STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0758

State of Minnesota,
Respondent,

vs.

DeAngelo Terrell Davis,
Appellant.

Filed May 28, 2019
Affirmed
Jesson, Judge

St. Louis County District Court
File No. 69DU-CR-2699

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Mark Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Peterson, 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

JESSON, Judge

During pretrial identification show-up procedures, two eyewitnesses identified appellant DeAngelo Terrell Davis as the person who threatened them with a gun. Davis asserts the procedures were unnecessarily suggestive and therefore challenges the district court's denial of his motion to suppress the pretrial identification evidence. Davis further challenges the district court's denial of his request for an eyewitness-identification jury instruction regarding the impact of race and the presence of a weapon on the reliability of eyewitness identification. Because the district court acted within its discretion, we affirm.

FACTS

In July 2016, a fight broke out in the alley behind a house in Duluth. The fight was broken up by two people, including A.B. According to A.B., one of the adult females involved in the fight was named Hope. Shortly after the fight ended, two people stopped by and spoke with A.B. and T.J. (a resident of the house) on the sidewalk on the opposite side of the street. During their conversation, they saw a car approach the house and stop briefly. Then, after driving around the block, the car stopped in the middle of the street in front of the house.

The driver of the car pointed an assault rifle through the open driver's side window at the group, including A.B. and T.J. With his finger on the trigger, the male driver repeatedly asked "who has my girl's sh-t?" and "who touched my girl?" In response to the questions, A.B. asked who his girl was. The male responded, "Hope." At this point, A.B. hid behind a vehicle and T.J. went into the house and told his roommate that someone was

outside with an assault rifle with a red dot sight on top.[1] The roommate called 911. Police were dispatched to the address.

While T.J. remained inside the house, the driver got out of the car and continued to ask about his girl's "sh-t." A.B. took note of the driver and the car, although he was also focused on the gun. After the driver got in his car and left, A.B. wrote down the car's license plate number.

When police officers arrived, an officer interviewed T.J., who described the driver as a black male, 5'8" or 5'9" tall, in his early 20s with short black hair, no facial hair and an average or muscular build. And he described the car as a "silver Mercedes-Benz or looks like it was that type" of car. But he testified that he was not good with cars.[2] T.J. also stated that the gun pointed at him was black, approximately three feet long, with a clip, and a red scope or laser sight.

While T.J. was being interviewed, another officer interviewed A.B., who stated that the car was a bronze Cadillac DeVille. And A.B. gave the officer the car's license plate number. A.B. described the driver as a "[b]lack dude, his hair's probably about an inch and a half off his head." But A.B. had difficulty judging the black male's age, stating he was "[m]id 20s, maybe. I don't know, man. It's hard to judge black people because they—they say black don't crack, so you can be thinking that somebody's 30 and they're 60." During the officer's interview with A.B., another eyewitness approached and asked,

[1] T.J. said he was familiar with guns from playing the video game Call of Duty.

[2] While T.J. was speaking with an officer, a woman approached T.J. and inserted herself into the conversation stating that the car was a bronze Cadillac DeVille. After T.J. was asked to describe the color of the car, he stated it was a "really light brown."

"[i]sn't this him, [A.B.]?" and showed him a picture of the Facebook profile of "Da King Davis" on her cell phone. A.B. responded, "[y]eah, that's him. That's him."[3]

Looking up the license plate number, provided by A.B., police discovered it was registered to a gold Cadillac DeVille, owned by a female, who resided in an apartment building in a different area of Duluth. Police drove to that address to look for the car, which was found in an alleyway less than one block from the registered owner's address. The car's driver's side door was open and the engine was warm. Officers then observed two adults, one later identified as appellant DeAngelo Terrell Davis, and a child, leaving the registered owner's address. The registered owner was Davis's former girlfriend.

When asked about the car, Davis stated he has a Cadillac, but that he does not drive it because it is under repair in the alley. Davis insisted that the car door should not be open, nor should the engine be warm, because the car had been parked in the alley all day. And when the officers asked Davis where he had been that day, he said he had not left the house, but later changed his story, stating that he took his son to a restaurant that afternoon. Around this point Davis became the primary suspect in the alleged crime and was detained by officers.

Police officers separately drove T.J. and A.B. to the address where Davis was located to conduct a show-up identification procedure.[4] Prior to the show-up, officers read

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[3] A.B. also described the gun as a matte black "AR-15-type assault rifle" with a "reddish yellow" sight on top.

[4] A show-up is a "one-to-one confrontation between suspect and witness to crime. A type of pretrial identification procedure in which a suspect is confronted by or exposed to the victim or a witness to a crime." *State v. Taylor*, 594 N.W.2d 158, 159 n.1 (Minn. 1999) (quoting *Black's Law Dictionary* 962 (6th ed. 1990)).

a "show-up advisory" to the witnesses several times during the drive and each witness signed an advisory.[5]

On the way to the show-up, A.B. heard over the police radio where the show-up would take place, and commented, "[h]e made it all the way where? Probably out east Hillside or something, huh." And over the radio, an officer stated that they would clear cars out so as to not "taint" the ID. When A.B. arrived at the show-up, Davis was brought out. A.B. identified Davis as the person who pointed the gun at him, and stated with 100% certainty he was the suspect.

During the show-up procedure involving T.J., the officer advised T.J. that the suspect was standing next to an Asian officer. T.J. then identified Davis with 100% certainty, stating that he knew it was him because of his goatee.

During both show-ups, the witnesses remained in the car about 30 feet from where Davis was standing. Davis was not restrained or handcuffed, and he slowly spun around a few times as directed by nearby officers. The elapsed time from the alleged crime to the identifications was around 90 minutes.

Officers then executed a search warrant at his girlfriend's residence, where the officers found a loaded black rifle-type gun equipped with a scope, with the serial number scratched off under a mattress in the main bedroom. Investigators took samples, containing

[5] The advisory reads: "I, Officer _____, am going to show you a person who might or might not be the suspect in this incident. Do not assume the person is the suspect in this incident because they are in the presence of [l]aw [e]nforcement. Please consider that clothing may be different. It is OK if you don't recognize the person. If you are unsure, do not guess. If you recognize the person, tell me why or how you recognize him or her."

several DNA profiles, from both the rear and forward grips of the gun. Davis could not be excluded as a contributor. And the major DNA profile from the forward grip sample matched Davis.

After his arrest, Davis filed a motion to suppress the evidence of the victims' two positive identifications of him. He asserted that the procedure used by the police officers for pretrial identifications—the two show-ups—violated his constitutional due-process rights. The district court denied his motion, and the case proceeded to a jury trial.

Before trial, Davis requested a cautionary instruction on eyewitness reliability. Specifically, he requested that the standard jury instruction be amended to include a standard cautionary instruction relevant to cross-racial identifications and the presence of a gun. The district court denied Davis's requested cautionary instruction and gave the standard instruction instead.

At trial, both T.J. and A.B. testified, as well as several investigating officers and forensic scientists. Both parties introduced evidence of the pretrial identification procedures, either through testimony or body camera footage. The testimonies given by T.J. and A.B. were consistent with the above described statements. And Davis testified on his own behalf. He explained that he spent time with his son that day, and did not drive the Cadillac. Davis's former girlfriend also testified that Davis did not drive the Cadillac that day.

The jury found Davis guilty on two counts of assault and one count of possession of a firearm bearing a removed or altered serial number. Davis was sentenced to concurrent 36-month terms in prison. Davis appeals.

D E C I S I O N

Davis first argues that he is entitled to a new trial because the district court erroneously denied his motion to suppress a pretrial identification that was inherently suggestive. Second, Davis asserts that because the district court abused its discretion when it denied his requested eyewitness-identification jury instruction regarding the impact of race and the presence of a weapon on the reliability of eyewitness identification, he is entitled to a new trial. We address each argument in turn.

I. The district court did not abuse its discretion by denying Davis's motion to suppress the pretrial identification evidence.

Davis contends the impermissibly suggestive identification evidence rendered its introduction a violation of his due-process rights. He bases this claim on the facts that the police told both witnesses that the person they were to view was believed to be the suspect, that the nature of the show-up led witnesses to believe Davis was in custody because he was flanked by armed officers in uniform, moving and turning at their direction, and officers specifically pointed out Davis to both witnesses. This is particularly problematic because there was no pressing need for a show-up that day, Davis asserts, rather than a less-suggestive photographic line up.

Generally, evidentiary rulings rest within the sound discretion of the district court, and this court will not reverse those rulings absent a clear abuse of discretion. *State v. Griller*, 583 N.W.2d 736, 742-43 (Minn. 1998). When reviewing pretrial orders where facts are undisputed and the district court's decision is a question of law, we

independently review the facts and determine, as a matter of law, whether the evidence must be suppressed. *Taylor*, 594 N.W.2d at 161.

Our independent review of identification testimony is grounded by the critical question of reliability. *Id.* If the identification procedures the police used are tainted by suggestion, "the result may be irreparable misidentification." *Id.* To test the reliability of identification, we use a two-part test: (1) we first determine if the procedure was unnecessarily suggestive; and (2) if so, we determine, under the totality of the circumstances, if the "identification created a very substantial likelihood of irreparable misidentification." *Id.*

The first inquiry includes the pivotal question of whether the defendant was unfairly singled out for identification. *Id.* In *Taylor*, for example, even though the police conducted a one-person show-up by having the witness view the defendant as he was removed from a squad car in handcuffs, the court found the procedure was not impermissibly suggestive because he was not singled out based on a description, but because the witness already knew his nickname. *Id.* at 161, 162. Similarly here, Davis was not singled out based on his description. Although the witness descriptions from the scene were far from precise, Davis was singled out based on the license plate of the car observed by a witness at the crime scene. The car was registered to his former girlfriend and when police went to her apartment, they found the former girlfriend, Davis, and the child together. The car, still warm with its door open, was nearby.

This tie between Davis and the license plate of the car leads us to conclude he was not impermissibly singled out for a show-up. This conclusion is reinforced by our decision

in *State v. Nunn*. 399 N.W.2d 193 (Minn. App. 1987), *review denied* (Minn. Mar. 13, 1987). In *Nunn*, police suspected that the defendant was involved in a robbery after a witness gave a license plate number to the police, and the police located a car with that license plate number outside of a residence, which the defendant was seen leaving. *Id.* at 194. Within an hour of the robbery, police took the defendant back to the scene of the crime for a show-up procedure and two witnesses positively identified the defendant as one of the robbers. *Id.* at 195. Based on these facts—not dissimilar to those before us—we concluded the show-up was not impermissibly suggestive.[6] *Id.* at 196.

But even if the identification procedure here was impermissibly suggestive, we would turn to the second part of the two-prong test and assess whether, in light of the totality of the circumstances, the identification is reliable. *Taylor*, 594 N.W.2d at 161. In doing so we consider five factors: (1) the witness's opportunity 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 photo display; and (5) the time between the crime and the confrontation. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). We address each factor below.

First, the assault occurred during the middle of the afternoon on a sunny day, and both witnesses were able to get a "good look" at Davis's face. This weighs in favor of

[6] Based upon the facts before us, our decision on whether the show-up procedure was impermissibly suggestive is a close one. But ultimately, we conclude that the show-up was not impermissibly suggestive because of the license plate identification. Further, because Davis had already been identified by his Facebook picture, this process could be considered merely confirmatory. *Taylor*, 594 N.W.2d at 162.

finding the identifications reliable. Second, T.J. stated that he saw the man's face, but he was focused on the gun and scared for his life. He thought that the man was going to "put at least a clip in [him]" and he could see the man had his finger on the trigger of the gun. A.B. testified that because he had been robbed before, he knew to "look at [his] face, look at the gun" and to "make sure [he knew] the make, model, [and] year of the vehicle." More importantly, A.B. was able to accurately describe the vehicle and remember the license plate number. The second factor weighs for finding A.B.'s identification reliable, but slightly against T.J.'s identification.

Both witnesses provided accurate descriptions of Davis. T.J. described the man as being a black male, 5'8" or 5'9" in height, in his early 20s with really short black hair and an average or muscular build. A.B. provided the police with a similar description. T.J. made no mention of any facial hair, but later stated that he recognized Davis because of his goatee. And both T.J. and A.B. identified Davis with 100% certainty.[7] Initially, T.J. made no mention of any facial hair, but later stated that he recognized Davis because of his goatee. This slightly reduces the reliability of T.J.'s identification. But overall, based on the facts, the third and fourth factors weigh in favor of finding the identification of Davis reliable.

[7] Davis asserts that social science research has shown that there is no statistical relation between the accuracy of an identification and the witness's degree of certainty. *See, e.g.*, Steven D. Penrod & Brian L. Cutler, *Improving the Reliability of Eyewitness Identification*, 2 J. Psych. 281-90 (1988); Vicki L. Smith et al., *Eyewitness Accuracy and Confidence: Within-Versus Between-Subjects Correlations*, 74 J. Applied Psych. 356 (1989). We acknowledge this research regarding the reliability of a witness's certainty, but here, given the totality of the circumstances, we conclude the witnesses' identifications are reliable.

Finally, about 90 minutes passed between the crime and the show-up identification. While Davis argues that 90 minutes is an extended period of time, other cases have upheld identification evidence obtained after a longer period of time. *See id.* at 922 (48 hours); *State v. Lushenko*, 714 N.W.2d 729, 733 (Minn. App. 2006) (three hours), *review denied* (Minn. Dec. 12, 2006). The final factor weighs in favor of finding the identifications reliable.

Here, T.J. and A.B. had ample time to view Davis, described him to police and identified him with 100% certainty. Perhaps most importantly, A.B. accurately described the car and provided the officers with the license plate number. After analyzing all the factors, both identifications are also independently reliable and did not create a substantial likelihood of irreparable misidentification.

II. The district court did not abuse its discretion when it denied Davis's request for an eyewitness-identification jury instruction on cross-racial identifications and the presence of a gun.

Finally, Davis argues that the district court abused its discretion by declining to adopt his proposed jury instruction on eyewitness identification. Jury instructions are entrusted to the district court's discretion, and a district court's refusal to give a requested instruction will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

Davis requested that the jury instruction be amended to include the following additions, in bold, to the standard cautionary instruction on eyewitness testimony:

> Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In

> doing so, you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness's view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time **and whether the eyewitness saw a weapon and was distracted**, and the lapse of time between the alleged offense and the identification**, and whether the witness and defendant's difference of race affected the accuracy of the identification. You should also evaluate whether the procedures employed by law enforcement had an impact on the accuracy of the identification. It is your duty to evaluate not only the credibility of the witness, but also the accuracy of the identification.**

10 *Minnesota Practice* CRIMJIG 3.19 (2016). The district court declined to add this language, citing *State v. Thomas*, 890 N.W.2d 413 (Minn. App. 2017), *review denied* (Minn. Mar. 28, 2017).

In *Thomas*, the defendant, a black male, robbed a white male at gun point. 890 N.W.2d at 415. Officers located a suspect matching the defendant's description and the victim identified that suspect at a show-up procedure. *Id.* at 415-16. Before trial, the defendant proposed that the district court modify CRIMJIG 3.19 by adding a cross-racial instruction. *Id.* at 416. The district court denied the request, noting the defendant did not intend to call any expert witnesses, and this court held that "it is not an abuse of discretion for a district court to refuse to give such an instruction when there has been no expert testimony to support giving the instruction." *Id.* at 420. Here, like *Thomas*, no expert testimony was offered to support giving the proposed instruction.

While we acknowledge that scientific studies recognize the fallibilities of eyewitness testimony, it is not the role of this court to extend or change existing law.

Tereault v. Palmer, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987). That task falls to the supreme court or the legislature. *Id.* And, as we stated in *Thomas*, "[t]he day may come when our supreme court wishes to endorse a jury instruction regarding cross-racial identification and reassess its decisions regarding the admissibility of expert testimony on eyewitness identification. But that is not our role."[8] 890 N.W.2d at 420.

Davis argues *Thomas* is distinguishable because it "did not discuss an instruction on the presence of a firearm, which was requested here." But both cases involved the presence of a firearm. Then Davis contends that scientific studies and caselaw "that recognize the frailties of eyewitness identification and endorse jury instructions that include language on cross-racial issues and the presence of a weapon are legion." And he further asserts that this court should reject *Thomas* as wrongly decided because the holding and rationale in *Thomas* are unsound. Davis cites one non-binding case to support his argument, but the Minnesota Supreme Court has never held that the relevant pattern jury instruction is inadequate or misstates the law. Nor has the supreme court decided *Thomas* was erroneous.

Finally, even if the omission of the requested instruction was error, the error was harmless. Davis's closing argument focused on the credibility of the victims' testimony

[8] The Minnesota Supreme Court Rules of Evidence Advisory Committee filed a report on October 1, 2018, recommending "that the factors juries should consider when evaluating the reliability of eyewitness identification evidence should be updated and modernized." But the committee could not agree on the details of the appropriate jury instruction. *Report on Eyewitness Identification* (Oct. 2018), http://www.mncourts.gov/mncourtsgov/media/PublicationReports/Publications-Reports-Rules-of-Evidence-Advisory-Committee-Summary-Report.pdf

and identification of Davis, including references to the presence of a firearm and the racial differences between Davis and A.B. and T.J. Davis's counsel told the jury to carefully consider the reliability of pretrial identifications and stated the reasons why they can be unreliable. Further, the district court specifically instructed the jury to carefully evaluate A.B. and T.J.'s testimony and identified a number of factors the jury should consider while doing so. We are not persuaded, given the record, that instructing the jury on cross-racial identification would have altered the verdict.

Because caselaw supports the district court's decision to deny giving the proposed jury instruction, and because it is not this court's position to change existing caselaw, we conclude that the district court did not abuse its discretion by denying Davis's request to amend the standard jury instruction to include references to the gun or cross-racial identifications. Nor did the district court err in denying the motion to suppress the pretrial identification procedures. Accordingly, we affirm.

Affirmed.