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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1057**

Majinieke Vasha Thompson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

**Filed March 26, 2018
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-14-25726

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Ross, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion by denying her petition for postconviction relief, which challenged the admission of identification and *Spreigl*

evidence, the sufficiency of the evidence regarding value of the property, and the witness-identification jury instruction. We affirm.

FACTS

On July 12, 2014, T.M. was working at Pearle Vision in the Eden Prairie Center Mall (EPCM) when one male and two females, one pushing a stroller, entered the store. When the female with the stroller and the male left the store, T.M. focused her attention on the remaining individual. The individual selected “at least half a dozen” frames, which were put on a tray for her to try on. When T.M. turned her back to the individual to reach for another set of frames, the individual fled the store with the tray.

T.M. called 911 reporting that someone took a tray of high-priced frames valued around \$1,000. T.M. described the suspect as “African American,” in her “early twenties” “wearing a pink jacket [and] low cut shirt.” She stated that the suspect had a tattoo of the word “beauty,” and tattoos on her leg, including “Shelly.”

EPCM security and police responded to the store. T.M. repeated her description of the suspect, including “the word beauty tattooed across her chest.” The director of EPCM security, M.G., recalled the “beauty” tattoo from a previous shoplifting incident. M.G. showed T.M. a picture from the previous case. T.M. recognized the suspect in the photo. M.G. provided police with the suspect’s name, appellant Majinieke Vasha Thompson.

A couple of weeks after the incident, T.M. chose Thompson’s photo in a lineup. T.M. was “absolutely certain” about her identification. Thompson was charged with theft—value more than \$1,000 but less than \$5,000. She moved the district court to prohibit the state from introducing evidence regarding T.M.’s initial identification.

The district court held a hearing on Thompson's motion. M.G. testified that he worked for a private entity that has a contract with EPCM. M.G. did not work for the city or the state and is not a licensed peace officer. M.G. testified that when the suspect was described as an "African-American female with a tattoo of the word 'beauty' on her chest," he recalled the tattoo description from a trespass report. M.G. testified that he showed T.M. a photo from the report and asked: "Is this somebody similar to . . . who you saw?" He testified that T.M. identified the suspect without hesitation.

Detective Coy testified that she generated a six-photo lineup using age, sex, height, and weight parameters. Because Detective Coy was informed that the suspect had a "tattoo of 'beauty' across her chest," she specifically chose a photo of Thompson in which her tattoo was not visible. A lieutenant with no knowledge of the case administered the photo lineup. He testified that he twice showed T.M. the photos and T.M. selected the photo of Thompson.

T.M. testified that M.G. showed her a photo and asked: "Is this the girl that was in your store?" T.M. testified that M.G. did not suggest that the suspect was in the photo. T.M. testified that at first the person in the photo did not look like the suspect because her hair was different, but then she saw the "beauty" tattoo and recognized the other woman in the photo as the person who entered the store with the suspect. T.M. testified that she recognized the suspect in the photo "taking away the hairstyle." She stated that she initially did not think that it could be a photo of the suspect because she assumed that the photo had been taken the day of the incident and the suspect was wearing different clothing than the

person in the photo. The district court denied Thompson's motion to suppress the identification evidence.

On August 21, 2015, a jury found Thompson guilty of the theft charge. On December 8, 2015, the district court sentenced Thompson to one year and one day commitment, stayed for three years. Thompson did not file a direct appeal.

On January 10, 2017, Thompson filed a petition for postconviction relief, asserting that identification evidence should have been suppressed, *Spreigl* evidence was erroneously admitted, the evidence was insufficient as to value of the property stolen, and the district court erred in jury instructions. The district court denied Thompson's petition and this appeal followed.

D E C I S I O N

Denial of a petition for postconviction relief is reviewed for an abuse of discretion. *Colbert v. State*, 870 N.W.2d 616, 621 (Minn. 2015). This court reviews legal issues de novo. *Id.* This court reviews the district court's factual determinations under the clearly erroneous standard and will not reverse those determinations "unless they are not factually supported by the record." *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014).

Identification evidence

Thompson first argues that the district court abused its discretion by determining that the initial photo identification was not overly suggestive. Thompson concedes that, while the photo lineup administered by law enforcement "may have been done according to established best practices," M.G. showing T.M. "a single photograph alleged to be that of the perpetrator tainted the procedure."

The United States Supreme Court held in *Perry v. New Hampshire* that “the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.” 565 U.S. 228, 248, 132 S. Ct. 716, 730 (2012); *see also State v. Mosley*, 853 N.W.2d 789, 796 (Minn. 2014) (relying on *Perry* in concluding that when law enforcement does not arrange a witness’s identification, the admission of the identification does not violate a defendant’s due-process rights). Determining reliability when due-process rights are implicated involves consideration of the opportunity of the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of the witness’s prior description, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977).

Here, the identification was not arranged by law enforcement. M.G. is not a licensed peace officer and does not work for the city or the state. Thus, Thompson’s due-process rights were not implicated and, in determining the admissibility of this evidence, the district court was not required to evaluate its reliability.

The Court in *Perry* stated that district courts may nonetheless exclude out-of-court identification evidence if it finds that its probative value is substantially outweighed by its prejudicial impact or potential to mislead the jury. 565 U.S. at 247, 132 S. Ct. at 729; *see Minn. R. Evid.* 403 (stating that 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”). When balancing probative value against potential prejudice, unfair prejudice “is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Here, the probative value of the evidence outweighed its danger of unfair prejudice. T.M.’s description caused M.G. to recall a photo of an individual with a similar tattoo involved in a prior incident. Thompson argues that T.M.’s identification was not of a face but of a blur on a chest area that could have been the same tattoo. But T.M. testified that she identified the suspect in the photo not based on the tattoo, but rather on the suspect’s eyes. Additionally, the photo lineup did not include a photo of a woman with a chest tattoo. And T.M. identified Thompson without hesitation. Finally, the district court instructed the jury:

Testimony has been introduced tending to identify [Thompson] as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so, you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness’s view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification. If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness’s memory is affected by that earlier identification.

This instruction includes the factors relevant to evaluating eyewitness-identification testimony, which is a safeguard in preventing a conviction based on unreliable eyewitness

identification. See *Mosley*, 853 N.W.2d at 799. Because Thompson’s due-process rights were not implicated and the evidence was more probative than prejudicial, the district court did not abuse its discretion in denying appellant’s petition for postconviction relief based on the admission of the identification evidence.

***Spreigl* evidence**

Thompson next argues that the district court abused its discretion by determining that *Spreigl* evidence was properly admitted.

Generally, evidence of other crimes or misconduct is inadmissible to prove a defendant’s character or to show that she acted in conformity with that character. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But this evidence may be admissible for the “limited purpose of showing motive, intent, absence of mistake or accident, identity, or a common scheme or plan.” *Id.* (citing Minn. R. Evid. 404(b)). The supreme court has developed a five-step process for determining whether to admit this evidence:

- (1) [T]he state must give notice of its intent to admit the evidence;
- (2) the state must clearly indicate what the evidence will be offered to prove;
- (3) there must be clear and convincing evidence that the defendant participated in the prior act;
- (4) the evidence must be relevant and material to the state’s case; and
- (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006).

Here, the evidence was admitted to prove identity and common scheme or plan. A detective testified that in July 2012, he responded to EPCM on a theft call, made contact

with Thompson and two other females, and recovered a pair of sunglasses. Thompson argues only that the evidence was not relevant or material to the state's case and that it was more prejudicial than probative.

Thompson claims that admitting the evidence to show identity was cumulative and a “subterfuge for impugning’ [her] character” because T.M.’s eyewitness testimony was conclusive proof of her identity. But Thompson put identity as a central issue at trial. When she testified, Thompson showed the jury her tattoos: a tattoo on her leg of big “twirling” flowers and stars and the name “Nitelen” in cursive writing and a tattoo on her chest that says: “Love Beauty Pain.” Thompson attempted to distinguish her tattoos from T.M.’s description of the suspect’s tattoos to raise doubt as to T.M.’s identification.

Thompson also argues that to establish a common scheme or plan, the *Spreigl* incident must be sufficiently similar to the charged offense. She admits that while there are “some similarities,” the evidence showed only that she “has engaged in shoplifting more than once.” The *Spreigl* offense, however, is markedly similar to the charged offense. Both offenses occurred at EPCM and involved multiple actors, one actor pushing a stroller, and the theft of sunglasses. The district court correctly determined that the *Spreigl* evidence was relevant and material to the state’s case.

Even if *Spreigl* evidence is relevant, however, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403. The closer the relationship in time, place, and modus operandi between the *Spreigl* offense and the current charge, the less likely the jury will use the evidence improperly. *State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004).

Here, the *Spreigl* evidence had high probative value. T.M. was the sole witness and Thompson was not discovered with the stolen merchandise, which was not recovered. Thompson's defense was that she was not the person who stole the merchandise, and the other incident was very similar to the charged offense, showing a common scheme. Additionally, the presentation of the evidence was brief and the district court gave the jury a cautionary instruction three times—before and after the evidence was admitted and in its final instructions. *See State v. Slowinski*, 450 N.W.2d 107, 114-15 (Minn. 1990) (stating that the reading of cautionary instructions lessens the probability of undue weight being given by the jury to the *Spreigl* evidence). Because the district court properly admitted the *Spreigl* evidence, the postconviction court did not abuse its discretion by denying relief.

Sufficiency of the evidence

Thompson also argues that the evidence was insufficient to prove the value of the items taken. In reviewing a claim of insufficient evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the verdict, is sufficient to allow the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). 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. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The reviewing court must 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).

When a jury considered circumstantial evidence, this court applies a heightened standard of review. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). This standard includes a two-step analysis to determine whether the evidence was sufficient to support the conviction. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, this court “identif[ies] the circumstances proved,” “assum[ing] that the jury resolved any factual disputes in a manner that is consistent with the jury’s verdict.” *Id.* Second, this court “examine[s] independently the reasonableness of the inferences that might be drawn from the circumstances proved,” and then “determine[s] whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotations omitted). The evidence is considered as a whole, not each piece in isolation. *State v. Andersen*, 784 N.W.2d 320, 332 (Minn. 2010).

The jury found Thompson guilty of “intentionally and without claim of right” taking “possession of movable property of another” valued greater than \$1,000 but not more than \$5,000, “without the other’s consent and with intent to deprive the owner permanently of possession of the property.” See Minn. Stat. § 609.52, subds. 2(a)(1), 3(3)(a) (2012). Thompson challenges only the sufficiency of the evidence proving value.

The circumstances proved show that when T.M. reported the theft on the 911 call, she stated that \$1,000 of merchandise was taken, which was her “gut” response. They also show that the responding officer watched T.M. assess the store’s inventory and document items taken, including: four pairs of Juicy sunglasses worth \$1,039.80; two pairs of Gucci sunglasses worth \$720; one pair of Versace sunglasses worth \$299.95; and one pair of Dolce & Gabbana worth \$319.95; with a total estimated value of \$2,379.70. The

circumstances proved show that T.M. guessed that “at least a half a dozen” “high-end” frames were on the tray valued between \$2,000 and \$2,500. They also show that Detective Coy testified that the people at Pearle Vision reported that the value of the theft was \$2,379.70. The circumstances proved are consistent with guilt and inconsistent with any other rational hypothesis because there is no value less than \$1,000 assigned to the property.

Thompson also challenges the restitution order. Thompson was ordered to pay restitution in the amount of \$2,639.55. Thompson filed a motion challenging restitution, and the district court held a hearing at which Thompson did not appear. The district court dismissed Thompson’s motion and stated that the restitution initially imposed remained. Thompson cannot now challenge restitution in a petition for postconviction relief filed nearly one year after the restitution hearing. *See* Minn. Stat. § 611A.045, subd. 3(b)(2012) (“A defendant may not challenge restitution after the 30-day time period has passed.”).

Jury instruction

Finally, Thompson argues that the district court abused its discretion by declining to adopt her proposed jury instruction on eyewitness identification. Jury instructions are entrusted to the district court’s discretion, and a district court’s refusal to give a requested instruction will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

The district court stated that the pattern instruction was appropriate because identification was a central issue. The Minnesota Supreme Court has affirmed a district court’s denial of a defendant’s request for an instruction concerning eyewitness

identification and its decision to read the pattern jury instruction. *State v. Lindsey*, 632 N.W.2d 652, 661-62 (Minn. 2001). The supreme court concluded that the pattern jury instructions “convey[] the relevant aspects of witness identification to the jury.” *Id.* at 662.

Thompson claims that while the pattern jury instruction provides a standard eyewitness-identification instruction, a more thorough instruction has been used in other jurisdictions. But Thompson provides no Minnesota authority for the proposed instruction. And our supreme court has not held that the relevant pattern jury instruction is inadequate or misstates the law. The district court did not abuse its discretion by declining to adopt Thompson’s jury instruction. The district court appropriately denied Thompson’s petition for postconviction relief.

Affirmed.