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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1782**

State of Minnesota,
Respondent,

vs.

Dylan John Lambertson,
Appellant.

**Filed October 9, 2012
Affirmed
Kalitowski, Judge**

Stearns County District Court
File No. 73-CR-10-8617

Lori Swanson, Attorney General, Jennifer Coates, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Dylan John Lambertson challenges his convictions of aggravated robbery, attempted aggravated robbery, and second-degree assault in connection with a

robbery of three high school students. He argues that: (1) the district court erred by admitting a victim's out-of-court and in-court identifications of appellant and (2) the state improperly questioned appellant about his choice to remain silent. We affirm.

D E C I S I O N

I.

Appellant first argues that the admission of out-of-court and in-court identifications of appellant by J.L., one of the robbery victims, violated his due-process rights. We review de novo whether a defendant has been denied due process. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

The United States Constitution guarantees all criminal defendants due process of law. U.S. Const. amend. XIV, § 1. 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.” *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). We apply a two-part test to determine whether the pretrial-identification procedure created a substantial likelihood of irreparable misidentification. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we ask whether the procedure was unnecessarily suggestive, which “turns on whether the defendant was unfairly singled out for identification.” *Id.* If the procedure was unnecessarily suggestive, we determine whether the “totality of the circumstances establishes that the evidence was reliable.” *Id.*

Suggestiveness

Here, the district court concluded that the photographic lineup shown to J.L. was unnecessarily suggestive because “[appellant] is the only suspect in the photo[graphic] lineup with a distinguishing characteristic, in this case, a tattoo.” The state concedes that the identification procedure was unnecessarily suggestive, and we agree. From the victims’ initial suspect descriptions, the characteristic that was likely to be most visible in a photographic lineup was the large tattoo on the suspect’s neck. Because the record demonstrates that appellant was the only suspect in the lineup with this distinguishing characteristic, we conclude that the lineup unfairly singled him out for identification. *Cf. State v. Farr*, 357 N.W.2d 163, 165 (Minn. App. 1984) (holding that lineup was not impermissibly suggestive because all of the lineup subjects “were close to the description complainant gave police”).

Reliability

Despite its suggestive nature, the district court determined that the out-of-court identification was nevertheless reliable and denied appellant’s motion to suppress the evidence. Appellant challenges this conclusion. To determine whether a suggestive identification is reliable, a court must consider (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 at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382 (1972).

J.L.'s opportunity to view assailant

Appellant argues that J.L.'s opportunity to view the assailant was limited by darkness, time, stress, and distractions. This argument is contrary to the record. J.L. estimated that the robbery lasted 30 to 45 minutes and stated that he was in close proximity to the assailant during the robbery. J.L. also stated that he engaged the assailant in conversation about the assailant's demands for money and speakers, the assailant's use of a knife, J.L.'s attempts to remove speakers from his vehicle, and whether DVDs would suffice as a substitute for money. And although the robbery occurred on the side of a rural road at night, J.L. testified that he was able to clearly view the assailant because his vehicle's overhead lights were on and the assailant leaned into the vehicle. This factor supports reliability.

J.L.'s attention to the assailant

Appellant argues that the record "fails to illustrate [J.L.'s] ability to view the [assailant]." But J.L. testified that he was able to observe the assailant's appearance after he "kind of focused on who it was." And the detailed description J.L. gave to police suggests that he paid a high degree of attention to the assailant. Therefore, this factor supports the identification's reliability.

Accuracy of J.L.'s description

Appellant argues that J.L.'s initial description of the assailant to police was vague and general and that it was inaccurate with respect to appellant's height and the image tattooed on his neck. The transcript of J.L.'s statement indicates that J.L. described the assailant to police as five feet six inches to five feet eight inches tall with a dragon tattoo

on his neck; appellant is five feet ten inches tall and his neck tattoo depicts two clown masks. But aside from these two minor inaccuracies, J.L. described the assailant as a white male with no facial hair, tattoos on his arms and neck, and a bandana. This description is accurate and particular and supports a finding of reliability.

Level of certainty

Appellant concedes that J.L. indicated he was “100%” sure that appellant was the assailant, but argues that certainty of identification does not correlate with accuracy and should not be considered. Appellant cites no Minnesota authority for this argument, and we note that the United States and Minnesota Supreme Courts have identified a witness’s certainty as an important indication of reliability. *Biggers*, 409 U.S. at 199, 93 S. Ct. at 382; *Ostrem*, 535 N.W.2d at 921. Because the record demonstrates that J.L. was very certain that appellant was the assailant, this factor weighs in favor of the identification’s reliability.

Time before identification

Appellant concedes that only a few hours passed between the robbery and when J.L. identified appellant in the photographic lineup, but argues that this factor should not be weighted heavily because J.L.’s description of the assailant was inaccurate. But as discussed above, the inaccuracies in J.L.’s description were minor, and appellant provides no authority for the assertion that minor inaccuracies should diminish the weight we accord to a timely identification. And because the record shows that J.L. identified appellant within just a few hours of the robbery, this factor also supports reliability.

Appellant argues that the district court “failed to weigh the corrupting effect of the suggestive identification” against its findings under the *Biggers* factors. For this argument, appellant relies on the Supreme Court’s statement in *Manson v. Brathwaite* that “[a]gainst [the *Biggers*] factors is to be weighed the corrupting effect of the suggestive identification itself.” 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). Minnesota courts have not explicitly adopted this additional balancing step. *See, e.g., Ostrem*, 535 N.W.2d at 921; *State v. Bellcourt*, 312 Minn. 263, 264, 251 N.W.2d 631, 633 (1977); *but see State v. Anderson*, 657 N.W.2d 846, 852 (Minn. App. 2002) (implicitly applying balancing step by considering the *Biggers* factors and then concluding that the suggestive identification procedure “tainted the eyewitness’s identification to such a degree that the identification was not based on an independent origin”). Nevertheless, each of the *Biggers* factors supports the reliability of the out-of-court identification here, and we conclude that the strength of the reliability factors outweighs any corrupting effect of the suggestive procedure. Therefore, the district court did not err by admitting J.L.’s out-of-court identification.

In-court identification

Appellant also asserts, without argument, that the unnecessarily suggestive photographic lineup also tainted J.L.’s in-court identification of appellant. Appellant failed to preserve this argument at trial, and we reject it because the same reliability analysis applies to in-court and out-of-court identifications, *State v. Stauffacher*, 380 N.W.2d 843, 849 (Minn. App. 1986), *review denied* (Minn. Mar. 21, 1986), and the totality of the circumstances surrounding J.L.’s in-court identification of appellant

establishes its reliability. Moreover, appellant's trial counsel vigorously cross-examined the police officer who created the photographic lineup at trial about the procedure he employed, exposing its flaws to the jury. *See Stauffacher*, 380 N.W.2d at 850 (“Danger that convictions may be based on misidentifications may be substantially reduced by a course of cross-examination at trial which exposes to the jury the method’s potential for error.”) (quotation omitted)). Therefore, we conclude that the in-court identification was properly admitted.

II.

Appellant argues that the prosecutor committed misconduct by eliciting improper testimony. Prosecutorial misconduct may occur when the prosecutor attempts to elicit or actually elicits “clearly inadmissible evidence.” *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Because appellant failed to object to the prosecutor’s questions at trial, we review his claim under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006) (establishing the standard for review of unobjected-to prosecutorial misconduct).

To establish plain error, appellant must demonstrate that the challenged conduct was erroneous and the error was plain. *Id.* at 302. “An error is plain if it was clear or obvious.” *Id.* (quotation omitted). If appellant establishes plain error, the burden then shifts to the state to prove that the error did not affect appellant’s substantial rights. *Id.* Reversal is warranted only when the alleged prosecutorial misconduct, “viewed in light of the entire record, is of such serious and prejudicial nature that appellant’s

constitutional right to a fair trial was impaired.” *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007) (quotation omitted).

Appellant testified at trial and denied any involvement in the robbery. He testified that he was returning to his father’s home when the robbery took place. On cross-examination, the prosecutor attempted to impeach appellant through a series of questions designed to elicit that appellant had not previously disclosed this alibi to the police.

It is well established that a defendant’s silence in the face of direct accusation is relevant evidence because “silence under accusation permits an inference that the accused acquiesced in the statement and admitted its truth.” *State v. Patterson*, 587 N.W.2d 45, 52 (Minn. 1998) (quotation omitted). But appellant contends that his silence as to an alibi was irrelevant and that its probative value was substantially outweighed by the danger of unfair prejudice because there was no evidence that his silence came in response to direct questioning about the robbery.

We agree that the record offers no evidence that appellant was directly questioned about the robbery before being arrested. But we need not decide whether appellant’s silence was relevant or whether its probative value was outweighed by the danger of unfair prejudice. Because appellant cites no precedent establishing that the attempt to elicit such evidence for purposes of impeachment constitutes prosecutorial misconduct, appellant has not demonstrated plain error. *See State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (stating that for an error to be plain, it must contravene established precedent); *Ramey*, 721 N.W.2d at 302 (stating that plain error is usually shown if the error contravenes caselaw, a rule, or a standard of conduct).

Moreover, even if appellant had demonstrated plain error, his substantial rights have not been affected because the absence of the prosecutor's questioning would not have "affected the outcome of the case." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). The primary issue at trial was identity, and the state presented overwhelming evidence that appellant was the assailant. Appellant generally matches the victims' descriptions of the assailant and was carrying a dark-colored bandana when he was arrested that matched the assailant's bandana. J.L. identified appellant as the assailant from a photographic lineup and in court. Police officers found appellant at his father's house in close proximity to the robbery within hours of the robbery. Officers observed a gray van in the driveway of the house that matched the description of the assailant's gray van and determined that the hood of the van was warm. Police also discovered a utility knife in the basement of appellant's father's house that was similar in appearance to the knife the assailant used. Finally, appellant acknowledged in a jail phone conversation with his girlfriend that he had made a "bad decision" for "chump change."

Because appellant has not demonstrated plain error or that his substantial rights have been affected, he is not entitled to a new trial.

Affirmed.