STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2357

State of Minnesota,
Respondent,

vs.

Michael Garfield Blake-Potter,
Appellant.

Filed January 18, 2011
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-CR-09-10886

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

John Choi, Ramsey County Attorney, Thomas E. Lockhart, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WORKE, Judge

Appellant challenges his second-degree-assault conviction, arguing that (1) the district court committed reversible error in admitting show-up identification evidence that was unnecessarily suggestive and unreliable, and (2) there is insufficient evidence to support his conviction. We affirm.

D E C I S I O N

Show-up

Appellant Michael Garfield Blake-Potter argues that the district court violated his due-process rights by admitting pretrial show-up identification evidence that was unnecessarily suggestive and unreliable. 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, on June 5, 2009, at approximately 3:30 p.m., officers were dispatched to an attempted robbery. V.K. reported seeing three males attack a female victim before fleeing; one male punched the victim in the face, a second struck her with a baseball bat, and a third attempted to take her purse. Police officers found two suspects and transported them for a show-up. An officer transported V.K. to the show-up. V.K. stated that the officer told him that officers "ha[d] the suspects" and instructed him to tell the officers if they had the "right suspects." V.K. was transported to an area with squad cars and several police officers. The suspects were in separate squad cars, removed one at a time, and presented in handcuffs with police officers nearby. V.K. identified the suspects as two of the assailants, identifying appellant with "one hundred percent" certainty as the bat-wielding attacker.

This show-up procedure included an officer telling V.K. that the officers had *the suspects*, the presence of several squad cars and officers, and appellant being presented alone in handcuffs with officers standing nearby. This type of procedure has been held to be unnecessarily suggestive. *See In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004) (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) (show-up was unnecessarily suggestive when suspect was transported in a squad car, presented

in handcuffs, and flanked by police, and officers told the witness that the suspect matched the description).

Totality of the Circumstances

While the show-up was unnecessarily suggestive, the district court concluded that, under the totality of the circumstances, there was sufficient reliability in the identification. "If 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. 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 argues that V.K.'s opportunity to view the assailants was minimal. The district court found that the opportunity to view was clear and unobstructed during the assault and attempted escape. The record supports the district court's finding. V.K. was on his way to play basketball when he saw the victim across the street and three males standing on a hill behind bushes. He watched as the victim walked toward the bus stop and one of the males came down the hill and punched the victim in her face. A second male hit the victim with a bat and a third male attempted to take her purse.

Someone drove by and yelled at the males, and they ran toward V.K. He was able to see their faces for approximately two or three seconds. V.K. ran to the victim and then chased her attackers. V.K. testified that he watched the assault closely. His opportunity to view the assailants occurred in the daylight and at a close range. *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 argues that V.K. was focused on tending to the victim. The district court found that V.K. was able to focus on the suspects for two or three seconds. The record supports the district court's finding. V.K. testified that he was not distracted by anything when he witnessed the assault and that he watched closely as it occurred. Although V.K. checked on the victim before chasing her attackers, he paid close attention to the assault even before it began and he saw the assailants run by him. This factor indicates an adequate independent origin for the identification.

Accuracy of Prior Description

Appellant argues that V.K.'s description was not accurate because he gave incorrect height, age, and clothing details. The district court found that V.K. described the suspect with the bat as "Hispanic but possibly Caucasian, slim, pale, low-cut haircut short, about six feet tall, white shirt/blue jeans." The court concluded that while "iffy," V.K.'s description was "not that far off." The record supports the district court's finding.

An officer testified that V.K. initially described the suspect with the bat as a "[l]ight-skinned White or Hispanic male wearing blue jean shorts or blue jeans." He described him as approximately 5'10" and wearing a white shirt. He described all three suspects being between 14 and 16 years old. V.K. testified that the suspect with the bat was approximately 6' tall, "like Hispanic . . . but he looked more Caucasian," "real slim," "real pale," with "short" hair, and wearing a white shirt and blue jeans.

Appellant is Native American and his skin-tone is pale. Appellant is 5'8" tall; V.K. stated that the suspect was approximately 6'. Appellant is slim; V.K. stated that the suspect was slim. Appellant was 21 years old at the time of the assault. V.K. stated that appellant was around 16 years old, but the others involved were teenagers; thus, it is not unreasonable to suggest that appellant was also a teenager. Appellant stated that he was wearing a gray shirt and green pants. V.K. stated that the suspect was wearing a white shirt and blue jeans. As the district court found, the description as a whole was substantially accurate, and the description indicates an adequate independent origin for the identification.

Level of Certainty

Appellant argues that although V.K. stated that he was certain about the identification, he was unable to identify appellant in the courtroom during the suppression hearing. The court found that V.K. was certain about his identification, stating that the officer and V.K. testified that V.K. "instantly" identified the suspect. V.K. testified that he was "one hundred percent" certain that he correctly identified the suspect who hit the victim with the bat. He made this identification only 30 minutes after

the attack, when his memory was fresh. V.K. was not able to identify appellant in the courtroom, but nearly three months had passed. V.K.'s level of certainty indicates an adequate independent origin for the identification.

Elapsed Time

Appellant agrees that only a short amount of time passed between the attack and the show-up. The district court found that the show-up was held within 30 minutes of the attack. This finding is supported by the record and indicates an adequate independent origin for the identification.

Based on the totality of the circumstances, even though the show-up was unnecessarily suggestive, there was an independent source for the identification and the district court did not err by admitting the identification evidence. Appellant, however, argues that we should adopt a new test—a per se rule of exclusion when the procedure offends due process. But as the state points out, we are an error-correcting court. The district court applied the correct standard and did not err in admitting the evidence.

Sufficiency of the Evidence

Appellant also argues that the evidence is insufficient to support his second-degree-assault conviction. Appellant concedes that an assault occurred; he asserts only that he did not participate. On review of a sufficiency-of-evidence claim, this court conducts a "review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Yang*, 774 N.W.2d 539, 560

(Minn. 2009). We presume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009).

Viewing the evidence in the light most favorable to the verdict, the evidence sustains appellant's conviction. First, there is the evidence of the eyewitness, which we determined is admissible. V.K. testified that appellant hit the victim with a bat. Second, there is the testimony of appellant's accomplice. Although accomplice testimony is inherently untrustworthy, *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008), a conviction can be had on the testimony of an accomplice if that testimony is corroborated. Minn. Stat. § 634.04 (2010).

M.A.-H. testified that he, appellant, and a third male, M.P., waited for the victim, S.M.H., on a hill, and when she walked by, he punched her and appellant hit her with a bat. M.A.-H. testified that "Creeper," aka Leonard Walton, assigned him to beat S.M.H. in exchange for money and that M.P. had a photo of the victim on his phone so that they knew whom to attack. M.A.-H. testified that he and appellant ran to a home where someone appellant knew lived, but they were kicked out.

M.A.-H.'s testimony was corroborated by circumstantial evidence linking appellant to the crime. When a conviction is based on circumstantial evidence, this court conducts a two-part analysis. *State v. Anderson*, 784 N.W.2d 320, 329 (Minn. 2010). First, we identify the circumstances proved, giving deference "to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* Second, we independently examine "the reasonableness of all inferences that might be drawn from the circumstances proved,"

including inferences consistent with a hypothesis other than guilt. *Id.* Thus, review consists of determining whether the circumstances proved are "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330.

S.M.H. testified that she dropped her child off with his father, Walton, before she was attacked. She identified the first person who attacked her as M.A.-H. Thus, S.M.H.'s testimony corroborated M.A.-H.'s testimony that Walton was the connection between S.M.H and her attackers. B.D. testified that on June 5, the day of the attack, appellant, M.A.-H., and someone named Duende went over to his house. M.P. testified that he was at B.D.'s house on June 5 and he saw appellant, M.A.-H., and Duende. Thus, this testimony corroborates M.A.-H.'s testimony that he was with appellant on the day of the attack.

M.P. testified that later in the day on June 5, appellant and M.A.-H. called him asking for a ride. M.P.'s mother, A.M., testified that she knows appellant and M.A.-H. because they are her sons' friends. A.M. testified that on June 5, at approximately 4:10 p.m., M.A.-H. called and asked her for a ride. Appellant got on the phone and whispered to her that he had done something stupid and needed a ride. A.M. testified that appellant told her that the police were after him because he and M.A.-H. "jumped" some boys. This evidence shows that at a time shortly after the attack appellant and M.A.-H. were searching for a ride because they were fleeing police. A.M. also testified that sometime later, her son received a postcard from appellant instructing him to testify that appellant "didn't touch or go near that girl." This evidence shows that appellant potentially attempted to sway witness testimony.

Appellant testified that on June 5 he was delivering marijuana to T.L. On his way, he saw M.P. standing on a hill and M.P. asked appellant if he wanted to "smoke some weed." They went into a bush with M.A.-H. and Duende. Appellant noticed a woman walk by. M.A.-H. went down the hill, said "Hey, bit-h" and punched her. Duende slid down the hill and pulled a bat from his pants and stuck the woman. Appellant went down the hill, yelling "What the fu-k," "Why are you doing this?" They ran because appellant was carrying marijuana. Appellant ran to T.L.'s house and gave him the marijuana. But T.L. testified that appellant planned to deliver a quarter pound of marijuana, but he never received the marijuana. T.L. testified that appellant showed up at his home with M.A.-H. and M.A.-H. told him that he had run up to some girl and Duende hit her with a bat.

Appellant claimed that T.L. lied about not receiving the marijuana because he did not want to get into trouble. However, Sergeant Ronald Jeffery testified that appellant told him that he fled because he was carrying one pound of marijuana, which the sergeant testified is approximately the size of a bowling ball. Appellant's testimony that he fled because he was carrying marijuana is not supported by the evidence. First, he claimed to be carrying one pound of marijuana, but T.L. testified that appellant was supposed to deliver only one-quarter pound of marijuana. Second, he supposedly fled carrying one pound of marijuana, but T.L. did not receive any marijuana, appellant was not found with any marijuana, and officers did not recover a bowling-ball-sized amount of marijuana. Officers did recover two discarded shirts that two suspects shed when they fled. And appellant was found without a shirt. And they found a bat, which appellant stated that he discarded after someone handed it to him.

The jury believed the state's evidence, which shows that appellant, M.A.-H., and one other male went to B.D.'s house on June 5. Walton was friends with B.D. M.A.-H. was assigned to "get" S.M.H. in exchange for payment. M.A.-H., appellant, and the third male waited on a hill for the victim. When they saw S.M.H., M.A.-H. punched her, appellant hit her with a bat, and the third attacker attempted to take her purse. Witnesses intervened, and the assailants fled. Appellant and M.A.-H. ran together. Appellant threw the bat. M.A.-H. and appellant called M.P. asking for a ride. Approximately ten minutes after the assault, M.A.-H. and appellant called M.P.'s mother asking for a ride; appellant told her that he had done something stupid and that the police were chasing him because he "jumped" some boys. A.M. refused to give appellant and M.A.-H. a ride. T.L. lived in the area, so appellant and M.A.-H. went to his house seeking refuge. T.L.'s family kicked appellant and M.A.-H. out of the home, and officers were able to apprehend them. The evidence supports appellant's second-degree-assault conviction.

Affirmed.