STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1392

State of Minnesota,
Respondent,

vs.

Warren James Northrup,
Appellant.

Filed August 23, 2021
Affirmed in part, reversed in part, and remanded
Florey, Judge

St. Louis County District Court
File No. 69DU-CR-17-3459

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided Reyes, Presiding Judge; Hooten, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal from a judgment of conviction for second-degree assault, appellant argues that his conviction must be reversed because he was deprived of his constitutional right to a speedy trial. In the alternative, appellant argues that the district court erred by failing to suppress an unnecessarily suggestive pretrial identification

procedure. Finally, appellant challenges his sentence based on an erroneous calculation of his criminal-history score and a failure to correctly credit him for jail time. We affirm appellant's conviction, but reverse and remand the sentencing issues to the district court.

FACTS

Appellant Warren James Northrup was charged with first- and second-degree assault and aggravated robbery. He was convicted following a jury trial of second-degree assault and acquitted of the other charges. The following facts were introduced at trial.

At about 3:00 a.m. on September 10, 2017, G.C.O. was talking on his cellphone on the porch in front of his trailer home in Duluth when an unknown man approached him and demanded that he empty his pockets. G.C.O. said that the man was carrying a shotgun in a bag and had a revolver in his hand. G.C.O. tossed his cellphone off the porch. The man struck G.C.O. with the revolver, causing a wound in the upper right part of G.C.O.'s head. The man ran away through the trailer park, past Trailer #10.

The owner of Trailer #10, B.N., heard noise and saw a man wearing all black clothing run in a northerly direction past B.N.'s trailer. B.N. checked on G.C.O., saw he was bleeding heavily, and returned to his trailer to call 911.

A police officer interviewed G.C.O., who described the man as "a Hispanic male, scrawny build, about 5'5", wearing all black, like goatee and a moustache. He thought he had some black gloves." The jury viewed the body-camera footage.

While the police officer was interviewing G.C.O., other officers attempted to track the suspect, using a police dog. The officers came upon a truck in a secluded location. The driver of the truck did not match the description of the suspect; he stated that he had seen

a red pickup truck in the area. This information was relayed to other officers, who located and stopped the truck. Appellant was the passenger in the truck, and he matched the description of the suspect. The driver said that she had dropped appellant off and picked him up again in the area where the trailer park is located.

Officers searched the truck and found black gloves in the glove box. The denim shorts that appellant was wearing and the gloves appeared to have blood on them; these items were later sent to the BCA for analysis. The DNA analysis showed blood matching G.C.O.'s DNA sample on the black gloves and the jean shorts. Officers discovered a wet shoe print on the track the police dog followed; the distinctive shoe print matched the shoes appellant was wearing.

The officer interviewing G.C.O. was notified that a potential suspect was in custody, and he asked G.C.O. to participate in a show-up identification procedure. The officer read a cautionary statement to G.C.O. about show-up procedure. Appellant was standing next to a single officer, and other squads had pulled away. G.C.O. remained in the officer's squad, and the officer shined his floodlight on appellant so that G.C.O. could see him but appellant could not see G.C.O. The show-up occurred about 4:00 a.m., or about one hour after the incident. G.C.O. identified appellant as his assailant and said he was 100 percent sure of the identification.

Appellant was charged with second-degree assault on September 12, 2017. The complaint was later amended to include charges of first-degree assault and aggravated robbery. He was convicted by a jury on February 14, 2020, of second-degree assault and was acquitted of the first-degree assault and aggravated-robbery charges. He was

sentenced to 57 months, committed, based on a criminal-history score of six, and was given credit for 587 days of jail time. Appellant appeals his conviction and raises issues about his sentence.

DECISION

I. Appellant was not denied his constitutional right to a speedy trial.

Appellant argues that he was denied his constitutional right to a speedy trial, as guaranteed by U.S. Const. amend. VI and Minn. Const. art. I, § 6. We review constitutional questions de novo. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017).

The United States Supreme Court articulated a four-part test to determine whether the state has violated the speedy-trial rights of a defendant. *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93 (1972). A reviewing court considers the length of the delay, the reason for the delay, whether the defendant asserted a right to a speedy trial, and whether the delay caused prejudice to the defendant, and then balances the relative conduct of the state and defendant. *Osorio*, 891 N.W.2d at 627-28 (relying on the *Barker* test).

Delays in the criminal-trial process can occur at different times; appellant asserts that the delay following his speedy-trial demand, and the overall delay between issuance of the complaint and jury trial, deprived him of his constitutional rights. Minn. R. Crim. P. 11.09 provides that "[a] defendant must be tried as soon as possible after entry of a plea other than guilty. On demand of any party after entry of such a plea, the trial must start within 60 days unless the court finds good cause for a later trial date." Here, the trial did not take place until two and one-half years after the complaint was issued; further, appellant requested a speedy trial on October 11, 2018, but the trial was held roughly 14 months

later. This delay presumptively triggers an analysis of the remaining three *Barker* factors. *State v. Strobel*, 921 N.W.2d 563, 569 (Minn. App. 2018), *aff'd on other grounds* 932 N.W.2d 303 (Minn. 2019).

We examine the reason for the delay by reviewing whether the state or the defendant is responsible for the delay. *Id.* We have closely scrutinized the delay in this case, because of the length of time between issuance of the complaint and conviction. The first delay occurred when appellant failed to appear for the omnibus hearing on October 18, 2017, and was not arrested until March 2018. At defense counsel's request, the omnibus hearing scheduled after the arrest was delayed from April 4 to May 18, 2018. The district court issued its order finding probable cause on June 18, 2018. Upon receipt of this order, the state submitted the evidence to the BCA for analysis; records show that the BCA received the evidence on July 2, 2018. Shortly after this, appellant was arrested and charged with unrelated felonies. It was not until October 11, 2018, that appellant made a speedy-trial demand, and the district court assigned a trial date within 60 days. The state's subsequent motion to amend the complaint did not affect the trial schedule.

Shortly before this scheduled trial date, the state moved for a continuance because the BCA had not finished its analysis. The state learned that the analysis would not be finished in time when it contacted the BCA three weeks before trial. Unlike the facts in *Strobel*, there is no indication that the state operated with a lack of diligence. *See id.* at 569-70. At the rescheduled pretrial hearing, the defense asked for a continuance to permit an expert to examine the BCA analysis; appellant waived his speedy-trial rights.

At the next pretrial hearing, appellant was sentenced on unrelated charges. Then, on the date scheduled for jury trial, defense counsel moved for a continuance because he believed that the state had revealed an exculpatory witness; the state maintained that appellant had attempted to tamper with a witness, G.C.O. Shortly after this, on April 19, 2019, appellant was arrested and charged with new felonies. On April 23, 2019, the state made a speedy-trial demand.

At the pretrial for the newly rescheduled jury trial, defense counsel requested a continuance; the state had provided new BCA test results 10 days before, and defense counsel wanted time to analyze them. The state withdrew its speedy-trial demand. On the new pretrial date, August 12, 2019, appellant was sentenced on the April felonies. Between that date and the scheduled trial date of September 24, 2019, appellant indicated that he wanted to plead guilty. But on September 24, he changed his mind, and the matter was reset for jury trial. Appellant was finally tried by jury in February 2020.

A review of this timeline discloses that both the state and appellant were responsible for delays. But the state asked for only one continuance, in November 2018, in order to get the BCA test results. Appellant was responsible for far more of the delays. This factor favors the state.

As to the third factor, appellant demanded a speedy trial in October 2018, but he later withdrew that request to facilitate his attorney's trial preparations, and he did not renew the speedy-trial demand.

The final factor is whether appellant was prejudiced by the delay. We consider three interests in order to determine whether a defendant has been prejudiced by a violation of

his speedy-trial rights: (1) excessive pretrial incarceration; (2) the defendant's anxiety and concern; and (3) impairment of the defense. *Taylor*, 869 N.W.2d 1, 20 (Minn. 2015). "[T]he third interest, preventing impairment of a defendant's defense, is the most serious." *Id.* (quotation omitted).

In *Taylor*, the supreme court stated that "[i]f a defendant is already in custody for another offense . . ., the first two interests are not implicated." *Id.* Appellant was out on bond from September 2017 until he was picked up in March 2018; he bonded out again in June 2018. For much of the time following this, appellant was in custody because he was charged in two other incidents. On February 25, 2019, he received a probationary sentence for his July 2018 conviction, including 152 days of jail time with credit for time served. He was out of jail until at least April 19, 2019, when he was arrested for second-degree assault and felony domestic assault. On August 12, 2019, he was sentenced to 54 months to serve on the April 2019 assault and domestic-assault charges. He received a total of 266 days credit for jail time in connection with these two charges. In short, appellant was incarcerated for most of this period of time because of the other charges and convictions.

Appellant argues that he was prejudiced because the state was able to generate more evidence from the BCA because of the delays. But this element of the *Barker* analysis focuses on "impediments to the ability of the defense to make its own case" and "the opportunity for the prosecution to prepare for trial does not, on its own, amount to prejudice to the defense." *Id.* (quotation omitted). *See also Strobel*, 921 N.W.2d at 572 (holding "that the state's additional opportunity to prepare for trial as a result of pretrial delay does not constitute prejudice to the defendants").

Balancing the four factors here, appellant's constitutional right to a speedy trial was not denied.

II. The district court did not err by failing to suppress pretrial identification evidence.

Appellant argues that the district court erred by failing to suppress pretrial identification evidence obtained through a show-up. The issue of the use of a show-up identification method was raised at the omnibus hearing in the context of whether there was sufficient probable cause to charge appellant with second-degree assault; appellant did not ask the district court to suppress the identification evidence. In its omnibus order, the district court considered whether the pretrial identification procedure was impermissibly suggestive, and, after applying a five-part analysis, it concluded that the identification was reliable based on the totality of the circumstances. Appellant did not raise the issue of suppression at trial, and his attorney did not object to the show-up testimony, although he briefly cross-examined the officer who conducted the show-up. Generally, an appellate court "will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). A court may, in its discretion, consider such an issue in the interests of justice. *Id.*

"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) (quotation omitted). We review due-process issues de novo. *Id.* at 83.

Minnesota employs a two-part test to determine if a defendant's due-process rights were denied by a pretrial identification procedure. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, a court determines whether the identification procedure was unnecessarily suggestive. *Id.* An identification procedure using a single photo or person is generally seen as unnecessarily suggestive. *Id.*; *see Manson v. Brathwaite*, 432 U.S. 98, 104, 97 S. Ct. 2243, 2247-48 (1977). Because the identification here was a show-up of a single person, it was unnecessarily suggestive.

The second prong of the test analyzes whether, in the totality of the circumstances, the identification was nevertheless reliable, because there was an adequate independent basis for the identification. *Ostrem*, 535 N.W.2d at 921. We use a five-part analysis to make this determination, reviewing: (1) the opportunity of the witness to view the defendant during the crime; (2) the degree of attention paid by the witness; (3) the accuracy of the description given by the witness before the identification procedure; (4) the degree of certainty; and (5) the time elapsed between the crime and the identification procedure. *Id.*

Employing this framework, the district court made the following findings: (1) although it was dark, G.C.O. was within a few feet of appellant and was able to view "specific details of his height, build, facial features, clothing, and items he was carrying"—notably, appellant was close enough to strike G.C.O. on the head with a pistol; (2) the details of the description suggest that G.C.O. was paying attention; (3) the description G.C.O. gave matched appellant in its key elements, and minor discrepancies affected only the weight of the evidence; (4) G.C.O. was certain of the identification, even after the police

officer cautioned him against assuming that the person he was shown was G.C.O.'s assailant and advised him to admit if he was unsure; and (5) the show-up occurred within 90 minutes after the assault. These circumstances are sufficient to show that there was an independent basis for G.C.O.'s identification of appellant.

We note that beyond G.C.O.'s testimony, other evidence supports the identification: appellant's gloves and jean shorts had blood on them that the BCA identified as containing G.C.O.'s DNA; a footprint matching the distinctive tread on appellant's shoe was found along the path of the suspect's flight; and the driver of the truck in which appellant was a passenger stated that she had dropped him off and picked him up close the trailer park.

III. Appellant's sentence is remanded to the district court for review and correction.

Appellant argues that his criminal-history score was improperly calculated because the district court used a conviction that did not result in a sentence. The state concedes that an error was made. "A sentence based on an incorrect criminal-history score is an illegal sentence that may be corrected at any time." *State v. Woods*, 945 N.W.2d 414, 416 (Minn. App. 2020). Appellant also asserts that he was not given credit for all of his presentence jail time. The state "does not object to the issue being raised when the matter is before the district court for resentencing." We therefore reverse appellant's sentence and remand the matter to the district court for review and correction of the sentence, if necessary.

Affirmed in part, reversed in part, and remanded.