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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0624**

State of Minnesota,
Respondent,

vs.

Kashka Kenya Shannon,
Appellant.

**Filed April 19, 2021
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CR-19-18430

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from the judgment of conviction, appellant argues that the district court (1) erred by failing to suppress the victim's out-of-court- and in-court-identification

statements and (2) should be disqualified because it impermissibly participated in plea negotiations. We affirm.

FACTS

At around 4:00 a.m. on July 10, 2019, an armed assailant entered O.W.'s parked car and demanded money and O.W.'s cell phone. When O.W. did not comply, and after a brief scuffle, the assailant shot him in the abdomen, took his wallet and cell phone, and fled the scene. *Id.*

On the date of the incident, O.W. described the assailant as an African-American male in his mid-30s to early 40s. He further described the assailant as bald but wearing a hat and wearing a brown or grey shirt. During later interviews with investigators, O.W. described the same basic details, but changed the color of the assailant's shirt, described additional facial hair, and added other descriptors.

Thirteen days after the incident, the investigating officer brought O.W. to the police station to identify the assailant in a six-photo lineup. The Minneapolis Police Department (MPD) has a double-blind identification protocol, in which an officer who is not involved in the case administers the lineup and any personnel involved in the investigation do not participate, to avoid improperly influencing the eyewitness. However, here, the investigating officer remained in the room, seated across the table from O.W., while an officer with no other involvement in the case administered the lineup. O.W. initially doubted his ability to identify his assailant. The investigating officer told him that the suspect may or may not be among the photos. The administering officer added that O.W. should err on the side of not picking anyone. After studying the first three photos one-by-

one, O.W. identified the person in photo four, which depicted appellant Kashka Kenya Shannon, as his assailant. The investigating officer nodded immediately after O.W. selected photo four. On a second review of the photos, O.W. again selected photo four and the investigating officer slightly nodded.

Based on O.W.'s identification and other evidence, in August 2019, respondent State of Minnesota charged appellant with first-degree aggravated robbery under Minn. Stat. § 609.245, subd. 1 (2018), possession of a firearm by a prohibited person under Minn. Stat. § 624.713, subd. 1(2) (2018), and second-degree assault under Minn. Stat. § 609.222, subd. 2 (2018).

Prior to trial, defense counsel moved to suppress O.W.'s photo-lineup identification and any subsequent in-court identifications of appellant, arguing that the MPD administered an impermissibly suggestive identification procedure. The district court heard arguments from both parties but took no testimony, viewed a video recording of O.W.'s photo-lineup identification, and ultimately denied appellant's motion to suppress. The case proceeded to trial.

On the first day of trial, the state put the existing plea offer on the record. The district court explained appellant's options: accept the state's offer, enter a straight plea, or proceed to a court or jury trial. It also explained the possible sentences associated with each scenario and asked appellant how he would like to proceed. Appellant responded "Jury trial." At trial, the state presented evidence of O.W.'s identification of appellant, including the video recording of O.W.'s photo-lineup identification.

The jury found appellant guilty of all counts. The district court sentenced him to 105 months in prison for aggravated robbery and a concurrent 60 months for the firearm offense. It did not impose a sentence for the assault offense. The district court also revoked appellant's probation in a separate matter and executed the associated 33-month sentence concurrently with the sentences in this case. This appeal follows.

DECISION

I. The district court did not err by allowing evidence of the victim's out-of-court and in-court identifications of appellant because the police did not administer an unnecessarily suggestive photo-lineup procedure.

Appellant argues that the investigating officer's presence, contrary to MPD's double-blind protocol, and head nods during O.W.'s photo-lineup identification of appellant, made the procedure unnecessarily suggestive. We disagree.

We review the district court's decision on the admissibility of identification evidence for an abuse of discretion, *State v. Booker*, 770 N.W.2d 161, 168 (Minn. App. 2009), and its factual findings for clear error. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). However, "we review de novo whether a defendant has been denied due process." *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008) (citing *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005)). Because impermissibly suggestive lineup procedures implicate due-process rights, we review the district court's determination of whether a lineup is suggestive de novo. *See id.*

"The admission of pretrial identification evidence violates due process if the procedure 'was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Hooks*, 752 N.W.2d at 83 (citing *Simmons v. United*

States, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968) and *State v. Roan*, 532 N.W.2d 563, 572 (Minn.1995)). We use a two-part test in addressing the admissibility of witness identification. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we ask whether the procedure used to elicit the identification is unnecessarily suggestive. *Id.* This inquiry focuses on whether the procedure unfairly singled out the defendant for identification. *Id.* (citing *Simmons*, 390 U.S. at 383, 88 S. Ct. at 970-71). Second, if the procedure is unnecessarily suggestive, we ask whether the totality of the circumstances created “a very substantial likelihood of irreparable misidentification.” *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted). If not, the identification is considered reliable despite the suggestive procedure. *Ostrem*, 535 N.W.2d at 921. The focus of this two-step test is whether police influence, rather than the witness’s own reasoning and recollection, led to the identification. *Hooks*, 752 N.W.2d at 84 (citing *Taylor*, 594 N.W.2d at 161).

Here, after viewing the photo-lineup-identification video, the district court found that O.W. focused on the photos and the administering officer and, as a result, did not see the investigating officer nod. It therefore determined that the MPD did not use an unfairly suggestive procedure. Our careful review of the record, including the video, persuades us that it supports the district court’s findings, which are not clearly erroneous. We therefore conclude that the district court did not abuse its discretion by denying appellant’s motion to suppress O.W.’s identifying statements and consequently, that admission of those statements did not violate his due-process rights.¹ Because appellant fails to show an

¹ Although we conclude under these particular facts that MPD did not use an unnecessarily suggestive procedure, we note with concern that MPD did not follow its double-blind

unnecessarily suggestive procedure, we need not address the second step of our due-process inquiry. *Ostrem*, 535 N.W.2d at 921.

Appellant also urges us to adopt a new rule: that failure to comply with double-blind protocols renders a lineup per se suggestive. We decline to adopt appellant's new rule because "we are an error-correcting court and it is not the role of this court to abolish established judicial precedent." *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005).

II. The district court did not impermissibly participate in plea negotiations requiring disqualification.

Appellant argues that the district court impermissibly participated in plea negotiations and that the proper remedy for this error is automatic reversal for a new trial before a different judge. We are not persuaded.

A district court judge may not participate in plea-bargaining negotiations. *Wheeler v. State*, 909 N.W.2d 558, 562-63 (Minn. 2018) (citing *State v. Johnson*, 156 N.W.2d 218 (1968)). The district court's role in plea negotiations is to approve or reject the plea agreement submitted by the parties. *Id.* at 565. Impermissible participation includes commenting on the propriety of plea offers or proposing a plea offer different from those presented by the parties. *Id.* at 567. However, the district court may "inquir[e] into the status of negotiations, shar[e] general sentencing practices, [and] disclos[e] nonbinding

protocol for lineups, which is designed to prevent undue influence in witness identifications. See Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L. Pol'y & Ethics J. 381, 389 (2006) (discussing purposes of double-blind identification procedures).

plea and sentencing information at the joint request of the parties. *Id.* at 565. We review the legal question of whether a judge participated in plea negotiations de novo. *Id.* at 563.

Here, the state put the existing plea offer on the record: if appellant pleaded guilty to first-degree aggravated robbery, the state would dismiss all other counts and agree to a downward departure to 60 months. The state noted that the presumptive sentence was 88 months with a sentencing-guidelines range of 75 to 105 months. And the state said that it would seek 105 months if appellant was convicted after a trial.

The district court then asked for both parties' consent to discuss a straight plea. Both consented. In discussing the plea, the district court explained the straight-plea process and reiterated the potential sentences already put on the record by the state. The district court also asked, "thinking of your family, thinking of – I think you have some beautiful children . . . did you need a little bit more time to consider what your options are . . . ?" The district court finally asked appellant "So you just tell me how you want to proceed and we'll do whatever you want." Appellant stated, "Jury trial."

The district court's statements when viewed in context show that it discussed plea procedures, repeated information already discussed by the state, and asked appellant whether he needed more time to consider his options, none of which are improper topics under *Wheeler*. 909 N.W.2d at 567. It did not impermissibly comment on the reasonableness of the plea offer or make its own offer. Further, it asked for the express consent of the parties in order to be consistent with *Wheeler*. *Id.* We conclude that the district court did not impermissibly participate in the plea negotiations.

Appellant argues that his 105-month sentence confirms that the district court participated in plea negotiations. We disagree for four reasons. First, although the district court said “if you are convicted, you’re looking at 105 [months],” it did not *promise* this sentence if appellant was convicted. Rather, it simply reiterated the state’s summary of potential sentences. Second, the state recommended 105 months at sentencing. Third, the presentence investigation report (PSI) recommended a 108-month sentence, providing independent support for the sentencing decision.² Fourth, although the 105-month sentence is a top-of-the-box sentence, it is nevertheless within the presumptive range. We therefore presume it is appropriate. Minn. Sent. Guidelines 2.D.1 (2018); *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008) (noting that top-of-the-box sentence is not upward departure). We reject appellant’s argument.

Affirmed.

² The PSI stated that the district court should sentence the firearm-possession count first, which would result in a higher criminal-history score and presumptive range when sentencing the aggravated robbery when *Hernandized*. See *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). But the state decided not to *Hernandize* and therefore recommended 105 months.