STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1306

In the Matter of the Welfare of: M. F., Child

Filed February 18, 2014
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-JV-13-1122

Cathryn Middlebrook, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Kirk, Judge.

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

LARKIN, Judge

Appellant challenges the admission of evidence stemming from a pretrial-identification procedure, arguing that the evidence violates his right to due process. We affirm.

FACTS

Respondent State of Minnesota charged juvenile appellant M.F. with simple robbery, theft from person, and misdemeanor theft. The state alleged that M.F. took a cell phone from T.L.'s hand in a stairwell of a Minneapolis parking ramp on February 16, 2013. Prior to trial, M.F. informed the district court that he intended to raise a "show-up issue." The parties agreed to combine the court trial on the charges and the evidentiary hearing on the eyewitness-identification issue and to make "arguments on the suppression when it's deemed appropriate." The trial established the following facts.

T.L. entered the parking ramp with C.R. at approximately 2:30 in the morning. Because C.R. had locked her keys in her car, they placed a phone call and waited in a stairwell for someone to arrive to unlock the car door. While they waited in the stairwell, a group of four or five young males walked past them. All but two exited the stairwell. M.F. leaned over the railing and talked to T.L. and C.R. The stairwell was well lit, and M.F. stood within a few feet of C.R. M.F. left the stairwell through the door to the parking ramp. He returned a few seconds later, grabbed T.L.'s cell phone out of his hand, and ran back out the door. At trial, C.R. identified M.F. as one of the males who stayed in the stairwell and as the male who took T.L.'s cell phone.

Parking-ramp security officers stopped a car that contained five males, including M.F., at the ramp's exit. The police arrived, removed the five males from the car, and placed them in three squad cars. Officers placed T.L. and C.R. in another squad car and drove them to a surface lot next to the parking ramp to conduct a show-up identification. The three squad cars containing the suspects were parked approximately 15 feet away

from the squad car containing T.L. and C.R. Officers removed each of the suspects from a squad car one at a time and had each face forward, backward, left, and right. During this process, each suspect was "fully illuminated" by the headlights and spotlights on the squad car that contained T.L. and C.R. Both T.L. and C.R. immediately identified M.F. as the person who took T.L.'s cell phone. C.R. was certain that M.F. was the person. C.R. was also certain when she later identified M.F. in court. Although T.L. and C.R. sat together in the back of a squad car during the process, they did not talk to each other.

Following trial, M.F. moved to suppress the in-court identification, arguing that the show-up procedure used by the police on the scene was unnecessarily suggestive. The district court denied M.F.'s motion and found M.F. not guilty of simple robbery and misdemeanor theft. But the district court found him guilty of theft from person.

M.F. moved for a new trial, arguing, among other things, that "the adjudication was not justified by the evidence and is contrary to law." In support of this argument, M.F. noted that the alleged victim, T.L., did not testify and argued that a police officer's testimony that T.L. identified M.F. during the show up was inadmissible hearsay. M.F. also argued that "[t]his is evidence the [c]ourt erroneously relie[d] on in its analysis denying the motion to suppress the show up identification." The district court concluded that "[d]isregarding [the officer's] testimony that the victim identified [M.F.] as the person who took the cell phone does not undermine confidence in the outcome of the case. The [c]ourt finds even without the victim's testimony and identification of [M.F.], the [s]tate proved the charge of felony theft from person beyond a reasonable doubt."

The district court denied M.F.'s motion for a new trial, adjudicated M.F. delinquent, and placed him on probation. M.F. appeals the district court's denial of his motion to suppress the identification evidence.

D E C I S I O N

M.F. contends that "C.R.'s identification of [him]—both pretrial and in-court—as the person who took T.L.'s cell phone was not the product of her independent powers of observation, but of an unduly suggestive show-up procedure." M.F. argues that by admitting this evidence, the district court violated his right to due process. Whether a constitutional violation has occurred presents a question of law, which we review de novo. *See State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). When reviewing a pretrial order on a suppression issue "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. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted).

The admission of pretrial-identification evidence violates due process if the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). Courts apply a two-part test to determine whether pretrial-identification evidence must be suppressed. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, the court must determine whether the pretrial-identification procedure was unnecessarily suggestive, which "turns on whether the defendant was unfairly singled out for identification." *Id.* Second, "[i]f the procedure is

found to be unnecessarily suggestive, the identification evidence may still be admissible as long as the totality of the circumstances establishes that the evidence was reliable." *State v. Young*, 710 N.W.2d 272, 282 (Minn. 2006) (quotation omitted). "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. An identification based on an impermissibly suggestive procedure may taint a future in-court identification unless there are facts to show the courtroom identification has an independent origin. *State v. Blegen*, 387 N.W.2d 459, 463 (Minn. App. 1986), *review denied* (Minn. July 31, 1986). "The court's ultimate concern is whether the techniques employed by the police influenced the witness's identification." *State v. Anderson*, 657 N.W.2d 846, 850 (Minn. App. 2002).

The parties disagree regarding whether the pretrial-identification procedure in this case constitutes a show up and whether the procedure was unnecessarily suggestive. Because a determination that the identification evidence was reliable under the totality of the circumstances would be dispositive even if we concluded that the procedure was unnecessarily suggestive, we focus our analysis on that part of the test. *See Young*, 710 N.W.2d at 282.

Identification evidence, even if unnecessarily suggestive, is nonetheless admissible "[i]f the totality of the circumstances shows the witness' identification has adequate independent origin." *Ostrem*, 535 N.W.2d at 921. We consider 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 at the [identification procedure];
> 5. The time between the crime and the confrontation.

Id. (quotation omitted).

Here, C.R. had ample opportunity to view M.F. at the time of the crime. M.F. stopped within a few feet of C.R. and talked to her in a well-lit stairwell. M.F. left and came back a second time before stealing the cell phone, providing C.R. another opportunity to view him. *See Seelye v. State*, 429 N.W.2d 669, 673 (Minn. App. 1988) (finding adequate independent origin of in-court identification where victim "saw his assailant through a glass door on a well-lit porch while walking the 12 to 15 feet across his living room," "talked face-to-face" with him, and "also saw him as he pushed his way into the house"); *State v. Kowski*, 423 N.W.2d 706, 709 (Minn. App. 1988) (concluding that witness had "ample opportunity" to view appellant "during their five minute face-to-face conversation with each other"). C.R. was certain that M.F. was the person who took T.L.'s cell phone. And the district court found that the police conducted the show up "immediately after the offense occurred." *See Ostrem*, 535 N.W.2d at 922 (concluding that unnecessarily suggestive identification procedure was nonetheless reliable where, among other things, it occurred "only 48 hours after the crime"). Although there is no finding regarding C.R.'s degree of attention or whether she provided a detailed description of the suspect before the identification procedure, the totality of the

circumstances shows that C.R.'s identification was reliable. *C.f. State v. Jones*, 556 N.W.2d 903, 913 (Minn. 1996) (concluding that the witness did not have an adequate independent origin for the identification where the witness viewed the suspect only briefly, gave only a "vague description," a "month had elapsed between the crime and the identification," she admitted that "her attention was focused on one of the weapons, not the individuals," and "she was uncertain about confirming her original identification in court").

In sum, we are not concerned that "the techniques employed by the police influenced the witness's identification." *Anderson*, 657 N.W.2d at 850. We therefore hold that M.F.'s right to due process was not violated.

Affirmed.