STATE OF MINNESOTA
IN COURT OF APPEALS
A11-26

State of Minnesota,
Respondent,

vs.

Stuart Douglas Larson,
Appellant.

Filed December 19, 2011
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR0915947

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Peterson, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of three counts of criminal vehicular homicide, arguing that the district court committed reversible error by failing to suppress

evidence obtained from a warrantless, unannounced entry into the bedroom he rented in a residence. Because the warrantless entry was justified by exigent circumstance and because the failure to knock and announce did not make the entry unreasonable under the circumstances, we affirm.

FACTS

Appellant Stuart Douglas Larson, driving a 2005 Chevrolet Silverado pick-up truck at approximately 11:30 p.m. on Highway 7 in Minnetonka, rear-ended a motorcycle ridden by S.M. The truck pushed the motorcycle for more than sixty feet before S.M. was thrown onto the roadway and the motorcycle was propelled into the ditch. Larson did not stop. S.M. was run over by several motor vehicles, including a semi-truck, and was killed.

A police officer followed a trail of fluid from the scene of the crash. The trail indicated that the vehicle leaking the fluid was weaving, at one point went over a curb and struck a sign post, and, at another point, missed a turn and backed up to correct the mistake. The trail stopped, and fluid was found pooling under a Silverado pick-up truck that was parked across the street from a residence in Minnetonka. The officer observed extensive damage to the front of the truck. Pieces of red material that matched the motorcycle were stuck in the front of the truck. The officer contacted the registered owner of the truck, who informed the officer that the truck actually belonged to Larson who lived in the basement of the residence across from where it was parked.

The officer knocked and rang the doorbell at the front door of the residence. The door was eventually opened by the homeowner, who confirmed that the truck belonged to

Larson. The homeowner said that Larson rented the lower level of the residence and was there sleeping. He accompanied two officers to the lower level. The door to Larson's bedroom was ajar. The officers entered and woke Larson. Larson smelled of an alcoholic beverage, had watery, bloodshot eyes and slurred speech, and was very unsteady on his feet. Larson said he had been drinking earlier in the evening but had not had anything to drink after arriving home. He said he had no recollection of being involved in an accident even after being shown the damage to the truck. Larson was arrested and taken to the hospital for a blood test. The test revealed an alcohol concentration of .15 at 3:41 a.m.

Larson was charged with three counts of criminal vehicular homicide: (1) operating a vehicle in a negligent manner while under the influence of alcohol, thereby causing S.M.'s death; (2) operating a vehicle while having an alcohol concentration of .08 or more, thereby causing S.M.'s death; and (3) operating a motor vehicle, thereby causing S.M.'s death, and then leaving the scene of the accident.

Larson moved to suppress all evidence obtained as a result of the warrantless, unannounced entry of officers into his living quarters. The district court found that (1) the officers had probable cause to believe that Larson committed the offense of leaving the scene of a fatal accident; (2) the homeowner had authority to consent to the officer's entry into the basement; and (3) the homeowner did not have authority to consent to entry into Larson's bedroom. The district court concluded that the warrantless, unannounced entry into Larson's bedroom violated the Fourth Amendment.

But the district court also concluded that the officers had a legitimate "concern for obtaining an alcohol sample" and stated that the officers

> [c]ould and should at least have begun the process and attempted to obtain a warrant, and they could and should have knocked before entering the bedroom. Or they could have simply waited outside the bedroom until the defendant emerged (as most everyone does in time from a bedroom), whereupon they could arrest him for the suspected felony. But none of these things would likely have changed the ensuing developments materially, except to allow some dissipation of any alcohol in [Larson's] system. Arrest and search warrants would almost certainly have issued if properly requested, [Larson] would certainly have left the bedroom of his own volition and just as certainly would have been arrested and subjected to blood testing. It follows from this that although the warrant and the knock-and-announcement requirements were not adequately observed or excused, the evidence would nonetheless have been obtained independently of these violations.

The district court stated that the "deterrent rationale of the exclusionary rule has relatively little force in the circumstances" and held that "the extreme remedy of suppression is neither required nor justified."

Larson was convicted of all charges and was sentenced to 57 months in prison. This appeal followed.

D E C I S I O N

"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) (quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)).

"The fourth amendment to the United States Constitution, and article I of the Minnesota Constitution, proscribe unreasonable searches and seizures by the government of 'persons, houses, papers and effects.'" *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992) (citing U.S. Const. Amend. IV; Minn. Const. art. I, § 10). "Warrantless searches are presumptively unreasonable unless one of 'a few specifically established and well-delineated exceptions' applies." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507 (1967)).

On appeal, Larson does not challenge the district court's findings that the police had probable cause to believe that Larson had committed a felony. Neither Larson's statement of the case on appeal nor his brief on appeal challenged the district court's finding that the homeowner had authority to consent to the officer's entering the basement, but Larson attempts to raise this argument in his reply brief. Issues not raised or argued in appellant's brief cannot be revived in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n. 2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990); Minn. R. Civ. App. P. 128.02, subd. 4 (stating that "[t]he reply brief must be confined to new matter raised in the brief of the respondent"). We therefore decline to address this issue other than to note that the record supports the district court's finding that the landlord retained authority to consent to the officers' entry into the common areas of the basement.

I. Inevitable discovery exception

"If the state can establish by a preponderance of the evidence that the fruits of a challenged search 'ultimately or inevitably would have been discovered by lawful

means,' then the seized evidence is admissible even if the search violated the warrant requirement." *Licari*, 659 N.W.2d at 254 (citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501 (1984)).

The fact that the officers most likely would have been able to obtain a warrant does not support the conclusion that evidence obtained without a warrant would have inevitably been discovered, as suggested by the district court. *See State v. Hatton*, 389 N.W.2d 229, 234 (Minn. App. 1986) (stating that "[i]f police are allowed to search when they possess no lawful means and are only required to show that lawful means could have been available even though not pursued, the narrow 'inevitable discovery' exception would 'swallow' the entire Fourth Amendment protection") *review denied* (Minn. Aug. 13, 1986); *State v. Martinez*, 579 N.W.2d 144, 148 (Minn. App. 1998) (stating that "[w]hen police obtain evidence in a warrantless search, the evidence may not be admitted under the inevitable discovery doctrine simply because a warrant *could* have been obtained") (emphasis in original), *review denied* (Minn. July 16, 1998). Additionally, "[t]he inevitable discovery doctrine 'involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.'" *Licari*, 659 N.W.2d at 254 (quoting *Nix v. Williams*, 467 U.S. at 444-45 n. 5, 104 S. Ct. at 2501).

Larson argues that the record does not support the district court's conclusion that any of the evidence obtained by the warrantless, unannounced entry into his bedroom would have inevitably been discovered through other means. We agree, in part. Plainly, much of the evidence used to establish that Larson was the driver of the vehicle at the time of the accident would have inevitably been discovered, but whether Larson would

have left the bedroom before the alcohol had dissipated from his blood and whether he would have made the same statements on voluntarily leaving the bedroom is purely speculative and does not support the inevitable discovery exception to suppression consequences for warrantless entry.

II. Probable-cause and exigent-circumstances exception

The state did not argue the inevitable-discovery exception to the district court and makes only a tepid attempt to defend its application on appeal. The state argued to the district court and continues to argue on appeal that probable cause to believe that Larson committed a felony and a reasonable suspicion that he was impaired created exigent circumstances that justified the warrantless entry into his bedroom. We agree. *See Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978) (stating that "[i]f the trial court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based").

"The police may enter a dwelling, without a warrant, to make a felony arrest if they have probable cause and exigent circumstances." *Othoudt*, 482 N.W.2d at 223. In this case, Larson does not dispute the district court's finding that the officers had probable cause to believe that he committed a felony. Exigent circumstances can be established by the single factor of imminent destruction or removal of evidence. *State v. Lussier*, 770 N.W.2d 581, 586–87 (Minn. App. 2009); *see also State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984) (noting that the Supreme Court has found exigent circumstances in situations involving "imminent destruction of evanescent evidence").

When law-enforcement officers have probable cause to believe that a defendant has committed criminal vehicular homicide, "it is important that the defendant's blood be tested within 2 hours of the accident causing injury to or the death of another." *State v. Schriner*, 751 N.W.2d 538, 545 (Minn. 2008). "The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant provided that the police have probable cause to believe that defendant committed criminal vehicular operation." *Id.* Because the evidence demonstrates that the requisite probable cause and exigent circumstance exist in this case, the district court did not err in denying Larson's motion to suppress evidence obtained from the warrantless entry into his bedroom.

III. Knock-and-announce requirement

The district court found that the "knock-an-announcement requirements were not adequately observed or excused, but concluded that the evidence would nonetheless have been obtained independently. Although Larson mentions in his brief on appeal the officers' failure to knock and announce prior to entering his bedroom, he did not present any argument on that issue in his brief. In his reply brief, Larson argues that even if the warrantless entry was justified by exigent circumstances, the district court erred by not suppressing the evidence for a violation of the knock-and-announce requirement. But Larson acknowledges that police need not knock and announce if they have reasonable suspicion to believe that doing so would be futile or result in the destruction of evidence. *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000). Larson does not cite, nor could we find, any authority that where exigent circumstances justify a warrantless entry to

prevent the destruction of evidence, the failure to knock and announce renders the entry so unreasonable as to trigger application of the extreme remedy of suppression. *See State v. Jackson*, 742 N.W.2d 163, 176 (Minn. 2007) (stating that "the common-law knock and announce principle forms a part of the reasonableness inquiry under the Fourth Amendment"). And Larson does not cite any authority to support his assertion that failure to knock and announce in the circumstances of this case, which includes Larson sleeping through doorbell ringing and knocking at the entrance to the residence sufficient to wake the homeowner, requires application of the suppression remedy. *See Lohnes*, 344 N.W.2d at 610-13 (affirming a warrantless, unannounced entry based on probable cause and exigent circumstances, noting that knocking and announcing "not only might have been but undoubtedly would have been a useless gesture" given the difficulty in rousing the occupants from sleep).

IV. Larson's supplemental pro se brief does not assert any issues on appeal.

Larson's supplemental pro se brief poses the question: "Whose version of the warrantless arrest is correct," followed by quotations from testimony in the record and Larson's assertion that, contrary to the officers' testimony, he was handcuffed. The supplemental brief does not present any issues or arguments on appeal.

Affirmed.