**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0899**

State of Minnesota,
Respondent,

vs.

John Christian Richmond,
Appellant.

**Filed May 13, 2013**
**Affirmed**
**Cleary, Judge**

Hennepin County District Court
File No. 27-CR-11-18537

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Cleary, Judge; and Hooten, Judge.

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

**CLEARY**, Judge

On appeal from his conviction of two counts of first-degree aggravated robbery involving two victims, appellant argues that (1) he is entitled to a new trial because the

district court erred in admitting into evidence identification from a photographic lineup that did not use the double-blind sequential method; (2) the court improperly admitted, over his objection, prejudicial *Spreigl* evidence for which the state had provided no notice; (3) his constitutional right to a public trial was violated when the district court announced that the courtroom doors would be closed during jury instructions; (4) the court's sentencing order imposing an aggregated sentence of 162 months in prison unfairly exaggerated the criminality of his act; and (5) the district court judge violated the Code of Judicial Conduct. We affirm.

## FACTS

In the early-morning hours of June 8, 2011, O.C.L. and A.G.P. were working at a gas station in northeast Minneapolis when a man, later identified as appellant John Christian Richmond, entered the store holding a gun. It was approximately 1:30 a.m., and although appellant was wearing a sweater or jacket with the hood pulled up, O.C.L. could clearly see his whole face. Appellant approached the employees, who were sitting near the store's two cash registers, and yelled at them to give him money. O.C.L. thought appellant was going to kill him, so he opened the registers and gave appellant the money right away. Appellant demanded more money and asked if there was a safe in the store. O.C.L. said there was no safe, and appellant became even more agitated and fired his gun. The bullet struck the paper roll in the cash register located between the employees. Neither employee was hit by the bullet, but O.C.L.'s hearing was affected.

Appellant then ordered the employees to the back of the store, thinking there would be a safe there. O.C.L. hurried to the back of the store, hoping that he might be

able to call the police, but appellant yelled at O.C.L. that he would kill him if he ran. Appellant realized that there was not a safe in the store and, while continuing to point the gun at both employees, told them to empty whatever they had in their pockets. Appellant then ordered the employees into the corner, threatened to shoot them if they moved, and left the store. A.G.P. called the police and told the emergency operator that they had just been robbed by a 40-year-old black male wearing a black sweater.

On the evening of June 9, L.H. was at her family's deli in northeast Minneapolis. She had arrived at the deli around 7:15 p.m. and was helping with closing duties. Around 8:10 p.m., she was standing by the windows when she saw a person outside. At trial, L.H. testified that the person caught her attention because although it was early summer and warm, he was wearing a heavier coat with the hood up and although it was dusk, he was putting on sunglasses. The following day, June 10, L.H. was looking at the Star Tribune website and noticed an article about a robbery that occurred near the deli. The article included a still photograph of the gas station robber taken from the gas station's surveillance camera, and L.H. believed the man in the photograph resembled the man she had seen outside the deli the night before. L.H. then called the number included in the article and spoke with Sergeant Carlson of the Minneapolis police department regarding the man that she had seen on June 9. At trial, Sergeant Carlson testified that it was, in part, the information from L.H. regarding the man she saw outside the deli that helped the police department suspect that appellant was involved in the gas-station robbery.

On June 14, police officer David Burbank administered a photographic lineup to O.C.L. and A.G.P. separately. When he administered the lineup, Officer Burbank knew

that appellant was a suspect and that one of the photographs depicted him. He showed O.C.L. six pictures, one by one, and asked O.C.L. whether he recognized any of the men in the pictures as the person who had robbed him. O.C.L. selected appellant's photograph and was confident of his identification. Officer Burbank then showed A.G.P. six pictures, one by one, and asked whether he recognized any of the pictures as the person who was involved in the robbery. A.G.P. also selected appellant's photograph and had no doubt that appellant was the person who had committed the robbery. The two employees were separated during the administration of the photographic lineups and did not speak with each other until after Officer Burbank had left. A.G.P. testified that Officer Burbank did not tell him to pick any particular photograph or use body language to suggest or otherwise influence which photograph to select. On June 24, L.H. was shown a photographic lineup by police officer Matthew McLean. Officer McLean was not aware which photograph in the lineup was the suspect. L.H. identified appellant's photograph.

Appellant was charged with two counts of first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2010). Before trial, appellant moved to exclude the photographic lineups to A.G.P. and O.C.L. as unnecessarily suggestive and the testimony of L.H. as prejudicial, other-act evidence. The district court ruled that the lineup evidence would be admissible at trial and that L.H.'s testimony regarding what she saw at the deli would be admissible to show how appellant came to the attention of police. During trial, after counsel concluded closing arguments, the district court judge closed and locked the courtroom doors. In so doing, the judge stated that "I'm now going

to cause the courtroom doors to be closed and locked. It's just a tradition. All members of the public are certainly welcome to stay and listen to the final jury instructions."

The jury found appellant guilty of both charges. The district court imposed two permissive consecutive sentences within the presumptive range for a total of 162 months. This appeal followed.

## D E C I S I O N

### I. The district court did not err when it denied appellant's motion to suppress pretrial identification evidence stemming from a photographic lineup that did not comply with police protocol.

"When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted). Impermissibly suggestive lineup procedures implicate due process rights. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). Whether a person has been denied due process is reviewed de novo. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

This court applies a two-part test to determine whether pretrial identification evidence is reliable and therefore admissible. *Ostrem*, 535 N.W.2d at 921. First, we look to whether the procedure was "unnecessarily suggestive." *Id.* A pretrial identification procedure is unnecessarily suggestive when the defendant was "unfairly singled out for identification." *Id.* Second, if the procedure was unnecessarily suggestive, this court must then determine whether the suggestive procedure "created a very substantial likelihood of irreparable misidentification." *Id.*

It is the Minneapolis police department's protocol to use a "double-blind" method when administering photographic lineups. This method requires the use of an administrator who does not know which picture in the lineup is that of the suspect. Appellant argues that, because Officer Burbank did not use the double-blind method when administering the photographic lineup to A.G.P. and O.C.L., there is no guarantee that the lineup was administered without improper influence or suggestive behavior.

Appellant cites no authority that holds that an officer's failure to follow suggested lineup protocol is per se suggestive; he admits that there is no evidence that Officer Burbank attempted to influence which photograph the victims selected when he administered the lineup; and he recognizes that the double-blind protocol is not required. There is nothing in the record indicating that appellant was singled out for identification or that the lineup was in any way suggestive simply because Officer Burbank knew the identity of the suspect. Because the procedure was not suggestive, we need not address whether the procedure created a substantial likelihood of irreparable misidentification. *See Ostrem*, 535 N.W.2d at 921. Accordingly, the district court did not err by denying appellant's motion to suppress the identification.

## II. The district court did not abuse its discretion when it admitted testimony of a witness who called the police with information after seeing a picture of the robber in a news article.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Evidence of other crimes or bad acts is characterized as "*Spreigl* evidence" after the supreme court's decision in *State v. Spreigl*, 272 Minn. 488,

139 N.W.2d 167 (1965). *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). If evidence was erroneously admitted, this court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009) (quotation omitted). If such a reasonable possibility exists, the erroneous admission of the evidence is prejudicial and a new trial is warranted. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

"The overarching concern behind excluding [*Spreigl*] evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *Fardan*, 773 N.W.2d at 315 (quotations omitted). A district court does not abuse its discretion in admitting evidence of events that triggered the investigation of a defendant or to give context for an investigation, even if that evidence implies that the defendant may have been involved with other crimes. *See State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998) (admitting testimony of neighbors to explain how the investigation began and why police were excavating the back yard); *see also State v. Czech*, 343 N.W.2d 854, 856–57 (Minn. 1984) (upholding the admission of a taped recording of a statement wherein defendant implicated himself in other crimes because the recording helped show the jury why the police were talking with defendant and why they were conducting an undercover investigation); *State v. Olkon*, 299 N.W.2d 89, 101

(Minn. 1980) (upholding the admission of testimony that associated the defendant with illegal acts committed by others because that testimony helped the jury understand how the police became associated with defendant). Evidence which tends to give context to an investigation can still be excluded if the danger of unfair prejudice substantially outweighs its probative value. Minn. R. Evid. R. 403; *see also Griller*, 583 N.W.2d at 743.

Before trial, appellant moved to exclude L.H.'s testimony on the grounds that it was inadmissible *Spreigl* evidence. At the Rasmussen hearing, appellant argued that L.H.'s testimony suggested that she believed appellant was attempting a robbery when he approached the deli on the night of June 9, and that such testimony would be evidence of a bad act. The state argued appellant was mischaracterizing the testimony as *Spreigl* evidence, and that there was no intention that L.H. would testify that she believed appellant was about to attempt a robbery when she saw him outside the deli. Instead, the state argued, L.H. would testify only regarding her observation of a person outside the deli.

The district court denied appellant's motion to exclude L.H.'s testimony.[1] In so doing, the district court reasoned that L.H.'s testimony was admissible to explain how the police identified appellant as a suspect. The district court wanted to allow the state to "show that they fairly arrived at [appellant] as a suspect rather than jumping to

[1] The district court did exclude as hearsay testimony regarding two anonymous phone calls received by the police. One call stated appellant had admitted to committing the robbery at the gas station, and the other identified appellant as the person in the still photo from the gas-station surveillance video.

conclusions and just grabbing anybody that they thought might match the general description." The district court noted, however, that because the man in the still photograph posted on the Star Tribune website was wearing a hooded sweatshirt or jacket and because L.H.'s testimony included that the man she saw outside the deli also had on a hooded top, there was a possibility that the jury might make some inferences about identity. The district court concluded that a *Spreigl* jury instruction would therefore be given, which it was.

The district court did not abuse its discretion when it concluded L.H.'s testimony was not *Spreigl* evidence and allowed its admission. L.H.'s testimony was the only evidence presented at trial which gave context as to how the police came to suspect and arrest appellant and which explained why appellant's picture was included in the photographic-identification lineup. L.H. did not testify, as appellant implies in his brief, that she thought appellant was "casing" the deli the evening she saw him or that she thought he "looked suspicious" and might have robbed the gas station. Instead, she testified only that she noticed appellant that night because he had on heavy clothes even though it was warm outside and because he was putting on sunglasses even though it was dusk. The district court properly concluded this testimony was non-*Spreigl*, and the probative value of this testimony is not outweighed by any unfair prejudice that may have resulted from its admission.

## III. The district court did not violate appellant's constitutional right to a public trial when it locked the courtroom doors during final jury instructions.

Appellate courts review questions of constitutional law de novo. *State v. Mahkuk*, 736 N.W.2d 675, 684 (Minn. 2007). "Denials of the public trial guarantee constitute structural error not subject to harmless error review." *State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012). However, when a right to a public trial has been violated, "[i]f a remand for a hearing on whether there was a specific basis for closure might remedy the violation of closing the trial without an adequate showing of the need for closure, then the initial remedy is a remand, not a retrial." *State v. McRae*, 494 N.W.2d 252, 260 (Minn. 1992).

The United States and Minnesota Constitutions provide that "the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. "The right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial. . . ." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215 (1984). In cases where the right to a public trial must give way to other rights, district courts must conduct what is referred to as a *Waller* analysis to ensure that (1) the party seeking to close the hearing has advanced an overriding interest that is likely to be prejudiced if the courtroom is not closed, (2) the closure is no broader than necessary to protect that interest, (3) any reasonable alternatives to closing the hearing are considered, and (4) the district court has made adequate findings on the record to support the closure. *Brown*, 815 N.W.2d at 616–17.

Not all courtroom restrictions implicate a defendant's right to a public trial, and those that do not are not necessarily subject to a *Waller* analysis. *Id.* The Minnesota Supreme Court has held that when courtroom doors are locked yet (1) the courtroom is not cleared of all spectators; (2) the judge tells spectators that they are welcome to stay before courtroom doors are locked; (3) the court never orders removal of any member of the public, press, or the defendant's family; and (4) jury instructions do not comprise a large portion of the trial proceedings, a district court's act of locking the courtroom during jury instructions is too trivial to amount to a violation of the defendant's right to a public trial. *Id*. at 617–18.

Here, the district court's closure of the courtroom doors during final jury instructions did not implicate appellant's right to a public trial. After the parties finished their closing arguments, the district court judge stated that "I'm now going to cause the courtroom doors to be closed and locked. It's just a tradition. All members of the public are certainly welcome to stay and listen to the final jury instructions." Nothing in the record indicates the district court judge improperly ordered removal of any press, public, or members of appellant's family. Final jury instructions did not comprise a large portion of the proceeding—they totaled 12 pages of a 706-page trial transcript.

Appellant points to the supreme court's warning in *Brown* that district courts should lock courtroom doors during jury instructions "sparingly" and that when doing so, "the better practice is for the [district] court to expressly state on the record why the court is locking the courtroom doors" to facilitate appellate review and so that it does not give the appearance that our state's courtrooms are closed to the public. 815 N.W.2d at 618.

We do not encourage or condone closing and locking courtroom doors during trial. We conclude nonetheless that the record here does not indicate that the district court's actions, on the whole, implicated appellant's right to a public trial. Therefore, we highlight *Brown*'s reference to the "better practice," but conclude it does not require reversal here.

## IV. The district court did not abuse its discretion by sentencing appellant to permissive consecutive sentences within the presumptive guidelines range.

This court's review of a district court's exercise of its discretion to not depart from a presumptive sentence is "extremely deferential." *Dillon v. State*, 781 N.W.2d 588, 595–96 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Only in a "rare case" will a reviewing court reverse a district court's imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court does not ordinarily interfere with a sentence "fall[ing] within the presumptive sentence range, either dispositionally or durationally, even if there are grounds that would justify departure." *State v. Abeyta*, 336 N.W.2d 264, 265 (Minn. 1983).

When there are multiple victims, consecutive sentencing does not constitute a departure from the guidelines. *State v. Thieman*, 439 N.W.2d 1, 7 (Minn. 1989). "[W]hen crimes are committed against different persons in the same incident, the [district] court has discretion to impose one sentence per victim so long as such sentencing doesn't over exaggerate the criminality of the defendant's conduct." *State v. Lee*, 491 N.W.2d 895, 901 (Minn. 1992). When determining whether consecutive sentences unfairly exaggerate the criminality of a defendant's conduct, this court reviews

sentences imposed on other defendants in similar cases. *State v. Yang*, 774 N.W.2d 539, 563 (Minn. 2009).

Appellant was sentenced to a 105-month prison term on the first count of aggravated robbery, and a 57-month consecutive term on the second count. Two sentences were imposed because there were two victims. Appellant argues that his sentences, although permissively consecutive and within the guidelines' presumptive range, exaggerated the criminality of the incident because the sentences imposed were at the top of the guidelines range and were imposed consecutively.

First, the district court did not abuse its discretion when it imposed sentences within the presumptive range. While the duration of appellant's sentences may be at the top of the presumptive range, they are still within it. *See State v. Delk*, 781 N.W.2d 426, 427 (Minn. App. 2010) ("[A]ny sentence within the guideline range is not a departure from the presumptive sentence"), *review denied* (Minn. July 20, 2010). The district court was required to order a guidelines sentence unless appellant's case involved "substantial and compelling circumstances" to warrant a departure. *See Kindem*, 313 N.W.2d at 7. Appellant did not argue any mitigating factors at sentencing. On appeal, he offers no compelling argument as to why this is one of those "rare cases" where this court should reverse the imposition of a presumptive sentence. *Id.*

Second, the district court did not abuse its discretion when it imposed consecutive sentences. Appellant argues that the consecutive sentences exaggerate the criminality of his acts because the robbery he committed was not as serious as murder, rape, or any more serious than any other store robbery; he did not intend to victimize two people—it

just happened that there were two people in the gas station when he decided to rob it; and he only demanded money from O.C.L. and A.G.P. after he found out the store had no safe. Appellant's argument is not persuasive, and his conduct was at least as serious as the defendant's conduct in similar cases. *See Yang*, 774 N.W.2d at 563.

In *State v. Hazley*, Hazley was found guilty of one count of aggravated robbery and five counts of second-degree assault for robbing a restaurant and was sentenced to consecutive prison terms. 428 N.W.2d 406, 407 (Minn. App. 1988), *review denied* (Minn. Sept. 28, 1988). Hazley argued that the consecutive sentences exaggerated the criminality of his offense because no one was hurt or even substantially threatened. *Id*. at 411. This court concluded that the district court did not abuse its discretion in imposing the consecutive sentences because the victims were ordered at gunpoint to lie down, and one victim was hit on the head when he did not move quickly enough in response to Hazley's demands. *Id*. Also, in *State v. Dick*, Dick was found guilty of first-degree burglary and terroristic threats for breaking into an occupied cabin and for threatening to kill the responding police officers. 638 N.W.2d 486, 489–90 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). Dick did not come into contact with the occupants of the cabin or actually injure any of the police officers. *Id.* at 490. Dick was sentenced to consecutive prison terms and argued that, because he was extremely intoxicated at the time he committed the offenses, the consecutive sentencing exaggerated the criminality of his acts. *Id*. at 493. This court rejected intoxication as a mitigating factor and affirmed the consecutive sentencing. *Id*.

Here, despite appellant's attempt to minimize the seriousness of his offenses, the district court did not exaggerate the criminality of appellant's actions or otherwise abuse its discretion when it imposed the permissive consecutive sentences. During the course of the robbery, appellant victimized two people by pointing a gun at them while he was agitated and yelling. Appellant discharged that gun in a manner that caused injury to one victim's hearing. Appellant robbed the two victims of their personal belongings, and acted in a manner that caused one victim to suffer post-traumatic stress disorder.

## V. The district court did not demonstrate bias against appellant in violation of the Minnesota Code of Judicial Conduct when it denied appellant's motion to suppress identification evidence.

In his pro se supplemental brief, appellant argues that the district court judge demonstrated bias, a lack of impartiality, and lack of open-mindedness in violation of the Code of Judicial Conduct at the Rasmussen hearing when he sustained objections by the prosecutor to questions posed by appellant's counsel, told appellant's counsel to "move on" during questioning, discussed controlling legal authority, and ruled that Officer Burbank's photographic-lineup evidence would be admissible at trial. Appellant does not argue that the judge should have been disqualified or removed, only that he violated the Code of Judicial Conduct.

"Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo." *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005). There is a "presumption that a [district] court judge has discharged his or her judicial duties properly," and a party alleging bias has the burden to establish allegations sufficient to overcome this presumption. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

"Prior adverse rulings by a judge, without more, do not constitute judicial bias." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006).

As an initial and important matter, although appellant was represented by counsel before and throughout his trial, he did not raise any claims of judicial bias directly to the district court or in any post-trial motions. This court generally does not decide issues raised for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Moreover, appellant did not demonstrate any bias or impartiality or violation of the Code of Judicial Conduct. The district court judge discussed controlling law, but only in order to rule on objections—he did not comment on whether he approves or disapproves of the law. Appellant points to no evidence indicating that the judge was participating in any activities that would reasonably undermine his independence, integrity, or impartiality. The record shows that the district court judge was fair and impartial throughout the Rasmussen hearing and the trial as a whole. The district court judge carefully considered motions and objections made by both counsel and ruled in appellant's favor on some very important motions—including motions to exclude the anonymous phone calls to the police department identifying appellant as the person in the photo taken from the gas station's security camera and claiming that appellant admitted to committing the robbery.

**Affirmed.**