STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2238

State of Minnesota,
Respondent,

vs.

Ali Abdulkadir Mohamed,
Appellant.

Filed December 14, 2010
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CR-09-11520

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

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

KLAPHAKE, Judge

This criminal appeal is one of three separate appeals before this court involving three codefendants who were tried jointly and convicted of committing first-degree

robbery at a Minneapolis apartment building on March 6, 2009. In this appeal, Ali Abdulkadir Mohamed challenges the district court's decisions to permit trial joinder, to deny his request for appointment of substitute counsel, to admit identification evidence of a police show-up, to admit evidence obtained by police without a search warrant, and to impose an upward durational departure at sentencing. Because the district court did not err or otherwise abuse its discretion in any of its decisions, we affirm.

D E C I S I O N

I. Joinder

Minn. R. Crim. P. 17.03, subd. 2, permits the court "at [its] discretion" to order trial joinder of two or more defendants. In reviewing a joinder issue, we conduct "an independent inquiry into any substantial prejudice to defendants that may have resulted from their being joined for trial." *State v. Blanche*, 696 N.W.2d 351, 370 (Minn. 2005). An "erroneous" joinder decision is subject to the harmless error rule. *Id.*; *Santiago v. State*, 644 N.W.2d 425, 450 (Minn. 2002). In determining whether to order joinder, "the court must consider: (1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." Minn. R. Crim. P. 17.03, subd. 2; *see State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009) (stating that joinder rule "neither favors nor disfavors joinder").

Nature of the Offense

Here, the codefendants acted in close concert in committing the crime. *See Jackson*, 773 N.W.2d at 118 (acting in close concert is proper consideration in evaluating nature of charged offense). Two of the codefendants entered the subject apartment

building vestibule together with the victim, C.J., and all three threatened the victim, assaulted the victim, took the victim's personal property, and remained in a group after the robbery, acting in a cohesive unit until they were discovered by police. In addition, the codefendants were charged with the same offense, and the evidence against all three was substantially the same. *See id.* at 118-19 (noting in granting joinder motion that defendants were charged with same offense and majority of evidence was admissible against both); *see also Blanche*, 696 N.W.2d at 371 (approving joinder decision when "the great majority of the evidence presented was admissible against both" defendants). This factor thus favors trial joinder.

Impact on the Victim

This factor includes consideration of the impact on the victim as well as on eyewitnesses. *State v. Powers*, 654 N.W.2d 667, 675 (Minn. 2003). Here, C.J. endured a beating and was placed in fear of his life by having a gun pointed at him throughout his lengthy encounter with the codefendants. An eyewitness, A.S., observed the violent encounter and initially expressed some concern about becoming involved in these proceedings. The impact on these individuals of having to testify in separate trials thus favors joinder.

Potential Prejudice to the Defendant

Appellant asserts that he was prejudiced because his defense was antagonistic to codefendant Jama Suleiman Ahmed's when both he and Ahmed claimed that they did not participate in the crime. *See State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999) (holding that prejudice does not mean merely that joined defendants had different

defenses, "but whether the defenses were inconsistent, or whether the defendants sought, through their chosen defenses, to shift blame to one another"). However, as appellant did not testify and relied on a defense that the state failed to prove its case, his defense was not antagonistic to his codefendant's defense. *See State v. Martin*, 773 N.W.2d 89, 100 (Minn. 2009) (stating that defendants did not have antagonistic defenses when they used identical motions and objections and jury was "not forced to choose between" the defenses); *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999) (permitting joinder even though one defendant claimed innocence and another defendant claimed intoxication and duress).

Appellant also claims that he was prejudiced by the district court's limitation of the defense to six peremptory strikes of jurors, rather than the five he would have received if appellants had been tried separately. As noted by respondent, appellant did not show what defense strategy he intended to pursue by use of peremptory strikes or how it varied from his codefendants' strategies. *See Powers*, 645 N.W.2d at 675 (a defendant should make an offer of proof to identify inconsistent or antagonistic defenses in order to prove that joinder would "substantially prejudice" the defendant). Under these circumstances, potential prejudice to appellant does not weigh against joinder.

Interests of Justice

Consideration of the length of separate trials is proper in assessing the interests of justice. *See id.* at 675-76 (using extended duration of multiple trials as basis for joinder). The district court primarily relied on the savings of time and money in considering this factor. However, an additional basis includes the potentially evanescent nature of C.J.'s

and A.S.'s availability to testify. *See Blanche*, 696 N.W.2d at 372 (using witness availability in consideration of interests of justice factor for joinder analysis). This factor also supports joinder.

Because all of the Minn. R. Crim. P. 17.03, subd. 2 factors support joinder, we conclude that the district court did not err in ordering appellant to be tried with his two codefendants.

II. Substitution of Counsel

A defendant's request for substitute counsel will be granted only when "exceptional circumstances" exist, when the demand is reasonable, and when it is timely made. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). Exceptional circumstances "are those that affect a court-appointed attorney's ability or competence to represent the client," and mere dissatisfaction with the court-appointed attorney does not constitute exceptional circumstances. *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001) (declining to adopt a more stringent federal standard). "The decision to appoint a substitute attorney is within the discretion of the district court." *Id.*

Appellant claims that the district court abused its discretion and committed reversible error by denying his request at the beginning of trial for appointment of substitute counsel. Appellant told the district court that his counsel was not "helping me," was not "fighting for my case," and did not "come and see me."

The thrust of appellant's argument is that the district court failed to conduct an inquiry into whether there were exceptional circumstances that mandated appointment of new counsel. However, the court was aware of appellant's counsel's performance

because appellant's attorney fully participated in several pretrial proceedings decided by the court. While appellant may have been dissatisfied with his lack of personal contact with his attorney, the court was aware that the attorney was capable. Under these circumstances, appellant's allegation was insufficient to mandate further inquiry by the court. *See State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006) (requiring serious allegation of inadequate representation). Further, although appellant's attorney had represented him for months, appellant sought substitute counsel on the first day of trial, which was untimely given the circumstances of this case. *See id.*; *State v. Worthy*, 583 N.W.2d 270, 278-79 (Minn. 1998) (rejecting defendant's request for appointment of substitute counsel based, in part, on the fact that defendant sought new counsel on the eve of trial).

The district court did not abuse its discretion by declining to grant appellant's request for substitute counsel.

III. Admission of Show-up Evidence

After police apprehended appellant and his two codefendants in an apartment, police took each codefendant, separately, to the front of the building to be identified by C.J. and another witness[1] as they sat in a police squad car. Appellant claims that this show-up procedure was unnecessarily suggestive, should have been suppressed, and necessitates reversal of his conviction.

District courts apply a two-part test to determine whether to suppress pretrial identification evidence. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, the

[1] The other witness did not cooperate with police or appear at trial.

court determines whether the identification procedure was "unnecessarily suggestive"; next, it determines whether under the totality of the circumstances the identification was reliable despite its suggestive nature. *Id*; *In re Welfare of M.E.M.*, 674 N.W.2d 208, 214-15 (Minn. App. 2004). On appeal, this court independently reviews the facts to determine whether such evidence must be suppressed as a matter of law. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). Absent an abuse of discretion, we will affirm. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

In this case, we agree with appellant that the police show-up was unnecessarily suggestive. Following his detention, appellant was brought in handcuffs with an officer escort out of the building where the victim believed that the men who robbed him were located. He was placed in front of a squad car spotlight where he could be fully illuminated, and with a police officer standing beside him, the victims were asked by another police officer whether or not they could identify appellant from their vantage point in a squad car about 20 feet away. This type of show-up has routinely been found unnecessarily suggestive in other cases. *See, e.g.*, *M.E.M.*, 674 N.W.2d at 215 (finding show-up unnecessarily suggestive when police presented handcuffed defendant, alone, to victim for identification); *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (finding show-up unnecessarily suggestive when police drove defendant to crime scene, pulled him out of squad car, and presented him in handcuffs to appellant for identification, stating that defendant matched the description of the perpetrator).

Nevertheless, we conclude that admission of the show-up identification evidence was proper considering the totality of the circumstances test. Consideration of the totality of the circumstances includes:

> 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 . . .;
> 5. The time between the crime and the confrontation.

Ostrem, 535 N.W.2d at 921.

Here, C.J. had ample opportunity to view appellant at the time of the crime. Appellant stood on the sidewalk in front of the apartment building when C.J. arrived, and C.J. spoke with appellant and codefendant Muhammed Sharif Maye at length during negotiations of a marijuana sale and repackaging of the marijuana for sale. C.J. noticed the separate actions that the three men took during his physical attack, which lasted for some duration. C.J. had the opportunity to view the defendants after the attack when he peeked through a door at them several times. Further, the accuracy of appellant's description shows that C.J. was particularly attentive to appellant's appearance. C.J. provided a very accurate and detailed description of appellant, which included that he was an 18-20 year old "Som[a]lian male, approx. 5 ft. 8 [in.]," who had a "light build," "short hair with short curls," and a "short mustache/goatee." Appellant was wearing a "white t-shirt under [a] dark jacket" and "dark pants." Appellant's appearance matched this description. C.J. stated to police that he was "very positive" of the identification. Finally, the time between the crime and the identification strongly favors the reliability of

the identification. Although it is unclear exactly how much time elapsed between the crime and appellant's show-up, police responded to the dispatch reporting the crime within minutes and appellant and his codefendants were apprehended soon after.

Under the totality of these circumstances, we conclude that the state demonstrated an "adequate independent origin" for the identification, and the district court did not abuse its discretion by denying appellant's motion to exclude the identification evidence obtained from the police show-up. *See Ostrem*, 535 N.W.2d at 922; *see also State v. Lushenko*, 714 N.W.2d 729, 732-33 (Minn. App. 2006) (affirming admission of show-up identification involving man who encountered burglar in his home, conversed with the burglar, and attempted to keep the burglar in home while notifying police; admission of evidence based on totality of circumstances that included victim's opportunity to view defendant during conversation, heightened degree of victim's attention due to suspicious circumstances; accuracy of the victim's description; victim's positive identification and certainty of it; and show-up conducted within three hours of initial encounter), *review denied* (Minn. Dec. 12, 2006).

IV. Admission of Evidence Obtained during Warrantless Search

Whether the district court erred by declining to suppress this evidence is a question of law, which this court reviews de novo. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Appellant challenges the district court's basis for admitting certain evidence obtained during the search of the apartment, including C.J.'s wallet, his identification, and the gun used during the crime. The district court ruled that the officers legally entered the apartment, and appellant does not challenge this ruling. Rather,

appellant challenges the district court's decision that the three items were admissible under the doctrine of inevitable discovery. *See State v. Richards*, 552 N.W.2d 197, 204 n.2 (Minn. 1996) (the inevitable discovery exception to the exclusionary rule applies when "police would have inevitably discovered the evidence, absent their illegal search.").[2]

The burden is on the state to show that the inevitable discovery exception applies, which "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (quotation omitted). This exception does not apply if police could have obtained a search warrant but did not: "Such an application of the 'inevitable discovery' rule would render the Fourth Amendment protection meaningless. A prosecutor would usually be able to show, through hindsight, that a warrant would have been issued and the evidence would have eventually been discovered." *State v. Hatton*, 389 N.W.2d 229, 234 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986); *see Richards*, 552 N.W.2d at 204 n.2 (requiring police to "preserve[] the integrity of the scene while waiting for a readily-obtainable warrant" and declining to permit legitimate police presence in an area to circumvent warrant requirement to conduct search beyond that allowed by law, noting that such conduct would "beg the question" of application of the inevitable discovery rule).

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[2] *See also Murray v. United States*, 487 U.S. 533, 539, 108 S. Ct. 2529, 2534 (1988) ("The inevitable discovery doctrine . . . is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered").

In *Hatton*, police were called to a motel where the victim had been sexually assaulted by two men. They arrested one suspect as he left the room. The other suspect was arrested by an officer who had been left to "watch the room"; the officer noticed the suspect moving under a bed. 389 N.W.2d at 232. The supreme court ruled that the officers' post-arrest search of the motel room without a warrant was illegal, but the court upheld the suspects' convictions because, consistent with the harmless error rule, there was other admissible evidence that conclusively proved the suspects' guilt. *Id.* at 234.

Here, the officers' decision to seek a warrant was motivated by evidence they had discovered during their illegal search, particularly discovery of the towel-wrapped gun, which only then prompted police to "freeze" the scene in order to obtain a search warrant. This describes the could-have-obtained-a-warrant-but-did-not conduct that was prohibited in *Hatton.*[3] *See Richards*, 552 N.W.2d at 204 n.2. Thus, the district court erroneously ruled the wallet, identification, and gun were subject to inevitable discovery exception to the exclusionary rule.

However, the harmless error rule applies to erroneous admission of evidence at trial: "If a defendant's guilt can be conclusively proven without considering the evidence admitted erroneously, the trial court's error will be considered harmless." *Hatton*, 389 N.W.2d at 234 (applying harmless error rule to evidence erroneously admitted under

[3] We also note that the independent source rule does not apply in this case because at the time of the search of the subject apartment, there was no separate police investigation that would have independently led to discovery of the evidence. *See Richards*, 552 N.W.2d at 204; *see also Hatton*, 389 N.W.2d at 233 (noting that exceptions to exclusionary rule apply only if police were independently pursuing lawful means to discover subject evidence at time of its seizure).

inevitable discovery doctrine). In this case, even without evidence of the gun and C.J.'s wallet and identification, there was strong evidence to support appellant's conviction for armed robbery. C.J. positively identified appellant as one of the three men who robbed him, and both he and A.S., the eyewitness, testified that one of the men used a small black handgun during the offense. In addition, C.J.'s two cell phones were lawfully discovered in the possession of the defendants, one during a search incident to appellant's arrest and the other at the feet of Maye as he was apprehended in the apartment. Further, during a search of Ahmed's person incident to his arrest, police found the bag of marijuana that had been in C.J.'s possession when he was robbed.

Thus, the erroneously admitted evidence, while probative, was cumulative of other admissible evidence that conclusively proved appellant guilty of armed robbery. Under these circumstances, we conclude that the erroneous admission of the evidence of the gun, C.J.'s wallet and C.J.'s identification does not entitle appellant to a new trial.

V. Duration of Prison Sentence

Finally, appellant argues that the district court abused its discretion by imposing a 12-month upward durational departure from the presumptive 48-month prison sentence. The district court's basis for appellant's upward departure was that "[t]he offender committed the crime as part of a group of three or more persons who all actively participated in the crime." Minn. Sent. Guidelines II.D.2(b)(10). "Generally, appellate courts review sentences that depart from the presumptive guidelines range for an abuse of discretion." *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010); *see State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellant does not dispute that three people participated in the aggravated robbery or that this is a valid basis for a durational departure. Rather, he argues that the fact that three persons were involved in the aggravated robbery did not make it more serious than the typical offense. However, all three suspects beat the victim, searched his person for items to steal, and made it difficult or impossible for him to defend himself or escape. These facts support the district court's decision to impose an upward durational departure in this case. *See Dillon*, 781 N.W.2d at 596 (stating that "we have found no case in which this court or the supreme court has overturned a district court's decision to depart . . . when adequate departure grounds exist").

Affirmed.