness, T.S., called 911 reporting that a “white male wearing jeans and a grey hooded sweatshirt” entered a neighbor’s garage. T.S. reported that the male exited the garage with a red backpack and a black-and-green duffle bag that he did not have when he entered. Officers located appellant carrying a red backpack. An officer transported T.S. to a show-up. In his report, the officer noted that as T.S. sat in the rear of his squad car, an officer removed appellant from another squad car and walked him into T.S.’s view. The officer noted that appellant was presented in handcuffs.

The district court found that the show-up was not unnecessarily suggestive. But appellant was removed from a squad car by an officer and presented in handcuffs. This sort of identification procedure has routinely been found to be unnecessarily suggestive. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004) (stating that the show-up was unnecessarily suggestive when police presented a singled-out, handcuffed suspect); *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (stating that the show-up was unnecessarily suggestive when police brought the defendant to the crime scene in a squad car, presented him while handcuffed and flanked by police, and told the victim that the defendant matched the description). Therefore, the district court’s finding was clearly erroneous; the show-up was unnecessarily suggestive.

Totality of the Circumstances

Even when the show-up procedure was unnecessarily suggestive, “[i]f the totality of the circumstances shows the witness’ identification has adequate independent origin, it

is considered to be reliable despite the suggestive procedure.” *Ostrem*, 535 N.W.2d at 921. Although finding that the show-up procedure was not unnecessarily suggestive, the district court still analyzed whether the identification was reliable under the totality of the circumstances. We consider five factors in determining whether a suggestive procedure creates a substantial likelihood of misidentification:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. [t]he witness’ degree of attention;
3. [t]he accuracy of the witness’ prior description of the criminal;
4. [t]he level of certainty demonstrated by the witness at the [show-up]; [and]
5. [t]he time between the crime and the confrontation.

Id.

Opportunity to View Criminal at Time of Crime

Appellant does not argue that T.S. did not have an opportunity to view appellant at the time of the burglary; rather, he challenges the accuracy of T.S.’s description, which is a separate factor. The district court concluded that T.S. had an opportunity to observe the burglary as it occurred near his home, during daylight hours. The record supports the district court’s findings and conclusion that T.S. had a clear opportunity to view the suspect at the time of the crime.

T.S. called 911 as he watched the burglary-in-progress from his kitchen window. He was able to see his neighbor’s garage from across the alley. He stated that he had “a perfect view” from 20 yards away. He told the 911 operator when the suspect came out of the garage, what he was carrying, and in what direction he traveled. T.S. stayed on the phone with the 911 operator and provided a narrative as he watched the commission of

the crime. *See, e.g., McDuffie v. State*, 482 N.W.2d 234, 236 (Minn. App. 1992) (admitting show-up identification when, in part, the victim “had the opportunity to view his assailants for several minutes as they robbed him”), *review denied* (Minn. Apr. 13, 1992). This factor indicates an adequate independent origin for the identification.

Degree of Attention

Appellant, again, does not argue that T.S. did not pay attention to the crime; rather, he argues that T.S. gave “contradictory descriptions” of the perpetrator, which fits better under the accuracy factor. The district court found that from T.S.’s “synopsis of what happened that he was fairly riveted . . . by what happened. He was describing it in a narrative and detailed way.” The record supports the district court’s findings and conclusion that T.S. paid great attention to the crime and the suspect.

T.S. paid attention to the perpetrator before he even entered the garage. T.S. stated that he was looking out his window when he saw someone he did not recognize walking slowing down the alley. The suspect walked by the garage and returned five minutes later. The suspect walked up to the garage, looked in a window, and gently pushed the door open. The suspect was wearing a dark blue/grey hooded sweatshirt with the hood over his head. T.S. called 911 and relayed information to the 911 operator as the events occurred. He told the operator when the suspect exited the garage and that he was wearing a baseball cap and carrying two bags that he did not have when he entered the garage. T.S. even put the phone down at one point, went outside, and watched the suspect walk down the alley in order to report the perpetrator’s direction of travel. This factor supports an adequate independent origin for the identification.

Accuracy of Prior Description

Appellant argues that T.S. gave contradictory and inaccurate descriptions, primarily challenging T.S.'s descriptions of the suspect's age and clothing. The district court found that T.S. described the color of the suspect's hooded sweatshirt; described a suspect with a light-skinned complexion; and described the suspect's hair style and color, height, weight, and age. The record supports the district court's findings and conclusion that T.S.'s descriptions were accurate.

During the 911 call, T.S. described the suspect as a "white man . . . [wearing] a greyish blue hooded sweatshirt. And navy blue jeans." He stated that he was "about thirty [years old]." He stated that the suspect was "about 5'11, 6 feet, and slim. . . . maybe 160 pounds." One officer noted in her report that T.S. described the suspect wearing a grey hooded sweatshirt and blue jeans. Another officer reported that T.S. described a white male wearing a grey sweatshirt, blue jeans, and a black hat. Another officer reported that T.S. described the suspect as a thin white male. Yet another officer reported that T.S. described the suspect wearing a grey "hoodie" and blue jeans, "in his 30's," "5'11 and thin." The officer reported that T.S. watched the suspect emerge from the garage wearing a baseball cap. And another officer reported that T.S. described the suspect as a "white male, in his 30's, approximately 5'11", 160 lbs., short blond hair, wearing a black baseball cap, a grey and black hooded sweatshirt, light colored blue jeans, and white shoes."

Appellant argues that T.S. first described the suspect appearing to be "thirty years old," and then he described him as "a young guy," despite the fact that he was thirty-nine

years old at the time of his arrest. T.S. accurately described the suspect as a male in his thirties. Appellant also argues that T.S. initially reported that the suspect was wearing a grey/blue hooded sweatshirt and navy blue jeans, but later reported that the suspect was in a “grey and black sweatshirt and light pants.” Appellant states that he was wearing a black sweatshirt and light blue jeans at the time of his arrest. T.S. consistently maintained that the suspect was wearing a greyish/dark blue hooded sweatshirt, blue jeans and white shoes. Further, T.S. accurately described appellant’s light complexion; hair style and color, from what he was able to detect viewing from under a hood or a baseball cap; height; and weight. Appellant attempts to highlight slight variations, but T.S.’s descriptions were consistent. This is further evidenced by the fact that officers brought another suspect to T.S. initially, and T.S. immediately stated that the officers had not found the correct person. This factor supports an adequate independent origin for the identification.

Level of Certainty

Appellant argues that although T.S. stated that he was 100% certain that appellant’s clothing matched that of the suspect, his description of the clothing varied with each telling. Again, appellant’s argument goes to accuracy, and not to T.S.’s certainty. The district court found that T.S. immediately stated: “Yeah, that’s the guy,” and was “90% sure,” about the physical identification, but “absolutely convinced” that the clothing matched. The record supports the district court’s findings and conclusion that T.S. was certain about the identification.

The squad video recorded the show-up. T.S. stated: “Yeah, that’s the guy.” The officer asked “[d]efinitely?” The witness stated: “yeah . . . he had the white tennis shoes, the light . . . jeans . . . kind of . . . darker sweatshirt-type thing, and . . . he’s got a baseball cap. . . . [S]hort hair . . . [I am] ninety percent sure that’s the guy. I mean that’s the clothes he had, and like I say he had a short haircut.” T.S. was 100% certain that the clothing matched and 90% certain that appellant was the perpetrator. This factor indicates an adequate independent origin for the identification.

Elapsed Time

Appellant agrees that only a short amount of time passed between the crime and the show-up. The district court found that the show-up was held within 20 minutes of the crime. This finding is supported by the record and indicates an adequate independent origin for the identification.

Appellant argues that T.S.’s identification was based on police officer influence. But the record does not support this assertion. The record shows that the officer in the car with T.S. stated, “we don’t know if this is the right guy.” And when the 911 operator told T.S. that officers were following a suspect, the operator was referring to the first suspect brought to T.S. for identification; the 911 operator was not referring to appellant. Thus, despite the unnecessarily suggestive show-up, under the totality of the circumstances, the identification was reliable and the district court did not err in admitting the evidence.

Affirmed.