

*This opinion is nonprecedential except as provided by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
A22-1062**

State of Minnesota,
Respondent,

vs.

James Irving Dale,
Appellant.

**Filed May 22, 2023
Affirmed in part and remanded
Florey, Judge***

Hennepin County District Court
File No. 27-CR-21-19186

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

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Frisch, Judge; and Florey,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal from judgments of conviction for unlawful firearm possession and property damage, appellant argues that (1) the district court erred in denying his motion to suppress identification evidence because law enforcement used a show-up identification procedure that was unnecessarily suggestive and presented a substantial likelihood of misidentification, and (2) the warrant of commitment erroneously indicated a 60-month sentence for property damage although the district court did not orally pronounce a sentence for that offense. We affirm in part and remand.

FACTS

In October 2021, respondent State of Minnesota charged appellant James Irving Dale with felony possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2) (2020), and misdemeanor fourth-degree damage to property under Minn. Stat. § 609.595, subd. 3 (2020). The state dismissed a third charge at trial and amended the damage-to-property charge to first-degree damage to property. Before trial, Dale filed a motion to suppress and preclude identification evidence obtained in violation of his constitutional right to due process. In his supporting memorandum, Dale argued that the show-up identification procedure that law enforcement used to identify him as the perpetrator of the offenses, as well as to identify the case containing the firearm that he allegedly possessed, was unnecessarily suggestive and created a substantial likelihood of irreparable misidentification.

The district court held an omnibus hearing in March 2022 to address Dale's motion. The parties stipulated to the exhibits the state submitted, including a surveillance video, audio of four 911 calls made by a witness, police reports, and two officers' body-camera footage. The district court found that the show-up procedure was unnecessarily suggestive, but it also found that there was not a substantial likelihood of irreparable misidentification and therefore denied Dale's motion to suppress. The district court then held a jury trial in April 2022. The following facts summarize the evidence presented at trial.

A.J. is the owner of a coffee shop in Minneapolis. At approximately 4:30 a.m. on October 11, 2021, A.J. received a call from the alarm company that services his coffee shop. He viewed surveillance footage on his phone depicting a masked person in the basement office of the coffee shop, so he instructed the alarm company to call the police.

Officers responded to the coffee shop and observed that a back window had been broken. A.J. arrived and showed the officers the surveillance video of the man who had broken into the shop. A.J. testified that nothing appeared to be missing in the basement office, although it appeared the man had rummaged through things.

Later that day, another person who lived near the coffee shop reported to police that someone had broken into his home. Two of his firearms, including an AR-15 rifle, were stolen. The AR-15 was stored in a black, rectangular, soft-sided case.

The following day, October 12, A.J. was working at the coffee shop when he saw the same person from the break-in surveillance footage walk into the shop. A.J. testified that the man was wearing the same clothing as the man in the footage, including a blue sweatshirt with orange writing and camouflage shorts. A.J. called 911 at 7:57 a.m. and

again at 8:02 a.m. to report that the man who had broken into the shop had returned. In the first call, A.J. described the man as a white man with a beard wearing a Minneapolis sweatshirt, camouflage shorts, and a camouflage hat. In the second call, A.J. informed the 911 dispatcher that he was pursuing the man. A.J. grabbed the man's hat during this encounter.

A.J. testified that he followed the man northbound through a nearby alley, but he stopped following when the man jumped over a fence and pulled something out of his pocket that "felt threatening." A.J. returned to the coffee shop, but he soon saw the man again, this time walking northbound on Xerxes Avenue. The man was carrying two bags: a camouflage backpack and a "large . . . black backpack case-looking thing" that was rectangular in shape. A.J. called 911 for the third time at 8:10 a.m. to report the sighting. He also informed the dispatcher that the man had "pulled a knife" on him while he was chasing the man.

One of the responding officers testified that they saw a white man in a blue sweatshirt and camouflage pants on Xerxes Avenue at approximately 8:30 a.m. The officers lost sight of the man, so they continued to search for him in their squad car and on foot. During this search, one officer found two black backpacks along the side of a house near 48th and Xerxes. The officers eventually found the man in a nearby backyard and took him into custody. The man matched A.J.'s description.

While returning to the coffee shop, the officers noticed a rifle case sitting in a yard less than a block from where they located the man. The case contained an AR-15 rifle. The officers recovered the rifle and returned to the coffee shop.

A.J. called 911 a fourth time at 8:37 a.m. to check on the status of his report. The dispatcher informed A.J. that law enforcement had the suspect in custody. When the officers returned to the coffee shop, they conducted a show-up identification with A.J., who identified the man as the person who had broken into the coffee shop. A.J. also identified the black, rectangular rifle case that he saw the man carrying. The man was later identified as Dale. Both the responding officer and A.J. identified Dale in court.

The jury found Dale guilty of felony possession of a firearm and first-degree damage to property. Dale requested to be sentenced at the conclusion of trial. The district court sentenced Dale to 60 months in prison.

Dale appeals.

DECISION

I. The district court did not err by denying Dale’s motion to suppress the show-up identification evidence.

Dale first argues that the district court committed reversible error by allowing the state to introduce evidence that identified Dale as the perpetrator because the show-up identification procedure was unnecessarily suggestive and created a substantial likelihood of misidentification. We disagree that the procedure created a substantial likelihood of misidentification requiring reversal of the district court’s decision to admit the evidence.

We generally review a district court’s evidentiary decisions for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). However, we review de novo whether the admission of pretrial identification evidence violated a defendant’s due-process rights. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). “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.” *Id.* at 83-84 (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). “[T]he reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed.” *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted).

Our courts apply a two-prong test to determine whether pretrial identification evidence violates due process and must be suppressed. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) (citing *Simmons*, 390 U.S. at 381). Under the first prong, we determine whether the identification procedure was unnecessarily suggestive. *Id.* Even if the procedure was unnecessarily suggestive, the evidence may be admissible under the second prong if “the totality of the circumstances establishes that the evidence was reliable.” *Id.* In other words, the second prong involves a determination of “whether the suggestive procedures created a very substantial likelihood of irreparable misidentification.” *Id.*

To evaluate the totality of the circumstances under the second prong of this test, we consider the following five factors:

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 [identification procedure];
5. The time between the crime and the confrontation.

Id. If the totality of the circumstances demonstrates “an adequate independent origin” for the witness’s identification of the defendant, then the identification evidence need not be suppressed despite the suggestive nature of the procedure. *Taylor*, 594 N.W.2d at 161.

Here, the district court found that the show-up identification procedure was unnecessarily suggestive. The state implicitly concedes this point in its brief, acknowledging caselaw that states “a one-person show-up is by its very nature suggestive.” *Id.* at 162. We therefore focus our analysis on the second prong of the test. *See State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996) (stating that analysis of the first prong of the *Ostrem* test is unnecessary when the state admits that the identification procedure was suggestive).

And our analysis of the five *Ostrem* factors leads us to conclude that the factors weigh in favor of the admission of the identification evidence.

1. A.J.’s Opportunity to View Dale

The district court noted that A.J.’s opportunity to view the criminal at the time of the crime was “substantial” because A.J. was able to review the surveillance video of the person who broke into his shop on October 11 and because A.J. had up-close contact with Dale while he chased Dale on October 12. On appeal, Dale argues that the state did not present evidence at the omnibus hearing about A.J.’s ability to view Dale and claims that A.J. “only had a brief opportunity to observe the suspect in his coffee shop, while he was likely distracted by customers and calling 911.”

The record contradicts Dale’s argument. A.J. had ample opportunity to view Dale because he reviewed the surveillance footage of the break-in on October 11 and then

witnessed Dale three separate times on October 12. He first witnessed Dale enter his coffee shop wearing the same clothing as the man in the October 11 surveillance footage. He next witnessed Dale a few minutes later when he gave chase, and he came close enough to grab Dale's hat. A.J. was also close enough for Dale's voice to be heard in the background of the 911 call. He witnessed Dale for a third time less than ten minutes later and provided further descriptions of Dale's location, the direction Dale was traveling, and the bags Dale was carrying. Thus, we conclude that this factor weighs in favor of reliability and admissibility.

2. *A.J.'s Degree of Attention*

The degree-of-attention factor weighs in favor of admissibility when the witness is "coherent, aware, and attentive" while making their observation of the defendant. *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005). Dale argues that this factor does not weigh in favor of admissibility because the state presented no evidence at the omnibus hearing about A.J.'s degree of attention. He further argues that A.J. did not describe Dale carrying a large, black, rectangular case prior to a police officer asking about the case. Again, we disagree.

The record evidence indicates that A.J. was highly attentive in his observations of Dale. The audio of the 911 calls shows that A.J. repeatedly described Dale's appearance and noted when Dale reappeared carrying bags he had not previously been carrying. A.J. also relayed the street names on which he observed Dale and the direction Dale was walking. We conclude that this factor weighs in favor of admissibility because A.J. appeared coherent, aware, and attentive when relaying his observations.

3. *The Accuracy of A.J.'s Description*

Dale argues that A.J.'s description was not accurate because the description relied on the clothing Dale was wearing and did not include a description of Dale's skin tone, height, weight, or other descriptive features. However, Dale's argument is inaccurate because A.J. included a description of Dale's skin tone and facial hair in his first 911 call. Furthermore, Dale fails to address that A.J. gave an accurate description of Dale's clothing and the bags he carried. *See State v. Lushenko*, 714 N.W.2d 729, 733 (Minn. App. 2006) (noting appellant's failure to address the fact that the witness's general description matched appellant), *rev. denied* (Minn. Dec. 12, 2006). We conclude that this factor also weighs in favor of admissibility.

4. *A.J.'s Level of Certainty During the Show-up Identification*

Dale argues that the 911 dispatcher and the police officer who conducted the show-up identification primed A.J. to believe that Dale was the perpetrator because they both informed A.J. that law enforcement had apprehended the suspect. Dale also argues that A.J.'s certainty in identifying the black rifle case was inflated because he did not have an opportunity to view the two other backpacks that police recovered and compare them to the rifle case. Finally, Dale argues that "[t]he lack of opportunity to compare the bags, coupled with the scary news about the recovered rifle, likely made [A.J.] feel more certain in his identification than he was."

However, Dale ignores A.J.'s statement to the police officer that he was "100%" certain Dale was the perpetrator. This statement was captured by the officer's body camera

and submitted into evidence during the omnibus hearing. This statement suggests that A.J. was indeed certain of his identification and weighs in favor of admissibility.

5. *The Amount of Time Between the Crime and the Show-up*

The amount-of-time factor weighs in favor of admissibility when the identification procedure occurs close in time to the witness's observation of the suspect. *See Lushenko*, 714 N.W.2d at 733 (concluding this factor favored admissibility when the identification occurred three hours after the witness's interaction with the suspect). Here, A.J. identified Dale less than one hour after he first called 911 to report that he had observed Dale enter his coffee shop. This factor weighs in favor of reliability and admissibility.

In sum, we conclude that all five *Ostrem* factors support the admission of the challenged identification evidence. A.J.'s identification of Dale was independently reliable, and the district court did not err by denying Dale's motion to suppress this evidence.

In his pro se supplemental reply brief, Dale argues that the show-up identification procedure was impermissibly suggestive and created a substantial likelihood of misidentification with regard to the black rifle case that A.J. also identified. He argues that although A.J. had multiple opportunities to view Dale without the bags, A.J. only had a brief opportunity to view Dale's bags because Dale was carrying the bags "across a busy intersection during rush hour traffic." Dale's arguments here are similar to the arguments made in his principal brief. For the same reasons we outlined in our analysis of the five *Ostrem* factors, we conclude that A.J.'s identification of the black rifle case was reliable and admissible. Therefore, we affirm the district court's admission of the evidence.

II. Remand is necessary to correct the warrant of commitment.

Dale next argues that we must remand his case to the district court to correct his warrant of commitment. At sentencing, the state asked for a 60-month sentence for the possession-of-a-firearm conviction and a concurrent guidelines sentence for the damage-to-property conviction.¹ The defense requested a downward durational sentencing departure of 36 months for the possession-of-a-firearm conviction.

The district court imposed a 60-month sentence for unlawful possession of a firearm, but it did not orally pronounce a sentence for the damage-to-property conviction. However, the district court later issued a warrant of commitment that listed a 60-month concurrent sentence for damage to property in addition to the 60-month sentence for possession of a firearm. The state agrees that remand is appropriate to correct the warrant of commitment but argues that the district court's oral sentencing order was unambiguous and reflected the district court's intention to impose the state's requested sentence for both convictions.

The district court must "[s]tate precisely the terms of the sentence" on the record when sentencing a defendant for a conviction. Minn. R. Crim. P. 27.03, subd. 4(A). For felony convictions, the court must also record the sentence in an order. Minn. R. Crim. P. 27.03, subd. 7. The district court may correct a sentence not authorized by law, as well as clerical mistakes, at any time. Minn. R. Crim. P. 27.03, subds. 9, 10. An unambiguous

¹ The state clarifies that the presumptive guidelines sentence for the damage-to-property conviction, given the severity level of the offense and Dale's criminal-history score, would be 24 months in prison.

oral sentencing order controls over the written order of commitment when the two conflict. *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002).

Based on the transcript, it appears the oral sentencing order is indeed unambiguous. The district court heard both parties' arguments regarding the duration of the sentence for firearm possession and then stated, "I'm going to sentence you to the 60 months that is being asked by the prosecution here." Although the state had also requested a concurrent sentence on the damage-to-property conviction, the district court did not acknowledge this request or state on the record that it was imposing any sentence for that offense.

Because the record is clear that the district court did not pronounce a sentence for the damage-to-property conviction, the warrant of commitment erroneously reflects a sentence that was never imposed. Thus, remand is appropriate to correct the warrant of commitment.

Affirmed in part and remanded.