STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0058

State of Minnesota,
Respondent,

vs.

Charles Thomas Ortley,
Appellant.

Filed January 13, 2014
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-11-29340

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget K. Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his convictions of aiding and abetting aggravated robbery and second-degree assault, arguing that (1) the district court erred by denying his motion

to suppress a show-up identification and (2) he is entitled to a new trial based on prosecutorial misconduct. We affirm.

FACTS

In the early morning hours of September 18, 2011, K.N., J.N., and E.V. were walking to E.V.'s home in Minneapolis. As they stood on the sidewalk in front of E.V.'s house, four men approached them. K.N. could see their faces because there was a street light on the corner, and the area was fairly well lit. K.N. also noticed two girls across the street talking on the phone. As K.N. began to leave, several of the men started hitting his friends. K.N. turned back to help and found himself standing face-to-face with one of the attackers who pointed a gun at his face. The gun was small, silver, and looked like a Glock. The man holding the gun said, "Run before I shoot you." K.N. got a good look at the person with the gun. As K.N. ran away, he turned around and saw his friends on the ground and the assailants going through their pockets. The attackers fled westbound on foot.

K.N. immediately called 911. Two squads arrived at the scene within minutes, and the officers told the victims to wait in E.V.'s house. While the first two squads were looking for the suspects, Officers Chad Meyer and Laura Turner took statements from the victims. All three described the suspects as Native American, and wearing dark clothing, black hats, black shirts, and jeans. K.N. stated that there were three male attackers and two female look-outs. K.N. said that the gun was small and silver, and described the

person with the gun as a mixed-race male, wearing a red long-sleeved shirt under a black short-sleeved t-shirt, with either unshaven facial hair or a mustache.[1]

Less than ten minutes after receiving K.N.'s call, officers apprehended four individuals they saw running across a street about five blocks west of where the assault and robbery occurred. Appellant Charles Thomas Ortley was wearing dark-colored jeans, a black t-shirt over a long-sleeved red shirt, and had a mustache. Ortley's ethnicity is Native American and African American. The officers found a silver Smith & Wesson gun on the ground in an area between the location of the assault and where the suspects were apprehended.

After telling the victims that several suspects had been located, officers transported the three to the area where the suspects were being held. Because there were not enough squad cars at the scene, K.N., E.V., and J.N. were placed in one car with Officer Meyer. The officer told them not to talk to each other, look at each other, or make facial gestures. One by one, the four suspects were walked by other officers to within 15 feet of the car, and turned to face all four directions. The viewing area was illuminated by street lights, car lights, and spotlights. K.N. positively identified all four suspects, and identified Ortley as the person who pointed the gun at him.[2]

Ortley was charged with two counts of aiding and abetting aggravated robbery and second-degree assault. The district court denied his motion to suppress evidence of the

[1] There was some discrepancy in the police reports as to whether K.N. described the gun-wielding assailant as having facial hair.

[2] J.N. did not identify any of the suspects, and E.V. did not provide identification testimony.

show-up identification. At trial, K.N. again identified Ortley as the person with the gun, and the jury found Ortley guilty of all three counts. This appeal follows.

D E C I S I O N

I. The district court did not err in allowing evidence of K.N.'s show-up identification of Ortley.

The admission of pretrial identification evidence violates a defendant's right to due process if the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Booker*, 770 N.W.2d 161, 168 (Minn. App. 2009) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968)), *review denied* (Minn. Oct. 20, 2009). We review claimed due-process violations de novo. *See State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). We apply a two-part test to determine whether pretrial identification evidence is reliable and therefore admissible. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we look to whether the procedure was "unnecessarily suggestive." *Id.* at 921. A pretrial identification is unnecessarily suggestive if the defendant was "unfairly singled out for identification." *Id.* Second, if the procedure was unnecessarily suggestive, we determine whether the totality of the circumstances establishes that the evidence was nonetheless reliable. *See id.*

Ortley argues that the show-up identification procedure was unnecessarily suggestive. This argument is persuasive. To some degree, a one-person show-up is "by its very nature suggestive." *State v. Taylor*, 594 N.W.2d 158, 162 (Minn. 1999); *see also State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (concluding that

identification procedure was unnecessarily suggestive because police singled out appellant based on eyewitness's description, brought appellant to scene in a squad car, presented appellant in handcuffs, flanked by uniformed officer, told witness that they thought they had a person in custody who matched witness's description, and then asked witness for identification). Here, like *Anderson*, the identification procedure was unnecessarily suggestive because the police singled out Ortley based on K.N.'s description, brought him to the area in a squad car, presented him in handcuffs, flanked by uniformed officers, and asked the victims for identification.

Because the show-up was unnecessarily suggestive, we turn to whether K.N.'s identification was nonetheless reliable. We look at the totality of the circumstances:

> 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.

Ostrem, 535 N.W.2d at 921. Consideration of these circumstances demonstrates K.N.'s pretrial identification of Ortley was reliable.

First, K.N. had a good opportunity to view Ortley and his associates at the time of the offense. K.N. saw the assailants approach him and his friends; they were two feet in front of him when they began hitting his friends and the area was illuminated by nearby streetlights. Ortley was in close proximity when he pointed the gun at K.N.'s face and, as K.N. ran, he looked back and saw the faces of the other assailants. Second, K.N.'s

degree of attention was good. He was not distracted and made a point of observing the assailants' faces.

Third, K.N.'s description of the suspects prior to the show-up was detailed and highly accurate. He described them as male attackers with female look-outs, Native American, in their 20s, wearing dark clothing. He told the police that the gunman had a small silver gun, wore a red long-sleeved shirt under a short-sleeve black t-shirt and a baseball cap, and had unshaven facial hair or a mustache. With the exception of the baseball cap, K.N.'s description matched Ortley's appearance at the time of arrest.

Fourth, K.N. testified that he was "100 percent" confident in his identification. He stated that Ortley's face "melted into my head," and "I'll never forget his face." Finally, very little time passed between the incident and the show-up identification—at most 15-20 minutes.[3]

Because the totality of the circumstances supports a conclusion that the show-up procedure did not create a substantial likelihood of irreparable misidentification, the district court did not err by denying Ortley's motion to suppress K.N.'s identification.

II. Ortley is not entitled to a new trial based on prosecutorial misconduct.

Ortley challenges one line of questioning and the prosecutor's closing argument as improper vouching. He objected to the testimony but not the closing argument. For objected-to prosecutorial misconduct claims, we apply a harmless-error test. In cases

[3] Ortley argues that K.N.'s certainty and the time between the incident and the identification are not statistically reliable factors. This argument fails because Minnesota law provides that both are proper factors a district court may consider. *Ostrem*, 535 N.W.2d at 921.

involving less-serious prosecutorial misconduct, we evaluate whether the misconduct "likely played a substantial part in influencing the jury to convict." *State v. Carridine*, 812 N.W.2d 130, 150 (Minn. 2012). In cases involving "unusually serious" misconduct, we consider whether it is certain beyond a reasonable doubt that the misconduct was harmless. *Id.* We review unobjected-to prosecutorial misconduct for plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error, the defendant must demonstrate that the prosecutor's act constitutes error, the error was plain, and the error affected the defendant's substantial rights. *Id.* at 302.

A. Objected-to vouching testimony

Ortley first challenges certain testimony of Sergeant Matthew McLean during recross-examination. A witness may not vouch for or against the credibility of another witness. *State v. Burrell*, 697 N.W.2d 579, 600 (Minn. 2005). But in certain situations, an otherwise improper question might be permitted to clarify a line of testimony or help evaluate credibility. *See State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (permitting prosecutor to ask "were they lying" questions on cross-examination to assist jury in weighing credibility of witness because defense put issue of credibility of state's witnesses in central focus).

On direct-examination by defense counsel, Sergeant McLean testified that he was responsible for reviewing reports submitted by other officers involved in the investigation. On redirect-examination, Sergeant McLean testified as follows:

> DEFENSE COUNSEL: Now, when you initially reviewed the reports, was it your opinion that the arrest made that night was of the actual people that perpetrated the offense?

> THE WITNESS: Well, as an investigator, I keep an open mind all the way through cases. My experience has taught me that cases take turns along the way and if you have a preconceived notion one way or the other, it then blinds you to other potentials.
>
> So I look at the reports and I look at what is written, but I'm continually analyzing what I'm finding as the investigations progress.

Ortley challenges the following exchange from the prosecutor's recross:

> PROSECUTOR: Officer McLean, if you thought, after the completion of your investigation, that the people arrested weren't the people that committed the crime, would you submit it to the County Attorney's Office?
>
> DEFENSE COUNSEL: Objection, Your Honor, opinion and that does invade the province of the jury?
>
> THE COURT: Overruled. The door is open.
>
> THE WITNESS: Can you repeat the question? I'm sorry.
>
> PROSECUTOR: If you thought that the persons that had been arrested had not committed the crime, would you – after you did all of your investigation, would you submit it to the County Attorney's Office?
>
> THE WITNESS: Oh, no.
>
> PROSECUTOR: In this case, did you have any hesitation submitting this case to the County Attorney's Office for charging consideration?
>
> THE WITNESS: No.
>
> PROSECUTOR: So you felt confident that the people who were arrested were the people that committed the crime?
>
> THE WITNESS: Yes.

Ortley argues that the prosecutor elicited improper vouching testimony from Sergeant McLean. We disagree. When the prosecutor's questions are viewed in context, it is clear that the prosecutor did not elicit the challenged testimony in the first instance. Rather, the prosecutor pursued a line of questioning on recross to clarify the sergeant's response to defense counsel's question whether the sergeant believed the right people were arrested. The ambiguous nature of Sergeant McLean's response to defense counsel's question prompted the prosecutor's further inquiry. Because the prosecutor did not elicit improper vouching testimony from Sergeant McLean, Ortley is not entitled to a new trial on this basis.[4]

B. Unobjected-to vouching argument

Ortley next argues that the prosecutor committed misconduct in closing argument by vouching for the credibility of K.N and Sergeant McLean. A prosecutor "may not personally endorse the credibility of witnesses," *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006), but it is not improper for a prosecutor "to analyze the evidence and argue that particular witnesses were or were not credible." *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006); *see also State v. Gail*, 713 N.W.2d 851, 866 (Minn. 2006) (calling a witness "a believable person" and "frank and sincere" was not improper vouching); *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012) (holding that prosecutor's comments that a witness was "very sincere" and "very frank in his testimony" were not

[4] And even if the challenged testimony constituted vouching, any error is harmless even under the more serious misconduct standard. *See Carridine*, 812 N.W.2d at 146 (concluding that state's persistence in asking questions that district court ruled improper—by continuing to ask FBI agent if a person could waive extradition—was misconduct, but was harmless even under the standard for more serious misconduct).

improper vouching because the statements were arguments regarding credibility), *review denied* (Minn. Mar. 19, 2013). When comments made in closing argument are challenged, we will evaluate the closing argument as a whole. *Swanson*, 707 N.W.2d at 656.

During closing argument, the prosecutor described K.N.'s testimony as believable, consistent, and credible; and K.N.'s demeanor as matter of fact, frank, sincere, and honest. The prosecutor later referred to Sergeant McLean as an experienced police officer and investigator, and he stated that the police officers involved in the case were reliable witnesses who were doing their jobs. The prosecutor also told the jury that it was up to them to decide how much weight to give to a witness's testimony.

Based on our careful review of the record, we conclude that the prosecutor's arguments regarding credibility do not constitute vouching. The prosecutor made the challenged statements in discussing the factors the jury may consider in assessing the credibility of a witness. *See id.* (holding that prosecutor may discuss factors affecting the credibility of the witnesses so long as the state does not endorse a witness's credibility). Similarly, the prosecutor's description of the testifying police officers as "reliable" is proper argument on credibility.

Moreover, even if the prosecutor's closing argument constitutes vouching, Ortley has not shown that it affected his substantial rights. *See State v. Pearson*, 775 N.W.2d 155, 163-64 (Minn. 2009). Plain error affects substantial rights when it has a significant effect on the verdict. *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010). Here, there was strong evidence of Ortley's guilt, including pretrial and trial identification, Ortley's

presence near the scene of the crime, the fact that Ortley's appearance matched the victims' descriptions, and the fact that when Ortley was arrested he had a cell phone in his pocket that was identical to a phone stolen from one of the victims during the attack. On this record, we conclude that any prosecutorial misconduct did not affect Ortley's substantial rights. Accordingly, Ortley is not entitled to a new trial.

Affirmed.