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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1593**

State of Minnesota,
Respondent,

vs.

Brianne Joy Peterson,
Appellant.

**Filed September 4, 2018
Affirmed
Bjorkman, Judge**

St. Louis County District Court
File No. 69VI-CR-16-613

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

Mark S. Rubin, St. Louis County Attorney, Sharon Chadwick, Assistant County Attorney,
Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Renée Bergeron, Special
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges her first-degree controlled-substance conviction, arguing that
she is entitled to a new trial because the district court erroneously admitted (1) an officer's

identification testimony that flowed from an impermissibly suggestive procedure and (2) photographs of text messages between appellant and an informant that lacked foundation. We affirm.

FACTS

On December 6, 2015, law-enforcement officers with the Boundary Waters Drug Task Force arrested B.L. after she tried to buy methamphetamine from an informant. The task force offered B.L. an opportunity to work as an informant in exchange for charging consideration, and she agreed to do so. On January 28, 2016, a task-force member told her that she had until the end of the day to set up a controlled buy or she would be dismissed from the informant program. B.L. responded that she would set up a transaction with her former intimate partner, P.S.¹

Through a series of text messages, P.S. agreed to sell B.L. a “half zip”² for \$1,000. P.S. told B.L. that appellant Brianne Peterson would facilitate the transaction. Peterson then exchanged text messages with B.L., ultimately telling B.L. to meet her in the women’s restroom of a local store. The two met in a restroom stall where B.L. gave Peterson \$1,000 for what later was determined to be just under 12 grams of methamphetamine.

Task-force members conducted surveillance from the store’s parking lot. Sergeant Steven Borchers was in one unmarked vehicle, and Officer Katherine Kral and Deputy Ryan Smith were in another. A Chevy truck pulled into the parking lot and B.L. went into

¹ P.S. was a suspected methamphetamine dealer in the area, and the task force was aware of him.

² A “half zip” is one-half ounce of methamphetamine.

the store. Neither the passenger nor the driver left the truck. B.L. received a text message from Peterson stating that she did not have the methamphetamine on her. The truck then left the lot, and B.L. returned to Deputy Smith and Officer Kral's vehicle.

The truck returned and both Sergeant Borchers and Deputy Smith saw someone exit and go into the store. B.L. re-entered the store after receiving another text from Peterson, and the transaction occurred. Although the task force had fitted B.L. with both audio and video recording devices, only the audio device worked, and only during part of the controlled buy. Deputy Smith and Officer Kral heard only muffled female voices and what they perceived to be the counting of money.

After the controlled buy, the officers allowed Peterson to leave in the truck. B.L. returned to Deputy Smith and Officer Kral's vehicle and handed them a small baggie containing the methamphetamine. During the debriefing session back at the sheriff's office, Deputy Smith took photographs of the text messages that B.L. and Peterson exchanged leading up to the controlled buy.

Peterson was subsequently charged with two first-degree controlled-substance offenses. Prior to trial, Peterson moved to exclude the text messages and Sergeant Borchers's testimony identifying her as the person who entered the store right before the controlled buy. The district court denied the motions, and the jury found Peterson guilty as charged. The district court denied Peterson's motion for a sentencing departure, and

imposed a 74-month executed sentence on one count of first-degree controlled-substance crime.³ Peterson appeals.

DECISION

I. The district court did not err by admitting Sergeant Borchers’s identification testimony.

Admission of identification evidence “violates due process if the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008) (quotation omitted). This court “review[s] de novo whether a defendant has been denied due process.” *Id.* at 83.

Peterson asserts that Sergeant Borchers’s pretrial and in-court identifications denied her due process because they were tainted by an impermissibly suggestive identification procedure. In analyzing suggestive-identification claims, we conduct a two-part test. *Id.* at 84. First, we ask whether the identification procedure was impermissibly suggestive. *Id.* This determination commonly turns on whether a defendant has been unfairly singled out by law enforcement. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). The constitutional concern flowing from roundly criticized single photograph line-ups is that “*police influence rather than the witness’s own reasoning and recollection* led to the witness’s identification of the defendant.” *Hooks*, 752 N.W.2d at 84; *see also State v.*

³ After the Minnesota Supreme Court released its decision in *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017), the district court granted Peterson’s motion to modify her sentence to 56 months.

Taylor, 594 N.W.2d 158, 161 (Minn. 1999) (stating that the ultimate concern is whether the police’s procedure influenced the witness’s identification of the defendant).

Second, if the procedure was impermissibly suggestive, we ask whether the identification was still reliable under the totality of the circumstances. *Ostrem*, 535 N.W.2d at 921. In answering that question, we consider (1) the opportunity of the witness to view the criminal during the crime, (2) the witness’s level of attention, (3) the accuracy of the prior description of the defendant by the witness, (4) the witness’s level of certainty at the photograph display, and (5) the time between the crime and the photograph display. *Id.* But we do not apply the two-part test when there is “no conceivable identification-inducing interaction between the police and the identifying witness.” *Hooks*, 752 N.W.2d at 84.

A. The identification procedure was not impermissibly suggestive.

This case does not present the typical suggestive-identification situation where a lay witness is provided with identifying information by law enforcement; Sergeant Borchers was both the “witness” who made the identification and the officer who determined what identification procedure to use. *See id.* at 85 (noting that an officer “who obtains and observes *for himself* a driver’s license photograph to identify *for himself* the person he observed committing the investigated crime does not implicate that person’s due process rights” in the same way that a police officer supplying one photograph to an eyewitness does). Sergeant Borchers testified that he was the task-force commander who approved and coordinated the controlled buy. And he observed the transaction from the store parking lot.

When Sergeant Borchers arrived at the police station following the controlled buy, Officer Kral showed him a photograph of Peterson, asking if she was the same person he saw enter and leave the store around the time of the controlled buy. Sergeant Borchers affirmed that the suspect he identified was Peterson based on the photograph.

The district court allowed Sergeant Borchers to identify Peterson as the person who delivered the methamphetamine to B.L. because he had the opportunity to see her during his surveillance of the controlled buy. And because Sergeant Borchers was in charge of the investigation, could have looked up Peterson's photograph on law-enforcement computers, and was not likely to be impermissibly influenced by his subordinate, the fact he was presented with only Peterson's photograph was not impermissibly suggestive. We agree with the district court's reasoning. Because there is "no conceivable identification-inducing interaction between police and the identifying witness" when the same officer both establishes the procedure and identifies the suspect, the due-process concern implicated in single photograph line-ups are not present here. *Id.*

Peterson attempts to distinguish *Hooks* by arguing that the identification process was impermissibly suggestive since Sergeant Borchers did not retrieve the photograph himself. We disagree. Even before the controlled buy, all three task-force officers were aware that Peterson was a suspect. Sergeant Borchers testified that he would have obtained Peterson's photograph himself following the transaction if Officer Kral had not already done so. As Sergeant Borchers was both an eyewitness to the crime and the lead law-enforcement officer, we cannot say that he impermissibly influenced himself. Nor do we conclude that he was impermissibly influenced by the subordinate officer who showed him

the photograph. Because Sergeant Borchers's pretrial identification did not trigger the due-process concerns that are implicated when law-enforcement officers ask a lay witness to make an identification, the two-part suggestive-identification test does not apply.

B. The identification was reliable under the totality of the circumstances.

Peterson contends that Sergeant Borchers's identification testimony was unreliable because he did not have an adequate opportunity to view Peterson. We disagree. Using binoculars from a distance of 100-150 feet, Sergeant Borchers saw an individual walk from the truck into the store. He described the person as slender, dark-haired, between 5'5" and 5'7" tall, and wearing a black skull cap, camouflage jacket, and dark jeans. This description was largely accurate, although Sergeant Borchers may have overestimated Peterson's height (B.L. testified it is 5'2") and mistook her stocking cap and sweatpants for a skull cap and jeans.

The district court determined that Sergeant Borchers's testimony established that he was in a position to sufficiently view Peterson as she entered the store, and the evidence in the record supports that determination. On this record, we conclude that the totality of the circumstances show Sergeant Borchers's identification of Peterson was reliable. The district court did not err by admitting Sergeant Borchers's pretrial and in-court identifications of Peterson.

II. The district court did not abuse its discretion by admitting photographs of text messages between Peterson and B.L.

District courts have a "considerable [amount of] discretion under Minn. R. Evid. 901(a) in deciding whether evidence has been adequately authenticated or identified."

State v. Dulak, 348 N.W.2d 342, 344 (Minn. 1984). Evidentiary rulings are reviewed “for an abuse of discretion and any error is subject to harmless error analysis.” *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001) (citation omitted). Reversal is warranted when an evidentiary error “substantially influences the jury to convict.” *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

To establish that evidence is authentic, the proponent must show that the evidence is “sufficient to support a finding that the matter in question is what its proponent claims.” Minn. R. Evid. 901(a). There is no single procedure for authenticating evidence. *See State v. Johnson*, 239 N.W.2d 239, 242 (Minn. 1976) (“There can be no rigid formulation of what showing is necessary in order for a particular item of evidence to be admissible.”). The rules of evidence provide several examples, including testimony of a knowledgeable witness “that a matter is what it is claimed to be.” Minn. R. Evid. 901(b)(1). And authentication can be established through circumstantial evidence. *State ex rel. Trimble v. Hedman*, 192 N.W.2d 432, 436 (Minn. 1971); *see also* Minn. R. Evid. 901 1977 comm. cmt. (stating that rule 901(b)(4) indicates that evidence can be authenticated by circumstantial evidence).

Peterson does not contend that the photographs do not accurately reflect the text messages as they appeared on B.L.’s cell phone. Rather, she argues that B.L.’s testimony did not provide foundation that the text messages were sent by Peterson. The state asserts that even though B.L. did not provide authenticating testimony at trial, the text messages were authenticated by the “distinctive characteristics, taken in conjunction with [the] circumstances.” Minn. R. Evid. 901(b)(4). We agree with the state.

B.L. testified that she had known Peterson for years. B.L. knew her by the nickname “Bree,” which is how Peterson’s contact information is labeled in B.L.’s cell phone. B.L. also knew a great deal about Peterson, including where she lived and her current relationship with P.S. B.L. testified that she believed that she was communicating with Peterson in the text messages. Her belief is corroborated by the fact Peterson began texting B.L. to set up the controlled buy directly after P.S. told her that Peterson would facilitate the transaction. B.L.’s relationship and previous interactions with Peterson put her in a good position to recognize Peterson’s communication style.

Moreover, the substance and timing of the text messages correlate with the observed conduct of Peterson during the controlled buy. In one of the challenged text messages, timestamped at 8:49 p.m., Peterson stated that she is in a silver Chevy truck outside the store. Deputy Smith saw a truck matching this description arrive at 8:35 p.m. A little after 8:50 p.m., Peterson indicated by text that she was going to get the “half zip” of methamphetamine. Task-force members observed the truck leave the store parking lot a few minutes later. At around 9:23 p.m., Peterson texted that she was on her way back to the store. The same truck returned to the parking lot two minutes later. B.L.—while in one of the unmarked cars—identified Peterson as she left the truck to go into the store. Peterson then texted B.L. at 9:29 p.m. and told her to go to the women’s restroom inside. Seven minutes later, the store’s surveillance system recorded B.L. and Peterson leaving the restroom together.

In sum, B.L. established she knew Peterson personally and had communicated with her via text on prior occasions. And the conduct observed by the task force directly tracks

the communications between B.L. and Peterson in real time. On this record we conclude that the district court did not abuse its discretion in ruling that the text messages were properly authenticated and admitting the photographs depicting the messages.

Affirmed.