STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0080

State of Minnesota,
Respondent,

vs.

Brandon Mitchell Sherman,
Appellant.

Filed February 3, 2014
Affirmed
Kirk, Judge

Clay County District Court
File No. 14-CR-12-743

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

Brian J. Melton, Clay County Attorney, Heidi Davies, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate State Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hooten, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellant argues that the district court erred when it (1) denied his pretrial motion to suppress evidence discovered during a warrantless search of a suitcase and (2) admitted

evidence obtained from a search of his residence because the warrant application was tainted by the fruits of the illegal search. While the parties intended a trial on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3, they actually proceeded with a bench trial under subdivision 2. Because the district court's failure to suppress evidence seized as a result of an illegal search was harmless, we affirm.

FACTS

On February 15, 2012, a Stop-n-Go convenience store in Moorhead was robbed at gunpoint. Surveillance video of the robbery showed that the robber, who made no attempt to cover his face, was a white male in his late twenties and was approximately 5'6" tall. He wore a gray, hooded sweatshirt that had the word "North" displayed on the front above a logo and beneath a v-shaped tear in the collar; blue jeans; brown boots; black, "Ringers" brand work gloves; and a black, beanie-style hat that bore a white, circular logo. Police conducted a canine search of the area, which yielded 12-inch-long footwear impressions in the snow.

Detective Ryan Nelson of the Moorhead Police Department discovered that the logo on the robber's sweatshirt was identical to those on sweatshirts that had been distributed to members of the Fargo North High School wrestling team during the 2009-2010 school year. On February 16, 2012, Nelson learned that a former wrestling coach mentioned appellant Brandon Sherman's name as possibly the person in the video. The former coach could not identify appellant from the surveillance footage, but a photo from appellant's Facebook account showed him wearing a "North" wrestling sweatshirt with a v-shaped tear in the

collar, matching the sweatshirt that the robber wore. Nelson called appellant, who explained that he was out of town, but that he could visit with Nelson when he returned.

On February 19, 2012, Nelson conducted a photo lineup with the Stop-n-Go cashier who had been held up by the robber. The cashier positively identified appellant, stating that he "really[,] really looks like the guy."

On February 24, 2012, Nelson and another detective arranged to meet appellant at his home. After advising appellant of his *Miranda* rights, Nelson questioned him and showed him still images taken from the surveillance footage of the robbery.[1] Appellant acknowledged that he attended Fargo North High School, was a wrestler, and bore a resemblance to the images of the robber. Appellant also identified the sweatshirt as a Fargo North sweatshirt and stated that he had one as a wrestler on that team, but he denied involvement with the robbery. He explained that he had donated the sweatshirt and claimed that, on the night of the robbery, he was home with a female friend and did not leave. Nelson then asked appellant whether he could search the residence, and appellant consented. When the detectives reached the basement, they noticed a closed suitcase and asked

[1] According to Nelson's reports, the still images that Nelson had shown to appellant, which were not in the district court's record, did not depict any features indicating that the store that had been robbed was a Stop-n-Go. During Nelson's questioning, however, appellant asked which Stop-n-Go store had been robbed, to which Nelson inquired how appellant knew the store in the images was a Stop-n-Go. Appellant claimed that he recognized the store because all Stop-n-Go stores have similar configurations of soda machines and ATMs in their entrance areas. But Nelson's reports indicated that the images to which appellant was pointing did not depict a soda machine, and the Stop-n-Go store that had been robbed did not have soda machines in the location that appellant indicated. Appellant's unsolicited identification of the Stop-n-Go and apparently flawed explanation for his knowledge of the location, however, were not mentioned in the warrant application to search appellant's home.

appellant to open it. Appellant grabbed the suitcase and placed it on a couch, but then expressed hesitance, stating it was a former roommate's suitcase and that he was unsure whether the detectives were allowed to search it. After the detectives told appellant that seeing the contents might clear him, appellant unzipped the suitcase but still did not open it. Appellant then asked if the detectives had a warrant to search the suitcase, again asserting that the suitcase was his former roommate's property and that the officers would have to seek the former roommate's consent to search the suitcase. Detectives warned appellant that they would "keep a strike on [him] for that," but appellant did not open the suitcase, insisting that the detectives would "have to get with" his former roommate if they wanted to search the suitcase. Nelson then opened the suitcase himself, revealing a gray Fargo North High School wrestling sweatshirt that had a v-shaped tear in the collar. After discovering the sweatshirt, the detectives continued to interview appellant. Appellant denied robbing the Stop-n-Go, but when asked if he knew who had, appellant "stated that he had knowledge of who committed the robbery, but was not willing to provide that information." The detectives arrested appellant on an outstanding warrant for desertion of the armed forces.

The detectives then applied for a search warrant for appellant's residence. The affidavit in support of the warrant application gave a detailed description of the robbery and robber; conversations with Fargo North High School faculty and staff concerning other possible suspects and appellant; the detectives' investigation of other suspects; the photo on appellant's Facebook account that showed him wearing a Fargo North sweatshirt with a cut at the neck similar to the surveillance video; the cashier's positive identification of appellant at the photo lineup; the detectives' interview of appellant; the discovery of the sweatshirt in

the suitcase; the fact that appellant was wearing "brown work-style boots . . . consistent with surveillance"; and appellant's statement that he had knowledge of who committed the robbery. The district court granted the application, and detectives executed the search warrant, discovering in the suitcase (1) a pair of black Ringers work gloves; (2) a pellet gun that resembled a pistol; and (3) a black, beanie-style hat that bore a white, circular Pittsburgh Steelers logo. Detective Nelson also seized appellant's brown boots, which he was wearing when he was arrested and taken into custody; the soles measured approximately 12 inches in length.

On February 25, 2012, Nelson interviewed appellant's female friend, with whom appellant claimed to be at the time of the robbery, and appellant's roommate. Appellant's female friend denied being with appellant on the night of the robbery; told detectives that a week prior to the robbery, appellant had expressed that he was contemplating robbing a gas station; revealed that the morning after the robbery, appellant had sent her a text message stating that he had robbed a gas station; and recounted that appellant had later told her that he was not joking when he sent her the message. Appellant's roommate told detectives that the black gloves had been a gift appellant received from a relative, and when shown images from the surveillance video, he positively identified appellant as the robber based on the robber's appearance. Appellant's roommate also recounted that, a few weeks prior to the robbery, appellant threatened, albeit jokingly, to rob him at his new job at another gas station.

Appellant was charged with one count of first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2010). Appellant filed a motion to suppress, in relevant

part, evidence discovered by the warrantless search of the suitcase, evidence discovered as a result of the execution of the search warrant, and his statements to detectives after he invoked his Fifth Amendment right to silence. The district court granted appellant's motion in part and denied it in part, finding (1) that the search of the suitcase was unlawful without a warrant because it went beyond the scope of appellant's consent, but that the evidence would not be suppressed because the police would have inevitably discovered the suitcase's contents; (2) that the magistrate that issued the search warrant for appellant's residence had a substantial basis to conclude that probable cause existed; and (3) that any statements appellant made in response to the detectives' continued questioning after he invoked his Fifth Amendment right to silence must be suppressed. After a "stipulated-facts trial" pursuant to Minn. R. Crim. P. 26.01, the district court found appellant guilty and sentenced him to 41 months in prison. This appeal follows.

D E C I S I O N

When reviewing "the legality of a search, [we] will not reverse the district court's findings unless they are clearly erroneous or contrary to law." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (quotation omitted). "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) (quotations omitted). When the facts are not in dispute and the district court's decision is a question of law, we "independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). "The interpretation of the rules of criminal

procedure is a question of law subject to de novo review." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

The parties and the district court referred to appellant's trial as a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 3, yet the "primary purpose" of entering into this stipulation was for appellant to "take advantage of this procedure so that he [could] appeal the [c]ourt's pretrial ruling." Rather than presenting stipulated facts, the parties submitted all of the investigative reports, videos, affidavits, and other documents, and asked the district court to review and determine appellant's guilt. This procedure more closely resembled a stipulation to the prosecution's *case* to obtain review of a pretrial ruling pursuant to Minn. R. Crim. P. 26.01, subd. 4. But because the parties did not agree on the record that the pretrial issue was dispositive of the case, a fundamental element of a trial under Minn. R. Crim. P. 26.01, subd. 4, appellant's trial did not conform to the procedure mandated by subdivision 4.

At oral argument on appeal, the parties agreed that they intended to hold a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3. But the trial in appellant's case did not conform to the requirements of Minn. R. Crim. P. 26.01, subd. 3. A trial on stipulated facts conducted pursuant to Minn. R. Crim. P. 26.01, subd. 3, is an "agreement between opposing parties regarding the actual event[s] or circumstance[s]," not a blanket submission of documents and exhibits for a district court's review and evaluation. *Dereje v. State*, 837 N.W.2d 714, 720-21 (Minn. 2013) (noting that the use of "evidence" in subdivision 4 and "facts" in subdivision 3 indicates that the two subdivisions have different meanings). Here, the parties did not stipulate to any facts to which the district court could "simply apply the

law." *Id.* at 721. Instead, the parties submitted to the district court nearly 1,400 pages of reports and documents, including police reports, and multiple CDs containing videos, audio statements, and photographs. Based on these materials, like *Dereje*, the district court adopted the state's version of events, implicitly rejecting appellant's version, and issued an order containing a detailed, seven-page "Findings of Fact" section. The supreme court explicitly rejected this procedure as "antithetical to the plain meaning of a trial on stipulated facts." *Id.* (holding "that the submission of documentary evidence presenting contradictory versions of events cannot constitute a valid trial on stipulated facts" under subdivision 3). Following the reasoning of *Dereje*, we conclude that what actually occurred at appellant's trial, which was improperly conducted under Minn. R. Crim. P. 26.01, subd. 3, was consistent with and satisfied the requirements for a bench trial under Minn. R. Crim. P. 26.01, subd. 2. *Id.* at 721. We will treat it as a bench trial pursuant to that subdivision, while emphasizing the importance for parties and the district court to articulate specifically the rule of criminal procedure and subdivision under which they are operating and to follow that rule's procedure meticulously.

Having determined that appellant's trial met the requirements for a bench trial under Minn. R. Crim. P. 26.01, subd. 2, we now address the issues of his appeal.

I. The warrantless search of the suitcase was outside the scope of appellant's consent and was unlawful.

The United States and Minnesota Constitutions protect individuals from unreasonable searches and seizures by police. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search conducted without a warrant is unreasonable. *Katz v. United*

States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). But a warrant is not required when valid and voluntary consent to search is given. *Othoudt*, 482 N.W.2d at 222.

A consensual search is limited in scope by the terms of its authorization. *Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401 (1980); *State v. Bunce*, 669 N.W.2d 394, 399 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003). The scope of consent is measured by an objective-reasonableness standard: "what would the typical reasonable person have understood by the exchange between the officer and the [individual]?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04 (1991). A search that exceeds the scope of consent is unreasonable and violates the Fourth Amendment. *Bunce*, 669 N.W.2d at 399.

The district court concluded that law enforcement exceeded the scope of appellant's consent to search when Detective Nelson opened the suitcase despite appellant's hesitance and ultimate insistence the suitcase belonged to his former roommate and that the detectives would "have to get with" his former roommate if they wanted to search the suitcase.[2] Based on this exchange, we agree that the typical reasonable person would have understood that appellant was limiting the scope of his consent to search the house. The search of the suitcase was, therefore, unlawful, and the results of the search should have been excluded unless they would have been inevitably or independently discovered by lawful means. *State v. Olsen*, 634 N.W.2d 224, 229 (Minn. App. 2001) (citing *Wong Sun v. United States*, 371

[2] We note that the issues of whether appellant, after telling detectives that the suitcase did not belong to him, even had a reasonable expectation of privacy to the suitcase or waived his right to challenge the results of the search were not argued to and considered by the district court. These issues are waived as a result, and we do not consider them on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

U.S. 471, 488, 83 S. Ct. 407, 417 (1963)) (holding that evidence discovered as a result of an illegal search is inadmissible), *review denied* (Minn. Dec. 11, 2001).

II. The sweatshirt and other contents of the suitcase would not have been inevitably discovered.

If the state establishes, 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.[3] *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509 (1984). "The inevitable-discovery doctrine applies when officers 'possess[ ] lawful means of discovery and [are], in fact, pursuing those lawful means prior to their illegal conduct.'" *State v. Barajas*, 817 N.W.2d 204, 219 (Minn. App. 2012) (quoting *State v. Hatton*, 389 N.W.2d 229, 233 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986)), *review denied* (Minn. Oct. 16, 2012). Importantly, the inevitable-discovery doctrine is a narrow exception, and it "*involves no speculative elements* but focuses on *demonstrated historical facts* capable of ready verification or impeachment." *Licari*, 659 N.W.2d at 254 (emphasis added) (quoting *Nix*, 467 U.S. at 444-45 n.5, 104 S. Ct. at 2509 n.5). *But see In re Welfare of J.W.K.*, 583 N.W.2d 752, 758 (Minn. 1998) (holding that while it was improper for police to use suspect's blood sample for investigation of an offense other than the crime for which suspect had consented to the sample, authorities "presumably" could have obtained consent for the use of the sample or, failing that, a warrant).

[3] In this case, the district court raised the inevitable-discovery doctrine *sua sponte* and ruled in the state's favor.

Here, the district court concluded that "[Detective] Nelson's investigation was reasonably likely to lead him to lawfully discover the sweatshirt in the suitcase within a reasonable time period," and that what constituted a reasonable time period in this case was longer than it might be in other circumstances because appellant had been arrested, making it unlikely that the suitcase would be interfered with before detectives could return with a warrant to search the house. And on appeal, the state contends that, because the detectives would have followed up and did follow up on appellant's alibi by interviewing his female friend and his roommate, who both discredited appellant and linked him to the robbery, the sweatshirt and the other evidence in the suitcase would have been inevitably discovered. But "[s]uch an application of the 'inevitable discovery' rule would render the Fourth Amendment protection meaningless." *Hatton*, 389 N.W.2d at 234.

In *Hatton*, police were called to a motel where the victim had been sexually assaulted by two men and managed to escape to an adjoining room. *Id.* at 231. Police arrested one suspect as he left the motel room. *Id.* at 232. An officer who had been left to "watch the room" arrested the other suspect after the officer noticed the suspect moving under the bed. *Id*. This court held that the officers' post-arrest search of the motel room without a warrant was illegal, rejecting the state's argument that, "because the officers could have obtained a search warrant, the questioned evidence would have inevitably been discovered." *Id.* at 234. The *Hatton* court noted:

> A prosecutor would usually be able to show, through hindsight, that a warrant would have been issued and the evidence would have eventually been discovered. To require a valid search warrant prior to a search, with few exceptions, is a reasonable safeguard against police conduct that treads upon protected

> Fourth Amendment rights. If 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.

Id.

Here, there are no demonstrated historical facts capable of ready verification showing that, prior to seeking a search warrant of appellant's residence, the detectives had made contact with appellant's female friend or roommate or that the detectives' interviews with these individuals would lead to the discovery of the suitcase's contents or even implicate appellant's involvement in the robbery. The district court's conclusion that "[Detective] Nelson's investigation was reasonably likely to lead him to lawfully discover the sweatshirt in the suitcase within a reasonable time period" misstates the law and appears to be based *entirely* on speculative elements. This conduct describes what *Hatton* forbids: police may not search when they possess no lawful means and then, with the luxury of hindsight, claim that a warrant would have been issued. The sweatshirt and other contents of the suitcase were not, therefore, admissible under the inevitable-discovery exception. *Id.*

III. The search warrant was not supported by an independent source, and the results of the search must be suppressed.

The state, in what can best be characterized as an independent-source argument, contends that even if the suitcase's contents would not have been inevitably discovered, the search warrant was supported by probable cause absent any "taint" that may have resulted from the illegal search. In other words, the state argues that sufficient probable cause was

present in the warrant application without mention of the sweatshirt or appellant's illegally obtained statements that were suppressed by the district court.

"To determine whether the warrant was independent of the illegal [source], one must ask whether it would have been sought even if what actually happened had not occurred." *State v. Lozar*, 458 N.W.2d 434, 439 (Minn. App. 1990) (quoting *Murray v. United States*, 487 U.S. 533, 542 n.3, 108 S. Ct. 2529, 2536 n.3 (1988)), *review denied* (Minn. Sept. 28, 1990). The warrant would not be supported by an independent source "*if the* [detectives'] *decision to seek the warrant was prompted by what they had seen during* [their illegal search of the suitcase], *or if information obtained* [as a result of the illegal search] *was presented to the Magistrate and affected his decision to issue the warrant.*" *Id.* at 438 (quoting *Murray*, 487 U.S. at 542, 108 S. Ct. at 2536).

In this case, there is no testimony or evidence in the record indicating that detectives would have sought a warrant to search appellant's residence absent their search of the suitcase. Here, the facts indicate that detectives would not have sought a warrant absent this search because they did not seek a warrant prior to finding the sweatshirt in the suitcase. Before interviewing appellant, detectives had the cashier's positive identification of him and the picture on appellant's Facebook account depicting him in a sweatshirt similar to the one the robber wore. But detectives did not apply for a search warrant of appellant's home at that time. It was only after they contacted and interviewed appellant, searched his residence, discovered the sweatshirt in violation of his Fourth Amendment rights, and obtained statements in violation of his Fifth Amendment rights that they applied for a search warrant. Absent this information, the only new evidence obtained from the interview that

linked appellant to the robbery at all was the fact that he was wearing brown, work-style boots. From these facts, we conclude that the detectives' decision to seek the warrant was prompted entirely by what they observed during their search of the suitcase. As a result, the tainted evidence cannot be sufficiently divorced from the lawfully obtained information in the warrant application, the warrant is not supported by an independent source, and the suitcase's contents must be suppressed. *Murray*, 487 U.S. at 540, 108 S. Ct. at 2534.

IV. The district court's failure to suppress the illegally obtained evidence was harmless.

The district court's admission of evidence in violation of a defendant's constitutional rights does not automatically result in reversal of his conviction so long as the error is harmless beyond a reasonable doubt. *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997). In this case, the state did not argue in the alternative that, even if the results of the search of appellant's residence are suppressed, we should affirm on the grounds that this error was harmless beyond a reasonable doubt. "[T]he state's failure to assert a harmless-error argument in its responsive brief is a waiver of the harmlessness issue, unless it is obvious that the district court's error was harmless." *State v. Porte*, 832 N.W.2d 303, 313 (Minn. App. 2013) (quotations omitted). But here, because the district court made detailed findings of fact in support of the guilty verdict and the findings involving evidence that was properly admissible were overwhelming, it is obvious that the district court's error was harmless, and the state's failure to brief the harmlessness issue is not a waiver of that issue on appeal. *Id.*

When analyzing whether the error was harmless beyond a reasonable doubt, we do not analyze whether a defendant would have been convicted without the error; rather, we

"look to the basis on which the [factfinder] rested its verdict and determine what effect the error had on the actual verdict. If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (citations omitted).

In this case, the district court's findings of fact supporting appellant's conviction were attributable to much more than the suitcase's contents. In finding appellant guilty, the district court considered (1) his lineup photographs and Facebook page vis-à-vis the surveillance video, which were corroborated by the cashier's positive identification of appellant as the robber; (2) appellant's admission that he had owned a Fargo North sweatshirt, which was unique to the members of the 2009-2010 high school wrestling team, and the fact that his Facebook account depicted him wearing the sweatshirt with a v-shaped cut at the neck that resembled the sweatshirt the robber wore; (3) appellant's admission that he resembled the robber; (4) appellant's unsolicited identification of the convenience store as a Stop-n-Go and the inconsistency of his explanation for his knowledge with photos of the Stop-n-Go; (5) appellant's boots, which were brown and had 12-inch-long soles, matching the surveillance video and measurements taken at the crime scene; (6) appellant's alibi that he was with a female friend on the night of the robbery and the female friend's denial that she was with appellant that evening; (7) appellant's comments to his female friend a week before the robbery that he had planned on robbing a gas station, text messages to her the morning after the robbery that he had robbed a gas station, and later admissions to her that he had not been joking in his text messages; (8) appellant's threats to his roommate, who worked at a gas station, that he would rob him; and (9) the positive identification of

appellant from both his female friend and roommate after each had viewed the surveillance video, indicating that appellant was the robber. Based on these findings supporting the verdict, appellant's conviction was "surely unattributable" to the error of not suppressing the suitcase's contents, and the error is harmless beyond a reasonable doubt. *Id.*

Affirmed.