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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1295**

State of Minnesota,
Respondent,

vs.

Harold Raymond Anderson,
Appellant.

**Filed June 20, 2011
Affirmed
Toussaint, Judge**

Benton County District Court
File No. 05-CR-09-1561

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

Robert J. Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Connolly, Judge; and
Harten, Judge. *

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

UNPUBLISHED OPINION

TOUSSAINT, Judge

Appellant Harold Raymond Anderson challenges his conviction of second-degree aggravated robbery, arguing that the district court erred by denying his motion to suppress the complainant's one-person photographic identification and one-person show-up identification. Because the identification procedures did not create a very substantial likelihood of irreparable misidentification, we affirm.

DECISION

We review de novo whether a defendant has been denied due process. *State v. Hook*, 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).

In determining whether a pretrial identification must be suppressed, appellate courts apply a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). We first determine whether the identification procedure was unnecessarily suggestive. *Id.* If the procedure was unnecessarily suggestive, we then determine whether, under the totality of the circumstances, the identification created “a very substantial likelihood of irreparable misidentification.” *Id.* We consider five factors in determining whether a suggestive procedure creates such a likelihood:

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

the witness at the [identification]; [and] 5. The time between the crime and the confrontation.

Id.

Appellant challenges the admission of evidence that T.S., the complainant of the robbery, identified a driver's license photograph of appellant as the man who committed the robbery. "Single photo line-up identification procedures have been widely condemned as unnecessarily suggestive." *Id.* The photo line-up in the present case contained three different photographs; however, each photograph was of appellant. We therefore hold that the photographic identification was unnecessarily suggestive.

We next turn to whether the suggestive nature of the identification created a very substantial likelihood of irreparable misidentification. T.S. had at least 60 seconds to view the man who robbed the store at close range and with good lighting, giving him ample opportunity to view the culprit. The specificity with which T.S. described the man to the police—as a white male in his early 40's, approximately 5'10", weighing approximately 180 pounds with a "buzz-cut" receding hair line, normal teeth, no noticeable jewelry or tattoos, and "five o'clock shadow" facial hair—suggests a high degree of attention. The accuracy of the description and the fact that T.S. said the photos were "very close" to the man who robbed the store also suggest that T.S.'s identification of appellant's photo was reliable despite the suggestive nature of the procedure. Finally, T.S. identified appellant's driver's license photograph as being of the man who robbed the store very shortly after the crime had been committed. Based on the totality of the circumstances, the photographic identification presented no substantial likelihood of

irreparable misidentification, and the district court did not err by denying appellant's motion to suppress the photographic-identification evidence.

Appellant also challenges the admissibility of T.S.'s identification of appellant following a one-person showup. Whether a showup procedure is unnecessarily suggestive turns on "whether the defendant was unfairly singled out for identification" and "whether the procedure used by the police influenced the witness identification of the defendant." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (emphasis omitted). A "one-person show-up is by its very nature suggestive." *Id.* at 162.

Assuming without deciding that the one-person showup was *unnecessarily* suggestive, the district court nonetheless did not err by denying appellant's motion to suppress the identification evidence. As with the photographic identification, described above, the totality of the circumstances supports a conclusion that the showup procedure did not create a substantial likelihood of irreparable misidentification. *See also State v. Darveaux*, 318 N.W.2d 44, 47 (Minn. 1982) (unduly suggestive lineup did not create a substantial likelihood of misidentification when the witness had already identified defendant in a permissible photo lineup); *State v. Hazley*, 428 N.W.2d 406, 410 (Minn. App. 1988) (no substantial likelihood of misidentification when witnesses viewed suspects individually from a squad car and the suspects were described before the showup as wearing clothing similar to the culprit), *review denied* (Minn. Sept. 28, 1988). The district court therefore did not err by denying appellant's motion to suppress the showup-identification evidence.

Affirmed.