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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0558**

State of Minnesota,
Respondent,

vs.

Ezekiel John Miller,
Appellant.

**Filed April 19, 2021
Reversed
Gaïtas, Judge
Concurring in part, dissenting in part, Larkin, Judge**

Ramsey County District Court
File No. 62-CR-19-5753

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Considered and decided by Cochran, Presiding Judge; Larkin, Judge; and Gaïtas,
Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Ezekiel John Miller was convicted of aggravated robbery and unlawful possession of a firearm following a stipulated-evidence court trial to preserve dispositive

issues for appeal. He now appeals his convictions, challenging the district court's denial of his motion to suppress evidence obtained from an unlawful seizure and his motion to exclude suggestive eyewitness identifications. Because we conclude that officers unreasonably seized Miller when they detained him for 27 minutes in the back of their moving squad car, we reverse.

FACTS¹

In August 2019, M.B. and M.V., a young couple, went to a St. Paul gas station in the middle of the afternoon to sell a gaming system to a buyer they had connected with online. While there, they were robbed at gunpoint by the purported buyer.

The buyer—a man who appeared to be in his mid-20s to mid-30s—spoke with M.B. and M.V. in the gas-station parking lot for about four minutes before robbing them. During their conversation, a few juveniles who seemed to know the buyer approached and then walked away. At the end of the four-minute encounter, the buyer pulled out a gun, pointed it at M.B. and M.V., took M.B.'s bag, and ran away. M.V. chased the robber, and, while he did so, the juveniles approached M.B. and one of them stole her cellphone. M.B. contacted 911, and officers were immediately dispatched to the scene.

¹ Our summary of the facts comes from the district court record of the evidentiary hearing on Miller's motion to suppress and exclude evidence. This record evidence includes officer testimony and exhibits, including extensive squad-car- and body-worn-camera footage.

Police encounter with Miller

Shortly after the robberies, Miller entered a store a few blocks away from the gas station declaring that he had just been robbed. Someone in the store² called the police, and two St. Paul Police officers, referred to here as Officer A and Officer B, responded to the call. These two officers were already aware of the gas-station robbery when they responded to the store because a large team of officers was looking for the suspects and had established a perimeter.

When the officers entered the store, they asked an employee if someone had been robbed, and the employee directed them to Miller. They approached Miller and asked what had happened. Miller told the officers that “a bunch of guys” had come running at him and had pushed him to the ground. Officer A asked if the guys took anything from Miller, and Miller replied that they tried but were unsuccessful. He said that he was able to get up and run and that the guys who pushed him kept running. The officers asked Miller for identification, and Miller handed them a temporary license. They also asked if Miller would be able to recognize the guys that pushed him, and he replied that he would.

Miller then told the officers that he was waiting on a car from a ride-share service, and asked if he could make a phone call. Officer A replied that there was no car outside when they arrived and asked if the address on Miller’s identification was current. Miller replied that it was not and provided a different address. Miller then answered an incoming

² The record from the suppression hearing does not clearly establish who called the police, but it appears to suggest that a store employee was the caller, as the officers indicate in video footage that they were responding to a “suspicious call” and a store employee at the front counter directed them, upon their arrival, to the person claiming to be robbed.

call and told the person on the other end that he was talking to the police about the people who tried to rob him and that he was waiting on the ride-share car. Officer A continued to ask Miller about the people who had pushed him, and Miller told him that they were two Black males and that one was wearing all red and the other was wearing tan shorts and a white or gray shirt. Miller then asked if he could check on his ride-share car, and Officer A replied, “Yeah, we can go walk outside for a second.” Officer A and Miller proceeded out of the store together.

Miller’s ride-share car was waiting outside. He thanked Officer A and attempted to walk to the car, but the officer responded, “Give me one second. Let me just check with my partner, we might have you identify these guys.” Miller replied that he needed to get going because he had a meeting and wanted to get to the train station. Officer A stated “Okay,” and asked “so you can’t hang out and do that then?” Miller responded that the officers had his phone number and could call him, or that he could come back later. Officer A indicated that would be fine, telling Miller “you’re good to go.” At that moment, though, Officer B, who was still in the store, came out. Officer B, observing Miller preparing to leave, exclaimed “no, no, no, no, you’re coming with us! We’re going to probably do a show-up.” Officer A then reversed course and agreed, explaining to Miller that they needed him “to do a show up to . . . to get these guys.” By this time, the officers had been speaking with Miller for almost five minutes.

Miller, who was standing by the open door of the car, objected again, stating “Sir, I really gotta go. I really gotta go.” Officer B replied, “We really need your help, so you’re coming so . . . you’re coming with us. We need you to I.D. somebody. They’re wanted

for a robbery.” Miller asked if the officers could bring the suspects to the store, and Officer B replied that they had to bring Miller to them. Additionally, Miller expressed concern that the suspects would see him, but the officers explained that he would not be visible from the back of the squad car. As Officer A continued to reassure Miller, noting that the identifications would not take long, they walked towards the squad car, which was parked right in front of the ride-share car.

As they walked to the squad car, Miller handed his cellphone to Officer A to speak with the person who had called Miller earlier and was still on the line. Officer A spoke briefly with the caller, who identified himself as Miller’s “mentor” and gave the officer his number before ending the call. Officer A then opened the door to the back of the squad car for Miller, again assuring him that it would not take long to identify the guys who robbed him and emphasizing that they did not want anyone else to get robbed.

The officers did not search Miller before he got in the squad car. Officer A later testified that the officers did not search him because they believed he was a victim; he was not a suspect for the gas-station robbery in their minds. At the time, the officers believed the robbers from the gas station had also attempted to rob Miller.

With Miller in the backseat of the squad car, the officers drove around for approximately 27 minutes. They initially drove a few blocks to where other officers had a suspect in custody and asked Miller whether that suspect had knocked him down. Miller positively identified the suspect, stating that he was 100% certain about his identification. The officers showed Miller two other people he did not recognize. Then, they told Miller

he had been “a big help” and asked where he wanted to go. He gave them the address of his meeting, and they proceeded in that direction.

When the squad car neared Miller’s meeting location, the officers received notice from dispatch about another suspect in custody. They turned around to take Miller back for another identification. Miller objected, telling the officers that he really needed to get to his meeting. The officers reiterated that Miller had been a huge help, and, when Miller asked to charge his phone, willingly plugged it in for him. When they arrived for the show-up involving a fourth suspect, Miller stated he did not recognize the individual. The officers again began to drive Miller back to his meeting location.

Just as they were again nearing that location, the officers received a photograph on their computer from a closed-circuit television (CCTV) camera at the gas station that reportedly showed the person who robbed M.B. and M.V. at gunpoint. The officers showed the photograph to Miller and asked if he recognized the person. Miller replied that the person in the photograph looked like him, and the officers brushed off this comment and laughed. However, as the officers pulled up to the meeting location and took a closer look at the photograph, they realized that the person in the photo was wearing the exact same clothing as Miller—both wore khaki shorts and a distinctive shirt that was gray on the torso area, with red sleeves and a big front logo. The officers removed Miller from the squad car, conducted a pat search, and handcuffed him. During the search, they found a small handgun in Miller’s pocket.

Officers A and B remained where they were with Miller until other officers brought M.B. and M.V. for a show-up. M.B. and M.V. positively identified Miller as the person who robbed them at gunpoint, and the officers took him into custody.

M.B. and M.V.'s identification of Miller

While Officers A and B were driving Miller to various sites for show-ups, other officers did the same with M.B. and M.V.

After M.B. had contacted 911, an officer arrived but spoke with M.B. only briefly before the officer left on foot to chase suspects possibly heading into an alleyway. Before the foot pursuit, M.B. told the officer that a man had robbed her at gunpoint, that a girl took her phone, and that the girl who took her phone was with a group of people including a male wearing all red.

Shortly after the first officer left, another officer, referred to here as Officer C, and his partner arrived at the gas station to meet with M.B. and M.V. and bring them to show-ups of potential suspects. M.B. and M.V. got into the back of Officer C's squad car, and the officer asked whether they could identify the person who robbed them with the gun. Both replied that they could. When asked to describe the person with the gun, they described him as "Black" and "taller," and M.V. said that he was "heavier set" and had "jagged teeth." M.B. added that the suspect had a hat and that his shirt was "gray, khaki, it was mixed colors I'm pretty sure." When pressed, she stated that she was not sure about the specific shirt color.

When asked about the robber's pants, M.V. responded that the robber was wearing full-length pants. Together, M.B. and M.V. estimated that the robber's age was between

mid-20s and 35. They described the gun as small, almost “mini,” silver, and perhaps a “handheld .22.” M.B. and M.V. said that the robber pointed the gun at both of them, and that M.V. chased the robber for a few blocks before he lost track of him and came back to the gas station.

Over the course of about an hour, Officer C and his partner showed M.B. and M.V. multiple suspects. M.B. and M.V. identified a few people as members of the group that had been in the parking lot, but were also shown multiple people who they said were not part of the group. All of M.B.’s and M.V.’s responses were quick, confident, and nearly simultaneous. M.B. in particular maintained a confident tone throughout the identification process.

About 30 minutes into the process, the officers received a CCTV photograph from the gas station showing a person in the parking lot. When shown the photograph, both M.B. and M.V. immediately exclaimed “that’s him!” and then confirmed that the person in the photo was the robber with the gun. Officer C then relayed to dispatch through police radio that the person in the CCTV photograph was “the guy with the gun.”

During the drive, communications from dispatch were broadcast through the police radio into the squad car. Several minutes after M.B. and M.V.’s identification of the robber, dispatch announced that a suspect was in custody and a gun had been recovered. Officer C responded to this information with “sounds like they’ve got the guy,” and, shortly thereafter, told M.B. and M.V. “We’re going to go over there and ID him okay? The guy that had the gun.” Officer C’s partner then relayed to other officers, “They’ve got the guy, we’re going to do a show-up over there. They’ve got the guy and the gun.”

As Officer C and his partner transported M.B. and M.V. to the show-up involving Miller, they discussed how other officers had the suspect in custody but did not initially know it. When they arrived at the show-up site, M.B. confidently stated without hesitation: “that’s the guy who robbed us at gun point,” and M.V. agreed.

Officer C later testified that police officers do not ordinarily interview witnesses together because they do not want the witnesses to influence each other. He confirmed that the same principle applies to show-up identifications, where witnesses are typically separated. He also confirmed that Miller was standing outside a squad car in handcuffs when M.B. and M.V. were asked whether they could identify him.

Proceedings in this case

The state charged Miller with four felony counts: first-degree aggravated robbery, Minnesota Statutes section 609.245, subdivision 1 (2018) (count one); prohibited person in possession of a firearm, Minnesota Statutes section 624.713, subdivision 2(b) (2018) (count two); prohibited person in possession of ammunition, Minnesota Statutes section 624.713, subdivision 2(b) (count three); and second-degree assault with a dangerous weapon, Minnesota Statutes section 609.222, subdivision 1 (2018) (count four). Miller moved to suppress any evidence obtained as a result of an unlawful seizure and to exclude M.B. and M.V.’s show-up identifications, along with any potential in-court identifications, as violations of due process. The district court held an evidentiary hearing on the motions. After the hearing, the district court issued an order denying Miller’s motions.

Following the district court’s order, the parties agreed to proceed with a stipulated-evidence court trial pursuant to rule 26.01, subdivision 4(a), of the Minnesota Rules of

Criminal Procedure, which allows a defendant to preserve a dispositive pretrial ruling on a specific issue for appellate review. The state dismissed counts two and four, and Miller submitted the issue of his guilt on counts one and three to the district court based on stipulated evidence. The district court found Miller guilty of both counts and sentenced him to concurrent prison terms of 84 months³ for count one and 60 months for count three.

This appeal follows.

DECISION

Miller argues that his convictions must be reversed on two independent bases. First, he contends that the district court erred in denying his motion to suppress the evidence stemming from the officers' seizure of his person. Miller claims that the officers seized him in violation of the Minnesota Constitution when they ordered him to participate in their investigation and confined him in the back of their moving squad car for approximately 27 minutes. Second, Miller challenges the district court's denial of his motion to exclude any evidence showing that M.B. and M.V. identified him as the robber during a show-up identification procedure. He argues that the show-up was unnecessarily suggestive and violated his constitutional right to due process. The state disputes that any constitutional violation occurred and argues that, even if it did, Miller's convictions need not be reversed. We address each issue in turn.

³ Miller's 84-month sentence for first-degree aggravated robbery was a downward durational departure from the sentencing guidelines by agreement of the parties based on the fact that the offense was less serious than a typical such offense.

I. The officers' detention of Miller in the back of their moving squad car for 27 minutes over his objections was an unreasonable seizure under the Minnesota Constitution.

The Minnesota Constitution, like the United States Constitution, guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” Minn. Const. art. I, § 10; *see* U.S. Const. amend. IV. This constitutional protection recognizes “the interests of ordinary citizens in not having their privacy or their freedom of movement interfered with by police investigators who do not have any reason to suspect them of wrongdoing.” *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 186 (Minn. 1994). If police officers seize a person, and that seizure is not constitutionally reasonable, all evidence obtained as a result of the seizure is subject to suppression in a criminal trial. *State v. Harris*, 590 N.W.2d 90, 99 (Minn. 1999); *see also In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (explaining that “any evidence that is the fruit of the [unlawful] seizure is suppressible”).

Here, the district court held that Officers A and B seized Miller when they removed him from their squad car and handcuffed him approximately 30 minutes into their encounter. The district court further concluded that the seizure was constitutionally permissible because, at that point, the officers reasonably suspected that Miller was the robber.

Miller argues that the seizure occurred much earlier in the encounter. He contends that the police initially seized him when they told him that he needed to come with them and directed him to sit in the back of their squad car. And according to Miller, because the officers did not suspect he was involved in any crime when they ordered him into their

squad car, the seizure was unreasonable and violated his rights under the Minnesota Constitution.

In considering a challenge to a district court's pretrial ruling on a motion to suppress evidence, the appellate court reviews factual findings for clear error and legal determinations de novo. *State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011). If the facts are not in dispute, appellate courts apply de novo review to examine whether an unreasonable seizure occurred. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

In reviewing the district court's order here, we first determine when the officers seized Miller. Then, we consider whether the seizure was reasonable.

A. The officers seized Miller when they stopped him from leaving and directed him into the back of their squad car.

A seizure occurs “when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *E.D.J.*, 502 N.W.2d at 781 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)). To determine whether a person has been seized within the meaning of the Minnesota Constitution, reviewing courts examine whether, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter.” *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995); *see also E.D.J.*, 502 N.W.2d at 780.⁴

⁴ The United States Supreme Court held in *California v. Hodari D.* that a seizure occurs under the Fourth Amendment when the police use physical force or a person submits to a police show of authority. 499 U.S. 621, 626, 111 S. Ct. 1547, 1551 (1991). Our supreme court has expressly declined to follow the *Hodari D.* holding when interpreting the Minnesota Constitution, concluding that the Minnesota Constitution affords more

The following circumstances suggest a seizure: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Harris*, 590 N.W.2d at 98 (quotations omitted). Absent these circumstances or some similar show of authority, “otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.” *E.D.J.*, 502 N.W.2d at 781 (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877).

The district court concluded that a reasonable person in Miller’s situation would have felt free to terminate the encounter, emphasizing the officers’ “exceedingly polite tone” and their willingness to charge Miller’s cell phone in their squad car. Additionally, the district court noted that Miller was not a crime suspect when he entered the squad car; rather, he was a purported crime victim who had sought police assistance.⁵

protection than the United States Constitution. *E.D.J.*, 502 N.W.2d at 783. Instead, our supreme court endorsed the *Mendenhall-Royer* test for a seizure, derived from two United States Supreme Court opinions that predate *Hodari D.*, which asks whether “a reasonable person would have believed that because of the conduct of the police he was not free to leave.” *Id.*; see *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1323-24 (1983); *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980).

⁵ To the extent that the district court made a factual finding that Miller initiated contact with the police, that finding is not supported by the record and appears to be clearly erroneous. The record from the suppression hearing does not contain a transcript of the 911 call to which the officers responded, but the body-worn-camera footage indicates that a store employee, rather than Miller, called the police to report “suspicious” activity.

Miller directs us to the officers' explicit statements—"no, no, no, no, you're coming with us!" He also points out that despite his repeated efforts to terminate the encounter, the officers insisted that he come with them.

Notably, the state takes no position on appeal regarding the timing of the seizure. Instead, as discussed below, the state argues that even if a seizure occurred, it was reasonable under the circumstances.⁶

Our careful review of the record, which includes body-worn-camera and squad-car-camera footage of the entire encounter, convinces us that no reasonable person in Miller's position would have felt free to terminate the encounter and disregard the officers' instructions that he was "coming with [them]." Indeed, Miller initially tried to terminate the encounter, but he was unsuccessful. When he attempted to leave by opening the door of his ride-share car, Officer B stopped him by firmly exclaiming "no, no, no, no, you're coming with us. We're going to probably do a show-up." Miller objected, emphasizing that he "really [had to] go," but Officer B insisted: "We really need your help, so you're coming . . . you're coming with us." The officers then walked Miller to their squad car, which was parked right in front of Miller's ride-share car.

That the officers used a polite tone with Miller, did not physically touch him, and did not brandish their weapons did not transform the situation into a voluntary encounter. *See Harris*, 590 N.W.2d at 98. We have previously observed that seizures can occur when

⁶ In the district court, the state took the opposite approach, arguing that the seizure occurred when the officers handcuffed Miller. The state made no alternative argument about the reasonableness of the officers' earlier conduct.

police “summon” a person—as in *State v. Day* where we held that “the summoning by [a] police officer, who was in uniform and armed, requiring appellant to approach the officer’s squad car to provide identification and to respond to questioning, constitute[d] a restraint and seizure” subject to constitutional protections. 461 N.W.2d 404, 407 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990). Here, Miller was not only asked to approach the squad car, but was directed to get into the squad car. The officers outnumbered Miller two to one. And their squad car was positioned in front of Miller’s ride. Moreover, no matter how “polite” the officers were here, we cannot overlook the dynamic that exists when police officers interact with a young Black man. *Cf. Harris*, 590 N.W.2d at 106 (Page, J., dissenting) (noting, in the context of an encounter between two police officers and a “young African-American male,” that “[t]he reality of the world is such that a person in [the defendant’s] position would likely feel compelled to comply with the police officers’ requests”).

In view of all of these circumstances, a reasonable person in Miller’s position would not have felt free to ignore the police instructions and end the encounter. We accordingly conclude that Miller was seized within the meaning of the Minnesota Constitution when the officers stopped him from leaving and directed him into their squad car.

B. The seizure was not constitutionally reasonable.

The next step in analyzing the officers’ detention of Miller is to determine whether the seizure comported with the constitutional requirement of reasonableness. *See* Minn. Const. art. I, § 10. Initially, we note that the district court did not consider the reasonableness of the seizure that we have identified because it concluded that Miller was

seized later in the encounter. Although questions that a district court did not decide are generally not amenable to appellate review, the supreme court has held that “[a] respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted.” *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003); *see also* Minn. R. Crim. P. 28.02, subd. 11 (stating that “[o]n appeal from a judgment, the court may review any order or ruling of the district court or any other matter, as the interests of justice require”). Neither party requests a remand to the district court, and the parties have briefed the issue of reasonableness. Moreover, the record is sufficiently developed for our review. We thus consider the issue in the interests of justice and judicial efficiency.

1. Warrantless seizures are generally unreasonable unless a warrant-requirement exception applies.

Again, the Minnesota Constitution prohibits unreasonable seizures. Minn. Const. art. I, § 10. Constitutional prohibitions on unreasonable searches and seizures are designed “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.” *Wold v. State*, 430 N.W.2d 171, 174 (Minn. 1988) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S. Ct. 3074, 3081 (1976)). As a general rule, warrantless searches and seizures of persons are per se unreasonable. *Id.*; *see State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016). When police officers search or seize a citizen without a warrant, “[t]he state bears the burden of establishing an exception to the warrant requirement” to justify their actions. *State v. Ture*, 632 N.W.2d 621, 627

(Minn. 2001). Because the police seized Miller without a warrant, we consider whether the state established that an exception to the warrant requirement applied.

2. The officers did not have reasonable, articulable suspicion of criminal activity to justify a traditional *Terry* stop.

A frequently invoked exception to the warrant requirement, applicable to seizures of persons, allows a law-enforcement officer to initiate a limited, investigatory stop—known as a *Terry* stop—if the officer has reasonable, articulable suspicion of criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880 (1968)). Whether an officer has the requisite reasonable suspicion to conduct a limited, investigatory stop depends on the totality of the circumstances. *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012).

The traditional *Terry*-stop inquiry does not support the seizure here, however. Both parties agree that, when the officers detained Miller in their squad car, he was not a suspect in the gas-station robbery. The record confirms that fact; the officers viewed Miller as a victim of a second attempted robbery by the gas-station robbery suspects. Indeed, Officer A testified that if he had suspected Miller of robbery, he would have pat-searched him before placing him in the squad car. Accordingly, the officers' warrantless seizure of Miller was not supported by reasonable, articulable suspicion of criminal activity. *See Munson*, 594 N.W.2d at 136.

Miller argues that this determination should end the inquiry. In his view, because the officers seized him without a warrant or reasonable, articulable suspicion of criminal

activity,⁷ the seizure was necessarily unconstitutional. The state, on the other hand, argues that the officers did not unlawfully seize Miller because they were “dealing with the exigent circumstance of an at-large armed robber.”

We disagree with Miller that the lack of justification for the seizure under the traditional *Terry*-stop analysis ends the inquiry. Because the touchstone of the constitutional inquiry is “reasonableness,” *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1944 (2006), the state may offer, for our consideration, an alternative justification for this type of nonarrest police detention of a citizen. *See Grunig*, 660 N.W.2d at 137. We accordingly turn to the state’s alternative arguments.

3. The freezing-the-scene framework from the *Appelgate* and *Wold* line of cases does not justify the seizure.

The state contends that no unlawful seizure occurred “because the police merely took a reasonable step—taking appellant to show-ups—to freeze the situation under the exigent circumstance of an armed robbery and unrecovered gun.” The state’s exigency argument is based on the following cases: *Appelgate v. Comm’r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987), *Wold v. State*, 430 N.W.2d 171, 173-74 (Minn. 1988), and *State v. Stavish*, 868 N.W.2d 670, 675 (Minn. 2015).

In *Appelgate*, a police officer stopped a car that was coming from an area where there was a reported “burglary in progress.” 402 N.W.2d at 107-08. The driver, Appelgate,

⁷ Another exception to the warrant requirement provides that police officers can arrest a felony suspect in a public place if they have probable cause. *State v. Walker*, 584 N.W.2d 763, 766 (Minn. 1998); *State v. Cook*, 610 N.W.2d 664, 667 (Minn. App. 2000). Neither party suggests that the heightened requirement of probable cause justified the seizure here though, nor would the record support that contention.

who was ultimately charged with DWI, challenged the validity of the stop arguing that the stop had been unlawful. *Id.* At the evidentiary hearing, the officer explained that there was “very little” traffic in the area at the time and Appelgate was driving erratically. *Id.* Thus, because Appelgate’s vehicle was seen coming from the burgled apartment complex, the officer suspected that Appelgate was involved in the burglary and initiated a stop. *Id.* at 109.

In reviewing the constitutionality of the officer’s “limited investigatory stop,” the supreme court noted that it was presented with “the specific issue of the stop of a motor vehicle near a recent crime.” *Id.* at 108. The supreme court explained that in such an evolving crime-scene situation, “experience has shown that when a victim or witness cannot name the offender[,] his apprehension is unlikely unless he is rather promptly found in the immediate area.” *Id.* (quoting 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.3(d), at 460 (2d ed. 1987)). In these circumstances, therefore, “‘the police must have some authority to freeze the situation.’ Indeed, ‘[e]ven if the circumstances are such that no one person can be singled out as the probable offender, the police must sometimes be allowed to take some action intermediate to that of arrest and nonseizure activity.’” *Id.* (quoting 3 LaFave, *supra*, at 461). The supreme court then applied six factors from a leading Fourth Amendment treatise for assessing whether an officer can conduct an investigative stop of a person in connection with a recently committed, nearby crime.⁸ *Id.* at 108-09. After doing so, the supreme court held, “Looking

⁸ These six factors are:

at the totality of the circumstances—the whole picture—we conclude that the officer had a particularized and objective basis for at least suspecting that Appelgate had been involved in the burglary and that the officer therefore was justified in subjecting Appelgate to a limited investigative stop for the purpose of ‘freezing’ the situation.” *Id.* at 109.

In *Wold*—the second case that the state cites to justify Miller’s seizure—a police officer arrived at the scene of a violent stabbing and found Wold and another man shouting at paramedics who were attending to a comatose victim. 430 N.W.2d at 173. Another officer instructed Wold to stand by an adjacent wall and patted him down, discovering incriminating evidence in the process. *Id.* The supreme court analyzed whether the officer’s limited, investigatory seizure of Wold was reasonable, applying the framework from *Appelgate*. *Id.* at 174. In doing so, the supreme court noted that it “ha[s] recognized that in order to ‘freeze’ the situation, the stop of a person present at the scene of a recently committed crime of violence may be permissible without trampling on the [constitutional] prohibition against unreasonable search and seizure.” *Id.* Ultimately, the supreme court affirmed the district court’s conclusion that the officer was “justified in stopping [Wold]

(1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender’s flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Appelgate, 402 N.W.2d at 108 (citing 3 LaFave, *supra*, at 461).

for the purpose of questioning him to ascertain the extent of his knowledge of, or participation in, the stabbing.” *Id.* at 175.

In the final case cited by the state, *Stavish*, the supreme court assessed the reasonableness of a warrantless blood draw—considered a “search” for purposes of constitutional protections—in the context of a DWI investigation. 868 N.W.2d at 674-75. The supreme court concluded that the state established, under the totality of the circumstances, that exigent circumstances justified the specific search at issue. *Id.* at 67-78.

We do not agree with the state that the above exigent-circumstances line of cases supports the officers’ seizure of Miller. These cases support—at most—limited, investigatory stops of a person present at or near an active crime-scene in order to ascertain the nature of the person’s potential involvement in the crime. *See Appelgate*, 402 N.W.2d at 108-09; *Wold*, 430 N.W.2d at 175. Miller was not at the scene of the armed robbery—the gas station. Although he was only a few blocks away, the events occurred in a busy urban area. Further, the officers did not “freeze the scene” by momentarily keeping Miller at the scene. Instead, they placed him in the back of their squad car and proceeded to drive him around. And finally, unlike the defendants in the above-three cases, Miller was not considered a potential suspect at the time the officers seized him. The officers in *Appelgate* and *Wold* briefly seized individuals to discern whether they had committed or witnessed a recent crime; they were not dealing with a person who had already been questioned and determined (mistakenly) to be a victim or witness. *See Appelgate*, 402 N.W.2d at 107-08; *Wold*, 430 N.W.2d at 174.

Moreover, even if we were to draw a broader “exigency” rule from the above line of cases and apply it to seizures of nonsuspects, who are not present at a crime scene, the record here simply does not support a finding of exigent circumstances that required police to seize Miller and keep him in their moving squad car for 27 minutes. Miller cooperated with the officers when they asked him what happened. His allegations did not create any particular exigency. Miller claimed he was pushed. He did not report seeing a gun. Miller told the officers how to reach him for additional information, providing his name and contact information, including an updated local address. And when Miller asked to leave, he offered to come back later to identify any suspects.

In fact, one officer was willing to let Miller leave, telling him that he was “good to go.” That officer testified that he did not believe any circumstances at that point required Miller’s continued presence. But Officer B—who did not testify at Miller’s suppression hearing—decided to detain Miller for the purpose of identifying suspects.

Given these circumstances, we cannot conclude that the state’s cited exigency—“an at-large armed robber”—justified the extended detention of Miller, who had already provided the police with details about what happened to him and who had not reported seeing a gun. Ultimately, the state has not demonstrated, under the *Appelgate* and *Wold* line of reasoning, that the type of exigency that would justify detaining a purported crime victim existed here.

4. The seizure was not reasonable under the framework articulated by the United States Supreme Court in *Brown v. Texas*.

In addition to the exigency argument based on *Appelgate* and *Wold*, the state also urges us to simply assess the “reasonableness” of the police actions here. Although not cited by the state, there is some authority for the proposition that a limited, investigatory seizure of a nonsuspect witness or victim may be reasonable under certain circumstances. That authority stems from the United States Supreme Court’s decision in *Brown v. Texas*, which interprets the Fourth Amendment. 443 U.S. 47, 52, 99 S. Ct. 2637, 2641 (1979).⁹

In *Brown*, the Court considered the constitutionality of Brown’s encounter with two officers in an alley located in an area known for drug trafficking. *Id.* at 48-52, 99 S. Ct. at 2639-41. The officers stopped Brown as he walked away from another individual because “he looked suspicious” and unfamiliar. *Id.* at 48-49, 99 S. Ct. at 2639. When the officers asked Brown to identify himself, he refused. *Id.* at 49, 99 S. Ct. at 2639. The officers then arrested Brown under a Texas statute penalizing a refusal to provide identification to an officer on request. *Id.*

The Court explained that the “reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.” *Id.* at 50, 99 S. Ct. at 2640 (quotation and citations omitted). “Consideration of the constitutionality of

⁹ Minnesota courts can interpret Article I, section 10, of the Minnesota Constitution as providing more—but not less—protection against unreasonable searches and seizures than the Fourth Amendment of the United States Constitution. *See State v. McMurray*, 860 N.W.2d 686, 690 (Minn. 2015); *see also Askerooth*, 681 N.W.2d at 361-62.

such seizures,” the Court explained, “involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *Id.* at 50-51, 99 S. Ct. at 2640. Concluding that Brown was stopped without reasonable, articulable suspicion that he was involved in criminal activity, the Court went on to note that “[i]n the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant’s right to personal security and privacy tilts in favor of freedom from police interference.” *Id.* at 52, 99 S. Ct. at 2641.

Other jurisdictions have, on occasion, considered the reasonableness of victim or witness seizures using a framework similar to the general one proposed in *Brown*. But those cases—relied upon by the dissent here—suggest that victims and witnesses have a *greater* liberty interest than criminal suspects. In other words, victims and witnesses are entitled to more protection from police interference. *See, e.g., United States v. Ward*, 488 F.2d 162, 170 (9th Cir. 1973) (reversing conviction en banc, holding that FBI agents’ stop of a motorist in order to question him about a third party who was suspected of a crime was unreasonable); *Maxwell v. County of San Diego*, 708 F.3d 1075, 1084 (9th Cir. 2013) (explaining that “in the hierarchy of state interests justifying detention, the interest in detaining witnesses for information is of relatively low value”); *State v. Fair*, 302 P.3d 417, 431 (Or. 2013) (holding that “officers constitutionally may, in appropriate circumstances, stop and temporarily detain for questioning a person whom they reasonably believe is a potential material witness to a crime”); *see also* 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.2(b) at 379-94 (6th ed. 2020)

(surveying cases involving witness seizures and observing that the actions of law enforcement officers are more “narrowly circumscribed” when they are dealing with witnesses as opposed to suspects).

Without referencing *Brown* or any other authority regarding the liberty interests of victims and witnesses, the state argues that “[w]hat the police did here was reasonable in light of the fact that appellant claimed to have been robbed, an armed robbery had just occurred nearby, the gun had not been recovered, and suspects were in custody.” But given the actual circumstances here—where Miller was blocks away from the robbery, where he did not claim to have seen a gun, where the police had already taken his statement, where the officers had his contact information, where he asked to leave in a waiting ride-share car, and where other officers were with the victims of the armed robbery—we cannot agree. Moreover, we note that the intrusion here was significant. In addition to ordering Miller into the back of a squad car against his wishes, the officers continued to detain him in their moving squad car for over 27 minutes. Even under the authority from other jurisdictions—which the state does not cite and which has not been directly applied by an appellate court in Minnesota—we cannot conclude that the seizure of Miller was reasonable.¹⁰ The interest in public safety simply did not outweigh a purported crime victim’s liberty interest.

¹⁰ The intrusion here significantly exceeded the scope of the intrusions in the cases relied on by the dissent. *See Fair*, 302 P.3d at 421-22 (in response to an aborted 911 call and indicators of a domestic assault, officers ordered suspected victim from inside her home onto her front porch to verify her identity and inquire about incident); *State v. Pierce*, 787 A.2d 1284, 1286 (Vt. 2001) (officer approached potential witness, whose vehicle was parked next to suspected drunk driver’s car, and immediately observed that potential witness smelled of alcohol, leading to DWI investigation of potential witness).

While we are quite concerned that Miller was dishonest with the officers about his involvement in the robbery, that does not change our analysis. We assess the constitutionality of the police action from the perspective of reasonable officers under the circumstances, *see Askerooth*, 681 N.W.2d at 364, and these officers were presented with circumstances where they reasonably thought they were interacting with a crime victim rather than a suspect.

Because the officers seized Miller within the meaning of the Minnesota Constitution without a warrant, and the state has not shown that an exigency justifying the warrantless seizure existed, and because we do not find that the seizure was otherwise reasonable, we conclude that the officers' detention of Miller violated his constitutional rights. Given this constitutional violation, all evidence stemming from the seizure must be suppressed. *Harris*, 590 N.W.2d at 99. The district court accordingly erred by denying Miller's suppression motion.

II. The show-up identification procedure used in this case, while highly suggestive, did not create a substantial likelihood of irreparable misidentification considering the totality of the circumstances.

Miller next argues that the district court erred by holding that the eyewitness identifications by M.B. and M.V. violated his due-process rights. Although the eyewitnesses' identifications likely resulted from Miller's unlawful seizure, and should be excluded on that basis, we nonetheless briefly address the arguments presented by the parties here.

The United States and Minnesota Constitutions guarantee criminal defendants the right to due process of law. U.S. Const. amend. XIV; Minn. Const. art. I § 7. "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.’” *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968)). Whether an identification procedure is so suggestive as to violate due process is an issue appellate courts review de novo. *Id.* at 83.

Appellate courts follow a two-part process in addressing the admissibility of identification testimony. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, the appellate court determines whether the procedure used to elicit the identification was “unnecessarily suggestive.” *Id.* In doing so, the court looks at “whether the defendant was unfairly singled out for identification.” *Id.* (citing *Simmons*, 390 U.S. at 383, 88 S. Ct. at 970-71). If the court finds that the identification process was unnecessarily suggestive, it must then determine whether the totality of the circumstances surrounding the identification created “a very substantial likelihood of irreparable misidentification.” *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted). If the totality of the circumstances did not create such a likelihood, then the identification is considered reliable despite any suggestive procedure. *Ostrem*, 535 N.W.2d at 921.

Here, the district court determined that “while the show-up method used by the police in this matter was undoubtedly suggestive,” the tactics used by the police were not so suggestive as to render the victims’ identifications of Miller unreliable.

Miller argues that the district court erred, asserting that the show-up procedure used was unnecessarily suggestive and the identification was not reliable under the totality of the circumstances. Each argument is addressed in turn.

A. The identification procedure was unnecessarily suggestive.

In determining whether an identification procedure is unnecessarily suggestive, courts ask “whether the defendant was *unfairly* singled out for identification.” *Taylor*, 594 N.W.2d at 161 (quotation omitted). The concern is whether “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 (emphasis omitted).

The state appears to concede that the procedure used by law enforcement officers in this case was unnecessarily suggestive. Such a concession, if made, is well supported by the record. Before the officers drove M.B. and M.V. to the show-up identification of Miller, they stated that other officers had “got the guy and the gun.” Officer C specifically told M.B. and M.V. “We’re going to go over there and ID him okay? The guy that had the gun.” When the officers showed Miller to M.B. and M.V., he was handcuffed and standing outside of a squad car. Additionally, the officers had M.B. and M.V. together in one squad car, which created a risk that they would influence each other. Under these circumstances, we conclude that the procedure used was unnecessarily suggestive.

B. Despite the suggestive identification procedure, there was not a substantial likelihood of irreparable misidentification.

Even if an identification procedure is unnecessarily suggestive, the identification will not be excluded unless the totality of the surrounding circumstances created “a very

substantial likelihood of irreparable misidentification.” *Taylor*, 594 N.W.2d at 161 (quotation omitted). Under the controlling precedent, we consider the following five factors to assess the totality of the circumstances: (1) the “opportunity of the witness to view the criminal at the time of the crime;” (2) the “witness[’s] degree of attention;” (3) the “accuracy of the witness[’s] prior description of the criminal;” (4) the “level of certainty demonstrated by the witness at the show-up;” and (5) the “time between the crime and the confrontation.” *Ostrem*, 535 N.W.2d at 921.

After a careful review of the record evidence—particularly, a CCTV video of the parking-lot interaction between M.B. and M.V. and the robber, and the squad-car video of Officer C driving M.B. and M.V. to various show-ups—we conclude that these five factors weigh in favor of reliability of the identifications here.

As to the first and second factors, M.B. and M.V. interacted with the robber during daylight. His face was uncovered and they spoke for about four minutes within just feet of each other before the robbery. And despite Miller’s claim that M.B. and M.V. were distracted by the general busyness of the parking lot and nearby street, the video footage shows that they were engaged in the interaction.

Regarding the third factor, although some details of M.B. and M.V.’s description ultimately did not match Miller (i.e., that the robber was wearing pants, not shorts), their descriptions largely lined up. Miller, from the body-camera footage, indeed appears to be “taller” and “heavier set,” between the mid-20s and 35 years old, and Black. That M.B. and M.V. did not precisely describe his shirt color seems understandable, as the robber’s shirt—as seen in the CCTV photograph—was gray on the torso area but had red sleeves

and a logo in the middle (as did Miller's shirt). This aligned with M.B.'s statement that the shirt was "gray" or "mixed colors," though she was not certain.

As to the fourth factor, M.B. and M.V. immediately and confidently identified Miller as the robber when they saw him. And despite Miller's suggestion in his brief, M.B. and M.V. did not seem to be so frazzled or emotional from the robbery as to cast doubt on their recollection. M.B., in particular, seemed composed and self-assured throughout the hour-long show-up process. Notably, she and M.V. responded right away when asked if other people were part of the group in the parking lot, confidently identifying a few suspects affirmatively and a few negatively.

For the fifth and final factor, only an hour or so had elapsed between the robbery and the identification. This short period of time certainly supports the reliability of the identifications.

Ultimately, despite the unnecessarily suggestive procedure used by the police in this case, the totality of the circumstances did not create "a very substantial likelihood of irreparable misidentification." *Taylor*, 594 N.W.2d at 161 (quotation omitted). The district court accordingly did not err by declining to exclude the identifications on due-process grounds.

III. Because the parties agreed to a stipulated-evidence trial under rule 26.01, subdivision 4, Miller's convictions must be reversed.

Following the district court's pretrial rulings on Miller's motions to suppress and to exclude the eyewitness identifications, Miller waived his right to a jury trial and agreed to a stipulated-evidence court trial under rule 26.01, subdivision 4(a), of the Minnesota Rules

of Criminal Procedure. Although the purpose of this rule is to allow a criminal defendant to preserve a dispositive issue for appeal, the state now argues that Miller's appellate issues are not dispositive.

Under rule 26.01, subdivision 4(a), “[w]hen the parties agree that the court’s ruling on a specified pretrial issue is dispositive of the case, or that the ruling makes a contested trial unnecessary,” the parties may use the procedure outlined in that subdivision “to preserve the issue for appellate review.” Under this procedure, the defendant maintains a not-guilty plea, and both the defendant and state “must acknowledge that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal.” Minn. R. Crim. P. 26.01, subd. 4(b)-(c). Then, “[t]he defendant must stipulate to the prosecution’s evidence in a trial to the court, and acknowledge that the court will consider the prosecution’s evidence, and that the court may enter a finding of guilt based on that evidence.” *Id.*, subd. 1(e). The defendant “must also acknowledge that appellate review will be of the pretrial issue, but not of the defendant’s guilt, or of other issues that could arise at a contested trial.” *Id.*, subd. 1(f).

Miller waived his right to a jury trial and agreed to a stipulated-evidence trial on the record, with his counsel and counsel for the state present. He responded affirmatively when asked if he agreed appellate review would be of the pretrial issues and that review of those issues would be dispositive. He also signed a written waiver acknowledging the same. The state did not voice any objection during the waiver on the record, and later submitted the stipulated body of evidence to the court.

In its brief to this court, the state argued that the district court’s rulings on the pretrial motions should be reviewed for harmless error. But the state withdrew this contention at oral argument, correctly recognizing that harmless-error analysis does not apply to convictions obtained pursuant to a stipulated-evidence trial. *See In re R.J.E.*, 642 N.W.2d 708, 713 (Minn. 2002) (explaining that harmless-error review should not be applied to trials on stipulated facts). Instead, the state asserted—for the first time at oral argument—that the procedure followed by the parties in the district court was invalid because the prosecutor did not sign an acknowledgment that the pretrial rulings were dispositive.

We reject the state’s new argument for several reasons. Initially, we observe that strict compliance with rule 26.01, subdivision 4, is not required. *State v. Myhre*, 875 N.W.2d 799, 803-04 (Minn. 2016). Indeed, appellate courts “have tolerated a substantial amount of procedural error when the record shows that the parties clearly intended to achieve the outcome contemplated by [the rule.]” *Id.* at 804. Here, the intention of the parties was clearly to proceed with a stipulated-evidence trial. The prosecutor was present while Miller went through the required rule 26.01, subdivision 4, acknowledgments on the record and did not object, and later submitted the stipulated body of evidence to the court. At no point did the prosecutor object to the defense’s characterization of the pretrial rulings as dispositive.¹¹

¹¹ We also observe that the state made no argument in connection with the suppression motion that the exclusionary rule would not apply if the district court concluded that the officers seized Miller in violation of the Minnesota Constitution.

Moreover, we ordinarily do not consider errors that were not objected to in the district court. *See State v. Osborne*, 715 N.W.2d 436, 441 (Minn. 2006). Nor do we consider challenges raised for the first time during oral arguments and not included in the parties' briefs. *See State v. Tracy*, 667 N.W.2d 141, 145 (Minn. App. 2003). We accordingly deem the state's challenge to the procedural validity of the stipulated-evidence trial forfeited.

Because we have determined that the district court erred by denying Miller's motion to suppress the evidence stemming from his unconstitutional seizure, and the parties agreed that issue is dispositive during the proceedings in the district court, we reverse his convictions.

Reversed.

LARKIN, Judge (concurring in part, dissenting in part)

I agree with the majority that a seizure occurred when the responding officers told Miller that he was “coming with [them]” to identify a potential suspect in a recent armed robbery, that the later show-up identifications of Miller as the perpetrator of the robbery were constitutional, and that the state’s challenge to the procedural validity of the stipulated-evidence trial is forfeited. But I write separately because I conclude that under the totality of the circumstances, the officers did not violate the Minnesota or United States Constitutions by temporarily detaining Miller based on his claim that he could identify the armed robber. I would therefore affirm Miller’s convictions.

This case requires us to decide whether the seizure of an alleged crime victim for approximately 30 minutes to conduct show-up identifications was reasonable. “When facts are not in dispute, as here, we review a pretrial order on a motion to suppress de novo and determine whether the police articulated an adequate basis for the search or seizure at issue.” *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011) (quotation omitted).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a seizure conducted without a warrant is per se unreasonable. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005); *State v. Dotson*, 900 N.W.2d 445, 450 (Minn. App. 2017). A police officer may, however, initiate a limited investigative seizure without a warrant if the officer has reasonable, articulable suspicion that the person to be seized is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968). Whether the police have reasonable suspicion to conduct an investigative seizure depends on the

totality of the circumstances, and a showing that the seizure was not “the product of mere whim, caprice, or idle curiosity.” *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005).

The analysis of an investigative seizure involves a dual inquiry. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). First, we ask “whether the [seizure] was justified at its inception.” *Id.* Second, we ask “whether the actions of the police during the [seizure] were reasonably related to and justified by the circumstances that gave rise to the [seizure] in the first place.” *Id.* The second prong of the inquiry “constrains the scope and methods of a search or seizure.” *Id.* A seizure that is initially valid “may become invalid if it becomes intolerable in its intensity or scope.” *Id.* (quotations omitted). “[E]ach incremental intrusion during a [seizure] must be strictly tied to and justified by the circumstances which rendered the initiation of the [seizure] permissible.” *Id.* (quotations omitted).

This case involves the temporary seizure of an alleged crime victim—as opposed to a criminal suspect—for investigative purposes. As explained by one leading legal scholar, “[t]he Model Code of Pre-Arrest Procedure takes the sensible position that the power to stop may constitutionally be extended so as to encompass the brief detention of potential witnesses in at least certain situations.” 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.2(b) (6th ed. 2020); see *State v. Degroot*, 946 N.W.2d 354, 361 n.10 (Minn. 2020) (citing LaFare). Under the Model Code, an officer may stop a person if:

(i) the officer has reasonable cause to believe that a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or danger to property, has just been committed near the place where he finds [the] person [to be stopped], and

(ii) the officer has reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and

(iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.

Model Code of Pre-Arrest Procedure § 110.2(1)(b) (1975).

The standard established in the Model Code was contemplated in *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973). In that case, federal agents stopped a driver whom they wanted to question about some federal fugitives. *Ward*, 488 F.2d at 163. The federal appellate court concluded that the stop was unreasonable, reasoning that “there was no crime ‘afoot.’ The [federal] agents did not stop appellant’s car in connection with any particular crime, but rather the stop was pursuant to a general criminal investigation that had begun several months before.” *Id.* at 169. The court also stated that “significantly, the stop was not made pursuant to the agent’s founded suspicion that the detainee was involved or about to be involved in criminal activity. Rather the stop was made for the purpose of questioning the appellant about a third person.” *Id.* (emphasis and footnote omitted). However, the court recognized that there were no “exigent circumstances” such as an emergency situation necessitating the “need for immediate action.” *Id.*

LaFare explains that *Ward* “should not be read so broadly” to mean that it is never constitutionally permissible to stop a potential witness. LaFare, *supra*, § 19.2(b). Rather, the “central point in *Ward* is that there were no exigent circumstances.” *Id.*

Other courts have concluded that a stop and temporary detention of a material witness is constitutional when exigent circumstances are present. For example, in *State v. Fair*, police temporarily seized a woman because they reasonably believed that she was a material witness to or a victim of a recent assault. 302 P.3d 417, 421-22, 429 (Or. 2013). After giving “due regard” both to the “practical necessities of effective law enforcement” and to the protected liberty interests at stake, the Oregon Supreme Court relied on the Model Code and held that the stop and on-the-scene detention of a likely material witness will be constitutional if:

(1) the officer reasonably believes that an offense involving danger of forcible injury to a person recently has been committed nearby; (2) the officer reasonably believes that the person [to be stopped] has knowledge that may aid the investigation of the suspected crime; and (3) the detention is reasonably necessary to obtain or verify the identity of the person, or to obtain an account of the crime.

Id. at 430-31 (stating that “[w]e have found no jurisdiction, and defendant cites none, that rejects the basic approach endorsed by the Model Code and by other authorities, such as Professor LaFave” (emphasis omitted)).

The Oregon Supreme Court concluded that the detention of the woman was reasonable because the officers detained her “with probable cause to believe that [her] husband had just assaulted her and under exigent circumstances that arose in the context of the officers’ emergency response to an apparent incident of domestic violence.” *Id.* at 435. The Oregon Supreme Court reasoned that the officers had responded to an aborted 911 call, which was made by the woman and which the court considered a “tacit invitation by [the woman] to come to her aid.” *Id.* at 426.

Similarly, in *State v. Pierce*, the Vermont Supreme Court held that an officer's brief seizure of the defendant for questioning was reasonable even though the defendant was not suspected of criminal activity. 787 A.2d 1284, 1288-89 (Vt. 2001). In that case, the police stopped the defendant's vehicle because the defendant had been stopped next to the vehicle of another motorist who was suspected of driving under the influence (DUI). *Id.* at 1285. The Vermont Supreme Court applied the standard articulated in the Model Code and determined that the following circumstances supported the reasonableness of the stop: (1) the defendant was a witness to a DUI offense, which is an offense involving a danger of "forcible injury to persons"; (2) the defendant had a "perfect vantage point" from which to observe erratic operation of the suspect vehicle; and (3) "a fresh witness account was desirable because the officer had to make immediate decisions about how to handle the situation before him." *Id.* at 1288-89 (quotation omitted).

In light of the lack of precedential authority regarding the issue presented in this case, I conclude that the standard discussed by LaFave, as articulated in the Model Code and applied in *Fair* and *Pierce*, is persuasive and supports a conclusion that the actions of the police in this case were constitutionally reasonable. The police were investigating an armed robbery that had just occurred at a gas station in broad daylight. One of the suspects had pointed a gun at the victims, creating a danger of "forcible injury to persons." The suspects ran from the scene and were at large in the community, creating an exigent circumstance.

Shortly after the robbery, an individual called 911 to report that Miller had entered a store located a few blocks away from the gas station and declared that he had just been

robbed. Two officers responded to the store and approached Miller. Miller spoke with the officers and told them that two guys pushed him to the ground and attempted to rob him. He also told the officers that he would be able to identify the suspects, reasonably causing the officers to believe that Miller had knowledge that would materially aid in the investigation of the robbery.

Not long after the responding officers approached Miller at the store, they learned that a suspect had been apprehended. It was reasonable for them to briefly detain Miller for the purpose of conducting a show-up identification. Although Miller initially expressed a desire to leave the scene, he did not demand to leave. Nor did he refuse to cooperate with the police. Moreover, the police treated Miller as a crime victim, and not a suspect; they did not search him, handcuff him, threaten him, or physically restrain him.¹² In fact, when Miller remarked that the person in the surveillance video looked like him, one officer said, “That ain’t you.” The officers spoke to Miller’s mentor on the phone, thanked Miller for his cooperation, charged his cell phone, and drove him to his destination. Importantly, the officers did not interfere with Miller’s liberty any longer than was necessary for him to participate in the two show-up identification procedures, which took less than one-half hour.

In sum, during the time that the police reasonably believed that Miller was a crime victim, their actions never strayed from the original purpose of the investigative seizure: transporting Miller to the location of a show-up identification to see if he could identify

¹² The police were therefore unaware that Miller was riding in the back of their squad car, unrestrained, with a gun in his pocket.

suspects in a recent armed robbery. Miller's seizure was reasonable at its inception, in its duration, and in its intensity.

Ultimately, the "touchstone of the Fourth Amendment is reasonableness." *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted). The "reasonableness of [a] seizure under the Fourth Amendment depends upon a weighing or balancing of '(1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty.'" *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 185 (Minn. 1994) (quoting *Brown v. Texas*, 443 U.S. 47, 50-51, 99 S. Ct. 2637, 2640 (1979)).

Here, important public concerns were served by the seizure, which significantly advanced the public's interest in apprehending individuals who had just committed an armed robbery in broad daylight. Given the totality of the circumstances, including the length of the detention and the officers' favorable treatment of Miller during the detention, the interference with Miller's liberty was not severe. On balance, I conclude that Miller's temporary detention for the purpose of participating in show-up identifications was constitutionally reasonable. I would therefore affirm.