STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0013

State of Minnesota,
Respondent,

vs.

Antonio Albert Schally,
Appellant.

Filed December 10, 2018
Affirmed
Randall, Judge[*]

Ramsey County District Court
File No. 62-CR-17-2078

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Randall, Judge.

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

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

In this direct appeal from judgments of conviction for ineligible person in possession of a firearm and receiving stolen property, appellant Antonio Albert Schally argues that (1) the district court erred in permitting a witness to identify him in court after police showed the witness an impermissibly suggestive photo; (2) the district court erred in denying his mistrial motion after an officer-witness referred to his involvement in an unrelated "terroristic threats" incident; and (3) the district court erred in ordering him to repay the victim's insurance deductible for damage to a vehicle that was not directly caused by appellant's conduct. We affirm.

FACTS

P.K. lived alone in South St. Paul on Butler Avenue. Around March 21, 2017, he was out of town and learned someone had broken into his home. When he returned home on April 2, he was able to survey the damage that had been done to his home, which included a door that had been kicked in. His gun safe, which contained several firearms and air guns, was gone. His van, which was parked in his garage when he left for vacation, was also gone.

In the afternoon on March 21, 2017, K.M. was in his garage working on a vehicle. With his radio going and the garage door closed, K.M. "heard a lot of banging . . . outside in the parking lot." K.M. opened the garage door to see what was going on. At that point, he could see individuals "inside a gold van beating on something," but he did not know what it was. Next, he saw three individuals get out of the van carrying pry bars and big

hammers, "like sludge hammers." He was able to provide a physical description of one suspect as "[w]hite male, [with] tattoos" who "actually turned around and asked [K.M.] what [he] was looking at." The individuals then closed the back hatch to the van and continued beating on the object in the van. In total, the beating and noise took place for about 10 to 15 minutes "if not longer." K.M.'s girlfriend came to see him while this was going on. K.M. noticed the suspect with tattoos helping put long guns into an Oldsmobile car that was parked next to the van. K.M. called 911 at approximately 1:26 p.m. and gave the 911 operator the full license plate number of the Oldsmobile. He told 911 that two individuals were at the scene "because the third one left."

Officer Lehner arrived first at approximately 1:30 p.m. K.M. initially gave Officer Lehner the Oldsmobile's plate number. K.M. told Officer Lehner that two white males had left—one in the van, and one in the Oldsmobile. Officer Lehner learned that the registered owner of the Oldsmobile was appellant, and he "drove around the area" looking for the Oldsmobile. Officer Lehner then came back and showed K.M. a picture of Schally. K.M. confirmed that Schally's picture matched the driver of the Oldsmobile.

Based on other information he had from a radio police alert, Officer Lehner believed 655 Hoyt Avenue would be a good address to investigate. Office Lehner estimated that 655 Hoyt Avenue was located about one to one-and-a-half miles from K.M.'s garage. His unit arrived at that address at 1:56 p.m., and Officer Lehner arrived shortly afterwards. The Oldsmobile was there. At about 2:20 p.m., Officer Lehner observed a white male "with salt and pepper hair" walk out of the house and over to the Oldsmobile, which was parked nearby. He saw the man get in the Oldsmobile and then walk back to the house "holding

an object next to him." About 15 minutes later, the man came out again carrying a red blanket. It looked like the man "had put something long and cylind[rical] in th[e] red blanket and then walked to the house."

Officer Diaz, who was part of a take-down unit, came on the case after Officer Lehner had done the preliminary investigation work. Schally left 655 Hoyt Avenue on foot at approximately 6 p.m. He was carrying a backpack and walking down the street with a second male. Officer Diaz and other officers approached the two men, and Officer Diaz ordered them to the ground with his weapon drawn. Both men obeyed the order. Officer Diaz then handcuffed Schally, but Schally would not stand up. Officer Diaz lifted him up and asked him to walk forward, but Schally refused, and Officer Diaz had to "physically escort him." Another officer then noticed a gun where Schally had been lying on the ground. Once Schally was handcuffed, it was difficult to get his backpack off, so officers cut it off. Inside the backpack was a nylon case with "[m]ultiple live rounds." P.K.'s car radio was also in the backpack as well as an inhaler with Schally's name on it.

Police obtained and executed a search warrant for 655 Hoyt Avenue that night. Police found several of P.K.'s guns in a room that Schally had been staying in for the previous four or five days. Schally was friends with the homeowner's son and stayed in his friend's room from time to time. In the room, police also found a 9mm Zoraki handgun that did not belong to P.K. Six people exited the residence, and DNA samples were collected from all of them. Schally was initially charged with just one count of possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2) (2016) on

March 23, 2017. Officer Lehner obtained a warrant and did a DNA swab on Schally on March 28.

The retrieved guns were swabbed for DNA and provided to the Bureau of Criminal Apprehension (BCA) for analysis. In total, seven swabs of the individuals from the house and Schally were provided to the BCA for comparison. There were several matches for Schally—the BCA could isolate an individual "major male profile" matching Schally on several samples where the profile would not occur more than once among unrelated randomly selected persons in the world population. There was no major profile on one item, but 99.997% of the world population could be excluded, and Schally could not be. The other six individuals could be excluded.

At trial, K.M. identified Schally in court as the person he saw in the parking lot outside his garage. At pretrial, defense counsel objected to the in-court identification because the earlier identification procedure with one photograph was unfair and unduly suggestive. Defense counsel reiterated this objection during the trial. At trial, Officers Lehner and Diaz also provided testimony to which defense counsel objected. For example, Officer Lehner testified that there was a radio police alert out on Schally's Oldsmobile and the 655 Hoyt Avenue address. Defense counsel objected to much of this testimony. At one point, Officer Diaz referred to there being a "pick up" for Schally's arrest in a "terroristic threats conviction." The court instructed the jurors to disregard the question.

After numerous amendments to the criminal complaint, six charges in total were eventually brought against Schally. These included the original charge for ineligible possession of a firearm and the same charge for another gun (Counts I and IV), two charges

for ineligible possession of ammunition (Counts II and V), and receiving stolen property under Minn. Stat. § 609.53, subd. 1(2016) (Counts III and VI). Schally was convicted of all charges except for Counts IV and V, which were related to the 9mm Zoraki gun that was not taken from P.K. Schally was then sentenced to 60 months on Count I and 27 months on Count III, concurrent with Count I. No sentence was imposed for Counts II and VI. Finally, the district court awarded restitution to P.K. in the amount of $4,293.32. Of this amount, $1,000 was for P.K.'s automobile insurance deductible. Schally appeals.

D E C I S I O N

In this appeal, Schally makes three primary arguments. First, Schally argues that the district court erred when it allowed K.M. to make an in-court identification of him after police showed a single photo of him to K.M. shortly after observing suspicious activity in a parking lot. Second, Schally argues that the district court should have granted him a mistrial because of an officer-witness's comment that Schally was wanted for "terroristic threats." Third, Schally argues that the district court erred in ordering that he pay $1,000 to P.K. for his insurance deductible on his damaged vehicle.

I. The district court did not abuse its discretion when it allowed witness K.M. to make an in-court identification of Schally.

Schally challenges his verdict on Counts III and VI—receiving stolen property. He argues that these convictions should be reversed because Officer Lehner's pretrial identification procedure involving a single photo of Schally was suggestive and "created a substantial likelihood of misidentification of the person transferring weapons to the blue Oldsmobile."

Generally, evidentiary decisions rest with the district court's discretion and are not reversed absent an abuse of that discretion. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). However, "despite the district court's general discretion to make evidentiary decisions, [appellate courts] review de novo whether a defendant has been denied due process." *Id.*

An in-court identification of a defendant violates due process if an earlier pretrial identification procedure, such as a photo lineup, "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968); *see also Manson v. Brathwaite*, 432 U.S. 98, 121-23, 97 S. Ct. 2243, 2256-57 (1977). To determine whether a pretrial identification must be suppressed, courts apply a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, courts consider whether the pretrial-identification procedure was unnecessarily suggestive. *Id.* "Whether a pretrial[-]identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification." *Id.* Second, even if the pretrial-identification procedure was unnecessarily suggestive, the in-court identification may still be admissible "if the totality of the circumstances establishes that the evidence was reliable." *Id.* The second inquiry depends on whether the in-court identification has an "adequate independent origin" that is not tainted by the pretrial-identification procedure. *Id.; see also State v. Hyvare*, 354 N.W.2d 835, 836 (Minn. 1984).

We first consider whether the photo lineup was unnecessarily suggestive. Here, Schally argues that the single-photo procedure was unnecessarily suggestive. *The state*

concedes this point, acknowledging that "single-photo identification procedures have been widely found to be unnecessarily suggestive." The case law supports this conclusion. *See, e.g., Ostrem*, 535 N.W.2d at 919-21. Consequently, the starting presumption is that the pretrial-identification procedure was unnecessarily suggestive.

Next, we consider whether the in-court identification was reliable despite being unnecessarily suggestive. The state argues that K.M.'s identification of Schally in the photo was independently reliable. Schally argues that the in-court identification was so unreliable that the admission of the evidence violated his due-process rights.

Courts consider five factors in evaluating whether the totality of the circumstances establishes the independent reliability of a pretrial identification:

> 1. The opportunity of the witness to view the criminal at the time of the crime;
> 2. The witness' degree of attention;
> 3. The accuracy of the witness' prior description of the criminal;
> 4. The level of certainty demonstrated by the witness at the photo display;
> 5. The time between the crime and the confrontation.

Ostrem, 535 N.W.2d at 921 (citing *State v. Bellcourt*, 251 N.W.2d 631, 633 (Minn. 1977) (citing *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382 (1972))).

The second part of the test is fact-intensive. Two cases serve as guides in undertaking this totality-of-the-circumstances test. First, in *State v. Jones*, police could only obtain general descriptions of two men involved in a shooting, indicating their build, skin tone, and gender, 556 N.W.2d 903, 906 (Minn. 1996). Several weeks after the shooting, a witness identified Jones after seeing a memo on an officer's desk. *Id.* The witness had been

in a house in the same room as Jones just before the shooting, but Jones ordered the witness and another person to leave the house while robbing two other individuals in the same room. *Id.* The witness stated at trial that she was not "sure if that's him or not because [she] really didn't get a good look at his face." *Id.* The witness also testified that her attention was focused on one of the weapons, not the individuals. *Id.* at 913. The prosecution did not ask the witness to identify Jones in court. *Id.* at 906. Considering (1) the time gap of a month between the crime and identification, (2) the witness's focus on the weapon, (3) the short time in the room with Jones, and (4) the witness's uncertainty about the identification, the court determined that there was no independent reliability for the identification, and it raised "significant due process concerns." *Id.* at 913.

Second, in *Ostrem*, a witness was driving with his family when he saw two men at his parents' house. 535 N.W.2d at 918. The witness spoke with the men, and one of them indicated that they were having car trouble. *Id.* After some money was found missing in the house later that same day, the witness gave officers a detailed description, including that one of the men was wearing "high-top tennis shoes with multicolored shoe strings." *Id.* Ostrem was identified the next day, and a deputy took his picture, depicting the same tennis shoes in the photo. *Id*. at 919. The deputy then put the photo on his desk, called in the witness and his wife, and they immediately identified Ostrem from the photo, which the detective did not prompt them to do. *Id.* The procedure was unnecessarily suggestive. *Id.* at 921. But considering that (1) the witness saw Ostrem "during daylight hours from relatively close range," (2) the witness carried on a conversation with one of the suspects, (3) he gave a detailed description of Ostrem, (4) the identification was "instantaneous and

unprovoked," and (5) the identification was "only 48 hours after the crime," the court determined that the out-of-court identification was reliable. *Id.* at 922.

Schally contends that this case is more like *Jones*. The state contends it is more like *Ostrem*. The factors support the state's position—the facts here are more similar to *Ostrem*.

First, factors one and two under the totality-of-the-circumstances test—the opportunity of the witness to view the criminal and the witness's degree of attention—favor the state's position. K.M. saw the events outside his garage in the parking lot in daylight and was close enough to hear what the individuals were saying. He heard one individual say to close the hatch of the van. And the individual K.M. identified as "[a] [w]hite male, [with] tattoos" actually "turned around and asked [K.M.] what [he] was looking at." K.M. noticed the same individual putting rifles into the Oldsmobile. The situation here is more similar to *Ostrem* where the witness saw the suspect outside during the day from relatively close range and interacted with the suspect. The situation here is unlike *Jones*, where the witness testified that she was focused on a weapon, not the individuals. Moreover, the witness only had a very brief interaction with the suspect in *Jones*. Consequently, factors one and two favor the state's position that the identification was reliable.

The third factor—the level of accuracy provided by the witness—favors Schally. K.M.'s identification of the suspect as "[w]hite male, [with] tattoos" was more vague than the detailed account provided by the witness in *Ostrem*. The identification was more like the generic description provided in *Jones* providing only the suspects' frame, skin tone, and gender.

The fourth factor—the level of certainty of the witness—favors the state. The witness in *Jones* admitted in open court that she was uncertain and did not get a good look at the suspect's face. 556 N.W.2d at 913. The witness's response in *Ostrem* was more confident and was immediate. 535 N.W.2d at 922. Here, the witness never displayed any wavering of certainty. This factor favors the state.

Finally, the fifth factor—the time between the crime and the identification—favors the state. The time gap here between observation and identification was 30 minutes or less. In *Jones*, it was a month. 556 N.W.2d at 913. In fact, the time gap here is even shorter than it was in *Ostrem*, which was 48 hours. 535 N.W.2d at 922.

The totality of the circumstances suggests that K.M.'s pretrial identification of Schally was strong enough to be independently reliable of the suggestive single-photo array. The district court did not abuse its discretion in allowing the in-court identification.

There is also strong evidence of guilt, which supports the state's position. K.M. identified Schally as the man he described as "[w]hite male, [with] tattoos." At the time, this unidentified man was putting guns into a blue Oldsmobile. K.M. got the full plate of the Oldsmobile, which police later determined was registered to Schally. In regards to the address at 655 Hoyt Avenue, the owner of the house testified that Schally had been sleeping in her son's room for the past few days. P.K.'s guns were discovered in the same room Schally was staying in. Moreover, Officer Lehner saw Schally moving guns between the Oldsmobile and the house at 655 Hoyt Avenue. When Officer Diaz later arrested Schally, a gun appeared on the ground where Schally had been ordered to the ground. Finally, at trial, a BCA employee testified that there was significant DNA evidence linking Schally to

most of P.K.'s guns that were found in the room in which Schally was staying.[1] The state also presented eight witnesses at the trial; Schally did not testify and presented no witnesses.

Schally focuses more on the other factors. First, Schally argues that the manner of presentation of the in-court identification was done in a "dramatic fashion." He argues that the identification was persuasive to the jury, that the state used the identification in its closing argument, and that defense counsel could not effectively counter the identification. However, the identification was one response and takes up one page of transcript out of approximately 200 pages of transcript testimony. And then there were eight witnesses testifying over two days.

In light of the evidence and an analysis of Schally's arguments, there was enough evidence for the jury to convict Schally.

II. Schally is not entitled to a new trial because of the officer-witness's potentially prejudicial comments.

Schally argues that he is entitled to a new trial because of prejudicial comments made by an officer-witness during the trial. In particular, Schally focuses on Officer Diaz's comment that Schally was involved in a terroristic threat. At trial, defense counsel objected when Officer Diaz made this comment and then asked the court to consider a mistrial after Officer Diaz's testimony concluded. The trial judge sustained defense counsel's objection

[1] There was also a potential admission from defense counsel at pretrial that there may not be "irrevocable harm of misidentification." As the state points out, defense counsel stated at pretrial: "I can't say that there's irrevocable harm of misidentification given the facts as I understand them."

to Officer Diaz's comment about "terroristic threats," ordering the jurors to "disregard that last question. It's not in evidence." The trial judge again noted during final instructions that the jury was to disregard any evidence that he "ordered stricken or told [them] to disregard." However, Schally argues that the jury's imagination "likely ran wild" with this comment, and that the above instructions did not cure the error because you cannot "unring the bell."

Because the district court has the discretion to order a mistrial if necessary, appellate courts will not disturb the decision absent an abuse of discretion. *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997). A mistrial should only be granted if "there is a reasonable probability that the outcome of the trial would be different." *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998).

Evidence from another crime that shows a defendant has a propensity to commit crimes is generally excluded from admission in trial because it is prejudicial. *See State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006); Minn. R. Evid. 404(b). "[T]he state has an obligation to caution its witnesses against making prejudicial testimony." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

The state cites to *State v. Bahtuoh* to support its position that a mistrial is not needed here. 840 N.W.2d 804 (Minn. 2013). In *Bahtuoh*, the state inadvertently failed to redact a reference from grand jury testimony linking the defendant to a previous shooting where the defendant was on trial for a shooting that occurred later in the day. *Id.* at 819. The testimony was read by a court reporter. *Id.* The supreme court determined in *Bahtuoh* that (1) the reference was isolated and brief, (2) the case against the defendant was strong, and (3) the

defendant was acquitted of some charges, which suggested the jury did not find the reference to an earlier shooting dispositive where the jury could have inferred the later shooting by the defendant was retaliation for the previous shooting. *Id.* at 819-20. Consequently, the *Bahtuoh* court concluded that the district court did not abuse its discretion. *Id.*

Here, the situation is similar to *Bahtuoh* in that the "terroristic threats" comment was isolated and brief—it was only one answer and was seemingly unprovoked from a reading of the transcript. And, like in *Bahtuoh*, the evidence in this case against Schally was strong, suggesting that the outcome would not have been different if the "terroristic threats" comment never occurred. *See Spann*, 574 N.W.2d at 53. Finally, like in *Bahtuoh*, the jury acquitted Schally of some charges, suggesting that the jury did not "run wild" in holding the "terroristic threats" remark against Schally. Based on guidance from *Bahtuoh*, the district court here acted within its discretion in denying Schally's mistrial motion.

III. The district court did not err in ordering that Schally pay $1,000 to P.K. for his insurance deductible.

Finally, Schally argues that his restitution obligation to P.K. should be reduced by $1,000. The district court awarded $1,000 to P.K. for his automobile insurance deductible. Schally argues that the loss must be "directly caused" by Schally's conduct that led to his conviction.

"A district court has broad discretion to award restitution, and the district court's order will not be reversed absent an abuse of that discretion. The district court's factual findings will not be disturbed unless they are clearly erroneous." However, "questions

concerning the authority of the district court to order restitution are questions of law subject to de novo review." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015) (citations omitted). Here, Schally appears to only be contesting that the factual record did not support the court's $1,000 restitution award, and so this court reviews for abuse of discretion.

In providing restitution for crimes, a compensable loss must be "directly caused by the conduct for which the defendant was convicted." *State v. Nelson*, 796 N.W.2d 343, 347 (Minn. App. 2011) (quotation omitted). "Where the victim's losses are directly caused by the defendant's conduct *for which he was convicted* there is nothing improper in ordering restitution." *State v. Esler*, 553 N.W.2d 61, 65 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Oct. 15, 1996).

Schally cites to *Esler* for support. In *Esler*, a defendant was convicted of second-degree murder. *Id.* at 62-63. Near the murder location, Esler had previously shot at a home, but was not prosecuted for the earlier shooting. *Id.* at 65. Consequently, the victim who suffered damage to his home was not a "victim" of the conduct arising from the murder conviction, and it was an abuse of discretion for the trial court to award restitution for the home damage. *Id.*

Here, Schally argues that, similar to *Esler*, where Esler was never prosecuted for the earlier shooting, Schally was never prosecuted for the burglary or automobile theft, and that "receiving stolen firearms" is not a direct cause of Schally's damaged property.

The state argues that *Esler* is distinguishable. This is because the stolen property was in P.K.'s stolen van, and K.M.'s testimony and identification placed Schally with others in a parking lot, pounding on a safe in the stolen van with pry bars and sledge

hammers. The stolen radio, which was "torn out" from the van, was found in Schally's possession.

The state's argument is supported by case law. For example, in *State v. Anderson*, a man was convicted of receiving four calves as stolen property. 405 N.W.2d 527, 529 (Minn. App. 1987), *review denied* (Minn. July 22, 1987). The court concluded that "because the calves were removed from their mothers at such an early age, they are no longer suitable for purebred seed stock and are probably suitable only for slaughter." *Id.* at 531. And, although the defendant may have had "no part in the actual taking," his receiving of the property contributed to the loss of use of the calves and fell within the discretion of the district court. *Id.*

Here, *Anderson* adds support for the district court's decision to order restitution without a burglary or theft conviction. The facts support that Schally was in P.K.'s van "beating on something" with either a pry bar or hammer shortly after it was stolen. The radio from the van was later found in Schally's backpack. Regardless of whether Schally initially took the van, the facts support that he was involved in damaging the van in the parking lot. The district court properly awarded restitution for P.K's automobile insurance deductible.

In sum, the district court did not err in allowing K.M.'s in-court identification. The district court properly denied Schally's mistrial motion. The district court properly awarded $1,000 in restitution for Schally's insurance deductible.

Affirmed.