STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1652

State of Minnesota,
Appellant,

vs.

Jason Edward Stushek,
Respondent.

Filed April 16, 2012
Dismissed
Johnson, Chief Judge

Isanti County District Court
File No. 30-CR-11-300

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

Jeffrey R. Edblad, Isanti County Attorney, David M. Kraemer, Assistant County Attorney, Cambridge, Minnesota (for appellant)

Sharon E. Jacks, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Cleary, Judge; and Collins, Judge.*

*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

JOHNSON, Chief Judge

Jason Edward Stushek is charged with second-degree burglary of a dwelling. The district court granted Stushek's motion *in limine* to exclude certain evidence tending to prove that Stushek gained entry to the dwelling by kicking in a door. The state challenges the district court's ruling in this pre-trial appeal. We conclude that the state has not demonstrated that the district court's evidentiary ruling will have a critical impact on its prosecution. Therefore, we dismiss the appeal.

FACTS

B.L. is an adult woman living in the city of Princeton. On the afternoon of June 9, 2011, she and her father, L.V., discovered that her home had been burglarized. B.L. observed that a service door to her attached garage had been forcibly opened, which dented and bent the door and damaged the door frame so that the door was hanging only by the top hinge. She also observed that the door from the garage to the interior of the home also had been forcibly opened, causing the door frame to be damaged. After going inside, she saw that her bedroom had been ransacked and that gun cases and jewelry boxes were strewn about. She came outside and found a car in the driveway with its engine running. She turned off the car and took possession of the ignition key.

Stushek then appeared, having walked onto B.L.'s driveway from a nearby hayfield. He was holding a gun safe that had been located in B.L.'s bedroom. He explained that he was driving down the road when he saw a man fleeing the house and that he had chased the man, who ultimately escaped. Based on Stushek's account, he and

L.V. searched for the man in L.V.'s car. They spoke with nearby highway construction workers, who explained that they had seen Stushek near the house that afternoon but had not seen anyone else.

L.V. and B.L. grew suspicious of Stushek and called 911. Deputy Sean Hartneck gathered initial information from Stushek, who told him the story about his and L.V.'s chase of the unidentified man. Deputy Sean Connolly later arrived and continued the investigation. Other sheriff's deputies continued the search for the unidentified suspect in the nearby hayfield and in a grove of pine trees but did not find anyone matching the description. A Minnesota State Patrol helicopter and a canine unit also surveyed the area but found no signs of a man in hiding.

After Investigator Robert Bowker arrived, Deputy Connolly briefed him on the information that had been gathered and suggested that he question Stushek further. Investigator Bowker asked Stushek to show him where he had chased the unidentified man. Investigator Bowker did not see any footprints or tracks in that area. Sergeant Chris Caulk then approached Investigator Bowker and informed him that a door had been kicked in and that there were visible footprints. Investigator Bowker asked Stushek to show him the bottoms of his shoes. Stushek did so and proceeded to explain that he entered the home with L.V. and had used his shoe to open a door. Investigator Bowker asked Stushek to sit and wait in a squad car. Investigator Bowker later spoke with both L.V. and B.L., who said that Stushek had not entered the home in their presence.

Meanwhile, Deputy Connolly observed the damaged doors. In his written report, he wrote, "I could see a faint foot print on the door that was kicked in to the interior

entranceway." He proceeded to question Stushek about the footprints on the door, which Deputy Connolly noted "was consistent with the footprint pattern on his shoe that he was wearing." Stushek stated to Deputy Connolly that he may have touched the door with his shoe when he and L.V. entered the home.

After speaking with Stushek, L.V., and B.L., Investigator Bowker decided to conduct some testing of the damaged doors. He applied fingerprint dust to the dented portion of the damaged service door. His written report states, "Almost immediately a shoe print became visible in the dust" and matched the tread of the shoes Stushek was wearing. Investigator Bowker performed the same procedure on the interior door and "found a shoe print that was angled sideways," which again matched Stushek's shoes. Deputy Connolly photographed the dusted shoeprints on both doors. Soon thereafter the deputies placed Stushek under arrest.

The next day, the state charged Stushek with one count of second-degree burglary of a dwelling, a violation of Minn. Stat. § 609.582, subd. 2(a)(1) (2010). The case was set for trial in September 2011. Shortly before the scheduled date of trial, Stushek moved *in limine* for a ruling that the state could not introduce (1) testimony concerning "a purported comparison between Defendant's shoes and a door," (2) photographs or testimony concerning "the modification of a door by the application of fingerprint dust," or (3) photographs of the door after it was "modified by the application of fingerprint dust." Stushek's motion asserted that such evidence would be inadmissible expert testimony and would be inadmissible pursuant to Minn. R. Evid. 403.

At a pre-trial conference, the district court granted Stushek's motion. During the hearing, the district court stated that the challenged evidence was inadmissible because the state did not preserve the doors and because the photographs were not scaled. The following day, the district court issued a written order prohibiting the state from offering into evidence (1) "pictures or testimony regarding the modification of a door by the application of fingerprint dust" and (2) "pictures of the door, modified by the application of fingerprint dust." The state appeals.

D E C I S I O N

The state argues that the district court erred by granting Stushek's motion *in limine*, which prevents the state from introducing evidence that Stushek's shoeprints were revealed by the use of fingerprint dust on the damaged doors. Before considering the substance of the state's argument, we first must address the threshold question whether the state may pursue a pre-trial appeal of the district court's ruling.

If the state appeals from a pre-trial order, the state "must clearly and unequivocally show . . . that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). The critical-impact test "is intended to be a demanding standard" and requires the state to show that the ruling "'significantly reduces the likelihood of a successful prosecution.'" *State v. Rambahal*, 751 N.W.2d 84, 89 (Minn. 2008) (quoting *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005)). In analyzing critical impact, "an appellate court should first examine all the admissible evidence available to the state in order to determine what impact the absence of the suppressed evidence will have." *In re*

Welfare of L.E.P., 594 N.W.2d 163, 168 (Minn. 1999) (citations omitted). An appellate court also should "examine the inherent qualities of the suppressed evidence itself." *Id.*

In this case, to obtain a conviction, the state must prove that Stushek either entered a dwelling without consent and committed a crime while in the building or entered the dwelling with the intent commit a crime. Minn. Stat. § 609.582, subd. 2(a)(1). The evidence excluded by the district court's ruling would tend to show that Stushek entered B.L.'s home by kicking in doors to her garage and home. The state contends that it has satisfied the critical-impact test because "the shoeprints are the only evidence the state has that shows the Defendant entered the . . . home without . . . consent." In response, Stushek contends that the state has not satisfied the critical-impact test "because the admissible evidence includes Stushek's admission that he entered the house by pushing the door open with his foot." The state also could call B.L. or L.V. to testify that Stushek never entered the home with their consent, contrary to Stushek's statement at the scene.

For the reasons identified by Stushek and for other reasons, we believe that the state's admissible evidence is strong enough that the evidence excluded by the *in limine* ruling is unlikely to have a critical impact. As an initial matter, we note that the state has evidence capable of proving that Stushek entered the home, unaccompanied and without consent. In addition, the state may have evidence that matching footprints were visible on the doors before Investigator Bowker used fingerprint dust. At oral argument in this court, the prosecutor initially stated that the state had such evidence and suggested that fingerprint dust was used merely to enhance the footprints so that they could be easily seen by jurors in photographic exhibits. Later in oral argument, however, the prosecutor

expressed doubt about whether the state's witnesses could testify that, before enhancement, footprints were visible and matched Stushek's shoes. The police reports are inconclusive on this point. As stated above, Deputy Connolly submitted a written report that could be interpreted to say that he matched Stushek's shoes to un-enhanced footprints. Because the state bears the burden of establishing critical impact, the uncertainty concerning the existence of admissible evidence of matching footprints augurs in favor of a conclusion that the state has failed to satisfy its burden. *See Rambahal*, 751 N.W.2d at 89.

Moreover, even without evidence of matching footprints, the state still has considerable circumstantial evidence that presumably can be used against Stushek at trial. The district court's ruling does not preclude the state from offering photographs of the damaged doors before fingerprint dust was applied.[1] With this evidence, the state can prove easily that someone kicked in the two doors. Other evidence points to Stushek as the person who performed the kicking. Stushek told the officers that he pawns jewelry as a source of income. On the day in question, the contents of B.L.'s jewelry boxes had been dumped on her bed. Stushek was in possession outside the home of a gun safe that had been located in B.L.'s bedroom. He did not give the investigating officers a good explanation for why he was at B.L.'s house. The highway construction workers told L.V. that they saw Stushek near the house that afternoon but no one else. Neither the canine

[1]Based on the terms of the district court's order and our review of the state's proffered exhibits, we assume that the state is not prohibited from introducing the following photographs: Court Exhibit 3 (Court File Document No. 48); Court Exhibit A (Court File Document No. 49); pages 1 and 2 of Court Exhibit B (Court File Document No. 50); and pages 1 and 2 of Court Exhibit C (Court File Document No. 51).

unit nor the State Patrol helicopter was able to locate the unidentified man whom Stushek described. Investigator Bowker did not see any tracks in the area where Stushek claimed to have chased the unidentified man. All of this evidence makes it even less likely that the district court's ruling "significantly reduces the likelihood of a successful prosecution." *Rambahal*, 751 N.W.2d at 89 (quotation omitted); *see also State v. Carlin*, 423 N.W.2d 741, 743-44 (Minn. App. 1988) (concluding that state had not shown critical impact because of other evidence, including visual identification by victim and statements by co-defendants).

In sum, we conclude that the state has not "clearly and unequivocally show[n]," *Scott*, 584 N.W.2d at 416, that the district court's ruling "significantly reduces the likelihood of a successful prosecution," *Rambahal*, 751 N.W.2d at 89 (quotation omitted). Thus, the state is not permitted to pursue a pre-trial appeal of the district court's ruling on the motion *in limine*.

Dismissed.