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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1996
A17-0357**

State of Minnesota,
Respondent,

vs.

Kyle Matthew Thomas,
Appellant.

**Filed November 6, 2017
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-15-6372

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Hennepin County jury found Kyle Matthew Thomas guilty of second-degree assault based on evidence that he stabbed a taxi cab driver in the hand with a pocketknife.

We conclude that the district court did not err by denying Thomas's mid-trial motion for a mistrial, that the district court did not err by excluding evidence of a municipal ordinance, and that the evidence is sufficient to support the conviction. Therefore, we affirm.

F A C T S

Late in the evening of March 8, 2015, Thomas left a nightclub in downtown Minneapolis and entered the front seat of a taxi cab. The cab driver, F.D., testified at trial that Thomas obviously was intoxicated and was unable to provide F.D. with a specific destination, saying only that he wanted to be taken to "somewhere in Dinkytown." F.D. was concerned that Thomas might not pay the fare upon arrival in Dinkytown, so he asked Thomas to pay the fare up front. After discussing the need for pre-payment for approximately five minutes, F.D. asked Thomas to get out of the cab. Thomas responded by punching the cab driver in the face. As the two men scuffled inside the cab, Thomas removed a small folding knife from his pocket and jabbed at the cab driver, cutting his left hand. Thomas exited the cab, and the two men fought briefly on the sidewalk. Thomas ran away, and F.D. followed him.

While following Thomas, F.D. came upon Officer McCarthy of the Minneapolis Police Department. F.D. told Officer McCarthy that he had been stabbed by a customer in his taxi cab. F.D. described the customer as an intoxicated white male of average height with brown hair and a light-colored shirt, possibly pink, with blood on it. Officer McCarthy used his police radio to report the incident. Officer Starr and his partner, who were on patrol nearby, heard the report. Officer Starr saw a man who matched Officer McCarthy's description, detained him, and learned from the man that he had been inside a taxi cab.

Officer Starr informed Officer McCarthy by radio that he had identified and detained a suspect. By that time, F.D. was being treated by paramedics in an ambulance. Thomas was brought to the ambulance, where F.D. identified Thomas as the man who had stabbed him.

The state charged Thomas with one count of second-degree assault with a dangerous weapon, in violation of Minn. Stat. § 609.222, subd. 1 (2016). At a pre-trial hearing, Thomas moved to suppress the evidence of F.D.'s identification of Thomas on the ground that the show-up procedure at the ambulance was flawed. The state presented the testimony of Officer McCarthy, who described the sequence of events leading up to F.D.'s identification of Thomas. Officer McCarthy testified that his partner, Sergeant McCarver, escorted Thomas to the back of the ambulance. Officer McCarthy testified that, before the show-up procedure, he told F.D. that he would be asked to look at a person who may or may not have been involved in the earlier incident and that he should state whether he recognized the person and, if so, how. Officer McCarthy testified that upon seeing Thomas, F.D. immediately said, "That's him!," and, "That's the guy who stabbed me." The district court denied the motion to suppress, reasoning that the show-up procedure was not overly suggestive and that the victim's identification was reliable because there was "very little likelihood of misidentification."

The case was tried to a jury on three days in August 2016. During opening statements, Thomas's attorney stated that he intended to prove that F.D. was required by a city ordinance to drive Thomas to his requested destination without requiring him to pre-pay the fare. After opening statements, outside the presence of the jury, the prosecutor

objected to the evidence referenced by Thomas's attorney. Counsel later made arguments to the district court during a subsequent recess. The district court ruled that the ordinance is irrelevant and, thus, inadmissible.

The state called eight witnesses: F.D., four police officers, two forensic scientists, and a person who was employed as a security guard at a nearby nightclub. Officer McCarthy testified that, while F.D. was being treated in the ambulance, F.D. identified Thomas as the person who had stabbed him. Officer Starr testified that he and his partner first drove Thomas to the ambulance and that three or four officers then escorted Thomas from the squad car to the back of the ambulance. F.D. later testified on cross-examination that he was not given any instructions before the show-up procedure. During a subsequent recess, Thomas asked the district court to reconsider its pre-trial ruling on the admissibility of the show-up evidence on the ground that the state's trial evidence did not conform to the evidence that the state had presented at the pre-trial hearing with respect to how many officers escorted Thomas to the ambulance and whether F.D. received any instructions before the show-up procedure. Thomas argued that the district court should declare a mistrial because, he asserted, the jury heard identification evidence that should not have been admitted. The district court denied the motion.

The jury found Thomas guilty. The district court imposed a sentence of 21 months of imprisonment. Thomas appeals.

DECISION

I. Show-Up Procedure

Thomas argues that the district court erred by denying his mid-trial motion for a mistrial, which challenged the state's identification evidence. He contends that the show-up procedure was overly suggestive and unreliable and, thus, that the identification evidence arising from the show-up procedure should have been deemed inadmissible. To resolve Thomas's argument, we must examine both the district court's pre-trial ruling on Thomas's motion to suppress evidence and the district court's mid-trial ruling on Thomas's motion for a mistrial.

Courts must apply a two-step test to determine whether evidence of a pre-trial identification is admissible. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). At the first step, the "inquiry focuses on whether the procedure was unnecessarily suggestive." *Id.* "Whether a pretrial identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification." *Id.* If a pre-trial identification procedure is unnecessarily suggestive, the second step of the inquiry becomes relevant. *Id.* At the second step, the identification evidence may be admissible, even if the identification procedure was suggestive, "if the totality of the circumstances establishes that the evidence was reliable." *Id.* The question at the second step is "whether the suggestive procedures created a very substantial likelihood of irreparable misidentification." *Id.* We evaluate the totality of the circumstances by considering five factors:

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 photo display; [and]
5. The time between the crime and the confrontation.

Id. (citing *State v. Bellcourt*, 312 Minn. 263, 264, 251 N.W.2d 631, 633 (Minn. 1977) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382 (1972))). This court applies a clear-error standard of review to a district court's pre-trial ruling that evidence of a pre-trial identification is admissible. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999); *State v. Adkins*, 706 N.W.2d 59, 62 (Minn. App. 2005).

A district court should grant a mid-trial motion for a mistrial if there was an error or defect in trial procedure that would deny a defendant a fair trial. *See State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Id.* (quotation omitted). This court applies an abuse-of-discretion standard of review to a district court's denial of a mid-trial motion for a mistrial. *See id.*

In this case, the district court denied Thomas's pre-trial motion to suppress the show-up evidence after rejecting his argument at both steps of the analysis. First, the district court noted that "show-ups are, by their nature, suggestive," *see State v. Taylor*,

594 N.W.2d 158, 162 (Minn. 1999), but determined that “the suggestiveness inherent in the show-up was not so great as to make this an unfair lineup.” The district court reasoned that the show-up was not unnecessarily suggestive merely on the ground that Thomas was brought to the victim rather than vice versa, that Thomas had blood on his shirt, or that Thomas was in handcuffs. Second, the district court determined that F.D.’s identification was reliable because there was “very little likelihood of any misidentification.” The district court reasoned that F.D. had the opportunity to see Thomas at a close distance for several minutes while they argued in the taxi cab, that F.D. had an additional opportunity to see Thomas when he followed as Thomas fled, and that F.D.’s description of Thomas was almost entirely accurate.

During a recess in the trial, after the state had presented the testimony of two witnesses, Thomas raised the show-up issue again by asking the district court to reconsider its pre-trial ruling. The district court initially stated that it would not reconsider its pre-trial ruling. The district court’s statement is consistent with caselaw stating that a district court retains discretion to reconsider a pre-trial ruling during trial. *See State v. Papadakis*, 643 N.W.2d 349, 356-57 (Minn. App. 2002). But the district court allowed Thomas’s attorney to make additional argument. The district court then denied the mistrial motion on the ground that “inconsistent evidence is [not] the basis for a mistrial.”

On appeal, Thomas contends that the trial testimony of Officer Starr and F.D., which Thomas asserts was inconsistent with Officer McCarthy’s testimony at the pre-trial hearing, “demonstrates that the show-up identification procedure was unnecessarily suggestive.” Specifically, Thomas contends that the show-up was unnecessarily suggestive

because it was a one-person show-up and because Thomas appeared in handcuffs. But those features of the show-up were known at the time of the pre-trial hearing and were not contradicted later by the state's trial evidence. Thomas contends further that the show-up was unnecessarily suggestive because F.D. was not given any instructions before the show-up and because Officer Starr's recollection of who escorted Thomas to the ambulance differed from Officer McCarthy's recollection. But Thomas does not elaborate on why those facts, if true, would make the show-up unnecessarily suggestive. We believe that the district court's reasons for finding that the show-up was not unnecessarily suggestive were not undercut in any way by the state's trial evidence. The determination that the show-up was not unnecessarily suggestive is a sufficient reason for concluding that the show-up evidence is admissible.

Thomas also contends on appeal that the state's evidence is insufficient to prove that the show-up procedure did not create a very substantial likelihood of misidentification. This part of Thomas's argument is not based on his mid-trial motion for a mistrial. Rather, this part of Thomas's argument is a challenge to the district court's pre-trial ruling. Thomas contends, in essence, that F.D.'s identification is unreliable because it arose from a chaotic scene and because F.D.'s description of Thomas likely could have fit a number of persons who were downtown that evening.

Contrary to Thomas's contentions, the five-factor test suggests that F.D.'s identification is not unreliable. First, F.D. had ample time and opportunity to look at Thomas while they discussed the cab fare for approximately five to six minutes, while they fought outside the taxicab, and while F.D. followed Thomas when he ran away. Second,

F.D. likely focused directly on Thomas because the parties sat side by side in the front of the cab and were directly facing each other while fighting on the sidewalk. Third, F.D.'s description of Thomas was mostly accurate, the only discrepancy being that F.D. said that Thomas's shirt may have been pink when in fact it was gray. Most importantly, F.D. accurately said that Thomas's shirt had blood on it, which likely distinguished it from most every other person downtown that evening. Fourth, F.D. stated that his identification of Thomas was made with "100 percent" certainty. And fifth, F.D.'s identification of Thomas was made shortly after the incident between them, within approximately a half an hour, given Thomas's testimony of when he left the nightclub and Officer Starr's testimony about when he detained Thomas. These circumstances demonstrate that the show-up procedure did not create a "very substantial likelihood of irreparable misidentification." *See Ostrem*, 535 N.W.2d at 921. The determination that F.D.'s identification is reliable is an additional sufficient reason for concluding that the show-up evidence is admissible.

Thus, the district court did not err by denying Thomas's pre-trial motion to suppress evidence or by denying his mid-trial motion for a mistrial.

II. Admissibility of Ordinance

Thomas argues in his *pro se* supplemental brief that the district court erred by sustaining the state's objection to his attempt to introduce the Minneapolis taxi cab ordinance into evidence. Thomas argues that the district court's ruling violated his constitutional right to present a complete defense.

The Due Process Clause protects a criminal defendant's right to present a complete defense. *State v. Jenkins*, 782 N.W.2d 211, 225-26 (Minn. 2010). The United States

Supreme Court has held that an evidentiary rule that “infringes upon a weighty interest of the accused and is arbitrary or disproportionate to the purposes the rule is designed to serve” violates the defendant’s constitutional right to present a complete defense. *State v. Pass*, 832 N.W.2d 836, 841-42 (Minn. 2013) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 1731 (2006)) (alterations omitted). But “evidentiary rules designed to permit the exclusion of unfairly prejudicial, confusing, or misleading evidence are unquestionably constitutional.” *Id.* at 842 (quotations omitted). Thomas does not develop an argument that the district court’s application of the rules of evidence is inconsistent with his constitutional right to present a complete defense. Accordingly, we construe Thomas’s *pro se* brief to argue that the district court erred in its application of the rules of evidence.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. With some exceptions, “[a]ll relevant evidence is admissible,” and “[e]vidence which is not relevant is not admissible.” Minn. R. Evid. 402. Furthermore, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403. This court applies an abuse-of-discretion standard of review to a district court’s evidentiary ruling based on relevance. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005).

The district court excluded the taxi cab ordinance that Thomas sought to introduce, which purportedly prohibits a cab driver from requiring pre-payment of a fare, on the ground that it is not relevant. The district court reasoned that, in “a verbal argument that leads to physical violence, there is no basis for, in effect, proving who was right in the argument, because whether he was right or wrong, that didn’t entitle him to engage in violence.” The district court also reasoned that the ordinance would not tend to impeach F.D.’s credibility because F.D. admitted to the conduct that Thomas contended was in violation of the ordinance. Thomas has failed to explain how the district court abused its discretion by excluding the evidence for those reasons.

Thus, the district court did not err by sustaining the state’s objection to Thomas’s attempt to introduce the taxi cab ordinance into evidence.

III. Sufficiency of Evidence

Thomas argues in his *pro se* supplemental brief that the evidence is insufficient to support his conviction.

When reviewing whether there is sufficient evidence to support a conviction, this court undertakes “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). This court “will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably

conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

A person is guilty of second-degree assault if he “assaults another with a dangerous weapon.” Minn. Stat. § 609.222, subd. 1. For purposes of this statute, “assault” means “(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10 (2016); *see also State v. Essex*, 838 N.W.2d 805, 809 (Minn. App. 2013), *review denied* (Minn. Jan. 21, 2014). The term “bodily harm” means “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7.

Thomas contends that the evidence is insufficient because, he asserts, F.D.’s testimony was not credible. Thomas’s contention is inconsistent with this court’s standard of appellate review. We do not attempt to determine whether any particular trial witness was credible or not credible, and we do not attempt to reweigh the evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009). Rather, we defer to the jury’s assessments of witness credibility. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). In evaluating the sufficiency of the evidence, we assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Given the nature of our appellate review, F.D.’s testimony that Thomas stabbed him is sufficient to support the jury’s verdict. Furthermore, the state introduced other evidence that tends to corroborate the jury’s verdict, including photographs of F.D.’s injured hand, photographs of blood at the scene of the stabbing, and a video-recording

captured by a security camera, which shows the two men fighting on the sidewalk after Thomas exited the cab.

Thomas also contends that the evidence is insufficient for the same reasons that were present in two cases in which the supreme court reversed the defendants' convictions. *See State v. Huss*, 506 N.W.2d 290, 292-93 (Minn. 1993); *State v. Langteau*, 268 N.W.2d 76, 77 (Minn. 1978). In *Huss*, the appellant was convicted of criminal sexual conduct based solely on the testimony of a three-year-old child, whose testimony was internally inconsistent and contradictory. 506 N.W.2d at 290, 292. In addition, a therapist had exposed the child to highly suggestive material, which may have improperly influenced her testimony. *Id.* at 292-93. In *Langteau*, the appellant was convicted of aggravated robbery based solely on the uncorroborated testimony of the victim, 268 N.W.2d at 77, whose actions were "questionable or unexplained," *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (distinguishing *Langteau* as well as *Huss*). In this case, however, there is no reason to question F.D.'s competence as a witness and no special reason to question his credibility, and his testimony was corroborated by physical evidence.

Thus, the evidence is sufficient to support Thomas's conviction of second-degree assault.

Affirmed.