STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0930

State of Minnesota,
Respondent,

vs.

Donavan Dexter Boone,
Appellant.

Filed June 9, 2014
Affirmed
Klaphake, Judge[*]

Ramsey County District Court
File No. 62CR127898

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

John J. Choi, Ramsey County Attorney, Andrew R.K. Johnson, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget K. Sabo, Assistant Public Defender, St. Paul, Minnesota; and

Stephen E. Schemenauer, Stinson Leonard Street LLP, Special Assistant State Public Defenders, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Klaphake, 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

KLAPHAKE, Judge

Defendant Donavan Dexter Boone appeals his conviction of first-degree attempted burglary and possession of burglary tools, arguing that the district court erred by admitting identification evidence from a show-up that violated his constitutional rights, resulting in error that was not harmless beyond a reasonable doubt. We affirm.

D E C I S I O N

The admission of pretrial-identification evidence violates a defendant's right to due process if the procedure is "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)). While evidentiary decisions are generally reviewed for an abuse of discretion, this court reviews de novo whether the admission of pretrial identification evidence denied a defendant due process. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008).

Boone argues that the district court erred by admitting evidence from a show-up identification because it was unnecessarily suggestive and therefore unreliable. This court applies a two-part test to determine whether pretrial identification evidence is reliable. "First, the procedure producing the identification is evaluated to determine if it was unnecessarily suggestive. Second, if the procedure is unnecessarily suggestive, the court then considers whether the totality of the circumstances created a substantial

probability that the defendant was misidentified.[1] *In re Welfare of M.E.M.*, 674 N.W.2d 208, 214-15 (Minn. App. 2004) (citations omitted).

As to suggestiveness, Boone states, in violation of standard police protocol, (1) he was displayed in the street while under a spotlight and in handcuffs; (2) alongside J.S., another handcuffed suspect; (3) and witnesses K.A. and T.S. sat side-by-side when asked to identify him. He also maintains that the identification was tainted by the police officer's indication to the witnesses that he and J.S. were the perpetrators. We agree.

A one-person show-up[2] is "by its very nature suggestive." *State v. Taylor*, 594 N.W.2d 158, 162 (Minn. 1999). And a show-up where the defendant is handcuffed is unnecessarily suggestive. *M.E.M.*, 674 N.W.2d at 215. In *Taylor*, the supreme court held that the show-up was not unnecessarily suggestive because it was "not a case where the police singled [appellant] out from the general population based on a description given to them by a victim, and then proceeded to present [appellant] to the victim, in handcuffs, for identification in a one-person show-up." 594 N.W.2d at 162. Such a situation "would be unnecessarily suggestive because of the potential for the show-up procedure, by itself, to influence the identification." *Id.* Considering this dicta, we

[1] On appeal, Boone advocates for a change in the law regarding the admission of show-up identifications into evidence, suggesting that the rule established by *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005), would be more appropriate. Making new law is within the authority of the supreme court, and "it is not the role of this court to abolish established judicial precedent." *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005).

[2] The show-up in this case is effectively a one-person show-up because police suspected Boone and J.S. were involved in a crime, and they were presented in isolation from other people.

concluded that the identification procedure in *State v. Anderson* was unnecessarily suggestive where

> the 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.

657 N.W.2d 846, 851 (Minn. App. 2002).

Here, police officers identified Boone based on K.A.'s descriptions to the 911 operator, and the officers asked for additional descriptions from K.A. after having detained men who matched those descriptions. While the officer's statement to T.S., "[w]e're glad we got 'em, too," may have been inadvertent, K.A. and T.S. appeared to understand from this dialogue that police believed they had detained the correct suspects before the show-up was conducted. These facts, along with Boone and J.S. being presented in isolation from other people, in handcuffs, and accompanied by a police officer, made the show-up unnecessarily suggestive.

But unnecessarily suggestive show-up evidence is admissible if, under the totality of the circumstances, the identification is reliable. *State v. Kelly*, 668 N.W.2d 39, 44 (Minn. App. 2003). The Minnesota Supreme Court has articulated five factors to evaluate 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 . . . ;
> 5. The time between the crime and the confrontation.

State v. Ostrem, 535 N.W.2d 916, 921 (Minn. 1995) (quoting *State v. Bellcourt*, 312 Minn. 263, 264, 251 N.W.2d 631, 633 (Minn. 1977) (citing *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382 (1972))) (adopting five-factor totality-of-the-circumstances test articulated by the United States Supreme Court).

K.A. and T.S. had a close opportunity to view Boone and J.S. trying to break into their house from both the front window, where the men were well lit by a motion-sensor light, and from the bedroom window, where the men stood directly below the window. T.S. estimated that in both instances Boone and J.S. were just a few feet from the windows. Boone contends that K.A. and T.S. did not get a good view of Boone because they gave conflicting testimony about the route they took when leaving the house. But such testimony on a minor detail does not affect their overall credibility or consistent testimony regarding their opportunity to view Boone and J.S. And, though both witnesses were awakened by the doorbell and commotion and testified to being alarmed, their descriptions of the events show they were alert and attentive.

Moreover, K.A. and T.S. provided accurate descriptions of Boone and J.S. before the show-up identification. K.A. told the 911 operator that the suspects were two thin, black men in their thirties, described them to the police as being in their twenties or thirties, and explained that one was wearing a striped shirt and had a skinnier face than the other, who was wearing a black hat and black jacket. While Boone was actually in his early twenties and was wearing a black do-rag on his head, the description is

otherwise accurate. During the show-up recording, T.S. states that there is a number on the back of J.S.'s striped shirt before the officer turns J.S. around to reveal the number on his back. Boone argues that there are several inconsistencies in the witnesses' testimony about the men's clothing, citing that they reported the stripes on J.S.'s shirt as different colors (gray and black versus white and blue), used different adjectives with respect to Boone's black jacket, identified Boone's headwear as some sort of cap, rather than a do-rag, and never mentioned that Boone was wearing a white shirt. Boone also points out that the witnesses did not identify the men using any physical features, such as height, hair, or facial features. Despite these minor discrepancies, the descriptions K.A. and T.S. provided before the show-up closely aligned with the actual appearances of Boone and J.S.

Further, at the show-up, T.S. indicated that the detained men were "definitely" the ones who had been at their house, and K.A. expressed no doubt about her identification. Both testified that they were sure of their pretrial identifications. Boone argues that the witnesses' level of certainty should be discounted as unreliable, citing various law review and journal articles about the prevalence of mistaken identification. But this factor, among four others, may properly be considered in the totality-of-circumstances test. *Ostrem*, 535 N.W.2d at 921. Finally, the lapse of time between the crime and the show-up was minimal, just a few minutes, which also favors admission.

The totality of the circumstances establishes that while the show-up identifications of Boone and T.S. were unnecessarily suggestive, the show-up procedure did not create a substantial likelihood of irreparable misidentification because the identifications were

otherwise reliable. Therefore, the district court did not err by admitting the show-up evidence at trial.

Affirmed.