STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2179

State of Minnesota,
Respondent,

vs.

Carl L. Richardson,
Appellant.

Filed April 29, 2008
Affirmed
Toussaint, Chief Judge

Ramsey County District Court
File No. K6-05-1933

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Karl E. Robinson, Special Assistant State Public Defender, 225 South Sixth Street, Suite 3500, Minneapolis, MN 55402-4629 (for appellant)

Considered and decided by Toussaint, Chief Judge; Willis, 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

TOUSSAINT, Chief Judge

Appellant Carl L. Richardson challenges his conviction of first-degree burglary, arguing that his identification by a one-person show-up was unduly suggestive and that the police violated his *Miranda* rights by failing to honor his assertion of his right to silence. Because we conclude that the identification was admissible under the totality of the circumstances and that the police did not violate appellant's *Miranda* rights, we affirm.

D E C I S I O N

When reviewing pretrial orders on motions to suppress evidence, this court may independently review the facts and determine, as a matter of law, whether the district court erred in refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The factual findings underlying the district court's decision are upheld unless clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Appellant was stopped by police officers early on the morning of June 7, 2005 because he matched the description of the suspect in an illegal entry of a home that had occurred in the neighborhood earlier that morning and he was spotted near the scene of the crime. After the stop, an officer contacted the witness, told her they had a possible suspect, and wanted to see if she recognized him. At the show-up, the witness was told by officers that when the suspect got out of the police car, she needed to determine whether she recognized him. Appellant got out of the police car, in handcuffs, and stood near police personnel. Appellant argues that the district court erred in denying his motion

to suppress the identification evidence because the one-person show-up procedure was unnecessarily suggestive and caused a substantial likelihood of irreparable misidentification.

In deciding whether a pretrial identification must be suppressed, the court first determines whether the procedure was unnecessarily suggestive. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). "Included in that inquiry is whether the defendant was unfairly singled out for identification." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (emphasis and quotation omitted). The court's focus under this part of the test is "whether the procedure used by police influenced the witness identification of the defendant." *Id.* It is well-established that one-person show-ups "are permissible identification tools." *State v. Hazley*, 428 N.W.2d 406, 410 (Minn. App. 1988), *review denied* (Minn. Sept. 28, 1988). A "one-person show-up is not unnecessarily suggestive per se." *Taylor*, 594 N.W.2d at 161-62.

Appellant first argues that this court should adopt a rule excluding identification evidence when it results from unduly suggestive procedures. He contends that eyewitness testimony is almost always unreliable and cites various law review articles and a case from another jurisdiction. But when an identification is unnecessarily suggestive, the court must perform a second analysis to determine whether the identification, under the totality of the circumstances, is reliable. *See, e.g., State v. Young*, 710 N.W.2d 272, 282 (Minn. 2004); *Taylor*, 594 N.W.2d at 161; *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996); *Ostrem*, 535 N.W.2d at 921.

It is unnecessarily suggestive for police to single out a person based on a description, bring that person back to the witness, and present the person to the witness in handcuffs. *See State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (finding one-person show-up was unnecessarily suggestive when officers presented suspect, who had been singled out based on description, to witness in handcuffs and flanked by police personnel); *see also Taylor*, 594 N.W.2d at 162. Appellant was spotted near the crime scene early in the morning and matched the police description of being a "black male," "twenties," tall, and had on a white T-shirt and blue jean shorts. He fled from the officers as soon as he saw them.

Appellant was not singled out based solely on a description; he was spotted at a gas station less than one mile from both crime scenes, matched the description given by the witness, and ran as soon as he saw officers. *See State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1988) (evidence of defendant's flight after crime suggests consciousness of guilt). But, at the scene of the show-up, the witness remained in the car and appellant was removed from another squad car in handcuffs and was presented standing next to officers. An officer told the witness that the possible suspect would walk out of the squad car and stand in front of the car in which she was sitting. On this record, we agree with the district court that the procedure used was impermissibly suggestive.

In considering the totality of the circumstances, however, we find the identification reliable. Even if an identification procedure was unnecessarily suggestive, the identification is still admissible if the totality of circumstances established that the identification was nonetheless reliable. *Ostrem*, 535 N.W.2d at 921. Ultimately, the "test

is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification." *Id.*

To determine whether a suggestive identification is nonetheless reliable, we look to five factors: (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 criminal; (4) the witness's level of certainty; and (5) the time between the crime and confrontation. *Id.*

The witness observed appellant in her own kitchen from a distance of about six feet. She was awake, drinking coffee, and reading at her kitchen table. She described him as tall, thin, "clean shaven" with "short hair," and in his twenties. She also noted he was wearing a white T-shirt and dark pants. When appellant was apprehended, he was lying next to a muddied white T-shirt, wearing long jean shorts that covered his knees, and was muscular, thin, and in his twenties.

While the witness was not completely sure at the show-up that appellant was the perpetrator, at trial she testified that she realized that she was certain it was him just after the show-up. Further, the time between the crime and the show-up was brief, less than two hours. *See State v. Kowski*, 423 N.W.2d 706, 709 (Minn. App. 1988) (finding that victim still had relatively fresh memory of perpetrator when three weeks had elapsed between incident and identification). Based on the totality of the circumstances, the trial court properly determined the identification was reliable.

Appellant next argues that the district court erred in admitting inculpatory statements given after he invoked his right to silence because the court found that

appellant reinitiated conversation with police.

Once a defendant has clearly and unambiguously invoked his *Miranda* rights, police interrogation must cease. *State v. Jones*, 566 N.W.2d 317, 323 (Minn. 1997). But a defendant waives his *Miranda* rights if he "initiates further communication, exchanges, or conversations with the police." *State v. Parker*, 585 N.W.2d 398, 405 (Minn. 1998) (quotation omitted).

Appellant argues, and the state concedes, that after receiving his *Miranda* warning, he unambiguously and unequivocally asserted his Fifth Amendment right to silence and that the police did not honor that assertion. We therefore analyze whether the district court's conclusion that, after asserting his right to silence appellant waived that right by reinitiating conversation, was error.

We review the factual determination of whether a suspect unequivocally revoked the right to remain silent by initiating conversation for clear error. *State v. Ganpat*, 732 N.W.2d 232, 239 (Minn. 2007); *see also State v. Hardimon*, 310 N.W.2d 564, 567 (Minn. 1981) (holding that, on appeal, court will not reverse findings of fact unless clearly erroneous).

When an accused makes post-*Miranda* inculpatory statements, the state bears the burden of proving that the accused knowingly, intelligently, and voluntarily waived his right against self-incrimination. *State v. Merrill*, 274 N.W.2d 99, 106 (Minn. 1978) (citing *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628 (1966)). Interrogation includes not only express questioning, but its functional equivalent. *State v. Paul*, 716 N.W.2d 329, 336 (Minn. 2006) (citing *Rhode Island v. Innis*, 446 U.S. 291,

300-01, 100 S. Ct. 1682, 1689 (1980)). That includes words or actions on the part of the police, other than those that normally accompany arrest and custody, "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 336-37. In determining whether police tactics were likely to elicit an incriminating response, the focus of the inquiry is on the perceptions of the suspect, not the intent of the police, and consideration of the totality of the circumstances surrounding the custody. *Id.*; *State v. Tibiatowski*, 590 N.W.2d 305, 309 (Minn. 1999).

The district court found, after reviewing the videotape of the questioning, that appellant was very frustrated, raised his voice, stood up quickly, and moved away from the table.

> Sergeant Dunnom did match his tone and said very strongly: Sit your ass down. And Mr. Richardson said: I don't want to talk. And Sergeant Dunnom says: That's fine. And Mr. Richardson said: I'm not going to say nothing. And Sergeant Dunnom says: You sit down and be mute. Thank you. And as things then were calming down at that point, Sergeant Dunnom says: But now.
>
> Now, we don't know if she was attempting to clarify. We don't know if she was going to give him the form as what happened later . . . . So we don't really know what was to transpire at that moment. But then Mr. Richardson starts speaking again and says: You ain't listening to me, and Sergeant Dunnom says: I'm trying, and then the conversation continues from there.
>
> It was some time shortly after that, that the statement that's at issue here was made.

The district court concluded that appellant reinitiated conversation after being read his *Miranda* rights and asserting his right to silence, thereby waiving his *Miranda* rights.

The record supports the district court's finding that, after appellant was told to sit down, the officer said "But now…" and was interrupted by appellant. Appellant then said, "You ain't listening to me," and the conversation continued. This situation is similar to *Paul*, where the Minnesota Supreme Court found that a suspect in custody initiated further discussion with a police officer by interrupting the officer and saying ,"I don't know; who put the warrant out . . . ." 716 N.W.2d at 337. The court found that between Paul's invocation of his right to counsel and his initiation of further discussion, the officer did nothing that was the functional equivalent of interrogation. *Id.* Here, the pertinent exchange was as follows:

> RICHARDSON: No, you miss my whole thing, I told you, cause you not listening to me—you just trying to send me to jail. I don't wanna talk no more.
>
> OFFICER: Set you ass down.
>
> RICHARDON: I don't wanna talk no more.
>
> OFFICER: That's fine . . . .
>
> RICHARDSON: I'm not gonna say nothing.'
>
> OFFICER: You sit down and be [mute].[1] Thank you. But now . . .
>
> RICHARDSON: You ain't listening to me.

Here, as in *Paul*, the officer did not interrogate appellant or do anything that would be reasonably likely to elicit a response between the time when appellant said he was not going to talk and the time appellant reinitiated conversation. The district court did not

[1] The transcript of the interrogation says "be amused" but the district court found upon reviewing the video, the officer actually said "be mute."

clearly err in determining that the inculpatory statements were admissible.

Affirmed.