IN THE COURT OF APPEALS OF THE STATE OF ALASKA

COLTEN EVAN ZAUKAR, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11653 Trial Court No. 4BE-11-1186 CR MEMORANDUM OPINION No. 6245 — October 14, 2015

Appeal from the Superior Court, Fourth Judicial District, Bethel, Dwayne W. McConnell, Judge.

Appearances: J. Adam Bartlett, Attorney at Law, Anchorage, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Kossler, Judges.

PER CURIAM.

Colten Evan Zaukar was convicted of second-degree robbery and first-degree burglary. Zaukar appeals his convictions, arguing that the superior court erred when it denied his motion to suppress the victim's identification of him. For the reasons explained here, we conclude that the superior court did not commit error, and we affirm Zaukar's convictions.

Facts and proceedings

In the early morning of August 2, 2011, Amanda Chief was asleep in the house she shared with her boyfriend, who was out of town that night. She awoke to discover the front door to the house open. As Chief walked around the house looking for an intruder, a man she later identified as Zaukar appeared from behind a door and pushed her to the floor. Zaukar was directly above Chief, with his hand over her mouth and his knee against her chest, but the lower part of his face was obscured by his sweatshirt. Chief noticed that he was wearing distinctive black-rimmed glasses.

Zaukar demanded money from Chief. Chief pleaded with him to leave, and after fifteen minutes, Zaukar let Chief up. When he did so, his sweatshirt fell away from his face, giving Chief a view of his goatee. Zaukar then left the house, and Chief called 911 to report the attack; she told the operator that the intruder was wearing a grey hooded sweatshirt and black-rimmed glasses and that he had a goatee.

Earlier that night, Zaukar had called Chief's house three times, and asked her twice if her boyfriend was at home. Although Zaukar did not identify himself on the phone, Chief recognized both his displayed phone number and his voice. Several months earlier, Vernon Zaukar, Zaukar's father and a friend of Chief's boyfriend, had stayed at the house. During that time, Zaukar had both called and visited the house, so he was known to Chief.

After Chief called 911, she called her boyfriend and told him that she had just been attacked by "Vernon's son," but that she could not remember Vernon's son's name. In response, her boyfriend said "Colten?," and Chief confirmed that was who she meant. Chief then called 911 again and provided Zaukar's name.

Six minutes after Chief's initial 911 call, Bethel Police Officer Amy Davis found Zaukar less than two blocks from Chief's house. Officer Davis arrested Zaukar,

and the State subsequently charged him with second-degree robbery[1] and first-degree burglary.[2]

Before trial, Zaukar moved to preclude Chief's in-court identification of him. He primarily argued that because Chief's identification was based on her boyfriend's identification, the in-court identification would be unduly prejudicial and would violate his due process rights. The court denied Zaukar's motion.

At trial, Chief identified Zaukar as the person who had attacked her in her home. Zaukar was convicted of both charged crimes.

Why we conclude the superior court did not err in permitting the in-court identification of Zaukar

On appeal, Zaukar claims that the trial court should have found that Chief's identification of him was not reliable and that Chief should not have been allowed to identify Zaukar as her attacker at trial.

Zaukar's claim is based on the *Brathwaite* test for assessing an identification procedure. *See Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977). Under this test, a court first examines whether the identification procedure was unnecessarily suggestive.[3] If the procedure is shown to be unnecessarily suggestive, the court then evaluates whether the witness's identification of the suspect is nevertheless reliable, despite the suggestiveness of the procedure.[4]

The State argues that we should reject Zaukar's *Brathwaite* claim because the police were not involved in the identification procedure that Zaukar is challenging

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[1] AS 11.41.510.

[2] AS 11.46.300(a)(1).

[3] *Anderson v. State*, 123 P.3d 1110, 1116 (Alaska App. 2005).

[4] *Id.* at 1116.

(*i.e.*, Chief's conversation with her boyfriend). The State urges us to adopt the United States Supreme Court's holding in *Perry v. New Hampshire* that the *Brathwaite* test only applies when the witness's identification of the suspect was the result of a police-arranged procedure.[5] But we need not decide whether to adopt the holding in *Perry* because, even if the *Brathwaite* test applies to Zaukar's case, Chief's identification of Zaukar passes that test.

The *Brathwaite* test was formulated to address the due process concern that an eyewitness, having seen a stranger commit a crime, might later misidentify someone as the perpetrator of a crime after an unnecessarily suggestive identification procedure alters the witness's memory of the real perpetrator.[6] Zaukar's case does not present this same concern because Zaukar was not a stranger to Chief.

The record shows that Chief recognized Zaukar — both his physical features and his voice — based on her previous contacts with him. When Chief spoke to her boyfriend, she identified the intruder as the son of Vernon — even though she could not recall the son's name until her boyfriend prompted her with the name "Colten." While Chief's boyfriend did suggest Zaukar's *first name* to her, this is not the same as suggesting his *identity* to her.

Thus, even assuming that the *Brathwaite* test applies here, Zaukar failed to show that Chief's identification of him was the result of a suggestive procedure (let alone an unnecessarily suggestive procedure). *See, e.g.*, *Green v. United States*, 580 A.2d 1325, 1327 (D.C. 1990) ("Plainly the likelihood of undue suggestivity is present only in situations where the perpetrator of the crime is a stranger to the witness[.]").

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[5] *See Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 723-28 (2012).

[6] *See Tegoseak v. State*, 221 P.3d 345, 350-63 (Alaska App. 2009); *see also* 2 Wayne R. LaFave et al., *Criminal Procedure* § 7.1(a), (c), at 890, 895 (3d ed. 2007).

Accordingly, the superior court properly permitted the in-court identification of Zaukar.

Conclusion

We AFFIRM the judgment of the superior court.