IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAYMOND JALIL BANKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78175-COA

FILED

APR 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Raymond Jalil Banks appeals from a judgment of conviction, pursuant to a jury verdict, of burglary, grand larceny, home invasion while in possession of a firearm, burglary while in possession of a firearm, attempted grand larceny of a firearm, robbery with use of a firearm, assault with use of a deadly weapon, obtain or possess credit or debit card without cardholder's consent, and felon in possession of a firearm. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

In November 2017, Banks, Kayshawn Smith-Harper,[1] and at least one other unknown person broke into John Moore's residence while Moore was out running errands.[2] When Moore returned home, he discovered a blue Lexus parked in his driveway—halfway inside his garage. Moore also noticed that three men were attempting to load his gun safe and other personal items, which had been removed from his house, into the Lexus. Moore pulled into the driveway, attempting to block the Lexus and the perpetrators from leaving the garage. Within minutes, Banks emerged

[1]The State tried Banks and Smith-Harper together. Smith-Harper has also appealed his conviction. *See Smith-Harper v. State*, Docket No. 78208-COA.

[2]We do not recount the facts except as necessary to our disposition.

from the house through a door leading into the garage and approached Moore. Banks pointed a handgun at Moore, ordered him to move his car, and threatened to shoot Moore if he did not. Moore complied, and the assailants fled in their vehicle, hitting Moore's car on their way out.

As the assailants fled, Moore called 911 and informed the operator that he was robbed by three or four black males in their early 20s, one of whom had a handgun. Moore also provided the operator with a partial license plate number for the Lexus. Meanwhile, as the perpetrators were absconding, their vehicle collided with a tow truck, forcing them to abandon the vehicle and flee on foot. Police quickly apprehended Banks and Smith-Harper, but the other suspects escaped. Officer Sean Meeks with the Sparks Police Department contacted Moore and asked Moore to follow him to where Banks and Smith-Harper were being detained to see if he could identify them, using a field identification procedure known as a show-up. Moore arrived at the location approximately an hour and thirty minutes after the crimes were committed at his house.

Before conducting the field identification, Officer Meeks administered to Moore a standard admonition. The admonition cautioned Moore that it was just as important to exonerate innocent people as it was to implicate guilty ones, and that he was not required to identify anyone if he was unable to make a positive identification. Moore then sat inside a police vehicle and viewed the suspects individually, first one and then the other, and positively identified both suspects. During the show-up procedure, both Banks and Smith-Harper were handcuffed and standing in front of police vehicles.

The State charged Banks with (1) burglary, (2) grand larceny, (3) home invasion while in possession of a firearm, (4) burglary while in

possession of a firearm, (5) attempted grand larceny of a firearm, (6) robbery with use of a firearm, (7) assault with use of a deadly weapon, (8) obtaining or possessing a credit or debit card without the cardholder's consent, and (9) possession of a firearm by a felon. Prior to trial, Banks moved to suppress Moore's identification from the show-up, arguing that it was unnecessarily suggestive and unreliable. The district court held a hearing on the motion and denied the request. After a four-day trial, a jury returned a guilty verdict on all counts, and the district court imposed an aggregate sentence totaling 120 to 330 months in prison.

On appeal, Banks argues that the district court erred by denying his motion to suppress and allowing the jury to hear identification evidence from the show-up procedure because the show-up procedure was unnecessarily suggestive. Furthermore, Banks urges this court to abandon long-standing Nevada precedent, which provide the framework for analyzing cases involving show-up procedures, in favor of New Jersey caselaw, namely, *State v. Henderson*, 27 A.3d 872 (N.J. 2011). We decline Banks' invitation to adopt the methodology prescribed by the New Jersey Supreme Court in *Henderson*, as it is a deviation from our well-established jurisprudence regarding show-up and field identification procedures.

Turning to the merits, Banks contends that the district court erred when it denied his motion to suppress evidence from the show-up identification, which he argues was unnecessarily suggestive. Specifically, Banks argues that the out-of-court identification was overly suggestive because he and Smith-Harper were handcuffed and the only black male suspects in the vicinity. The State argues that the show-up procedure was not unnecessarily suggestive, but even if it was, Moore's identification was reliable. We agree with the State and affirm the judgment of conviction.

"Suppression issues present mixed questions of law and fact." *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013) (internal quotation marks omitted). This court examines a district court's "findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *Id.* at 486, 305 P.3d at 916. The Due Process Clauses of the United States and Nevada Constitutions prohibit the use of a pretrial identification if, based on the totality of the circumstances, the identification was unnecessarily suggestive and conducive to irreparable mistaken identification. *Johnson v. State*, 131 Nev. 567, 574-75, 354 P.3d 667, 672-73 (Ct. App. 2015); *see also Stovall v. Denno*, 388 U.S. 293 (1967), *abrogated on other grounds by United States v. Johnson*, 457 U.S. 537, 543-44 (1982).

"An on-the-scene confrontation [i.e., show-up identification] between [an] eyewitness and suspect is inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender." *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). But a show-up identification "may be justified by countervailing policy considerations," such as the witness' fresher memory or the exoneration of innocent suspects. *Id.* In other words, show-up procedures may be warranted where exigent circumstances exist. Moreover, even if the identification procedure used by law enforcement was unnecessarily suggestive, due process is not necessarily offended if the identification was otherwise reliable. *Johnson*, 131 Nev. at 579, 354 P.3d at 675; *see also Bias v. State*, 105 Nev. 869, 872, 784 P.2d 963, 965 (1989). Indeed, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

In *Johnson*, this court concluded that a show-up identification was not unnecessarily suggestive, even though the defendant "was wearing handcuffs and spotlighted in front of a marked police car during the show-up" identification. 131 Nev. at 577, 354 P.3d at 674. First, we noted that prior to the show-up identification, officers had "specifically cautioned [the witnesses] that it was just as important for the show-up to exonerate innocent people as it was to implicate guilty ones." *Id.* Thus, we concluded that the witnesses "were not unduly pressured into a false or mistaken identification." *Id.* at 578, 354 P.3d at 675.

We also concluded in *Johnson* that "[e]ven if the show-up contained elements of suggestiveness, strong countervailing policy considerations existed" justifying the identification procedure. *Id.* Specifically, we observed that the show-up procedure was conducted "while the victims' memories were still fresh," that the crimes were violent and it was therefore crucial that police quickly determine whether or not the detainee was the true perpetrator, and that the defendant was potentially dangerous because he purportedly used a firearm during the commission of the crime. *Id.* Therefore, we held that the show-up procedure was not unnecessarily suggestive because "the decision to employ a show-up rather than another more onerous method of identification was warranted under the exigencies that existed" at the time. *Id.*

The facts of this case are similar to *Johnson*. Here, shortly after the crimes were committed, Officer Meeks notified Moore that officers had detained two black males, who matched the description that he had provided, at a nearby location. Officer Meeks and Moore then separately drove to that location so that Moore could attempt to identify the detainees. Once they arrived, Moore sat inside a police vehicle to observe the men and

potentially make an identification. Moore viewed the men individually, one and then the other, and both men were handcuffed and standing in front of police vehicles. After a few minutes, Moore confidently identified both suspects.

Although some elements of this show-up procedure were suggestive, we conclude that they were not *unnecessarily* suggestive based on the totality of the circumstances. For instance, prior to making the identifications, Officer Meeks administered a standard admonition, which Moore read and signed, cautioning Moore that it was just as important to exonerate innocent people as it was to implicate guilty ones. Specifically, the admonishment warned Moore that the detained persons "may or may not be a person who committed the crime now being investigated"; that "[y]ou do not have to identify anyone"; and "[i]t is just as important to free innocent persons from suspicion as it is to identity those who are guilty." Thus, similar to *Johnson*, there was no undue pressure on Moore to make a false identification.

The countervailing policy considerations that existed in *Johnson*, which justified the use of the show-up procedure there, also existed in this case. First, Moore's memory was still fresh when he made the identification. Indeed, the show-up was conducted about an hour and thirty minutes after the incident occurred. Second, the crimes were violent in nature—e.g., robbery and burglary with use of deadly weapon—making timely apprehension of the guilty parties imperative. *See, e.g., Johnson*, 131 Nev. at 578, 354 P.3d at 675 (explaining that "had the police mistakenly detained the wrong people and employed a more time-consuming method of identification[,] . . . the true criminals could have committed additional violent offenses . . . or escaped apprehension entirely"). And finally, a

firearm was used during the commission of the instant crimes. The record shows that Moore testified to this fact, and he informed the 911 operator that one of the suspects was armed. Thus, police knew that they were likely dealing with an armed suspect and therefore needed to act promptly to ensure public safety. Based on this record, we conclude that the show-up identification used in this case was not unnecessarily suggestive.

The show-up identification was also reliable. Reliability is assessed using the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Canada v. State*, 104 Nev. 288, 294, 756 P.2d 552, 555 (1988) (quoting *Brathwaite*, 432 U.S. at 114).

Here, the incident occurred in broad daylight, and Moore was within six feet of Banks as he brandished the firearm. During the suppression hearing, Moore also testified that he was quite focused on Banks, given that he was holding a gun, and that the incident lasted at least one minute. Moreover, when Moore spoke with the 911 operator, he described Banks as being a black male in his early twenties, who was "about five-six" and possibly wearing a black hoodie. According to the record, Banks is a black male, 5 feet 8 inches tall, and 21-years-old at the time the crimes were committed. Additionally, police recovered a black sweatshirt near the area where they apprehended Banks and Smith-Harper. Thus, the record demonstrates that Moore had a good opportunity to view Banks and that his degree of attention was high, resulting in an accurate prior description. *See Riley v. State*, 86 Nev. 244, 245-46, 468 P.2d 11, 12 (1970) (concluding that a witness' identification was reliable where he observed

the suspect for seven seconds from twelve to fifteen feet away); *see also United States v. Drake*, 543 F.3d 1080, 1089 (9th Cir. 2008) (providing that less than one minute was ample time for the witness to properly view the robber).

Furthermore, Moore testified that he was one-hundred percent certain that Banks was the gunman when he made the identification at the show-up, and Officer Meeks attested that Moore "was very confident and made a very confident identification of both" suspects. The record also reveals that subsequent to the show-up, Moore positively identified Banks as the gunman at the suppression hearing and again at trial. Moreover, police conducted the show-up procedure within an hour and thirty minutes after the crimes were committed while Moore's memory was still fresh. Therefore, we conclude that the district court did not err in denying Banks' motion to suppress because, based on the totality of the circumstances, the show-up procedure was not unnecessarily suggestive and Moore's identification was reliable. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
David Kalo Neidert
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk