

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
December 26, 2013

v

WILLIE HUDSON KELLAM, JR.,

Defendant-Appellee.

No. 311855
Oakland Circuit Court
LC No. 2012-239747-FC

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

In this case arising from a shooting and robbery, the prosecution appeals of right the trial court's order dismissing the charges against defendant Willie Hudson Kellam, Jr. The trial court dismissed the charges after it determined that the only evidence tying Kellam to the shooting and robbery—Roderick Amerson's identification of Kellam—had to be suppressed. We conclude that the trial court erred when it applied an expansive rule of exclusion for suggestive identifications. Due process does not require the suppression of every identification that has been made under suggestive circumstances; rather, a trial court should only suppress a witness' identification when law enforcement officers arranged the suggestive conditions that led to the identification. The record demonstrates that the law enforcement personnel involved here did not arrange the suggestive conditions that preceded Amerson's identification. Accordingly, the trial court could not properly suppress Amerson's identification on that basis; whether Amerson's identification was credible was a matter to be determined by a jury. For these reasons, we reverse the trial court's decision to suppress the identification, vacate its order suppressing Amerson's identification and dismissing the charges against Kellam, and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

In January 2012, Amerson testified at Kellam's preliminary examination. He stated that he had met a woman, LaQuinta Humphrey, a few times prior to the incident in May 2011. On the day at issue, Humphrey called him and asked him to come meet her. Amerson left to pick up Humphrey at her home; it was around 10:30 or 10:45 at night. Amerson said he saw Humphrey walking and stopped his van to pick her up. He parked near an intersection and they began to talk.

While Amerson was facing Humphrey, someone approached his side of the van: “the guy comes from out of nowhere and bust[s] my window and he’s hollering and he shoots me in the chest.” The bullet entered on his left and passed out the right side. Amerson said he was in a “daze” after the shot, but remembered “fighting with him.” Humphrey ran around to the other side of the van and “they both was trying to pull me down to the ground.” He started to lose his strength “because I was bleeding so much . . .” The man grabbed his wallet from his back pocket. The man and Humphrey ran to a nearby car and “they pulled off.” Amerson stated that he then drove to his mother’s home, which was nearby, and she drove him to the hospital.

Amerson testified that he identified Humphrey in a photo lineup shortly after the shooting, but was not able to identify Kellam from a photo lineup. He nevertheless identified Kellam as the man who shot him. On cross examination, Amerson admitted that he first identified Kellam as the shooter at Humphrey’s preliminary examination.

Amerson said he attended Humphrey’s preliminary examination along with his mother. The prosecutor, Robert Novy, approached him and “told me to walk around” the courthouse and see if he recognized the man who shot him. He walked out into the hallway on the second floor with his mother and saw Humphrey at a distance with a man, but did not recognize the man as the shooter at that time. However, after he “walked downstairs and came back up,” he took a closer look at the man with Humphrey and realized “that was the guy who shot me.” Amerson also recognized the hoodie that Kellam was wearing at the preliminary examination as the same hoodie that Kellam wore on the night in question.

Amerson admitted that Kellam was the only black man on the second floor and that Kellam was standing next to Humphrey. But he did not know at the time that Humphrey was married to Kellam. He also was not accompanied by a police officer and he denied that anyone told him to look at Kellam; he said he took a closer look at Kellam because he “wanted to be for sure.”

After cross-examining Amerson, Kellam’s lawyer called Amerson’s mother, Maurice Woods, to testify about the circumstances surrounding Amerson’s identification. Woods testified that she attended Humphrey’s preliminary examination with her son. She was waiting for the examination to begin when Novy called her over and told her “that he thought maybe the person who had shot my son may be in the courthouse.” Novy asked her to get her son and “go look around to see if he could identify anyone.” So she did.

She walked out into the hallway with her son; there were two people “over in the right hand corner” and a Caucasian male near the window. The only black man was the man talking to a black woman. She later learned that the black woman was Humphrey—the woman involved in the shooting. Woods told her son “let’s walk downstairs” because she did not know where the person might be. She walked downstairs with her son and told him to “just look around to see if he could identify anyone.” There were other black men downstairs, but she did not recall how many. Ultimately, her son identified the black man standing with Humphrey as the man who shot him.

At the conclusion of the preliminary examination, Kellam's lawyer argued that Amerson's identification was tainted and should not be considered. For that reason, she asked the district court to dismiss the charges against Kellam.

The district court determined that any problem with Amerson's identification was a matter for the circuit court. As such, it concluded that there was probable cause to support six charges against Kellam: armed robbery, MCL 750.529, assault with the intent to commit murder, MCL 750.83, possession of a firearm while ineligible to do so (felon in possession), MCL 750.224f, and one count of possessing or carrying a firearm during the commission of a felony (felony firearm) for each of the first three counts, see MCL 750.227b.

Kellam's lawyer later moved to suppress Amerson's identification. The circuit court held a hearing on the motion in May 2012.

Amerson again testified about the events involved in his shooting. He also related how he came to identify Kellam at Humphrey's preliminary examination. He stated that his mother came up to him and asked him to walk around the courthouse and see if the individual who shot him was there. They walked upstairs, went downstairs, "walked around, looked at [a] few guys up close, then walked up and I seen him—I looked at him up close and I—I knew that was the guy who shot me."

Amerson admitted that the prosecutor—Novy—was the one who suggested that he walk around, but denied that Novy told him that the man who shot him was definitely in the courthouse. Instead, he told him "just to walk around and see if I see anybody that—that I recognize that was there that night that shot me." So he went to both the first floor and the second floor of the courthouse and "looked around the hallways, looked at all the guys downstairs and upstairs."

Amerson said that he did not recall any police officers ever talking to him about possible suspects. He also said that only his mother accompanied him on the walk—neither a police officer nor a prosecutor was with him. Amerson saw Kellam with Humphrey when he first left the courtroom, but did not immediately walk back into the courtroom and identify Kellam as the man. He went downstairs and looked at a few men. When he returned to the second floor, he "got a good look" at Kellam; he "walked up close just to make sure that that was the guy, because I didn't want to identify the wrong guy, but I knew that was the guy when I looked in his eyes."

Novy also testified at the hearing. He said that he saw a black man talking with Humphrey by a window at Humphrey's preliminary examination, but did not know if the man was the other suspect—Kellam—in Amerson's shooting. He went to the conference room where several officers were waiting and inquired about the man's identity. An officer went to the second floor where Humphrey was talking with the man and returned; the officer verified that the man with Humphrey was Kellam.

Novy then approached Woods: “What I indicated to her was the person that shot your son may or may not be in the courthouse. I would like you to go back into the courtroom, take your son and go through the courthouse and see if he recognizes anyone.” He did not speak directly with Amerson and did not accompany them on their walk. After 10 or 20 minutes, Amerson returned and told Novy that he recognized “the individual” who shot him. Novy then proceeded with Humphrey’s preliminary examination. When he had Amerson on the stand, he asked him if he would recognize the man who shot him and Amerson “indicated the person that shot me is over to the right in the back portion of the courtroom, and he identified [Kellam] as the person that shot him.”

After hearing the evidence, the trial court first considered whether there was “any state action” involved in Amerson’s identification of Kellam at Humphrey’s preliminary examination. It stated that it did not “believe that the prosecutor was involved in putting together an identification or setting the stage, so to say, for the identification.” The court explained: “the prosecutor had no involvement in Defendant Kellam being at the courthouse, . . . had no involvement with Defendant Kellam being with the co-Defendant Humphrey, and the prosecutor had no involvement in the makeup of the people in the courthouse at the time” Despite these findings, the court found that the “prosecutor did have a hand in orchestrating the identification.” Specifically, the prosecutor took “it upon himself to go to the victim’s mother, inform the mother that the man who shot her son may or may not be in the courthouse, and to tell her son to take a look around” This, the court reasoned, showed that the prosecutor had “a hand in setting the identification up, although he did not have a hand in setting up the circumstances” of the identification.

After determining that there was state action on that basis, the trial court then examined whether the circumstances surrounding Amerson’s identification were “unduly suggestive.” The court found that the circumstances were unduly suggestive because Kellam was the only black man on the second floor and was with Humphrey, who was the only other person involved in the shooting. “All that information taken together,” the court thought, made this an “unduly suggestive” identification. Finally, the trial court found that Amerson did not have a sufficiently independent basis for his identification that would permit him to identify Kellam as the man who shot him. For these reasons, the circuit court concluded that Amerson’s identification had to be suppressed and because Amerson’s identification was the only evidence linking Kellam to the shooting, the court also determined that it had to dismiss the charges against Kellam.

The circuit court entered an order granting Kellam’s motion to suppress Amerson’s identification on August 9, 2012. In that same order, the trial court additionally ordered the charges against Kellam to be dismissed without prejudice.

The prosecution now appeals to this Court.

II. DUE PROCESS AND IDENTIFICATION

A. STANDARDS OF REVIEW

Whether a pretrial identification violated a defendant's right to due process of law is a mixed question of fact and law. *Sumner v Mata*, 455 US 591, 597; 102 S Ct 1303; 71 L Ed 2d 480 (1982). This Court reviews de novo whether the trial court properly applied the constitutional standard to the facts. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). However, this Court reviews the factual findings underlying the trial court's decision for clear error. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

B. IDENTIFICATIONS AND DUE PROCESS

Whether evidence may properly be admitted at trial is ordinarily governed by Michigan law. *Perry v New Hampshire*, 565 US ___; 132 S Ct 716, 723; 181 L Ed 2d 694 (2012). The United States Supreme Court has, nevertheless, recognized that evidence may be barred under the Due Process Clause of the United States Constitution when the evidence is so "extremely unfair" that its admission would violate "fundamental conceptions of justice." *Id.*, quoting *Dowling v United States*, 493 US 342, 352; 110 S Ct 668; 107 L Ed 2d 708 (1990). While every case "must be considered on its own facts," courts must suppress a witness' identification when made under a procedure that "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). A procedure is impermissibly suggestive when "law enforcement officers use an identification procedure that is *both* suggestive and unnecessary." *Perry*, 132 S Ct at 724 (emphasis added). Even when a witness' identification involved an impermissibly suggestive procedure, there is no rule of automatic exclusion. *Manson v Braithwaite*, 432 US 98, 112-114; 97 S Ct 2243; 53 L Ed 2d 140 (1977). Instead, the identification evidence may be submitted to the jury if, under the totality of the circumstances, the witness' ability to make an accurate identification were not "outweighed by the corrupting effect of the challenged identification itself." *Id.* at 116. To determine whether the witness' identification was sufficiently reliable, courts must weigh the "corrupting effect of the suggestive identification" against the factors set out in *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 401 (1972). See *Braithwaite*, 432 US at 114.

The "primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place." *Perry*, 132 S Ct at 726, citing *Braithwaite*, 432 US at 112. That is, the due process check on eyewitness testimony does not arise from a "suspicion of eyewitness testimony generally," but rather serves to deter "improper police arrangement of the circumstances surrounding an identification." *Perry*, 132 S Ct at 726. When a witness' identification does not involve improper law enforcement conduct, the identification does not implicate due process even though the witness may have been influenced by externally suggestive factors. *Id.* at 727 (stating that the expansion of the due process check to include all external influences would "open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications" and concluding that such a rule lacks support in the case law). Accordingly, as a threshold matter, before a trial court may exclude an identification under due process it must first determine whether the witness' identification involved improper

law enforcement conduct: “The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.” *Id.* at 728. In the absence of state misconduct, the witness’ testimony is a normally a matter for the jury subject to the safeguards built into our adversarial system. *Id.* at 728-729 (recognizing that the reliability of evidence is generally a matter for the jury and discussing the safeguards that are built into the adversarial system to ensure that a jury’s assessment of such evidence is fair).

C. ANALYSIS

Here, the trial court found that the prosecutor did not orchestrate the conditions surrounding Amerson’s identification; it found that “the prosecutor had no involvement in Defendant Kellam being at the courthouse, . . . had no involvement with Defendant Kellam being with the co-Defendant Humphrey, and the prosecutor had no involvement in the makeup of the people in the courthouse at the time” Notwithstanding these findings, the trial court determined that it had to suppress Amerson’s suggestive identification because Amerson would not have walked the courthouse had the prosecutor not asked him to do so. That is, the trial court operated under the assumption that any state action automatically implicates due process no matter how tenuous the connection between the state action and the suggestive identification. However, as the Supreme Court explained at length in *Perry*, not every suggestive identification implicates due process; rather, a trial court should only suppress an eyewitness’ identification when law enforcement *arranged* the suggestive circumstances involved in the identification and the suggestive circumstances were unnecessary. *Perry*, 132 S Ct at 726 (stating that due process is only implicated when law enforcement officers improperly arranged the “circumstances surrounding” the suggestive and unnecessary identification).

In *Perry*, a witness called the police department and reported seeing a man trying to break into cars parked in the parking lot to the witness’ apartment building. *Id.* at 721. A police officer soon arrived and discovered Barion Perry in the lot holding two car-stereo amplifiers. *Id.* While that officer was questioning Perry, another officer arrived. The first officer asked Perry to stay in the parking lot with the newly arrived officer. *Id.* The first officer then went to the complaining witness’ fourth-floor apartment. *Id.* The officer asked the complaining witness’ wife for a description of the man that she saw and she pointed out her window and stated that the man was standing in the parking lot next to a police officer. *Id.* at 721-722. Because the police officers did not arrange the circumstances surrounding the identification, the Supreme Court concluded that the trial court did not err when it refused to make a preliminary judicial assessment of reliability under due process. *Id.* at 730. Similarly, the undisputed facts involved in this case show that the law enforcement did not arrange the suggestive circumstances surrounding Amerson’s identification.

The only involvement by law enforcement in the identification was the prosecutor’s statement to Amerson that the person who shot him “may or may not” be in the courthouse and his request that Amerson walk the courthouse to see if he could recognize anyone. Amerson agreed that the prosecutor prompted him to walk the courthouse to see if he recognized anyone, but testified that he did not walk with a police officer or the prosecutor; instead, he walked with his mother. He also testified that no one told him specifically to look at Kellam and he had no prior knowledge that Kellam had a relationship with Humphrey. And, although he saw Kellam

with Humphrey when he first exited the courtroom, he did not immediately identify him as the man who shot him. Instead, as Woods testified at the preliminary examination, she and Amerson went downstairs and walked the courthouse because they did not know where the person might be. Amerson did not finally identify Kellam as the man who shot him until after he returned to the second floor and got a closer look at him.

The evidence showed that the prosecutor knew that Kellam was in the courthouse and that he was with Humphrey shortly before he asked Amerson to walk the courthouse. However, as the trial court found, the prosecutor did not arrange for Kellam to be at the courthouse and did not arrange for him to stand with Humphrey. Moreover, there was no guaranty that Kellam would remain with Humphrey long enough for Amerson to encounter him once he began to walk the courthouse. Kellam could have left Humphrey's side at any time for any reason. Indeed, there was no guaranty that Kellam would even remain in the courthouse. Accordingly, as the trial court found, the prosecutor did not and could not have arranged this circumstance. The fact that Kellam was with Humphrey and remained with her throughout Amerson's walk was merely fortuitous.

The undisputed evidence also showed that the prosecutor told Amerson—directly or indirectly—that the man “may or may not” be in the courthouse and that Amerson had no prior knowledge that Kellam was the man that law enforcement suspected as having been involved in the shooting and robbery.¹ Thus, there is no evidence that law enforcement suggested that any particular person within the courthouse was the person they believed was involved. Similarly, although the testimony showed that there were only a few African-American men in the courthouse, there was no evidence that law enforcement orchestrated the racial makeup of the persons present in the courthouse. Even though Kellam was standing with Humphrey and was the only African-American man on the second floor when Amerson left the courtroom, Amerson testified that he did not immediately recognize him as the man who shot him. For that reason, he walked downstairs and took a look at other men. It was only after returning to the second floor and getting a close look at Kellam that he became certain that Kellam was the man involved in the shooting. Under these facts, any connection between the state's action and the circumstances actually giving rise to the suggestive identification was too tenuous to implicate due process—the prosecutor's decision to ask Amerson to walk around the courthouse and see if he recognized anyone simply did not amount to arranging the circumstances which tended to suggest a particular identification. See *Perry*, 132 S Ct at 724-730.

¹ The trial court found that a detective told Amerson that Humphrey's boyfriend was a suspect. However, there was no testimony or evidence to support that finding. Therefore, we are left with the definite and firm conviction that the trial court erred when it made that finding. *Farrow*, 461 Mich at 209.

Once the trial court found that Amerson's identification did not involve improper conduct by law enforcement, it should have ended its inquiry and denied Kellam's motion. Because law enforcement did not arrange the suggestive circumstances surrounding Amerson's identification, the fact that his identification might be unreliable was a matter for the jury subject only to the safeguards built into our adversarial system. *Id.* at 728-729.

III. CONCLUSION

The trial court erred as a matter of law when it determined that it must examine whether Amerson's identification was unduly suggestive even though law enforcement officers were not involved in the arrangement of the circumstances surrounding the identification. Where law enforcement did not arrange the suggestive circumstances, there is no due process violation and any deficiencies in the eyewitness' identification are matters of credibility for the jury. *Id.* For these reasons, we reverse the trial court's decision to suppress Amerson's identification, vacate its order suppressing Amerson's identification and dismissing the charges against Kellam, and remand for further proceedings consistent with this opinion.

Reversed, vacated, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly