STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0627

State of Minnesota,
Respondent,

vs.

Lavel Montae Tyler,
Appellant.

Filed March 25, 2013
Reversed and remanded
Stauber, Judge

Hennepin County District Court
File No. 27CR0925717

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

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

David W. Merchant, Chief Appellate Public Defender, Cathryn Young Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

On appeal from his retrial after remand, appellant argues that the district court was precluded from reconsidering its prior ruling excluding out-of-court identifications by

two witnesses and committed reversible error by admitting the results of an unfairly suggestive show-up procedure and allowing a witness to make an in-court identification. Because the show-up procedure was unnecessarily suggestive and gave rise to a very substantial likelihood of irreparable misidentification, we reverse appellant's convictions and remand for a new trial.

FACTS

In the early-morning hours of May 21, 2009, police received a report of a home invasion. Upon arrival, police met with S.P., who stated that she and her husband D.A. had been in bed with their infant child when they heard loud bangs coming from the front door. S.P. went to investigate and was met by two or three men wearing hooded sweatshirts and bandanas over their faces and armed with handguns. She ran to a bathroom and shut the door, and observed one of the men pistol-whip D.A. S.P. broke a bathroom window and ran from the house for help. Police established a perimeter and interviewed D.A., who confirmed S.P.'s story. D.A. was also able to give descriptions of the masked men and the weapon used.

Approximately 15 minutes after the reported home invasion, police responded to a suspicious-person report in a nearby area. Officers observed two African-American males who met the physical descriptions given by D.A. One of the men was appellant Lavel Montae Tyler. Officers observed appellant drop a backpack and walk away from it; upon searching the backpack, police found a semiautomatic handgun, a black glove, and personal property belonging to the occupants of the home.

Police arrested appellant and the other man and brought each to the scene of the home invasion for identification. Appellant and the other man were shown individually, flanked by uniformed police officers, illuminated by squad-car spotlights, and handcuffed. S.P. stated that she was 70% sure that appellant was the gunman who assaulted D.A.

Appellant was charged with one count of aiding and abetting first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2008); one count of aiding and abetting first-degree burglary (dangerous weapon) in violation of Minn. Stat. § 609.582, subd. 1(b) (2008); one count of aiding and abetting first-degree burglary (assault) in violation of Minn. Stat. § 609.582, subd. 1(c) (2008); and one count of aiding and abetting second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2008).[1] The complaint was later amended to include an additional count of aiding and abetting second-degree assault.

Appellant moved to suppress the results of the show-up procedure and any subsequent in-court identifications. At the hearing on the motion, officers testified that while appellant may have worn a sweatshirt during the show-up, it was not worn until after D.A. had identified the men. The district court initially denied appellant's suppression motion, and the matter proceeded to a bench trial. At trial, however, evidence was presented that the witnesses were not asked to identify appellant until after appellant was wearing the brown-hooded sweatshirt and blue bandana. This evidence had not been before the court at the time it denied appellant's motion, and the district

[1] The state dismissed the first-degree-assault charge at the close of its case-in-chief.

court therefore reconsidered the motion and "exclude[d] from its consideration evidence of any out-of-court identifications" made by the witnesses. The district court found appellant guilty on all remaining counts and imposed sentence.

Appellant appealed, arguing that the district court committed plain error by not ruling on his motion for judgment of acquittal. We agreed, reversed appellant's convictions, and remanded for a new trial. *State v. Tyler*, 2011 WL 2518918 (Minn. App. June 27, 2011), *review denied* (Minn. Sept. 20, 2011).

On remand, the district court again reconsidered the suppression of the identifications, and ruled that the identifications were admissible. Following a jury trial, appellant was found guilty on all remaining counts and the same sentence was imposed as before the remand. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court's reconsideration of its suppression of the identifications violated the scope of remand we articulated in *Tyler*, 2011 WL 2518918, at *3. "[D]istrict courts are given broad discretion to determine how to proceed on remand, as they may act in any way not inconsistent with the remand instructions provided." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). "We review a district court's compliance with remand instructions for an abuse of discretion." *State v. Montermini*, 819 N.W.2d 447, 454 (Minn. App. 2012).[2]

[2] Appellant argues for de novo review, suggesting that "[w]hether the [district] court exceeded the mandate of the court of appeals on remand is a question of law." In support

In *Tyler*, we noted that "[a] district court is free to reconsider its pretrial [rulings]" and therefore "before any retrial, the parties should be allowed to seek reconsideration of the district court's rulings on the suppression issues." 2011 WL 2518918, at *3. Because our remand instructions specifically state that the *parties* are allowed to seek reconsideration of the district court's *rulings* on the suppression *issues*, the district court did not abuse its discretion in reconsidering its ruling on the suppression of the out-of-court identifications following remand.

Appellant also argues that because the out-of-court identifications were not at issue in the direct appeal, the law-of-the-case doctrine precluded the district court from reconsidering its decision on the suppression of those identifications. This argument is similarly unavailing. The law-of-the-case doctrine "ordinarily applies where an appellate court has ruled on a legal issue and has remanded the case to the lower court for further proceedings." *Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994). The doctrine operates to preclude an issue determined in an appeal from being relitigated in the district court or reexamined in a subsequent appeal. *State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007).

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of this assertion, he relies on our decision in *Alpha Real Estate Co. v. Delta Dental Plan*, 671 N.W.2d 213, 217 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). Such reliance is misplaced. In *Alpha Real Estate*, we considered a challenge to the contract clause as violating anti-kickback, conflict-of-interest, or fee-splitting-prohibition statutes. 671 N.W.2d at 216. Commenting that the appellant had not moved for a new trial, but that such motions are not a prerequisite for appellate review of substantive questions of law, we noted that an appellate court reviews questions of law de novo. *Id.* at 216-17. Nothing in *Alpha Real Estate*, however, stands for the proposition that whether a district court has complied with an appellate court's remand instruction is a question of law necessitating a de novo standard of review.

We did not rule on the suppression issue in the first appeal, the law-of-the-case doctrine did not preclude the district court from reconsidering the issue.

II.

"[W]e review de novo whether a defendant has been denied due process." *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). "The admission of pretrial-identification evidence violates due process if the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 83-84. (quotation omitted). When reviewing a challenge to a pretrial identification, appellate courts apply a two-part test: (1) was the identification procedure unnecessarily suggestive and (2) if so, did the identification create "a very substantial likelihood of irreparable misidentification" under the totality of the circumstances. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995).

Appellant argues that the show-up procedure—in which he and a co-defendant were presented to a witness while handcuffed, flanked by police officers, illuminated by squad-car lights, with police officers holding up a bandana and hooded sweatshirt—was unconstitutionally suggestive. The supreme court's holding in *State v. Taylor*, 594 N.W.2d 158 (Minn. 1999), is instructive. In dictum, the supreme court stated that a one-person show-up is unnecessarily suggestive if the police single out a suspect from the general population based on a victim's description and present the suspect in handcuffs to the victim for identification. *Taylor*, 594 N.W.2d at 162. Here, the police singled out appellant based on the eyewitness' description and a suspicious-person report, brought appellant back to the scene in a squad car, presented appellant in handcuffs, flanked by

uniformed police officers, and then asked the eyewitness for identification. We conclude that this procedure was unnecessarily suggestive.[3] *See State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (conducting similar analysis).

An unnecessarily suggestive identification procedure does not preclude admission of the identification testimony unless there is a substantial likelihood of irreparable misidentification. *Taylor*, 594 N.W.2d at 161. "While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 381 (1972) (citation omitted). An appellate court evaluates whether the identification was reliable despite the suggestive procedure by looking at the totality of the circumstances and considering the following five factors:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness's degree of attention;
3. The accuracy of the witness's prior description of the criminal;
4. The level of certainty demonstrated by the witness at the confrontation; and
5. The time between the crime and the confrontation.

[3] It is ambiguous from the transcript whether police held a hooded sweatshirt up in front of appellant or whether the sweatshirt was put on appellant during the show-up procedure. It also appears from the transcript that police may have put a blue bandana over appellant's face during the show-up. While these actions may have heightened the unnecessary suggestiveness of the show-up, we conclude that the procedure used by the police was unnecessarily suggestive even without the use of the sweatshirt and the bandana.

Ostrem, 535 N.W.2d at 921. A witness's identification is considered reliable despite a suggestive nature if the totality of the circumstances demonstrates that the identification has an adequate independent origin. *Id.*

Here, neither D.A. nor S.P. was able to view the burglars' faces during the crime, as the men wore bandanas over their faces. As noted by appellant, the victim's statements regarding the men's eye shape and hair were also inconsistent, with S.P. first identifying appellant as the gunman by his almond-shaped eyes and hair, then identifying the other man as the gunman during the first trial. During the second trial, S.P. identified appellant as the unarmed burglar, but D.A. was unable to make an in-court identification of appellant. The witnesses were also only 70% sure that appellant was involved in the burglary. Based on the totality of the circumstances, the state has not met its burden of proving that the unnecessarily suggestive procedure did not create a very substantial likelihood of misidentification. The admission of the out-of-court identifications therefore violated appellant's due process. *See Hooks*, 752 N.W.2d at 83. And because S.P.'s in-court identification followed this unnecessarily suggestive show-up procedure that created a very substantial likelihood of misidentification, we hold that the district court erred by allowing her in-court-identification testimony.

When a constitutional error occurs at trial, a new trial is required unless the state can prove beyond a reasonable doubt that the verdict is surely unattributable to the error. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). The state suggests that any error in the identification procedure was harmless based on the evidence found in appellant's bag. But the inquiry is not "whether a jury would have convicted the defendant without the

error, [but] rather . . . whether the error reasonably could have impacted upon the jury's decision." *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (quotation omitted); *see also State v. Koppi*, 798 N.W.2d 358, 365-66 (Minn. 2011) (holding that constitutional error is not harmless simply because the evidence is otherwise sufficient to support a jury's verdict). Here, the evidence does not so overwhelmingly point to guilt—especially in light of D.A.'s inability to make an in-court identification of appellant—that it can be said that the out-of-court identification reasonably could not have impacted the jury's decision. The error was therefore not harmless, and a new trial is required. We therefore reverse appellant's convictions and remand the matter for a new trial not inconsistent with this opinion.

III.

Appellant also argues in his pro se supplemental brief that the district court erred by not making specific findings regarding whether the testimony from the two trials was inconsistent. Because we reverse appellant's convictions and remand for a new trial due to the district court's admission of the out-of-court identification, we do not address appellant's pro se argument.

Reversed and remanded.