STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1131

State of Minnesota,
Appellant,

vs.

Ricky James Bedell,
Respondent.

Filed December 17, 2012
Reversed and remanded
Larkin, Judge

Chisago County District Court
File No. 13-CR-11-809

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

Janet Reiter, Chisago County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Center City, Minnesota (for appellant)

Bradford S. Delapena, Assistant State Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Larkin, Judge; and Klaphake, 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

LARKIN, Judge

In this pretrial appeal, appellant challenges the district court's exclusion of identification evidence. Two orders are challenged. The first suppresses evidence that three witnesses identified respondent in a photographic lineup. The second prohibits those witnesses from identifying respondent in court at trial. Appellant argues that the orders critically impact its case and that the district court erred by excluding the evidence on due-process grounds. We reverse and remand.

FACTS

On August 6, 2011, a man and woman assaulted E.L. at a bar in Taylor Falls. The police interviewed E.L. and four witnesses to the assault, K.M., I.A., G.J., and J.S., shortly after the incident. But formal, recorded statements were not taken from E.L. and the witnesses at that time, because they were intoxicated. E.L. recalled getting punched and kicked, but he was not sure whether he had been in a fight. K.M., a bartender at the bar, told the police that the man and woman who assaulted E.L. had been kicked out of the bar on prior occasions; she also told the police where she thought they lived. I.A. told the police that the man punched E.L. numerous times and kicked E.L. while he was on the ground. K.M. and I.A. were unable to positively identify either individual, but they stated that the woman was known as "Missy." G.J. had never seen the man and woman before and did not know their names, but he told the police that the man had red hair and the woman had dark brown hair. J.S. told the police that he did not see anything, did not hear anything, and did not want to be involved.

Based on this information, the police suspected that respondent Ricky James Bedell was involved and prepared a photographic lineup that included Bedell's booking photograph, in addition to the booking photographs of five other individuals. Bedell's photograph was number three in the lineup. The police showed E.L the lineup, and E.L. told the police that "[n]umber three looks more familiar than anybody." The police asked E.L. if he was 100% certain, and he stated: "Uh, that's the closest of what I can remember the guy looked like, yeah, it was number three." When asked a second time whether he was 100% sure, E.L. stated, "No, I don't remember, yeah, I remember the guy was short like me and bald, had no hair, that's all I really remember."

The police also showed J.S. the photographic lineup. J.S. identified the individual in photograph number three as the man who assaulted E.L. and indicated that he was 100% certain of his identification. Lastly, the police showed I.A. the lineup, and she identified Bedell as the person who assaulted E.L.

The police did not show K.M. the photographic lineup because K.M. identified Bedell by name prior to viewing the lineup. When the police formally interviewed K.M., she recalled seeing Bedell and his friend M.L. sitting at the end of the bar before the assault. K.M. stated that she did not see Bedell kick or punch E.L. during the assault—she said that M.L. "did all that." But she saw Bedell swinging a chair at people in the bar while M.L. assaulted E.L. K.M. indicated that she knew Bedell and M.L. because they had been in the bar before and she had kicked them out on prior occasions.

Appellant State of Minnesota charged Bedell with aiding and abetting assault in the third degree. Later, the state added a charge of aiding and abetting assault in the first degree. Bedell moved the district court to suppress "all evidence of identity arising from the photo line[-]up" because the lineup was "unduly suggestive." Bedell also requested dismissal of all counts against him for lack of probable cause. Following a hearing, the district court ruled that "the photo lineup should be excluded." The district court reasoned that although the photographic lineup was not "unduly suggestive," the identification evidence was not reliable in light of the totality of the circumstances. But the district court denied Bedell's motion to dismiss.

The state moved the district court to reconsider its order suppressing the photographic lineup and, in the alternative, to clarify whether the three photographic-lineup witnesses would be allowed to identify Bedell at trial. The district court denied the state's motion to reconsider, but it scheduled a hearing on the state's motion to clarify. Following the hearing, the district court ordered that the photographic-lineup witnesses would not be allowed to identify Bedell at trial because there were insufficient facts to show that their courtroom identifications would have an independent origin. This pretrial appeal by the state follows.

D E C I S I O N

I.

Bedell argues that this court lacks jurisdiction because the state's appeal of the district court's May 7, 2012 suppression order is untimely. *See State v. Barrett*, 694 N.W.2d 783, 785-86 (Minn. 2005) (noting that the state's failure to timely file or serve

notice of a pretrial appeal is a jurisdictional defect). Jurisdiction presents a question of law that an appellate court reviews de novo. *See id.* at 785.

To perfect a pretrial appeal, the state must appeal "within 5 days after the defense, or the court administrator under Rule 33.03, serves notice of entry of the order to be appealed from on the prosecutor." Minn. R. Crim. P. 28.04, subd. 2(8). But the state may extend its time to appeal by filing a motion for reconsideration or clarification, so long as the motion is filed within the time allotted to appeal. *See State v. Wollan*, 303 N.W.2d 253, 254-55 (Minn. 1981) (motion for clarification); *State v. Palmer*, 749 N.W.2d 830, 831 (Minn. App. 2008) (motion for reconsideration). Once extended, the time to appeal does not begin to run until entry of the order denying reconsideration or providing clarification. *See Wollan*, 303 N.W.2d at 255.

When calculating the time to appeal, "[t]he day of the act or event from which the designated period of time begins to run must not be included," but "[t]he last day of the period must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday." Minn. R. Crim. P. 34.01. "When a period of time prescribed or allowed is 7 or fewer days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation." *Id.* Further, "[w]hen a party is served with a notice or other paper by mail, three days must be added to the time the party has the right, or is required, to act." Minn. R. Crim. P. 34.04. "[I]ntermediate Saturdays, Sundays and legal holidays shall be excluded under rule 34.01 before adding [three] days for service by mail." *State v. Hugger*, 640 N.W.2d 619, 625 (Minn. 2002).

The district court filed its initial suppression order on May 7, 2012. On May 8, the district court administrator filed a notice of filing of order and "sent" a copy of the notice to the parties, according to a handwritten notation in the bottom left-hand corner of the notice. On May 16, the state filed its motion to reconsider or clarify. If the state was personally served with the notice of filing on May 8, it would have been required to appeal by May 15. But if the notice was served by mail, the state had until May 18 to file its motion to reconsider or clarify. Bedell argues that there is no evidence in the record to demonstrate that the state filed its motion to reconsider or clarify within the five-day appeal period because it is unclear whether the state was served personally or by mail. In other words, Bedell argues that the state has failed to make this court's "jurisdiction appear plainly and affirmatively from the record." *See State ex rel. Farrington v. Rigg*, 248 Minn. 49, 50, 78 N.W.2d 721, 722 (1956) (dismissing appeal for lack of jurisdiction where appellant failed to present proof that he served his notice of appeal on the adverse party). We are not persuaded.

"A presumption of regularity attaches to the actions of the [district] court." *State v. Skjefte*, 428 N.W.2d 91, 94 (Minn. App. 1988), *review denied* (Minn. Aug. 29, 1988). The applicable procedural rule states that "[u]pon entry of an order made on a written motion subsequent to arraignment, the court administrator must promptly mail a copy to each party and must make a record of the mailing." Minn. R. Crim. P. 33.03. The handwritten notation "sent 5-8-12" in the bottom left-hand corner of the notice of filing of the May 7 order indicates compliance with rule 33.03, i.e., that the notice was served by mail. Moreover, there is no evidence rebutting the presumption of regularity that

attaches to district court actions. We therefore conclude that the state timely filed its motion to reconsider or clarify within the time allowed to extend its time to appeal.

Bedell also argues that the district court's May 7 suppression order is not properly before this court because the state did not timely appeal the district court's May 25 order denying its motion to reconsider the May 7 order. This argument is also unpersuasive. Once again, a timely motion for reconsideration or clarification extends the time to appeal. *See Wollan*, 303 N.W.2d at 254-55; *Palmer*, 749 N.W.2d at 831. The state brought its motion to reconsider or clarify on May 15. Although the district court denied the state's motion to reconsider on May 25, it did not rule on the state's motion to clarify until June 29. The state served its notice of appeal on July 2.

Relevant authorities indicate that the state was not required to separately appeal the bifurcated motions. For example, a "prosecutor may not appeal under [Rule 28.04] until after . . . the district court has decided all issues raised." Minn. R. Crim. P. 28.04, subd. 2(8). The rule also states that "[a]ll pretrial orders entered and noticed to the prosecutor before the district court's final determination of all issues raised . . . may be included in this appeal." *Id.* Moreover, piecemeal appellate review is disfavored. *See Bonynge v. City of Minneapolis*, 430 N.W.2d 265, 266 (Minn. App. 1988) (acknowledging this court's policy against piecemeal appeals). As of May 25, when the district court denied the state's motion to reconsider, the district court had not yet ruled on the state's alternative motion for clarification and thus had not decided "all issues raised." Minn. R. Crim. P. 28.04, subd. 2(8). The state's time to appeal therefore remained tolled until the court administrator served notice of entry of the order clarifying

the district court's May 7 order on the state. *See Wollan*, 303 N.W.2d at 255; Minn. R. Crim. P. 28.04, subd. 2(8). Because the state filed its notice of appeal within five days of the district court's June 29 order clarifying its May 7 suppression order—the last of the issues raised—the state's appeal of the district court's May 7 order is properly before us.

II.

Critical Impact

The state may appeal "any pretrial order" if it can establish that "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subds. 1(1), 2(1). "As a threshold matter in any pretrial appeal by the [s]tate, the state must clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Rambahal*, 751 N.W.2d 84, 89 (Minn. 2008) (quotations omitted). The state need not show that the exclusion of evidence in a criminal prosecution destroys its case. *State v. Zais*, 805 N.W.2d 32, 36 (Minn. 2011). "Whether suppression of a particular piece of evidence will significantly reduce the likelihood of a successful prosecution depends in large part on the nature of the state's evidence against the accused." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995).

Bedell concedes that the district court's orders satisfy the critical-impact standard. We agree. The state's case relies heavily on E.L.'s, J.S.'s, and I.A.'s identification of Bedell as one of the individuals who physically assaulted E.L. They are the only witnesses who claim to have seen Bedell physically assault E.L. Although K.M. reported

that Bedell was present while M.L. assaulted E.L., K.M. did not see Bedell kick or punch E.L. Thus, the state's case is much weaker without the identification testimony of E.L., J.S., and I.A., and the district court's orders significantly reduce the likelihood of a successful prosecution. The critical-impact test therefore is satisfied. *See Zais*, 805 N.W.2d at 36 (concluding that exclusion of the testimony of the only eyewitness to the defendant's conduct critically impacted the state's ability to prosecute him).

Due Process

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." *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). Courts apply a two-part test to determine whether pretrial-identification evidence must be suppressed. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, the court must determine whether the pretrial-identification procedure was unnecessarily suggestive, which "turns on whether the defendant was unfairly singled out for identification." *Id.* Second, "[i]f the procedure is found to be unnecessarily suggestive, the identification evidence may still be admissible as long as 'the totality of the circumstances establishes that the evidence was reliable.'" *State v. Young*, 710 N.W.2d 272, 282 (Minn. 2006) (quoting *Ostrem*, 535 N.W.2d at 921).

Similarly, "[a]n identification based on an impermissibly suggestive photospread may taint a future in-court identification unless there are facts to show the courtroom identification has an independent origin." *State v. Blegen*, 387 N.W.2d 459, 463 (Minn. App. 1986) (citing *United States v. Wade*, 388 U.S. 218, 241, 87 S. Ct. 1926, 1939

(1967)), *review denied* (Minn. July 31, 1986). Accordingly, in determining whether an in-court identification must be precluded, courts apply a two-part test. A court must first determine whether the underlying pretrial-identification procedure was impermissibly suggestive. *See id.* If so, the court must then determine whether the proffered courtroom identification has an independent origin. *See id.*

Whether a constitutional violation has occurred presents a question of law, which we review de novo. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). "When reviewing a pretrial order suppressing evidence where the facts are not in dispute and the trial court's decision is a question of law, the 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).

Here, the district court determined, under the first part of the applicable tests, that the photographic lineup "was not unduly suggestive" because "the individuals in the lineup display bear a reasonable physical similarity to [Bedell]." Nevertheless, the district court concluded that "[i]n light of the totality of the circumstances, the identification evidence is not reliable" and suppressed the photographic identifications. Similarly, when deciding the state's motion to clarify whether the photographic-lineup witnesses would be allowed to identify Bedell at trial, the district court reiterated "that the photo lineup procedure . . . was not unduly suggestive," but it concluded that there were "insufficient facts to show that courtroom identification would have an independent origin."

The state argues that the district court should have ended its analysis and denied Bedell's motion to suppress once it determined that the photographic lineup was not unduly suggestive. We agree. "[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012). The United States Supreme Court explained that, "[t]he due process check for reliability, . . . comes into play only after the defendant establishes improper police conduct." *Id.* at 726. "[T]he Court has linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification." *Id.*

The United States Supreme Court further explained that "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." *Id.* at 728. Rather, the decisions turn

> on the presence of state action and [the] aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Id. at 721. In sum, "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such

evidence for reliability before allowing the jury to assess its creditworthiness." *Id.* at 728.

The tests traditionally used to determine whether a pretrial or in-court identification violates due process embody the principle, explained in *Perry*, that due-process concerns do not arise *unless* law-enforcement officers obtain identification evidence through an impermissibly suggestive procedure. If the underlying identification procedure is not unnecessarily suggestive, there is no constitutional basis for exclusion—regardless of the unreliability of a photographic-lineup identification or the lack of an independent basis for an in-court identification. Although the latter considerations are properly considered by the finder of fact at trial, they do not provide a constitutional basis for suppression. *See id.* at 721.

Bedell agrees that there is no constitutional basis for relief on due-process grounds so long as the photographic lineup in this case was not unnecessarily suggestive. Nevertheless, he contends that this court should affirm the district court's orders, arguing that the district court erroneously concluded that the photographic lineup was not unduly suggestive. But Bedell did not file a cross-appeal raising that argument. Instead, he raised the issue for the first time in his response brief.

Generally, a defendant has no right to file a pretrial appeal and must wait until after conviction and sentencing to raise all challenges to adverse rulings. *See* Minn. R. Crim. P. 28.02, subd. 2; *State v. Joon Kyu Kim*, 398 N.W.2d 544, 549-50 n.8 (Minn. 1987) ("Under the Rules, the defendant has no pretrial appeal as of right."). But Minn. R. Crim. P. 28.04, subd. 3, specifically provides a defendant the right to file a cross-appeal

when the state files a pretrial appeal. According to the rule, "[w]hen the prosecutor appeals, the defendant may obtain review of any adverse pretrial . . . order by filing a notice of cross-appeal with the clerk of the appellate courts . . . within 10 days after the prosecutor serves notice of the appeal." Minn. R. Crim. P. 28.04, subd. 3. But "[t]o challenge a district court ruling, a respondent has to file a notice of review, '[e]ven if the judgment below is ultimately in its favor.'" *State v. Botsford*, 630 N.W.2d 11, 18 (Minn. App. 2001) (quoting *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996)), *review denied* (Minn. Sept. 11, 2001). "'If a party fails to file a notice of review . . . , the issue is not preserved for appeal and a reviewing court cannot address it.'" *Id.* (quoting *Holmberg*, 548 N.W.2d at 305); *see also State v. Bren*, 704 N.W.2d 170, 176-77 (Minn. App. 2005) (declining to address an issue raised by respondent on appeal because respondent did not file a notice of review), *review denied* (Minn. Dec. 13, 2005). Because Bedell did not file a cross-appeal, his challenge to the district court's ruling regarding the suggestiveness of the photographic lineup is not properly before us, and we do not address it any further.

Bedell also argues that this court should affirm on the alternative ground that the photographic-lineup witnesses lack the personal knowledge necessary to qualify as competent identification witnesses. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But "[a] respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the

arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003).

Bedell's argument is based on Minn. R. Evid. 602, which provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Bedell argues that the district court's conclusions that "any in-court identification of [Bedell] would likely be attributed to the photo line-up" and that there were "insufficient facts to show that courtroom identification would have an independent origin" are equivalent to a conclusion that the photographic-lineup witnesses lack the personal knowledge necessary to qualify as competent identification witnesses at trial.

The state counters that there are insufficient facts in the record for this court to consider Bedell's alternative theory. As the state points out, there is no testimony in the record from the photographic-lineup witnesses regarding their qualifications as potential identification witnesses at trial. The state also notes that because Bedell's motion to suppress was based solely on constitutional grounds and not on rule 602, it did not have any reason to develop a record regarding application of the evidentiary rule. We agree that the record is inadequate to consider Bedell's alternative theory, and we therefore do not address its merits.

In conclusion, identification evidence is not excluded on due-process grounds unless the underlying identification procedure was impermissibly suggestive. *See Young*, 710 N.W.2d at 282 (holding that the identification of defendant in a photographic lineup that was not impermissibly suggestive did not violate defendant's right to due process);

Blegen, 387 N.W.2d at 465 (holding that a photospread that was not impermissibly suggestive did not taint a subsequent courtroom identification of defendant). Because the district court determined that the photographic lineup was not unduly suggestive and that determination is not subject to review in this appeal, we reverse the district court's orders suppressing the identifications of the photographic-lineup witnesses and prohibiting in-court identifications from those witnesses, and we remand for further proceedings.

Reversed and remanded.