

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0111**

State of Minnesota,
Respondent,

vs.

Luot Tut Makuac,
Appellant.

**Filed January 3, 2022
Affirmed in part, reversed in part, and remanded.
Bryan, Judge**

Blue Earth County District Court
File No. 07-CR-20-795

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Patrick McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, Mitchell Zillman, certified student attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal, appellant challenges his convictions and the restitution ordered by the district court. Appellant argues that the admission of certain identification testimony violated the Confrontation Clause and contravened the rules of evidence. We conclude,

however, that any error was harmless beyond a reasonable doubt and affirm the conviction. Appellant also argues that the district court erred when it ordered restitution. Specifically, appellant disputes the causal connection between the offense and the loss claimed by the victim, and that the district court failed to consider appellant's ability to pay the restitution amount. We conclude that appellant forfeited the causation challenge. However, because we are unable to determine whether the district court considered appellant's ability to pay, we remand the case to the district court for further findings.

FACTS

On February 29, 2020, three men entered the home of A.S. without permission, held A.S. at gun point, and stole several items. A.S. reported the crime and law enforcement officers detained three suspects. The suspects were transported back to the home, and law enforcement officers asked A.S. whether the suspects were the individuals who had robbed him.¹ A.S. identified two of the individuals. After further investigation, respondent State of Minnesota charged appellant Luot Tut Makuac with six felony offenses, including aiding and abetting first-degree aggravated robbery and aiding and abetting first-degree burglary. The case proceeded to trial and the jury found Makuac guilty of five offenses after the state dismissed one offense. The jury also found that the state had established three aggravating sentencing factors. At sentencing, the district court granted the state's motion for an aggravated departure, sentenced Makuac to two, concurrent prison terms of 96 months, and

¹ The district court denied Makuac's pretrial motion to suppress the "show-up" identification, and Makuac does not challenge that decision on appeal. Instead, the appeal relates only to the presentation of this evidence at trial, not the constitutionality of the show-up identification.

ordered him to pay restitution. Makuac appeals. Given the issues raised, we first address the evidence presented at trial before summarizing the district court's decision to order restitution.

A. Evidence Presented at Trial

At trial, the state presented the testimony of several witnesses, including law enforcement officers and A.S. The district court also admitted several exhibits, including a recording of the 911 call made by A.S. reporting the crime, photos of A.S.'s home, surveillance video, firearms, and photographs documenting items that law enforcement recovered during a search of Makuac's residence.

According to the testimony of A.S., at approximately midnight on February 29, 2020, three men came to A.S.'s home. The men knocked on the door, and when A.S. answered, they entered the home without permission. A.S. recalled that one of the men wore a grey hooded sweatshirt, one wore a black jacket and beanie, and one wore squared glasses and a black hooded sweatshirt with white lettering on the sleeves. After entering the home, the men asked for A.S.'s roommate who was not present at the time. A.S. asked the men to leave, but they refused. Two of the men pointed guns at A.S. and demanded money and anything of value. At one point, the man wearing a black hooded sweatshirt and squared glasses pointed a gun at A.S., while the other two ransacked the house. At another point, the man wearing the grey hooded sweatshirt also pointed a gun at A.S. A.S. testified that the weapons were held close enough to him that he noticed that the serial number on one weapon had been scratched off and that the other weapon had a laser sight mounted on it. A.S. also explained that while he was held at gunpoint, the men looked

through the rooms of the home, one at a time. The men took personal property belonging to A.S., including two cell phones, two videogame consoles, a laptop, and other items.

After the men left the home, A.S. ran after them and caught a glimpse of the vehicle that the men got into before they drove away. A.S. then called 911. A.S. also testified that he provided descriptions of the individuals during the 911 call and when speaking with police officers, including what the individuals were wearing and what type of guns were used. A.S. did not testify about any subsequent statements that he made during the show-up identification.

The state also presented the testimony of Sean McClinton, a police officer who responded to the 911 call. McClinton testified that he arrived at A.S.'s home and obtained a physical description of the assailants and the clothes that they were wearing. McClinton relayed this information to other law enforcement officers. Approximately 45 minutes later, McClinton learned that law enforcement officers had detained three suspects: Makuac, K.N., and C.B. McClinton explained to the jury that the three suspects were transported to the area near A.S.'s home, and McClinton and Officer Ken Baker conducted a show-up identification. McClinton recounted that A.S. confirmed that K.N. and Makuac were both involved in the earlier incident. Makuac was the person A.S. previously described as wearing a grey sweatshirt, and K.N. was the person that A.S. previously described as wearing a black hooded sweatshirt and squared glasses. McClinton also testified that A.S. stated he was 100% certain about his identification of K.N. and 90% certain about his identification of Makuac.

The state also presented Baker's testimony regarding statements that A.S. made during the show-up identification. Specifically, Baker testified that law enforcement officers asked A.S. whether the vehicle that they had recovered when they detained the three assailants was the same vehicle that A.S. saw driving away from his home. According to Baker's testimony, A.S. positively identified the vehicle, but stated that he was only 75% certain of that identification. A.S. could not positively identify C.B. as the third individual during the show-up identification.

Makuac objected to McClinton's testimony of A.S.'s statements during the show-up identifications. The district court admitted the testimony as a statement of prior identification. Makuac made the same hearsay objection to Baker's testimony and the district court admitted the evidence as "foundational." In addition, before McClinton's testimony about the show-up identifications, the district court read Minnesota Criminal Instruction number 3.19, the model cautionary jury instruction regarding out-of-court identification statements.

At the beginning of the second and last day of trial, the jury submitted four questions to the district court, but only one is relevant to this appeal.² In that question, the jury asked "why didn't [A.S.] get asked about the show-up details in his testimony or viewing the car

² The jury also asked why they could not hear additional DNA evidence, whether they could have copies of the preliminary instructions, and whether they could have transcripts of A.S.'s testimony. After discussing these questions and potential answers with the parties, the district court instructed the jury to consider all the evidence as presented during the trial and explained that the district court would provide written instructions at the close of the trial, but that transcripts would not be available.

so that it is not hearsay?” After discussing the questions with trial counsel, the district court wrote the following response to the jury: “I can’t answer that.”³

Makuac renewed his hearsay objections to McClinton’s and Baker’s testimony regarding A.S.’s statements during the show-up identification. Makuac also argued that admission of the testimony violated the Confrontation Clause because he could not cross-examine A.S. about his statements. The district court overruled the objections and admitted the testimony.

In addition to the testimony of A.S. and the testimony regarding the statements that A.S. made during the show-up identification, the state also presented the 911 call, which included statements from A.S. describing the suspects and their vehicle. Photographs received into evidence corroborate A.S.’s recollection of the incident and the actions of the suspects at his home. The surveillance video of the porch outside A.S.’s home also corroborates A.S.’s testimony and his physical description of the suspects and their vehicle. The state also presented evidence regarding items recovered during the investigation, including from a search of the vehicle and from a search of C.B.’s bedroom closet. The trial exhibits included photographs of items and several items themselves. For example, the district court admitted evidence of firearms with distinctive features that matched A.S.’s descriptions: a handgun with a laser sight and a handgun with a scratched-off serial number. The firearm with a scratched-off serial number was recovered from C.B.’s

³ Neither party provided this court with copies of the hand-written questions or responses from the court. Instead, the district court read into the record the questions and answers, and the trial transcript includes the district court’s discussion of the jury questions with the parties.

bedroom closet. In addition, the district court admitted evidence regarding an Adidas backpack containing A.S.'s stolen electronics, which was also recovered from C.B.'s bedroom closet. The district court further admitted DNA evidence, including testimony regarding known DNA samples obtained from K.N., C.B., and Makuac and unknown DNA samples from the grips and triggers of the handguns. According to testimony from an expert witness employed by the Minnesota Bureau of Criminal Apprehension (BCA), Makuac's DNA matched a major male DNA profile obtained from the grip of the handgun recovered from C.B.'s closet. The BCA expert further testified that the male DNA profile obtained from this handgun did not match the DNA of the other two suspects.

B. Order of Restitution

At Makuac's sentencing hearing, the district court received A.S.'s affidavit of restitution and permitted A.S. to present a victim impact statement. A.S. explained that as a result of the incident, he dropped out of school and moved out of Mankato:

So, because of this, um, and the incident that happened, I had to proceed to drop out of college. I did not feel safe in the household that I was in, or staying at at the time in Mankato. And I had to move back up North to my relatives and family. Yeah, so, I-I dropped out. I had a career plan set to go on to tech school. Now I'm down money, down, you know, everything. Just kind of back to square one at this point.

Makuac's presentence investigation report (PSI) was submitted to the district court as well. The PSI did not include detailed information about Makuac's ability to pay restitution. It did note that from 2018 until his arrest, Makuac was employed for only five months. The PSI also noted that Makuac lost this job when he was arrested for the instant offense. The district court ordered restitution in the amount of \$5,450, due within one year and payable

out of Makuac's prison earnings. Makuac made no objections prior to, during, or after the sentencing hearing regarding restitution until this appeal.

DECISION

I. Admission of Testimony Regarding the Show-Up Identification

Makuac argues that the district court violated his constitutional right to confront witnesses and misapplied the rules of evidence when it admitted McClinton's and Baker's testimony regarding the statements of A.S. during the show-up identification. We need not decide whether the district court erred in admitting the testimony because the state established that any error was harmless beyond a reasonable doubt.

The Confrontation Clause provides a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) ("We apply an identical analysis under both the state and federal Confrontation Clauses"). Admission of an out-of-court statement violates the Confrontation Clause when "the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant." *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 39, 59 n.9 (2004)). We review de novo whether the admission of evidence violates the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). When an error implicates a constitutional right, a new trial is required unless the state can show beyond a reasonable doubt that the error was harmless. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009) (citing *State v. Scott*, 501 N.W.2d 608, 619 (Minn. 1993)). An error is harmless beyond a reasonable doubt if the guilty verdict was surely

unattributable to the error. *Caulfield*, 722 N.W.2d at 314 (quoting *State v. Juarez*, 572 N.W.2d 286, 291 (Minn.1997), and *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005)).⁴

In determining whether the verdict was surely unattributable to an error, we examine the record as whole, considering the following five factors: (1) how the evidence was presented; (2) whether the evidence was “highly persuasive”; (3) whether the evidence was highlighted in closing arguments; (4) whether the defendant effectively countered the evidence; and (5) whether the other evidence of guilt was overwhelming. *Caulfield*, 722 N.W.2d at 314 (citing *Al-Naseer*, 690 N.W.2d at 748). The final factor is not conclusive, but “[o]verwhelming evidence of the defendant’s guilt is a factor, often a very important one.” *Id.*; see also *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009); *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011).

In this case, only one of these five factors supports Makuac’s argument: the parties’ discussion of the show-up identifications during their closing arguments. The remaining factors all favor the state, and the fourth and fifth factors strongly support the conclusion that the verdict was surely unattributable to any error. We discuss each factor in turn.

⁴ Because we conclude that the state has established harmlessness under the constitutional standard, we necessarily also conclude that any error admitting inadmissible hearsay into the record was also harmless under the lower standard that applies to violations of the rules of evidence. See *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006) (“Erroneous admission of evidence that does not have constitutional implications is harmless if there is no ‘reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.’” (quoting *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994))). Therefore, we need not address Makuac’s hearsay challenge or the state’s alternative arguments that the testimony satisfied the excited-utterance and residual hearsay exceptions.

First, the presentation of the evidence in question favors the state. Although the district court admitted evidence of A.S.'s statements during the show-up identification through McClinton's and Baker's testimony, this testimony was presented without drama or fanfare. *See State v. Sterling*, 834 N.W.2d 162, 174 (Minn. 2013) (concluding that the error was harmless in part because the introduction of the evidence was "without drama or fanfare and likely had no unduly prejudicial effect"). The testimony was relatively brief and part of the state's presentation of a much larger case-in-chief. The first *Al-Naseer* factor weighs heavily in favor of the state.

Second, we cannot characterize McClinton's and Baker's testimony of A.S.'s statements during the show-up identification as "highly persuasive." McClinton and Baker both testified that A.S. expressed varying degrees of certainty in his identifications. Specifically, McClinton and Baker explained that A.S. was 100% certain that K.N. was involved, but was not as certain when identifying Makuac (90% certain) or the vehicle (75% certain). In addition, the testimony of McClinton and Baker regarding A.S.'s statements was corroborated by statements made by A.S. on direct examination and made by A.S. in the 911 call. Makuac raises no concerns regarding the admission of this other identification evidence on appeal, and we conclude that McClinton's and Baker's testimony has limited additional persuasiveness beyond that of the other identification evidence admitted at the trial. Finally, the jury asked why A.S. himself did not testify regarding his statements during the show-up identification, and in its question, the jury classified McClinton's and Baker's testimony as hearsay: "[W]hy didn't [A.S.] get asked about the show-up details in his testimony or viewing the car so that it is not hearsay?"

This question indicates that the jury did not find McClinton's and Baker's testimony to be highly persuasive. For these reasons, the second *Al-Naseer* factor favors the state's arguments.

Third, because both parties discussed A.S.'s statements during the show-up identification in their closing arguments, this factor favors Makuac. The context and substance of the closing arguments, however, limits the overall weight that we give to this factor. The state summarized the show-up identification during closing argument, but focused primarily on other inculpatory evidence in the case, including other identification evidence not challenged on appeal. For his part, Makuac described the show-up identification as "an issue" and "a hole in the state's case" in his closing argument. Makuac emphasized that A.S. himself did not testify regarding the statements made during the show-up identification and encouraged the jury to disregard the testimony about the show-up identifications. In sum, this factor weighs slightly in favor of concluding that the error was not harmless.

Fourth, Makuac effectively countered the evidence through cross-examination of McClinton and Baker regarding the show-up identification. The district court also granted Makuac's request to provide cautionary instructions regarding identification testimony during McClinton's testimony and again during the final instructions. In addition, as noted above, Makuac's closing argument provided him an opportunity to criticize the show-up identification, asking the jury to doubt McClinton's and Baker's testimony because it was not supported by A.S.'s testimony during the trial. This factor strongly favors the state's argument on appeal.

Fifth and finally, the other evidence of guilt was overwhelming. The identification testimony in A.S.'s direct examination and the 911 call, as well as other identification evidence not contested on appeal, supported the jury's conclusion that Makuac committed the charged offenses. Moreover, the photographs from A.S.'s house and the surveillance video further corroborated A.S.'s testimony and Makuac's involvement in the offenses. In his direct examination, A.S. testified that the firearms used were pointed so close to him that he observed distinctive features, including a laser sight on one weapon and a scratched-off serial number on the other. The evidence recovered from C.B.'s bedroom included a firearm with its serial number scratched off next to a backpack containing A.S.'s stolen property. DNA collected from this weapon was consistent with a DNA profile that matched the sample provided by Makuac. We conclude that the inculpatory evidence admitted at trial and unchallenged on appeal is overwhelming and the fifth factor weighs strongly in favor of the error being harmless.

Balancing all the factors together, we conclude that any constitutional violation that may have occurred was harmless beyond a reasonable doubt.

II. Restitution Order

Makuac argues that the district court erred when it ordered restitution for the following two reasons: (1) the offense did not directly cause the loss claimed by A.S.; and (2) the district court did not consider his ability to pay the restitution ordered. We conclude that Makuac forfeited any factual challenge to the restitution order, but remand the matter to the district court for further consideration of Makuac's ability to pay.

A crime victim has the right to receive restitution for “any out-of-pocket losses resulting from the crime, including medical and therapy costs, replacement wages and services.” Minn. Stat. § 611A.04, subd. 1(a) (2020). In determining the amount of restitution, a district court shall consider “(1) the amount of economic loss sustained by the victim as a result of the offense; and (2) the income, resources, and obligations of the defendant.” Minn. Stat. § 611A.045, subd.1(a) (2020). “[District courts] may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant’s crime.” *State v. Boettcher*, 931 N.W.2d 376, 381 (Minn. 2019). Generally, an offender may challenge restitution, but must do so by requesting a hearing within 30 days of sentencing, Minn. Stat. § 611A.045, subd. 3(b), and appellate courts will not consider restitution arguments raised for the first time on appeal, *see State v. Johnson*, 851 N.W.2d 60, 64 (Minn. 2014) (declining to consider a restitution argument raised for the first time on appeal). This 30-day time limit does not apply, however, where the “challenge is to the legal authority of the court to order restitution.” *State v. Gaiovnik*, 794 N.W.2d 643, 648 (Minn. 2011).

In this case, A.S. explained at sentencing that he experienced an economic loss when he dropped out of school and moved out of Mankato because of the offense. On appeal, Makuac disputes this testimony. However, Makuac did not file a request for a restitution hearing as required by statute. Minn. Stat. § 611A.045, subd. 3(b). Because a challenge to the causal connection between the offense and A.S.’s loss raises a factual challenge, not a legal one, Makuac has forfeited appellate review of this portion of the district court’s decision.

Makuac also argues that the district court lacked legal authority to order restitution where it failed to consider his ability to pay restitution of \$5,450 within one year. The state concedes that the district court did not expressly consider Makuac's ability to pay and urges us to remand the matter for further findings pursuant to *State v. Miller*, 842 N.W.2d 474, 479-80 (Minn. App. 2014) (reversing restitution order and remanding for further findings because the district court failed to consider the offender's ability to pay, even though the offender raised the issue for the first time on direct appeal), *rev. denied* (Minn. Apr.15, 2014). Assuming (as the state does) that Makuac's challenge is properly characterized as a challenge to the district court's legal authority and assuming (as the state does) that pursuant to *Miller*, Makuac can properly raise this issue for the first time on direct appeal, we conclude that further findings are required to justify the district court's decision.

Affirmed in part, reversed in part, and remanded.