STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1293

State of Minnesota,
Respondent,

vs.

Tyler Ray Smith,
Appellant.

Filed August 1, 2011
Affirmed
Kalitowski, Judge

Becker County District Court
File No. 03-CR-09-2433

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Michael D. Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Larkin, Judge.

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

KALITOWSKI, Judge

A jury found appellant Tyler Ray Smith guilty of one count of controlled-substance crime (sale of cocaine), arising from a controlled transaction with a

confidential police informant. Appellant challenges his conviction, arguing that (1) the informant's pretrial identification of appellant was the product of an unnecessarily suggestive identification procedure; (2) the prosecutor deprived appellant of a fair trial by eliciting testimony that the informant was reliable and by arguing that the jury should believe the informant because police deemed him reliable; and (3) the district court erred by concluding that appellant waived his right to confront the author of a laboratory report. We affirm.

D E C I S I O N

I.

Appellant argues that the district court violated his due-process rights by denying his motion to suppress the informant's pretrial identification of appellant. We disagree.

Admission of identification evidence produced through procedures "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" violates a defendant's due-process rights. *Simmons v. United States*, 390 U.S. 377, 384-86, 88 S. Ct. 967, 971-72 (1968). We review de novo whether a defendant has been denied due process. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005). To determine whether a pretrial identification must be suppressed, we apply a two-part test to determine whether the identification procedure created a substantial likelihood of irreparable misidentification. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. App. 1999). "The test is whether the identification procedure was unnecessarily suggestive, and, if so, whether the identification is nonetheless reliable when considered

as part of the totality of the circumstances." *State v. Hooks*, 752 N.W.2d 79, 84 (Minn. App. 2008).

Identification procedure

We first determine whether the identification procedure was unnecessarily suggestive.

At the omnibus hearing, a West Central Minnesota Drug Task Force deputy testified about the charged offense and the challenged pretrial identification. On August 20, 2008, a confidential informant for the drug task force arranged to purchase cocaine from G.S. Police equipped the informant with an audio-recording device and visually monitored the transaction, which took place through the driver's side window of a van driven by G.S. During the transaction, police observed a Ford Mustang nearby.

When debriefed, the informant stated that he had purchased cocaine from the two occupants of the van: a driver and a passenger. The informant identified G.S. as the driver but could not identify the passenger by name. He described the passenger as a "younger, clean-cut Native American male wearing a baseball cap." The informant also told police that the passenger "may be a nephew" of G.S.

Five days later, the deputy and his partner showed the informant a photograph of R.S., the registered owner of the Mustang police had seen near the site of the transaction. The informant immediately stated that R.S. was not the passenger. The officers then showed the informant a photograph of appellant, who is R.S.'s brother. The deputy testified that the officers showed this photograph to the informant because appellant was involved in "a prior investigation that [the task force] [was] still working" and because

appellant's physical features matched the informant's description of the passenger. The informant positively identified appellant as the passenger. No other photographs were shown to the informant.

In determining whether an identification procedure was unnecessarily suggestive, we inquire whether police influence—rather than the witness's own reasoning and recollection—led to the identification of the defendant. *Hooks*, 752 N.W.2d at 84; *see also Taylor*, 594 N.W.2d at 161 ("Ultimately, the concern is whether the procedure used by the police influenced the witness identification of the defendant."). An identification procedure prejudicially influences a witness when the witness perceives that police suspect a particular individual. *Hooks*, 752 N.W.2d at 84-85. For example, when a police officer shows a witness "too few viable identification options," the police officer "unfairly suggests who[m] the witness should identify." *Id.* at 85; *see also State v. Young*, 710 N.W.2d 272, 282 (Minn. 2006) ("The key factor . . . is whether the defendant was unfairly singled out for identification."); *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) (condemning single-photo line-up identification procedures as unnecessarily suggestive).

Here, the police suspected both R.S. and appellant of being the passenger. The police showed the informant only two photographs—one of R.S. and one of appellant—and only one at a time. On this record, we conclude that the identification procedure was unnecessarily suggestive. We therefore proceed to the second prong of the test.

Adequate independent origin

"Under the second prong, courts look at whether, under the totality of the circumstances, there is a substantial likelihood for irreparable misidentification. Thus, even where a suggestive procedure is employed, if the witness'[s] identification has an adequate independent origin, it is considered to be reliable." *State v. Lushenko*, 714 N.W.2d 729, 732 (Minn. App. 2006) (citation and quotation omitted), *review granted* (Minn. July 19, 2006) *and order granting review vacated* (Minn. Dec. 12, 2006). We consider five factors in analyzing the totality of the circumstances: (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 photo display; and (5) the time elapsed between the crime and the confrontation. *Ostrem*, 535 N.W.2d at 921.

1. Opportunity to view the criminal

The informant was able to see the van's passenger during the drug transaction while he stood at the driver's window. There is no evidence that the passenger's baseball cap obscured his face. This factor weighs in favor of admission.

2. Degree of attention

As the district court found, the informant was focused on obtaining cocaine from the driver and passenger and nothing in the record shows that he was distracted from this goal. No evidence shows that the informant was under the influence of alcohol or controlled substances during the transaction. This factor weighs in favor of admission.

3. Accuracy of prior description

The informant described the passenger as a "younger, clean-cut Native American male wearing a baseball cap." Appellant does not challenge the district court's finding that this description, though vague, is consistent with his appearance. The informant also described the passenger as possibly G.S.'s nephew. Appellant does not challenge the accuracy of this statement, which is consistent with G.S.'s trial testimony. This factor weighs in favor of admission.

4. Level of certainty

The deputy testified that the informant, upon being shown the photograph of R.S., immediately said that R.S. was not the passenger. When shown the photograph of appellant, the informant said: "That's the guy that was with [G.S.]." The evidence shows that the informant made an unequivocal identification of appellant and appellant only. This factor weighs in favor of admission.

5. Time between the crime and the confrontation

The informant identified appellant's photograph five days after the crime. This factor weighs in favor of admission. *See Seelye v. State*, 429 N.W.2d 669, 673 (Minn. 1988) (holding that identification made 12 days after crime was "reasonably prompt").

We conclude that the totality of the circumstances here does not indicate a danger of irreparable misidentification. Although the identification procedure was unnecessarily suggestive, there was an adequate independent origin for the informant's identification of appellant as the van's passenger.

II.

Appellant argues that he was denied a fair trial because the prosecutor committed misconduct by eliciting "vouching" testimony from a police officer that the drug task force had "deemed [the informant] reliable" and by arguing that the jury should believe the informant's testimony because two police officers who testified at trial "deemed [the informant] reliable."

Before trial, appellant submitted motions to the district court prohibiting "vouching" testimony, and the district court granted the motions. We read the motions as addressing the conduct that appellant challenges on appeal. Thus, appellant was not required to renew an objection to the prosecutor's conduct following the favorable rulings on the motions in limine. *See* Minn. R. Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection . . . to preserve a claim of error."); *State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002) (stating same).

We therefore review appellant's prosecutorial-misconduct claims under a two-tiered harmless-error test. *See State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009) (describing test for objected-to conduct). For cases involving claims of "unusually serious prosecutorial misconduct" the conviction may be upheld if there is "certainty beyond a reasonable doubt that misconduct was harmless." *Id.* For cases involving less serious prosecutorial misconduct, an appellate court determines whether the misconduct likely played a substantial part in influencing the jury to convict. *Id.*

A prosecutor may argue the credibility of witnesses if the argument is tied to the evidence. *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003). But a prosecutor may not elicit opinion testimony from a witness about the credibility of another witness or argue that a witness is or is not credible based on another witness's opinion testimony. *Van Buren v. State*, 556 N.W.2d 548, 550-51 (Minn. 1996) (holding that prosecutor committed misconduct by (1) eliciting testimony that witnesses believed the victim's story and (2) using this testimony in closing argument to bolster the victim's credibility); *see also State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (prohibiting trial witnesses from vouching for or against the credibility of another witness).

Here, in eliciting testimony that the drug task force had "deemed [the informant] reliable" and in arguing to the jury that the informant was credible because two police officers "deemed him reliable," the prosecutor erred and violated the district court's order prohibiting vouching testimony. But under either tier of the harmless error test, we conclude beyond a reasonable doubt that the prosecutor's error was harmless and that it did not play a substantial part in influencing the jury to convict.

Although the prosecutor improperly bolstered the informant's credibility, the informant was not the only trial witness to directly implicate appellant. G.S. pleaded guilty to aiding and abetting controlled-substance crime for this offense but was not required to testify against appellant as part of his plea agreement. Nevertheless, G.S. corroborated the informant's testimony about appellant's participation in the drug transaction. Moreover, the prosecutor's conduct here was not pervasive. *See State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009) (stating that prosecutorial misconduct

claims are reviewed "in light of the whole trial" (quotation omitted)); *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010) (stating that closing argument is reviewed as a whole in prosecutorial-misconduct cases). Thus, we conclude that appellant was not deprived of a fair trial.

III.

Appellant argues that the district court violated his confrontation rights by admitting a Minnesota Bureau of Criminal Apprehension (BCA) laboratory report into evidence. We disagree.

> Evidentiary rulings—including the admission of chemical or scientific test reports—are within the discretion of the district court and will not be reversed absent a clear abuse of discretion. But whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law [that] this court reviews de novo.

State v. Weaver, 733 N.W.2d 793, 799 (Minn. App. 2007) (quotations and citations omitted), *review denied* (Minn. Sept. 18, 2007).

Here, appellant moved the district court to prohibit the state from offering into evidence any BCA report without proper foundation by the lab analyst who prepared the report. The district court allowed the BCA laboratory report to be admitted into evidence without the live testimony of the analyst who prepared it, concluding that appellant had waived his right to confront the preparer by making an untimely demand under Minn. Stat. § 634.15, subd. 2 (2008). Appellant argues that under the state and federal constitutions, the district court's "mechanical" application of section 634.15 violated his confrontation rights. We disagree.

In *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006), the Minnesota Supreme Court declared unconstitutional a previous version of section 634.15. The supreme court explained the statute's deficiencies:

> At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his constitutional rights.

Caulfield, 722 N.W.2d at 313.

After *Caulfield*, the legislature amended section 634.15. 2007 Minn. Laws ch. 54, art. 3, §§ 12-13, at 249-50. The version of the statute in effect when the charged offense was committed provides, in relevant part:

> (a) Except in civil proceedings, . . . an accused person or the accused person's attorney may request, by notifying the prosecuting attorney at least ten days before the trial, that the following persons testify in person at the trial on behalf of the state:
>
> (1) a person who performed the laboratory analysis or examination for the report . . . .
>
> (b) If the accused person or the accused person's attorney does not comply with the ten-day requirement described in paragraph (a), the prosecutor is not required to produce the person who performed the analysis or examination or prepared the report. In this case, the accused person's right to confront the witness is waived and the report shall be admitted into evidence.

Minn. Stat. § 634.15, subd. (2) (2008). The statute also requires that the prosecutor notify the defendant or his attorney of the contents of the report and of subdivision 2's requirements at least 20 days before trial. *Id.*, subd. 1(c) (2008).

In 2009, the United States Supreme Court held that state "notice and demand" statutes—that is, statutes that "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial"—do not violate the federal constitution. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 & n.12 (2009).

Because the 2008 version of section 634.15 provides a criminal defendant with adequate notice of the consequences of not making a timely request for live testimony of the preparer of a BCA laboratory report, we conclude that the statute complies with the requirements of *Melendez-Diaz* and *Caulfield* and does not violate appellant's confrontation rights under the United States or Minnesota Constitutions.

Here, the state notified appellant in October 2009—several months before trial—that section 634.15 required him to notify the prosecutor at least ten days before trial if he wanted the BCA analyst to testify in person. The state also informed appellant of the consequences of not complying with the ten-day notice requirement. Appellant concedes that his demand for live testimony was untimely. By failing to comply with section 634.15's notice and demand provision, appellant waived his right to confront the preparer of the BCA lab report and the district court did not err by admitting the laboratory report into evidence. *See* Minn. Stat. § 634.15, subd. 2(b) (stating that if a defendant does not

comply with the ten-day notice requirement, he waives the right to confront the witness "and the report *shall* be admitted into evidence" (emphasis added)).

Affirmed.