STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1394

State of Minnesota,
Respondent,

vs.

Craig Leslie Anderson,
Appellant.

Filed August 18, 2009
Affirmed
Connolly, Judge

Jackson County District Court
File No. 32-CR-05-1124

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Robert O'Connor, Jackson County Attorney, 405 Fourth Street, Suite 2D, Jackson, MN 56143 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

Appellant argues that the evidence obtained during the search of his residence should have been suppressed and that his conviction of fifth-degree controlled-substance crime should be reversed because of numerous errors. We affirm.

FACTS

The facts of this case are largely undisputed. On August 26, 2005, Jackson Police Officer Margaret Salzwedel obtained a warrant to search appellant Craig Leslie Anderson's residence and attached office. The search warrant authorized police to search the residence for financial records and weapons and allowed them to enter during the nighttime hours without knocking or announcing their presence.

The warrant was executed the following evening at 8:59 p.m. At the time of the search, appellant had recently returned home, and the lights were on in the house. The police entered through an open garage door and found appellant watching television. The police discovered, among other things, a pipe on a table in the downstairs living room with a white residue that appeared, and was later confirmed, to be methamphetamine, and a small baggie in the upstairs adjoining office that also contained methamphetamine.

Appellant was charged with two counts of financial exploitation of a vulnerable adult, one count of fourth-degree controlled-substance crime, two counts of fifth-degree controlled-substance crime, and one count of marijuana possession. On August 30, 2005, appellant made an appearance before a district court judge and also made a motion for her removal, which was granted. On January 10, 2007, the district court denied

appellant's motion for suppression of the evidence obtained during the search of his residence. On November 30, 2007, the district court again denied appellant's motion to suppress, but dismissed for lack of probable cause all charges except two counts of financial exploitation of a vulnerable adult, one count of fifth-degree controlled-substance crime, and one count of marijuana possession. The district court severed the financial exploitation charges and the drug charges for trial.

A jury trial was held on April 3, 2008, and appellant was convicted of one count of fifth-degree controlled-substance crime. Appellant was sentenced to a stayed prison term of 12 months and one day. This appeal follows.

D E C I S I O N

I. The district court did not err by refusing to suppress the evidence because a no-knock, nighttime search warrant was properly authorized.

Appellant argues that the district court erred by refusing to suppress the evidence obtained during the search of his residence because a no-knock, nighttime search was not necessary. Respondent asserts that the unannounced, nighttime search was necessary for the safety of the officers conducting the search. The district court agreed that the warrant application contained sufficient facts to support an unannounced, nighttime search in an effort to protect officer safety.

Minn. Stat. § 626.14 (2004) states:

> A search warrant may be served only between the hours of 7:00 a.m. and 8:00 p.m. unless the court determines on the basis of facts stated in the affidavits that a nighttime search outside those hours is necessary to prevent the loss, destruction, or removal of the objects of the search or to protect the searchers or the public. The search warrant shall

> state that it may be served only between the hours of 7:00 a.m. and 8:00 p.m. unless a nighttime search outside those hours is authorized.

The Minnesota Supreme Court has held "that the statute requires at least a finding that there is reasonable suspicion to believe a nighttime search is necessary to preserve evidence or to protect officer or public safety." *State v. Bourke*, 718 N.W.2d 922, 926 (Minn. 2006). Likewise, "[i]n order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1421 (1997). The reasonable suspicion standard is "not high." *Id*. at 394, 117 S. Ct. at 1422. It does, however, require "something more than an unarticulated hunch, [] the officer must be able to point to something that objectively supports the suspicion at issue." *Bourke*, 718 N.W.2d at 927 (quotation omitted).

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). On appeal, courts give "great deference to the issuing judge's determination. . . of whether a nighttime search warrant should be authorized under Minn. Stat. § 626.14." *Bourke*, 718 N.W.2d at 927-28 (quotation omitted). "The issuing judge's determination must be based on the factual allegations contained in the

affidavit in support of the warrant application and the reasonable inferences to be drawn therefrom." *Id.* at 928 (quotation omitted).

The district court found that:

> A no-knock nighttime search was authorized by the issuing officer. There is sufficient information in the body of the application and affidavit justifying the nighttime no-knock search based on officer safety. The application includes information that [appellant] had a firearm in his possession, that he had recently exhibited aggressive and strange behaviors, and that he was known to have fired a shotgun at a conservation officer's aircraft in 1998.

The district court's conclusion that the body of the warrant contained "sufficient information to allow the issuer to determine the [no-knock, nighttime] entry was necessary to protect the safety of the peace officers" was not erroneous. The search warrant application submitted by Officer Salzwedel was approximately 14 pages long and discussed the investigation of appellant in great detail. Included among these facts were several statements that indicated the reasoning for a no-knock, nighttime search: appellant had allegedly called his parents several times at night saying things that caused them to fear for others; appellant's brother stated that appellant had a gun; it was suspected that appellant was using drugs because he was exhibiting aggressive behavior; appellant was convicted on a felony drug charge in Florida and was not allowed to possess firearms under federal law; and appellant was convicted in 1998 on a dangerous weapons charge when he fired a shotgun at a conservation officer's airplane.

Appellant attempts to discount these contentions in the search warrant by stating that he had a shotgun because he was a hunter, by implying that he did not intentionally

shoot at the conservation officer's airplane, and by alleging that his brother thought he might pose a threat to others because they were estranged and his brother was vindictive. Even if true, these clarifications, other than that appellant was a hunter, did not appear on the face of the search warrant application, and there is no reason to believe that police knew of them and chose to omit them. This application was all that the magistrate had as a basis for deciding whether appellant posed a risk to officer safety. As stated previously, the reasonable suspicion standard is not high. Viewed in its entirety, the warrant application contained sufficient information to create a reasonable suspicion that a no-knock, nighttime search was necessary to protect officer safety.

II. The district court did not err by refusing to suppress the evidence because the magistrate who issued the search warrant was neutral and detached.

"Both the Federal and Minnesota constitutions require that no warrant shall be issued absent a showing of probable cause for search." *State v. Merrill*, 274 N.W.2d 99, 110 (Minn. 1978). The existence of probable cause must be determined by a "neutral and detached magistrate" solely upon the information presented by the applicant. *Id.* Appellant argues that the evidence discovered in the search must be suppressed because the warrant was not issued by a neutral and detached magistrate. The district court denied appellant's motion to suppress, finding no evidence of bias. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *Harris*, 590 N.W.2d at 98.

On July 1, 2005, the district court judge who issued the search warrant, presided over a civil guardianship case involving appellant's parents. In that case, an agreement was reached that if guardianship was later contested, the judge would recuse herself. After his arrest in this case, appellant appeared before the judge and requested that she be removed "per my parent's request." The request was granted. On September 19, 2005, a different district court judge held a hearing to consider a second notice of removal filed by appellant to remove him from the case. At that hearing, appellant testified that the original district court judge had been removed from a criminal case in which he was involved approximately ten years prior. At that time, he had filed a complaint against that judge with the Judicial Standards Board. Therefore, appellant argues that his contact with that judge in a ten-year old criminal case in which he filed a complaint against her, and her brief oversight of a recent guardianship hearing were sufficient contacts with appellant to demonstrate partiality in the issuing of the search warrant.

As a general matter, judges are not automatically disqualified from presiding over matters based upon information they gain in their day-to-day lives as judges and as citizens. *State v. Dorsey*, 701 N.W.2d 238, 247 (Minn. 2005). "Our judicial system presumes that judges are capable of setting aside collateral knowledge they possess and are able to approach every aspect of each case with a neutral and objective disposition." *Id.* (quotation omitted). In fact, the United States Supreme Court has held that

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147 (1994).

Appellant has not alleged any evidence of antagonism or bias against him by the judge who issued the warrant and the record reflects no such evidence. Rather, he merely states "a person reasonably could question whether she harbored some animosity or hostility toward appellant." This court does not presume error on appeal. *White v. Minnesota Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). Without some actual indication of bias on the part of the judge who issued the warrant, the district court did not err by refusing to suppress the evidence obtained from the search of appellant's residence based on the assertion that the search warrant was not issued by a neutral and detached magistrate.

III. The district court did not abuse its discretion by denying appellant's request for a mistrial.

Appellant argues that the district court abused its discretion by denying his request for a mistrial after Officer Salzwedel testified that (1) she began investigating appellant after receiving a "vulnerable adult report," (2) she was searching for "financial records, weapons, drugs" and "financial exploitation records," (3) entry into appellant's home was made by the "HEAT team," (4) a rifle and shotgun were found in appellant's residence; and (5) she believed appellant was a "felon" who unlawfully possessed firearms. Respondent asserts that because the testimony did not violate the order limiting certain evidence, appellant rejected the district court's curative jury instruction offer, and the drug possession evidence was so overwhelming, the district court did not abuse its discretion by refusing to grant a mistrial.

"This court reviews a [district] court's denial of a motion for a mistrial for abuse of discretion." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Id.* (quotation omitted).

The district court issued a pretrial instruction limiting the prosecution's references to the financial exploitation of appellant's parents or the weapons. It did allow the state to present a logical story which might contain some mention as to why police were executing a search warrant.

The prosecutor initially asked Officer Salzwedel how the investigation of appellant got started. She responded that she had received a "vulnerable adult report." Appellant did not object. The questioning continued, and the prosecutor asked Officer Salzwedel what kinds of items they were searching for at appellant's residence. She answered "financial records, weapons, drugs." Appellant again did not object, but asked for a bench conference, which was granted, followed by a short recess so that the prosecutor could speak with Officer Salzwedel. After the recess, the prosecutor asked what items the search warrant allowed the officers to search for, and Officer Salzwedel responded "financial exploitation records and weapons." Appellant objected and approached the bench for another conference.

The prosecutor later asked who entered the residence first, and Officer Salzwedel responded that it was HEAT, the High Risk Entry Arrest Team. Appellant did not object to this question. Officer Salzwedel testified that the search team found a shotgun and a

22-caliber rifle in the residence. Again, appellant made no objection. Lastly, the prosecutor asked Officer Salzwedel why she arrested appellant, and she stated that it was her belief that he was a felon in possession of a firearm. Appellant did not object to this statement either, but subsequently moved for a mistrial. The district court denied the motion, but offered to give a curative instruction to the jury. Appellant rejected this offer.

Respondent argues that these statements do not warrant a mistrial because they do not violate the pretrial order. However, the more pertinent inquiry involves whether there is a reasonable probability that the outcome of the trial would have been different if the statements had not been made. In this case, there is no reasonable probability that the statements affected the jury's verdict.

"[T]he constitution guarantees a fair trial–not a perfect or error-free trial." *State v. Mayhorn*, 720 N.W.2d 776, 792 (Minn. 2006). The statements made by Salzwedel were likely improper, but they did not rise to the level of prejudice that would necessitate a new trial. In fact, appellant did not even object to three of the five allegedly prejudicial statements. At the end of the trial, the district court gave appellant the option of a curative jury instruction. Appellant refused that offer.

Furthermore, the evidence against appellant in this trial was overwhelming. Drugs were found in two different locations during the search of appellant's residence. Appellant lived alone, his parents having moved out over a month before the search occurred. Appellant admitted to Officer Salzwedel that there may have been some drug residue in his house from his recent trip to Sturgis, South Dakota. There was no evidence

introduced that the drugs belonged to appellant's parents or anyone else. "Where, as here. . . the evidence of guilt is overwhelming, a new trial is not warranted because it is extremely unlikely that the evidence in question played a significant role in persuading the jury to convict." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quotation omitted). The district court did not abuse its discretion by denying appellant's request for a mistrial.

IV. The district court did not commit plain error by failing to give a jury instruction requiring the jury to unanimously agree upon which act of possession had been proven beyond a reasonable doubt.

"A unanimous verdict shall be required in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). The district court properly informed the jury of this unanimity requirement. Nonetheless, appellant argues that the district court erred by failing to give a jury instruction requiring the jury to unanimously agree upon *which* act of possession had been proven beyond a reasonable doubt. Appellant did not object to the omission of this instruction at the district court, and raises this argument for the first time on appeal.

"A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). "Nevertheless, a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights. . . ." *Id.* Plain error is (1) error; (2) that is plain; and (3) affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

In this case, drugs were found in two different locations within appellant's residence: upstairs in an office and downstairs in the living room. A published decision of this court, *State v. Stempf*, dealt directly with the unanimity jury instruction when drugs were found in two different locations. 627 N.W.2d 352 (Minn. App. 2001). That case instructs our analysis in this one.

In *Stempf*, the police executed a search warrant at the defendant's place of business and found methamphetamine. *Id.* at 354. The next morning, when the defendant arrived for work, the police searched his vehicle and again found methamphetamine. *Id.* The defendant was charged with a single count of possession of methamphetamine, but the state "introduced evidence that (1) appellant possessed methamphetamine found at the premises of his workplace; and (2) he possessed methamphetamine found in the truck." *Id.* The defendant presented evidence for different defenses with regard to each substance. *Id.* "The state told the jury in closing argument that it could convict if some jurors found appellant possessed the methamphetamine found in the truck while others found he possessed the methamphetamine found on the premises." *Id.* Appellant requested a jury instruction "requiring the jurors to evaluate the two acts separately and unanimously agree that the state had proven the same underlying criminal act beyond a reasonable doubt." *Id.* The district court refused to give the instruction, and the defendant was found guilty. *Id.*

On appeal, the defendant argued that the district court's failure to give his requested unanimity instruction was error. *Id.* at 353. This court agreed, stating that "nothing in Minnesota law permits trial on one count of criminal conduct that alleges

different acts without requiring the prosecution to elect the act upon which it will rely for conviction or instructing the jury that it must agree on which act the defendant committed." *Id.* at 356. The court concluded that

> [b]ecause the state did not elect which act of possession it was relying on for conviction, we find the [district] court's refusal to give a specific unanimity instruction violated appellant's right to a unanimous verdict. Some jurors could have believed appellant possessed the methamphetamine found on the premises while other jurors could have believed appellant possessed the methamphetamine found in the truck. . . . The record in this case does not permit a conclusion that violation of appellant's right to a unanimous verdict may have been harmless error.

Id. at 358.

In a more recent case, this court expanded on the unanimity instruction requirement. *State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). In *Rucker*, the defendant was convicted of two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct arising from his relationships with two minor females. *Id.* at 542. The defendant argued that the district court erred in not instructing the jury to unanimously determine which specific acts he had committed. *Id.*

The court distinguished *Stempf*, stating that "in *Stempf*, although only one offense was charged, the defendant's conduct occurred in two different, known locations." *Id.* at 548. The court continued:

> Unlike *Stempf*, the prosecution here did not emphasize certain incidents, distinguish as to the proof of some incidents compared to others, or encourage the jury to find certain incidents were more likely to have occurred than other

> incidents, and appellant did not present separate defenses for each incident of alleged sexual abuse; rather, he simply maintained throughout his trial that he never had sexual contact with either child-victim.

Id.

This court concluded that "the district court did not err in not instructing the jury that it must unanimously agree on which specific incidents formed the basis of appellant's convictions." *Id.*

This case can likewise be distinguished from *Stempf*. First, the drugs in this case were found in a single residence, with one substance upstairs and one substance downstairs. In *Stempf*, the drugs were found in a business one day and a vehicle the next. Second, unlike in *Stempf* where the defendant argued that neither the business nor the vehicle belonged to him, appellant was the only person that lived in the residence. The unity of time, place, and a singular occupant involved demonstrates that the jury would have minimal reason to suspect appellant of possession of one of the substances but not the other. It seems logical that he either possessed both or neither. Furthermore, neither the state nor the district court informed the jury that they could convict appellant if some of them believed that he possessed one substance and some believed that he possessed the other. Lastly, appellant did not present separate defenses with regard to the two separate drug locations. Rather, he merely argued, similar to the defendant in *Rucker*, that he had not possessed the drugs at all. Therefore, the district court did not commit plain error by failing to give the specific unanimity instruction.

V. The district court did not err by requiring appellant to pay $500 to a county criminal investigation fund.

Appellant argues that the district court erred by ordering him to pay $500 to the Jackson County Criminal Investigation Fund as part of his sentence. Respondent asserts that because such a payment is authorized by statute, no error occurred.

The district court has "only the statutory sentencing authority proscribed by the legislature." *State v. Osterloh*, 275 N.W.2d 578, 580-81 (Minn. 1978). Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Minn. Stat. § 631.48 (2004) permits the court to order a defendant to pay "the whole or any part of the disbursements of the prosecution" as part of the criminal sentence. In this case, the prosecution sought an order from the district court directing appellant to pay $651 for the costs of prosecution. The district court ordered appellant to pay $500 to the Jackson County Court Administrator's office for the Jackson County Criminal Investigation Fund. Based on this court's decision in *State v. Kujak*, the district court did not err by ordering appellant to make this payment. 639 N.W.2d 878, 885 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002).

In *Kujak*, the district court ordered the defendant to pay $950 in reimbursement to the Southeastern Drug Task Force for the costs of prosecution. *Id.* A clerical error labeled that payment as restitution. *Id.* This court concluded that a restitution payment to a drug task force as part of appellant's sentence would have been inappropriate, but that

same payment was allowable under Minn. Stat. § 631.48 as reimbursement for the costs of prosecution. *Id.*

In this case, the district court did not explicitly refer to the $500 payment as a reimbursement. However, error is never presumed on appeal. *White*, 567 N.W.2d at 734. Appellant is unable to demonstrate how a reimbursement payment to a drug task force, as in *Kujak*, is so dissimilar to a payment to a county criminal investigation fund that the latter must be invalidated. Appellant does not cite to anything in the record to indicate that this was restitution or any other impermissible payment. Furthermore, the prosecution explicitly sought an order from the district court directing appellant to pay the costs of prosecution. Therefore, appellant has not sufficiently demonstrated that this $500 payment was anything other than permissible reimbursement to Jackson County for the costs of prosecution. This is an allowable directive under Minn. Stat. § 631.48.

Affirmed.