STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1638

In the Matter of the Welfare of: N. B. M., Child.

Filed July 17, 2023
Affirmed
Larkin, Judge

Hennepin County District Court
File Nos. 27-JV-22-1287, 86-JV-22-1287

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Larkin, Judge; and Halbrooks, Judge.*

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant juvenile challenges the district court's denial of two motions to suppress evidence and his resulting adjudication of delinquency for the offense of aiding and abetting first-degree aggravated robbery. Because the district court did not err in denying the motions, we affirm.

---

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

Respondent State of Minnesota charged appellant juvenile N.B.M. with aiding and abetting first-degree aggravated robbery. The underlying juvenile delinquency petition alleged that N.B.M. and a companion approached teenaged females K.K. and S.K. as they filled a vehicle with gas at a convenience store. N.B.M. brandished a gun and took the vehicle by force. The police located the stolen vehicle approximately two hours later and detained N.B.M. and three other suspects, who were all located near the vehicle. Specifically, the police located N.B.M. and two other people crouched in some ferns along the side of a home, and the stolen vehicle was parked in front of the home next door. About one hour later, the police showed K.K. a three-person photo array that included a photograph of N.B.M. K.K. identified N.B.M. as the person who displayed the gun and drove off in her vehicle.

N.B.M. moved the district court to suppress K.K.'s identification, arguing that the identification violated his right to due process. N.B.M. separately moved the district court to suppress other evidence obtained at the time of N.B.M.'s arrest and dismiss the charge, arguing that his arrest was not supported by probable cause. The other evidence included a gun and the keys to the stolen vehicle, which the police found in the ferns where N.B.M. was crouched when the police encountered him. A DNA sample obtained from the gun matched a sample obtained from N.B.M. And N.B.M.'s fingerprint was found on K.K.'s phone, which was in the stolen vehicle at the time of the robbery.

The district court held a two-day evidentiary hearing on the motions and denied them. The parties agreed to a stipulated-facts trial, and the district court found N.B.M. guilty of aiding and abetting first-degree aggravated robbery.

The district court transferred the case to Wright County, where N.B.M. resided, for disposition. The Wright County district court adjudicated N.B.M. delinquent and issued a dispositional order placing him at Minnesota Correctional Facility-Red Wing.

N.B.M. appeals, challenging the district court's denial of his motions to suppress.

DECISION

I.

N.B.M. contends that the district court erred by denying his motion to suppress K.K.'s pretrial identification, arguing that the identification violated his right to due process.

The admission of identification evidence violates due process if the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). We apply a two-part test to determine whether to suppress pretrial eyewitness identification evidence. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, this court determines whether the identification procedure "was unnecessarily suggestive," which "turns on whether the defendant was unfairly singled out for identification." *Id.* Second, if the procedure was unnecessarily suggestive, we consider whether the totality of the circumstances establishes that the identification was nonetheless reliable; if so, the evidence is admissible. *State v. Young*, 710 N.W.2d 272, 282 (Minn. 2006).

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (citing *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992)). And we review de novo whether an individual has been denied due process. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

The relevant facts are as follows. N.B.M. and a companion approached K.K. and S.K.'s car in broad daylight while they were filling it with gas; N.B.M. approached the driver's side door where K.K. was standing and pointed a gun at K.K. K.K. moved aside, and N.B.M. got into the car. K.K. had an unobstructed view of N.B.M. for about 50 seconds while she hit the car window asking for her phone back.[1] Golden Valley Police Officers Trevor Weinmann and Levi Siljander were immediately dispatched to the scene and took statements from K.K. and S.K. K.K. described the suspect who displayed the gun and drove off in her vehicle as a teenage male with curly hair wearing a blue hooded sweatshirt; S.K. described the suspect who had a gun as a teenage white male wearing a black hoodie.

About three hours later, Officer Weinmann showed K.K. and S.K. three individual photographs; each depicted a white male handcuffed in a police vehicle. One of the photographs was of N.B.M. He was depicted wearing a dark blue sweatshirt and with

[1] N.B.M. contends that K.K. had a view of him for only ten seconds. But the time stamp on a security-camera video recording of the incident shows that K.K. had a view of N.B.M. for about 50 seconds.

braided hair. As K.K. looked at the photo of N.B.M. she stated, "I'm like fairly confident" and "that one looks . . . yes." Officer Weinmann asked K.K. to confirm that N.B.M. "was the driver that pointed the gun," and K.K. responded, "yes." S.K. did not identify any of the individuals in the photographs.

The district court concluded that "the sequential display of photographs of three young white male suspects was not unduly suggestive." N.B.M. assigns error to that conclusion. He first argues that the identification procedure was unnecessarily suggestive because Officer Weinmann did not use a "double-blind" procedure. N.B.M. describes a "double blind" procedure as one in which "there is both a blind administrator," that is, a person who does not know the suspect's identity, and a "blinded procedure," that is, one performed in such a way that the administrator is unable to inadvertently provide cues to the witness. *See* N.Y. State Div. of Crim. Just. Servs., *Identification Procedures: Photo Arrays and Line-ups Model Policy*, 1, 2 (Mar. 2015), https://perma.cc/9LXT-FBMA [hereinafter *Identification Procedures*].

N.B.M. does not cite and we are not aware of any precedential authority indicating that failure to use a double-blind procedure automatically renders a resulting identification unnecessarily suggestive.[2] And although a double-blind procedure was not used in this case, the record does not suggest that Officer Weinmann did anything to unfairly single N.B.M. out for identification. *See Ostrem*, 535 N.W.2d at 921 ("Whether a pretrial

[2] In fact, this court recently declined to adopt a rule "that failure to comply with double-blind-protocols renders a lineup per se suggestive." *State v. Shannon*, No. A20-0624, 2021 WL 1525255, at *3 (Minn. App. Apr. 19, 2021), *rev. denied* (Minn. June 29, 2021).

identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification."). Officer Weinmann showed K.K. the photos of each suspect, one at a time, and asked her if any of the individuals looked familiar. He did not tell her that she needed to identify a suspect or draw any particular attention to N.B.M.'s photograph. In fact, he told her, "And if you don't know, that's fine, I'm not trying to—I'm not trying to convince you or like, like give you any hints or anything. I'm just asking."

N.B.M. also argues that the procedure was unnecessarily suggestive because Officer Weinmann only showed K.K. photographs of individuals who had been arrested for the crime and did not include "filler" photographs of people who generally matched the suspect description. N.B.M. asserts that this procedure "was the functional equivalent of a single-photo line-up," which has "been widely condemned as unnecessarily suggestive." *Id.*

A single-photo lineup is one in which the police show a witness the picture of a single individual who matches a description of the suspect. *See Simmons*, 390 U.S. at 383. It is preferable to show a witness images of different individuals because "too few viable identification options unfairly suggests who the witness should identify." *State v. Hooks*, 752 N.W.2d 79, 85 (Minn. App. 2008). In this case, Officer Weinmann showed K.K. three photographs of three different suspects, and each of them matched the general description of the robbers. All three photos were of teenaged white males, and two of the males were wearing dark colored hooded sweatshirts. We do not see how this three-person photo array is the equivalent of a single-photo line-up or why the other two photographs were not adequate "filler" photographs.

N.B.M. next argues that the identification procedure did not follow "best practices," which he asserts include: (1) showing the photo array to a witness out of the sight and earshot of others; (2) reading a "standard detailed witness instruction" before showing the photo array to the victims; and (3) using separate photo arrays in the case of multiple suspects. *See* U.S. Dep't of Just., *Eyewitness Identification Procedures for Conducting Photo Arrays* (Jan. 6, 2017), https://perma.cc/HVX4-9HE3. Here again, N.B.M. does not cite and we are not aware of precedent requiring the use of these best practices.

Moreover, the authority that he does cite, *State v. Trimble*, does not persuade us that the failure to use those practices here resulted in an impermissibly suggestive identification procedure. 371 N.W.2d 921 (Minn. App. 1985), *rev. denied* (Minn. Oct. 11, 1985). In *Trimble*, this court stated that it was improper for the police to use, for identification purposes, a photograph of the defendant in "jail garb with messy hair." *Id.* at 924. This court concluded that "the photo display was not unduly suggestive" but warned that "these same factors under other circumstances could be found impermissibly suggestive." *Id.* N.B.M.'s comparison to *Trimble* is limited to the following line: "Although N.B.M. was not wearing jail garb, he may as well have been." N.B.M. notes that he was photographed in the back of a squad car in handcuffs. But N.B.M. does not explain how the circumstances here rise to the level of reversible error when compared to those in *Trimble*, which did not rise to that level.

Finally, N.B.M. complains that the precise moment at which K.K. identified N.B.M.'s photograph was not captured on Officer Weinmann's body-worn camera because the feed cut out for about six seconds. N.B.M. acknowledges that "this doesn't necessarily

go to the inherent suggestiveness of the procedure," but he argues that it was inconsistent with best practices and "shield[ed] the critical part of the photo array from judicial review." *See Identification Procedures*, *supra*, at 5. There is no requirement that identification procedures be recorded in Minnesota. *Cf. State v. Scales*, 518 N.W.2d 587, 588 (Minn. 1994) (adopting the rule that "[a]ll custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs in a place of detention").

And although it may be a best practice to record identification procedures, Officer Weinmann testified regarding the identification process at the evidentiary hearing, he was cross-examined regarding that process, and the district court had an opportunity to assess his credibility. The record does not provide any reason to suspect that the officer improperly suggested that K.K. should identify N.B.M. during the brief interruption of the recording.

N.B.M. primarily relies on *State v. Stanifer*, in which this court concluded that an identification procedure did not create a likelihood of misidentification because the photographs were not shown to the victim to "identify" the suspect. 382 N.W.2d 213, 217 (Minn. App. 1986). Instead, the victim had already positively identified Stanifer as the man who had taken his wallet, and the photographs were shown to the victim to clarify the role that Stanifer played in the crime. *Id.* N.B.M. asserts that "[i]mplicit in this Court's holding is the conclusion that [the photographic identification] would have been impermissibly suggestive otherwise." We are not persuaded that *Stanifer* compels a conclusion that the identification procedure in this case was unnecessarily suggestive.

We do not diminish concerns regarding the reliability of eye-witness identifications and the safeguards that may be provided through use of best practices. But the failure to do so in this case does not cause us to conclude that the identification procedure was unnecessarily suggestive. Even if we were to conclude otherwise, we would not automatically hold that the identification was inadmissible. Instead, we would have to determine whether the identification created a substantial likelihood of irreparable misidentification. In the interest of thorough review, we reach that issue, even though it is not necessary to do so.

Identification evidence, even if unnecessarily suggestive, is nonetheless admissible "if the totality of the circumstances establishes that the evidence was reliable." *Ostrem*, 535 N.W.2d at 921. In making that determination, we consider whether the challenged procedure "created a very substantial likelihood of irreparable misidentification," and apply the following five factors:

> 1. The opportunity of the witness to view the [suspect] at the time of the crime;
> 2. The witness' degree of attention;
> 3. The accuracy of the witness' prior description of the [suspect];
> 4. The level of certainty demonstrated by the witness at the photo display;
> 5. The time between the crime and the confrontation.

Id. (quotation omitted).

Even though the district court determined that the identification procedure in this case was not "unduly suggestive," it reviewed the factors above and explained:

> An analysis of [those] factors reveals that [K.K.] had ample opportunity to see the suspect based upon the fact that it was

> daylight, there were no objects between the victim and the suspect, the suspect was within one foot or several inches away from [K.K.], the accuracy of [K.K.'s] description of the suspect as being a white male with curly hair wearing a blue hooded sweatshirt, the fact that the identification occurred approximately four hours after the incident and the level of certainty demonstrated by [K.K.].

The court's findings are supported by the record and not contested by N.B.M. K.K. had an opportunity to view N.B.M because it was daylight and had an unobstructed view of N.B.M. for about 50 seconds. During that time, her attention was focused on her assailant as she banged on the car window and asked for her phone. N.B.M. argues that K.K. viewed her assailant "during a highly stressful and traumatic event." That fact alone does not render her identification unreliable. *See State v. Witt*, 245 N.W.2d 612, 615 (Minn. 1976) (concluding a rape victim "had more than ample opportunity to observe her assailant during the crime").

In addition, K.K. described the robber as a male teenager with curly hair wearing a blue hooded sweatshirt. N.B.M.'s photograph depicted a male teenager with braids wearing a dark colored hooded sweatshirt. Lastly, only about three hours passed between the armed robbery and K.K.'s identification of N.B.M. in the photo array. *See Ostrem*, 535 N.W.2d at 922 (concluding that an identification that took place 48 hours after the crime was reliable). The totality of the circumstances assure us that K.K.'s identification was reliable and did not violate N.B.M.'s right to due process. The district court therefore did not err by denying N.B.M.'s motion to suppress K.K.'s identification of N.B.M.

II.

N.B.M. contends that the district court erred by denying his motion to suppress evidence obtained as a result of his arrest, arguing that his arrest was not supported by probable cause.

The United States and Minnesota Constitutions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "The touchstone of the Fourth Amendment is reasonableness." *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted). Generally, warrantless searches and seizures are per se unreasonable. *State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016). An exception to the warrant requirement permits a police officer to "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). And under certain circumstances, the police may conduct a warrantless arrest based on probable cause. *See* Minn. Stat. § 629.34, subd. 1(c) (2022) (providing that certain peace officers may make an arrest without a warrant if "a public offense has been committed or attempted in the officer's presence").

The level of suspicion required for an arrest is higher than that required for an investigative seizure. "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) (quotations omitted). We apply an objective standard when determining whether police had probable cause to believe that a crime had been

committed, and if the objective standard is met, we will not suppress evidence or invalidate an arrest "even if the officer making the arrest or conducting the search based his or her action on the wrong ground or had an improper motive." *State v. Olson*, 482 N.W.2d 212, 214 (Minn. 1992).

When reviewing a district court's finding that there was probable cause to arrest, we independently review the facts to determine the reasonableness of the officer's actions. *State v. Camp*, 590 N.W.2d 115, 118 (Minn. 1999). Again, whether the actions of the police were reasonable is an objective, and not subjective, inquiry, and the existence of probable cause depends on the facts of each particular case. *State v. Moorman*, 505 N.W.2d 593, 598-99 (Minn. 1993).

To determine whether there was probable cause to arrest N.B.M. for robbery, we must first determine the point at which N.B.M. was arrested. "The ultimate test to be used in determining whether a suspect was under arrest is whether a reasonable person would have concluded, under the circumstances, that he was under arrest and not free to go." *State v. Beckman*, 354 N.W.2d 432, 436 (Minn. 1984). There is no bright-line test separating a legitimate investigative stop from an unlawful arrest. Instead, "common sense and ordinary human experience must govern over rigid criteria." *State v. Balenger*, 667 N.W.2d 133, 139 (Minn. App. 2003) (quotation omitted), *rev. denied* (Minn. Oct. 21, 2003).

The supreme court has explained:

> [I]f an officer making a reasonable investigatory stop has cause to believe that the individual is armed, he is justified in proceeding cautiously with weapons ready. Moreover, once a

> person is permissibly stopped, an officer may frisk that person for weapons if the officer is justified in believing that the suspect is armed and dangerous. We have also held that *briefly handcuffing a suspect while the police sort out the scene of an investigation does not per se transform an investigatory detention into an arrest, nor does placing the suspect in the back of a squad car while the investigation proceeds*. Here, the record indicates that the stop of the Blazer's occupants occurred late at night and that it involved multiple suspects. The record also shows that the officers were acting on information that the occupants may be armed and that the Blazer was carrying a large amount of illegal drugs. *Under these circumstances, approaching the Blazer with weapons drawn, removing the occupants from the Blazer, frisking them, placing them in the back seat of squad cars and even handcuffing them briefly until it was determined they were not armed, were reasonable steps taken by the officers to safely conduct their investigation.*

State v. Munson, 594 N.W.2d 128, 137 (Minn. 1999) (emphasis added) (quotation and citations omitted).

The relevant facts here are as follows. At 10:40 p.m., approximately two hours after a robbery at gunpoint in which the victim's car was taken, the police located the stolen vehicle in Bloomington. The vehicle was unoccupied and parked near a house where an individual known to police as a "frequent-flyer" lived. The officers shone their flashlights towards the "frequent flyer's" residence and saw three people crouching in the ferns on the side of the residence. They "appeared to be digging into ferns." Two of the individuals matched the description of the suspects: they were white males in dark colored sweatshirts. The police ordered the three individuals to the ground at gunpoint. N.B.M. was one of the individuals. N.B.M. complied with the officer's command, and the police handcuffed him. Next, the police searched the ferns where they had observed the suspects and found a gun and the keys to the stolen vehicle.

The circumstances here are similar to those in *Munson*. The seizure occurred at night. It involved multiple suspects. And the police had reason to believe that the suspects were armed. In fact, the officers here had more incriminating information than the officers in *Munson* because these officers had reason to believe that the suspects had recently stolen a car from its driver at gun point, in broad daylight, at a public gas station. Those circumstances suggest a degree of danger to the police at least as great as that in *Munson*. Thus, *Munson* indicates that the police appropriately took the precautions that they did in an effort to safely conduct their investigation, without necessarily converting the initial seizure into an arrest.

The district court did not make an express determination regarding when the arrest occurred. But it found that there was probable cause to arrest N.B.M. when the officers observed him crouched in the ferns. The district court explained its reasoning as follows:

> The Bloomington police officer who arrested [N.B.M.] clearly had probable cause to arrest [N.B.M.] based upon the facts and circumstances known to the officer at the time of the arrest. The Bloomington police had been notified by police dispatch that a car that had been stolen from a victim at gunpoint was located at a certain address in Bloomington. The police officers first verified that there was no one in the vehicle, and then looked around and saw [N.B.M.] with some other persons crouching outside of a window of a house, digging into ferns at 10:30 p.m. where a known offender lived that was only two houses away from where the stolen vehicle was found. [N.B.M.] and the other persons matched the description that was provided as being white males wearing hooded sweatshirts with a firearm. That information constituted sufficient probable cause to arrest [N.B.M.] at gunpoint.

We need not resolve the parties' dispute regarding whether N.B.M.'s arrest occurred when he was ordered to the ground at gun point or after the police found additional

incriminating evidence in the ferns where they encountered him because we agree with the district court's reasoning and conclusion that there was probable cause for N.B.M.'s arrest when the police ordered him to the ground at gunpoint.

N.B.M.'s argument to the contrary is not persuasive. He relies on *State v. Blacksten*, 507 N.W.2d 842 (Minn. 1993). In *Blacksten*, the police arrested the defendant for a robbery that had occurred two days earlier. 507 N.W.2d at 844-46. At the time of the arrest, the officer knew that the defendant was linked to a second robbery suspect, that the second suspect had a prior record of robbery, and that the defendant had been with the second suspect on the day of the robbery. *Id*. at 846. The defendant also matched the witnesses' general description of the suspects. *Id.* at 847. The supreme court determined that the police lacked probable cause for the arrest because, although the defendant had been with the other suspect, it was ten hours before the robbery occurred, and because the witnesses' description of the suspects were of little value given that the robbers wore ski masks and helmets. *Id.*

The facts supporting probable cause in this case are more substantial. The police encountered N.B.M. approximately two hours after the robbery, crouched in plants on the side of a home, near a vehicle that had been stolen in an armed robbery, and N.B.M. matched the suspect description provided by the victims. The arresting officer's statements regarding when he developed probable cause for the arrest are irrelevant because the standard is an objective one. *See Olson*, 482 N.W.2d at 214 (stating that we will not suppress evidence or invalidate an arrest "even if the officer making the arrest or

conducting the search based his or her action on the wrong ground or had an improper motive").

Based on the totality of the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that N.B.M. had committed the recent aggravated robbery. Thus, the district court did not err in determining that there was probable cause to arrest N.B.M. and, therefore, no basis to suppress the evidence obtained as a result of his arrest.

Because the district court did not err in denying N.B.M.'s motions to suppress, we affirm.

Affirmed.