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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1227**

In the Matter of the Welfare of:
O. L. J., Child.

**Filed April 13, 2010
Reversed
Klaphake, Judge**

Hennepin County District Court
File Nos. 27-JV-09-1860/27-JV-09-5663

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant O.L.J.)

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota 55487 (for respondent)

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant O.L.J. challenges his adjudication of delinquency for theft, claiming that a show-up identification procedure conducted by police soon after the commission of the crime on February 20, 2009, was unnecessarily suggestive and unreliable, violated his due process rights, and should have been suppressed. We agree and reverse.

DECISION

A district court's evidentiary rulings are discretionary, and this court will affirm absent an abuse of that discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Admission of identification evidence that is obtained by suggestive identification procedures, such as show-ups, however, may violate a defendant's due process rights. *State v. Roan*, 532 N.W.2d 563, 572 (Minn. 1995). This court independently reviews the facts to determine whether such evidence must be suppressed as a matter of law. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

In determining whether to suppress pretrial identification evidence, this court applies a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we determine whether the identification procedure was "unnecessarily suggestive," and then we determine whether the identification was nevertheless reliable, considering the totality of the circumstances, because there was an "adequate independent origin" for the identification. *Id.*; *In re Welfare of M.E.M.*, 674 N.W.2d 208, 214-15 (Minn. App. 2004). While there is not a per se rule, the supreme court has noted that the show-up's "very nature" is suggestive. *Taylor*, 594 N.W.2d at 162. The totality of the circumstances to be considered include (1) the witness's opportunity to view the perpetrator when the crime was committed; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the witness's degree of certainty in making the identification; and (5) the time between the crime and the identification. *Ostrem*, 535 N.W.2d at 921.

Here, appellant and his two friends were discovered by police within a few blocks of where a wallet was stolen from the victim. The victim reported that he was robbed on Hillside Avenue in Minneapolis by three teenage black males at about 10:00 p.m., and one of the teenagers was wearing a black leather jacket with “checkers.” Police responded to the call, apprehended appellant and his friends, and then asked the victim to come with them to “take a look at” “some people.” At the detention site, an officer removed each boy from a squad car, one in handcuffs, placed them in front of the lights of a second squad car while flanked by police officers, and asked the victim inside the second squad car if he recognized each boy. The victim identified two of the boys as those who had stolen his wallet. This sort of identification procedure has routinely been found unnecessarily suggestive. *See, e.g., Taylor*, 594 N.W.2d at 160-61 (finding show-up unnecessarily suggestive when defendant was placed in front of squad car in handcuffs for victim identification); *M.E.M.*, 674 N.W.2d at 215 (ruling show-up unnecessarily suggestive when “[t]he police present[ed] to the victim a singled-out, handcuffed suspect”); *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (ruling show-up unnecessarily suggestive when police brought defendant to crime scene in squad car, showed him to victim while in handcuffs and flanked by police, and told victim that defendant matched description).

Further, in this instance police were seeking an initial identification of the victim’s assailant and were not just confirming the assailant’s identity, such as in cases where the victim knew the assailant’s name. *See, e.g., Taylor*, 594 N.W.2d at 162 (noting that when show-up is merely confirmatory, it does not risk substantial likelihood of

misidentification, even though unnecessarily suggestive). For all of these reasons, the show-up conducted in this case was unnecessarily suggestive.

We next apply the totality of circumstances test to determine whether there is an independent basis of reliability despite the suggestiveness of the identification procedure. The victim had the opportunity to view his main assailant for a short time at close range while the theft was occurring. *See, e.g., McDuffie v. State*, 482 N.W.2d 234, 236 (Minn. App. 1992) (admitting show-up identification when, in part, victim “had the opportunity to view his assailants for several minutes as they robbed him”), *review denied* (Minn. Apr. 13, 1992). But the victim also indicated that the assailants came at him “kind of fast” from behind, that the whole encounter took place quickly and at night, and that his attention was focused on losing the grip on his grocery bag and dropping his bottles of soda. He could not provide a specific description of the assailants other than their race, the fact that they were teenagers, and that one of them wore a black leather coat with “checkers.” When detained, appellant was wearing a shiny black non-leather coat with a quilted pattern. While the victim gave a general description of his assailants as to race and as to one of the assailant’s coats, the description was otherwise devoid of any detail that would set them apart from the general population of the area. *See Taylor*, 594 N.W.2d at 162 (contrasting reliability of identification of specific, named suspect from “general population” of people who match suspect’s description); *State v. Jones*, 556 N.W.2d 903, 913 (Minn. 1996) (concluding that victim identification unreliable when show-up was based on “vague description” of defendant). We also note that the crime occurred on a street on which police were unable to track the perpetrators due to the

amount of foot traffic. Although the victim was asked to identify the assailants soon after the crime occurred and seemed fairly certain of his identification as to two of them, we conclude that under the totality of circumstances factors, the identification evidence should have been suppressed. We thus reverse appellant's adjudication of delinquency because no evidence other than the victim's identification of appellant linked appellant to the crime.

Reversed.