STATE OF MINNESOTA
IN COURT OF APPEALS
A09-293

State of Minnesota,
Respondent,

vs.

Jamel Daniel Hoard,
Appellant.

Filed March 2, 2010
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-K9-08-1049

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

After his conviction for second-degree controlled-substance crime, appellant argues that the district court erred by (1) denying his motion to suppress evidence,

(2) overruling his *Batson* objection, and (3) denying his motion for a new trial. We affirm.

FACTS

On the evening of October 25, 2007, Sergeant Steve Anderson, Officer Thomas Tanghe, and three other officers of the St. Paul Police Department (SPD) Narcotics Vice Response Team were on patrol in an unmarked police SUV in the vicinity of a grocery store (the store) at the corner of Rice Street and Charles Avenue in St. Paul. The officers were patrolling and surveilling "hot spots" that had been the subjects of complaints about criminal activity.

Someone who worked at the store complained to the SPD that, as she was entering the store, she had been "hit up or offered drugs" by individuals loitering in front of the store. The owner of the restaurant immediately north of the store made a similar complaint to the SPD, reporting that she was offered drugs as she entered the store. The SPD considered the grocery store location a "hot spot," based on these complaints, statistical map data, information from other local business owners, and the SPD Narcotics Unit's own experience in the area.

At approximately 8:30 p.m., the officers observed three men doing a "corner to corner," which, according to Anderson, is "an activity where they aren't really doing anything specifically, [they]'re just bopping from one corner to the next corner to the next corner. And it's consistent with loitering . . . [and] drug dealing." Though the three men did not go into the grocery store, they were periodically in front of it, and it appeared

to Anderson that they did not have a legitimate reason to be there. The officers observed the three men blocking the door to the grocery store by standing in front of the entrance.

Anderson, who was driving, parked the unmarked SUV immediately in front of the three men, and the other officers got out and approached them. Anderson explained at the suppression hearing that the officers' approach of the three men was "an investigative inquiry or stop," and that he "wanted to see what was going on." Although the officers did not yell orders or pull out their guns, two of the three men immediately raised their hands. The officers simultaneously instructed the men to keep their hands up. The third man, who was later identified as appellant Jamel Hoard, did not put his hands up. Instead, he started to back into the doorway of the store. From his place in the driver's seat of the SUV, Anderson noticed that appellant's left hand was "cupped or closed," though his right hand was not. After Anderson pointed out appellant to the other officers, appellant raised his hands part way at which point Anderson saw what he was "very confident" to be crack cocaine in appellant's left hand. Anderson shouted to the other officers that appellant had drugs. Tanghe then turned his attention to appellant and approached him, shouting to all three men "very forcefully" to keep their hands up. Appellant turned and ran into the store. All the officers except Anderson chased appellant and arrested him, recovering a clear plastic bag containing cocaine from his mouth.

Respondent State of Minnesota charged appellant with second-degree controlled-substance crime in violation of Minn. Stat. § 152.022, subd. 2(1) (2006), for possession of six grams or more of a mixture containing cocaine.

Prior to trial, appellant moved to suppress the evidence, arguing that the officers lacked reasonable articulable suspicion to justify the stop and did not have probable cause to seize appellant or search his mouth to recover the drugs. The district court denied the motion, concluding that the officers had reasonable articulable suspicion for the stop.

The district court proceeded with jury selection. During voir dire, the state directed general questions to the entire panel of prospective jurors and then followed up with individual questions to particular jurors. The state asked no questions of the jurors about race. One of the prospective jurors, T.X., appeared to be Hmong. In response to a question from the court, T.X. stated that her boyfriend's cousin, whom she sees two or three times a month, is a deputy sheriff, but she did not recall where. When appellant asked the venire if anyone had been the victim of a crime, T.X. said that she was assaulted in her garage at her North Minneapolis home in 2000 and that she "probably shouldn't talk about it," but that the incident should not have an effect on her. Upon questioning by the state, T.X. stated that she reported the incident to the police but no one was arrested because she could not remember what happened. When the state asked the venire if anyone had been charged with a crime, T.X. reported that she had once been arrested for passing bad checks, but the charges were ultimately dropped. T.X. disclosed that the incident happened after her purse, checkbook, and identity were stolen, and the checks were actually written by the thief. T.X. stated that she did not have any bad feelings toward the police based on the experience. When the prosecutor asked T.X. whether he "should be concerned at all about the fact that you've had that experience that might cause you to look at me or the process we're involved in here," T.X. first

responded, "No," but then mentioned that the thief in her case had never been caught and concluded with, "So I don't know."

The state used one of its peremptory challenges to strike T.X. from the jury. Appellant objected under *Batson v. Kentucky*, noting that appellant was African American, T.X. was "Hmong[] or is of Asian descent," and the remainder of the jury panel was white. Appellant argued that T.X.'s voir dire responses indicated that "she could be fair and impartial" and argued that there was "an improper motive" behind the strike. The district court concluded that appellant had not made a prima facie showing that the peremptory strike was based on race and denied appellant's *Batson* challenge.

At trial, the arresting officers' testimony was substantially consistent with the officers' testimony at the suppression hearing. The state introduced five photographs of a clear plastic bag of drugs on the floor of the back room of the store, where appellant was arrested. Officer Holter, who was present at the time of the arrest, testified that the plastic bag in the photographs was the same one removed from appellant's mouth. He saw the drugs come out of appellant's mouth and onto the floor, where the pictures of them were taken. Holter remained in the room with the drugs from the time they were removed from appellant's mouth until a photographer arrived to take pictures. Holter then sealed the drugs in an evidence bag labeled with appellant's case number and took the drugs to the police station, where he checked them into an evidence locker. He testified that the evidence bags are designed in such a way that they cannot be opened without cutting or tearing the bag and tampering with a bag would be apparent.

Kelly Hervin, an SPD Crime Lab criminalist, testified that she conducted a preliminary controlled-substance test of the drugs. Hervin received a sealed evidence bag which revealed no evidence of tampering. Inside that bag were 30 knotted plastic bags. Hervin weighed the contents of all 30 bags and found a total weight of 7.14 grams. She tested the contents of all 30 bags for controlled substances and found that the substance preliminarily tested positive for cocaine. When finished with her testing, Hervin resealed the evidence bag with tape marked "St. Paul Crime Lab" and wrote the case number, her initials, and the date of testing on the tape. Hervin also testified about a report that she wrote summarizing her work. In the report, Hervin discussed the chain-of-custody procedures in the lab, including that the evidence is kept in a vault. The report reflects that the evidence in this case was delivered to the lab by SPD Officer Chung and received by Jennifer Jannetto, another SPD Crime Lab criminalist. Jannetto brought the drugs to the chemistry section of the lab, where they remained until they were examined by Hervin. Hervin did not know how or why Chung had custody of the drugs.

Jannetto performed the final test of the substance on August 15, 2008. She went to the property room and collected the evidence bag, which was sealed and initialed by Hervin on November 5, 2007. Jannetto observed no tampering of the bag. Inside the bag were 30 small bags and Jannetto tested the contents of each of the 30 separate bags. She found that the contents of each of the 30 bags tested positive for cocaine. The state did not offer the cocaine into evidence and it was not admitted.

Appellant did not testify or present any witnesses or evidence in his defense. The jury found appellant guilty of second-degree controlled-substance crime. Appellant

moved for a new trial or judgment of acquittal on the bases that the cocaine was not admitted into evidence and alleged gaps in the chain of custody of the drugs. The district court denied appellant's motion. This appeal follows.

D E C I S I O N

I. Suppression

Appellant argues that the district court erred by not suppressing evidence obtained as a result of the stop, because the officers lacked reasonable articulable suspicion to justify the stop. "When reviewing pretrial orders on motions to suppress evidence, [this court] 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). This court reviews de novo whether a search or seizure is justified by reasonable suspicion or probable cause. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). We review the district court's findings of fact for clear error. *Id.*

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10; *see also Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961) (applying the Fourth Amendment to the states by way of the Fourteenth Amendment's due-process clause). In Minnesota, a seizure occurs where, based on the totality of the circumstances, "a reasonable person in the defendant's shoes would have concluded that he or she was not free to leave." *In re Welfare of E.D.J.*, 502 N.W.2d 779, 780 (Minn. 1993). Evidence obtained as the result of

a constitutional violation must generally be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177–78 (Minn. 2007).

Officers may constitutionally conduct limited stops to investigate suspected criminal activity if the officers can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)) (quotation marks omitted). A determination of whether the police have reasonable suspicion to conduct an investigative stop is based on the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981); *Engwer v. Comm'r of Pub. Safety*, 383 N.W.2d 418, 419 (Minn. App. 1986).

The Minnesota Supreme Court has recognized that the "reasonable suspicion standard is not high." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotations omitted). "Reasonable, articulable suspicion requires a showing that the stop was not the product of mere whim, caprice, or idle curiosity." *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003) (quotation omitted). "That standard is met when an officer 'observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot.'" *Timberlake*, 744 N.W.2d at 393 (quoting *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997)). And the grounds for making a stop can be based on the collective knowledge of all investigating officers. *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005).

In this case, the state concedes that appellant was seized from the time the officers instructed the group of men to keep their hands raised. But the state emphasizes that the

officers were able to articulate the following specific facts supporting the stop: police department statistics indicated the Rice–Sherburne area was a "hot spot" for narcotics activity; the three men were moving from corner to corner with no apparent purpose, which is consistent with drug activity; in the past, men standing in front of the store had offered to sell drugs to people entering the store; and the three men were standing in front of the store with no apparent reason to be there. Based on these facts, the stop of the three men, including appellant, was not the result of the officers' "mere whim, caprice, or idle curiosity." Based on their experience, the officers reasonably suspected that the three men were engaged in criminal activity in front of the store. Therefore, the district court did not err in concluding that the stop was lawful and denying appellant's motion to suppress the evidence.

II. *Batson* Objection

Appellant argues that the district court erred in overruling his *Batson* challenge to the state's use of a peremptory challenge to strike T.X., an apparently Hmong woman, from the jury panel. "Peremptory challenges allow a party to strike a prospective juror that the party believes will be less fair than some others and, by this process, to select as final jurors the persons they believe will be most fair." *State v. Martin*, 773 N.W.2d 89, 100 (Minn. 2009) (quotation omitted). But the Equal Protection Clause of the United States Constitution's Fourteenth Amendment prohibits the use of a peremptory strike based on a prospective juror's race. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986).

In *Batson*, the Supreme Court established a three-step process to analyze whether a peremptory strike was racially motivated. *Id.* at 96–98, 106 S. Ct. at 1723–24; *see also* Minn. R. Crim. P. 26.02, subd. 6a(3) (using the same three-step process). First, the objecting party must establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 96–97, 106 S. Ct. at 1723. Second, if the party objecting to the strike establishes a prima facie case, then the proponent of the strike must provide a race-neutral explanation. *Id.* at 96–97, 106 S. Ct. at 1723. Third, the district court must determine whether the opponent of the strike has proven purposeful discrimination. *Id.* at 96, 98, 106 S. Ct. at 1723–24.

Under the first step, the party making a *Batson* objection establishes a prima facie case of purposeful discrimination by showing (1) "that one or more members of a racial group have been peremptorily excluded from a jury," and (2) "that circumstances of the case raise an inference that the exclusion was based on race." *Martin*, 773 N.W.2d at 101 (quotation omitted). "The fact that the prospective juror is a member of a racial minority, alone, does not raise an inference that the exclusion was based on race." *State v. Wren*, 738 N.W.2d 378, 388 (Minn. 2007). Instead, the prima facie showing is based on "'the totality of [the] relevant facts' of a prosecutor's conduct" in the trial. *Martin*, 773 N.W.2d at 101 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S. Ct. 2317, 2324 (2005)).

"Because the existence of racial discrimination in the exercise of a peremptory strike is a factual determination, we give great deference to the district court's ruling and will not reverse unless it is clearly erroneous." *Id.* "We afford great deference because

the record may not reflect all of the relevant circumstances that the court may consider." *Id.* (quotation omitted). The clear-error standard of review applies even when the district court overrules the objection after the first step of the *Batson* analysis, concluding that a prima facie showing of race-based discrimination has not been made. *See Wren*, 738 N.W.2d at 389.

Appellant argues that much of the information elicited from T.X. during voir dire—that she has a relative in law enforcement, that she has been a crime victim, and that she "knew first-hand what it was like to live in a neighborhood beset by crime"—demonstrates that she would be a juror favorable to the prosecution. Appellant argues that the state's decision to strike T.X., despite these apparent advantages to the state, raises an inference of discrimination sufficient to establish a prima facie case.

But the district court is in the best position to determine whether an inference of discrimination has been raised, *see Martin*, 773 N.W.2d at 101, and in this case the district court concluded that appellant had failed to make a prima facie showing that the peremptory challenge of T.X. was based on race. In addition to the "pro-prosecution" facts about T.X., the district court was aware that T.X. had been arrested for a crime that she did not commit and had responded ambiguously to the state's question about how that would affect her ability to be a juror. The court was also aware that the state asked the same general questions to all prospective jurors. Based on this information, the court reasonably concluded that the state's questions to T.X. about her experiences were not race-related and that there was no inference of race-based discrimination. We conclude

that the court did not err by concluding that appellant did not make out a prima facie case on step one of the *Batson* analysis.

III. Motion for New Trial

Finally, appellant argues that the district court erred by denying his motion for a new trial "in the interests of justice" under Minn. R. Crim. P. 26.04, subd. 1(1)1. When faced with such a motion, a district court must consider (1) the degree to which the moving party is at fault for the alleged error, (2) the degree to which the other party is at fault, (3) whether some "fundamental unfairness" to the defendant needs to be addressed, and (4) whether the situation is extraordinary enough to warrant granting a new trial in the interests of justice. *State v. Green*, 747 N.W.2d 912, 918–19 (Minn. 2008). This court reviews denials of a motion for a new trial for an abuse of discretion. *Id.* at 917.

Appellant argues that "[i]t is fundamentally unfair to a defendant charged with felony drug possession to not introduce the drugs into evidence, at least without a rational explanation for the failure to offer the drugs." But appellant does not explain how the physical presence of the drugs in the courtroom or jury room would impact the trial or the jury's verdict. To prove that appellant is guilty of second-degree controlled-substance crime for the possession of cocaine, the state must establish beyond a reasonable doubt that the defendant possessed a mixture weighing six grams or more containing cocaine. Minn. Stat. § 152.022, subd. 2(1). The actual drugs need not be admitted to prove these points. *See State v. Olhausen*, 681 N.W.2d 21, 22–23, 26 (Minn. 2004) (stating that there is no "minimum evidentiary requirement[]" when it comes to the identification of a drug, and sustaining a conviction for drug possession without the drugs themselves being

admitted into evidence). After all, the jurors, not being experts in chemical analysis and having no scientific equipment in the jury room, would be unable to draw any particular conclusions from observing or handling a bag of what appears to a layperson to be a collection of nondescript crystals. The admission of physical drugs in a controlled-substance prosecution is more illustrative than dispositive.

But a chain of custody for the drugs must be established between the time of seizure and the time of testing to provide a basis for the chemist's testimony that what she tested—and found to contain a controlled substance—was the same bag of nondescript crystals seized from appellant. *See State v. Hager*, 325 N.W.2d 43, 45 (Minn. 1982) (noting that drugs were adequately authenticated where the state established a chain of custody through the time of testing, and that admissibility of the chemist's testimony was not at issue). To establish a valid chain of custody, the prosecution must reasonably demonstrate that the evidence offered is the same as that seized, and that it is in substantially the same condition at the time of trial as it was at the time of the seizure. *State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976). But admissibility should not depend on the prosecution negating "all possibility of tampering or substitution, but rather only that it is reasonably probable that tampering or substitution did not occur." *Id.* at 505, 239 N.W.2d at 242. "Contrary speculation may well affect the weight of the evidence accorded it by the fact finder but does not affect its admissibility." *Id.* The trier of fact ultimately decides whether the evidence is what it purports to be. *Hager*, 325 N.W.2d at 45.

Here, testimony at trial was sufficient to show that the substance Hervin and Jannetto tested was the same substance appellant possessed and that there were no signs of tampering. Holter testified that he watched the bag of drugs from the time it was in appellant's possession until it was photographed, and that he then sealed the drugs in a marked evidence bag. The photographs, which were entered into evidence, show that the bag that was recovered by the officers contained individually wrapped items. Hervin and Jannetto testified that the drugs they weighed and tested were individually wrapped in the same manner and that the package they received in relation to this case was sealed in an evidence bag. Hervin and Jannetto also testified that there was no indication that the seal had been broken. The testimony was sufficient to establish the chain of custody from the time the drugs were seized until they were tested, which is sufficient to support the admissibility of the test results. Any remaining speculative possibility that someone had swapped out or tampered with the substance could be properly weighed by the jury, as argued by appellant during his closing argument.

The jury found that the state had proved the identity and nature of the substance possessed by appellant beyond a reasonable doubt. The admission of the drugs into evidence was not necessary for the jury to accomplish this task. Because obtaining a conviction without admitting the drugs into evidence was not fundamentally unfair, the district court did not abuse its discretion in denying appellant's motion for a new trial.

Affirmed.