STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2195

State of Minnesota,
Respondent,

vs.

Corey Lashon Maull,
Appellant.

Filed June 11, 2012
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27-CR-10-6056

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

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

Bradley Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Willis, 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

STONEBURNER, Judge

Appellant challenges his conviction of first-degree aggravated robbery, arguing that he was prejudiced by the district court's abuse of discretion in evidentiary rulings and is entitled to a new trial. Because we conclude that the district court did not abuse its discretion by admitting the challenged evidence, we affirm.

FACTS

Appellant Corey Lashon Maull is one of four men apprehended immediately after the robbery of B.A. B.A. was surrounded by four men shortly after he left a bar in Minneapolis at two o'clock in the morning. B.A. was punched in the face, and his cell phone, wallet, and money were stolen. B.A. got the attention of off-duty police officer Daniel Lysholm, who worked in a nearby restaurant. As he described the robbery to Lysholm, B.A. pointed to the men, who were visible further down the well-lit street. As Lysholm and B.A. followed the men, Lysholm radioed for assistance, describing the men in terms of the jackets they were wearing. B.A. and Lysholm still had the men in sight when officers in a nearby squad car apprehended the men and arrested them.

The men were identified as Maull, Kenneth Johnson, Giorgio Tyler, and Darail Murphy. During the arrest, the officers discovered identification cards and credit cards on the ground between Johnson and Murphy, who were standing near the back of a squad car. Maull was seated in a squad car when B.A. approached. B.A. identified the cards as his and identified the men as the individuals who had robbed him. He asked Murphy and Johnson, who were still standing at the back of the squad car, "Why did you beat me?

Why did you take my things?" None of the men responded. The officers found B.A.'s cell phone on a nearby window ledge and recovered from Tyler cash in the denominations that B.A. had reported were stolen from him.

Maull was charged with first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subd. 1 (2008). He was tried with Johnson, who was similarly charged. At trial, over Maull's objection, the district court admitted a photograph of Maull taken at the scene of the arrest depicting the back of Maull's distinctive jacket as well as Maull's handcuffed hands. The district court also permitted, over Maull's objection, evidence of Maull's silence in the face of B.A.'s questions about why he had been beaten and robbed.

A jury found Maull (and Johnson) guilty as charged. Maull was ultimately sentenced to 58 months in prison, and this appeal followed, challenging the district court's evidentiary rulings.

D E C I S I O N

A. Standard of review

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). If an evidentiary ruling involves constitutional error, the reviewing court examines whether the error was harmless beyond a reasonable doubt. *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003).

B. Admission of photograph

Maull argues that admission of the photograph showing him in handcuffs was prejudicial, but the relevant consideration is whether the photograph was *unfairly* prejudicial, such that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. Maull bases his argument on caselaw that discourages the use of restraints on a defendant in the courtroom and the admission of mug shots as evidence. *See State v. McAdoo*, 330 N.W.2d 104, 107 (Minn. 1983) (stating that the main reason to generally exclude police identification photographs is that the jury may infer that the defendant has engaged in prior criminal conduct); *State v. Klinkert*, 271 Minn. 548, 549, 136 N.W.2d 399, 400 (1965) (observing that appropriate steps should be taken to minimize the jury's exposure to the defendant in handcuffs, including removing the handcuffs before the defendant enters the courtroom); *State v. Lehman*, 749 N.W.2d 76, 84-85 (Minn. App. 2008) (holding that "requiring a defendant to wear jail clothes in open court is a due-process violation"), *review denied* (Minn. Aug. 5, 2008).

But the Minnesota Supreme Court has recognized that a defendant's appearance in restraints inside the courtroom is distinguishable from an appearance in restraints in transit to or from a courtroom, which a jury would interpret as "standard law enforcement practice." *State v. Hull*, 788 N.W.2d 91, 105 (Minn. 2010) (citing *State v. Shoen*, 598 N.W.2d 370, 378 (Minn. 1999)). In *McAdoo*, the Minnesota Supreme Court upheld the admission of police identification photographs because the probative value of the photographs was not substantially outweighed by the potential for unfair prejudice in the

circumstances of that case. 330 N.W.2d at 107. And in *State v. Bobo*, this court held that the appellant failed to establish that a mug shot was unfairly prejudicial because the jury was likely to infer that the photograph was taken in connection with the offense for which the defendant was being tried. 414 N.W.2d 490, 493 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987). Additionally, we recently rejected the argument of Maull's codefendant Johnson that admission of photographs of Johnson and the other individuals arrested, including Maull, in handcuffs was more prejudicial than probative under Minn. R. Evid.403. *State v. Johnson*, 811 N.W.2d 136,148-49 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). Noting that the jury had been informed that Johnson was arrested and the record was clear that the photographs were taken at the time of arrest, we concluded that "[t]he jury could assume that Johnson would be in handcuffs as part of 'standard law enforcement practice.'" *Id.* at 148 (quoting *Hull*, 788 N.W.2d at 105). We found that the photographs were probative of identification given the descriptions by B.A. and Lysholm of the men and their jackets, and the probative value of the photographs outweighed any prejudicial effect. *Id.* The same analysis applies to Maull's challenge to the admission of his photograph. We conclude that the district court did not abuse its discretion in admitting the photograph.

C. Admission of silence in the face of the victim's accusations

Maull argues that, by permitting the state to present evidence of his postarrest, pre-*Miranda* silence in response to B.A.'s spontaneous accusatory questions, the district court violated his constitutional right to remain silent. We addressed the identical argument for the first time in *Johnson*. Adopting the reasoning of *United States v. Frazier*, 408 F.3d

1102, 1111 (8th Cir. 2005) (holding that the use of postarrest, pre-*Miranda* silence does not violate a defendant's Fifth Amendment right when there is no governmental action inducing the silence, and noting that "an arrest by itself is not governmental action that implicitly induces a defendant to remain silent"), we held that because "Johnson remained silent in response to B.A.'s questions, questions not posed by the government," and "he was under no government-imposed compulsion to speak at the time of his silence . . . . Johnson's silence did not implicate the Fifth Amendment." *Johnson*, 811 N.W.2d at 148. *Johnson* is controlling in this case, therefore Maull's silence in response to B.A.'s questions did not implicate the Fifth Amendment.

"[I]f a defendant's silence is not in response to a choice compelled by the government to speak or remain silent, then testimony about the defendant's silence presents 'a routine evidentiary question that turns on the probative significance of that evidence.'" *State v. Borg*, 806 N.W.2d 535, 543 (quoting *Jenkins v. Anderson*, 447 U.S. 231, 244, 100 S. Ct. 2124, 2132 (1980) (Stevens, J., concurring)). In *Johnson*, this court determined that Johnson's silence was admissible under Minn. R. Evid. 402 because a defendant's silence in the face of a direct accusation permits an inference that the accused acquiesced in the statement and admitted its truth. 811 N.W.2d at 148 (citing *State v. Patterson*, 587 N.W.2d 45, 52 (Minn. 1998)). Likewise Maull's silence is admissible because it permits an inference that he acquiesced in the victim's accusatory questions and admitted their truth. *See* Minn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence."), Minn. R. Evid. 402 ("All relevant evidence is admissible."). The district court did not abuse its discretion by admitting the testimony from Lysholm that the suspects did not respond to B.A.'s questions.

Affirmed.