STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1149

State of Minnesota,
Respondent,

vs.

Logan Phillip Kirch,
Appellant.

Filed August 9, 2021
Affirmed in part, reversed in part, and remanded
Ross, Judge

Scott County District Court
File No. 70-CR-19-2370

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Laura G. Heinrich, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A 15-year-old girl ran away from home and asked a stranger she met online to drive her from Minneapolis to Shakopee. The girl fell asleep in the man's car and woke up to him digitally penetrating her vaginally. A police detective traced the man's social-media account to Logan Kirch and showed the girl a photograph of Kirch's face. She identified

Kirch from the photograph as the man who sexually assaulted her. Kirch contends on appeal that his consequent conviction of third-degree criminal sexual conduct resulted from an unconstitutionally suggestive identification procedure and that the district court at sentencing erroneously included a lifetime conditional-release term to follow his incarceration. Although the single-photograph identification procedure was highly suggestive, we hold that the district court did not abuse its discretion by admitting the identification into evidence because the circumstances made the identification independently reliable. We therefore affirm in part. But we reverse in part and remand for resentencing because the lifetime conditional-release term exceeds the sentence authorized by statute.

FACTS

A 15-year-old girl ran away from home in July 2018. She contacted men on the social-media platform, Snapchat. One man, whom the girl referred to as "Logan," exchanged about 60 messages with the girl, many sexually graphic. The girl asked Logan if he would drive her from Minneapolis to Shakopee. He said he would.

A man who identified himself to the girl as the one with whom she had been conversing online picked her up in his car as they had planned. The girl fell asleep in the car. She woke up as the man was penetrating her vaginally with his finger.

The man dropped the girl off, and she reported the assault to Shakopee police. She recounted how she had met the man online and described him as being a white male in his "early 20s, slightly overweight . . . [with] blond hair and blue/green eyes." A police

detective investigated and obtained the IP address of the man's Snapchat account. The detective traced the IP address to a Shakopee home. Logan Kirch resided there.

The detective met with the girl three months after the assault. He showed her printouts of chat logs from the sexually explicit online discussion between her and the man and asked if she recognized the messages. She did. He then presented her with a photograph of Kirch's face, saying, "[H]e may or may not be the one that was involved." The girl "instantaneous[ly]" identified Kirch as the man who picked her up and sexually assaulted her in the car.

The district court held a stipulated-facts bench trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 3, after denying Kirch's pretrial motion to suppress and admitting evidence that the girl had identified Kirch by the photograph. The district court determined that the identification procedure was not unnecessarily suggestive. It also found that the girl had seen Kirch clearly during the incident, had provided an accurate description before seeing the photograph, and had recognized Kirch's photograph with certainty. It therefore concluded that her identification was reliable, independent of any undue suggestiveness from being shown an image of only one man.

The district court found Kirch guilty of third-degree criminal sexual conduct. At sentencing, the district court also considered a prior offense; in 2017 the district court had adjudicated Kirch delinquent as a juvenile for second-degree criminal sexual conduct because he rubbed his ten-year-old sister's genitalia as she slept. *See State v. L.P.K.*, No. A20-1155, 2021 WL 1245013 (Minn. App. April 5, 2021). In that prior case, the district court placed Kirch on extended jurisdiction juvenile probation status. *See* Minn.

Stat. § 260B.130, subd. 5 (2020). Based on that circumstance and the current conviction, the district court revoked Kirch's EJJ status, executed his previously stayed adult sentence for the 2017 conviction, and imposed a ten-year conditional-release term for that offense. The district court then sentenced Kirch for the conviction now on appeal, imposing a 39-month prison term to be followed by lifetime conditional release. In a separate appeal, we have already affirmed the district court's decision to revoke Kirch's EJJ probation. *See L.P.K.*, 2021 WL 1245013. Kirch now appeals his current conviction and the conditional-release component of the sentence.

DECISION

I

Kirch challenges his conviction on the theory that the district court improperly admitted evidence that the girl identified him by photograph. The Fourteenth Amendment's Due Process Clause bears on whether the on-scene and in-court identifications are admissible. We review de novo whether a due-process violation occurred, including one that results from improperly admitted evidence. *State v. Hill*, 871 N.W.2d 900, 905 (Minn. 2015). Three issues ordinarily determine whether the state can properly introduce identification evidence: (1) whether the police were involved in arranging the procedure, (2) whether the identification process was highly suggestive and therefore tending to be unreliable, and if so, (3) whether the suggestive procedure was necessary under the circumstances. *See Perry v. New Hampshire*, 565 U.S. 228, 238–39, 132 S. Ct. 716, 724 (2012) (synthesizing the analyses of *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972), and *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243 (1977)). Generally speaking, the

state may not introduce evidence of an out-of-court identification or elicit a subsequent in-court identification from the same witness if the out-of-court identification process was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967), *abrogated on other grounds by United States v. Johnson*, 457 U.S. 537, 102 S. Ct. 2579 (1982). We therefore first address the suggestibility of the detective's identification procedure.

Kirch convincingly argues that the detective employed an unnecessarily suggestive identification procedure. A long-standing and extensive body of federal and state appellate caselaw uniformly denounces the practice of police officers' presenting eyewitnesses with only a single suspect for identification. *See Manson*, 432 U.S. at 104, 97 S. Ct. at 2248 (condemning single-photo lineups); *Simmons v. United States*, 390 U.S. 377, 383–84, 88 S. Ct. 967, 971 (1968) (discouraging use of single photo); *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) (presuming unnecessary suggestiveness of single-photo lineup and observing that courts "have [] widely condemned" this approach). The detective here showed the girl only a single photograph. The state offers no reason the detective could not have located and presented the girl an array of photographs of multiple men who, like Kirch, fit the girl's description of her assailant. And we can think of none. With modern technology, it can take only minutes for police to assemble a feasible photographic lineup, and in this case police had months. We add that the detective's tepid qualification that the man in the photograph "may or may not be" the offender did little to mitigate the suggestive nature of his presenting only a single image as his identification procedure.

We are not persuaded otherwise by the state's contention that "a one-person show-up is not unnecessarily suggestive per se," quoting *State v. Taylor*, 594 N.W.2d 158, 161–62 (Minn. 1999). The *Taylor* court held that a one-person identification procedure was not unnecessarily suggestive in part because the victim knew the offender from at least ten prior encounters and could therefore easily recognize him. *Id.* at 162. In sharp contrast here, the victim had never seen Kirch before he picked her up in his car. Her only knowledge of his face came from his sole, criminal encounter with her. We do not read *Taylor* to endorse the single-photo presentation here. We conclude that the detective employed an unnecessarily suggestive identification procedure.

If the question of unnecessary suggestibility were the only one, we would reverse the district court's decision to admit the evidence and consider whether to reverse the conviction and order a new trial. But an identification resulting from an unnecessarily suggestive procedure may nevertheless be admitted into evidence if, under the totality of the circumstances, the witness's identification has an "adequate independent origin." *Ostrem*, 535 N.W.2d at 921. We conclude that the girl's identification was reliable independent of the procedure's suggestiveness. We do so based on this nonexclusive list of factors: (1) the girl's opportunity to view Kirch; (2) her degree of attention; (3) the accuracy of her prior description; (4) her degree of certainty when identifying Kirch; and (5) the time between the crime and the identification. *See id.* Most of these factors justify admitting the identification.

Regarding the girl's opportunity to view Kirch and the degree of her attention on Kirch, the district court found that she clearly saw him while she sat in his car. The

circumstances support the finding, as she necessarily saw him before and after she entered the car and after she awoke to the assault. We are not swayed by Kirch's conjecture that the girl's use of marijuana prevented her from clearly seeing Kirch. She saw him well enough to describe him to police. We also are not dissuaded by the lack of the girl's express testimony that she saw her assailant's face, because the district court necessarily inferred from her providing the detailed description that she had the opportunity to see and did see Kirch's face clearly. The first two factors weigh in favor of admissibility.

Regarding the accuracy of the girl's description, Kirch contends that she imprecisely described him as blond and overweight. But the girl provided a largely accurate prior description of Kirch as a slightly overweight man in his 20s, with blue/green eyes and blond hair. Although she described his hair as blond in July 2018 and the record includes a photograph of him with dark hair, the record does not foreclose the reasonable plausibility that he changed the color of his hair between the assault and the photograph. And Kirch's assertion that he was not overweight at the time of the incident has no support in the record. The third factor favors admissibility.

Regarding the girl's degree of certainty when she identified Kirch, the state failed to elicit any testimony from either the detective or the girl about how confident she was in the identification. But the testimony showed the district court that the identification was instant and unwavering. This tends to support the district court's belief that the girl was certain.

Regarding the time between the girl's observation of the man and her identification of Kirch's photograph, three months passed between the assault and the identification.

Although this period is not so long as to call the reliability of the photographic identification into question, it is not so brief as to establish the identification as reliable independent of the suggestiveness in the detective's procedure.

It is not overwhelmingly so, but our review of the factors in light of the record supports the district court's conclusion that, on balance, the girl's identification was independently reliable. It was therefore admissible despite our conclusion that the detective's procedure was unnecessarily suggestive.

II

Kirch correctly contends that the district court erroneously imposed a lifetime conditional-release term. We review de novo whether a sentence is authorized by law. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). The issue here is not whether the district court should have imposed a term of conditional release but whether the length of the term is lawful. The district court must impose a conditional-release period when sentencing a defendant convicted of third-degree criminal sexual conduct. Minn. Stat. § 609.3455, subds. 6, 7 (2020). The district court must impose a ten-year conditional-release term if the defendant has no "previous or prior" criminal-sexual-conduct conviction and a lifetime term if he does. *Id.* Kirch would have such a "previous" conviction if the district court convicted and sentenced him for one before he committed the present offense. *Id.*, subd. 1(f) (2020). And he would have a "prior" conviction if the district court convicted him of committing a sex offense before his conviction of the current offense (regardless of whether the district court convicted him for the first offense before his commission of the present offense), and the convictions related to separate behavioral incidents. *Id.*, subd. 1(g)

(2020). A conviction includes a guilty plea. Minn. Stat. § 609.02, subd. 5(1) (2020). But Kirch was adjudicated delinquent as an EJJ with a stayed adult sentence, and an EJJ adjudication is a conviction only if the sentence has been executed. Minn. Stat. § 609.3455, subd. 1(b) (2020). We resolve this issue therefore based on whether Kirch's EJJ adjudication resulted in an executed sentence before his conviction in this case.

It did not. The district court adjudicated Kirch delinquent for second-degree criminal sexual conduct in 2017, but it did not execute his sentence until June 2020. The district court also convicted Kirch of third-degree criminal sexual conduct in December 2019 and did not impose a sentence until June 2020. *See* Minn. Stat. § 609.02, subd. 5(2). Kirch therefore had neither a "previous" nor "prior" sex-offense conviction before his conviction in this case. The district court therefore improperly imposed the lifetime conditional-release term for the conviction. And that part of Kirch's sentence is unauthorized by law. *State v. Cook*, 617 N.W.2d 417, 419 (Minn. App. 2000). We vacate the sentence and remand the case for the district court to impose a ten-year conditional-release term.

The state points out that one of Kirch's sentences should include a lifetime of conditional release and the other a ten-year period of the same, and so it asks that our remand instructions also direct the district court to modify Kirch's original ten-year conditional-release period to lifetime conditional release. But as the state conceded at oral argument, the companion case in which Kirch received a ten-year conditional-release sentence is not before us in this appeal. Because we lack jurisdiction over that case, we

leave to the parties and the district court how to effectuate the mandated lifetime conditional release.

Affirmed in part, reversed in part, and remanded.