STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1182

State of Minnesota,
Respondent,

vs.

Benjamin Joseph Hill,
Appellant.

Filed May 19, 2014
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-11-438

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

LARKIN, Judge

Appellant challenges his convictions of two counts of possession of a firearm by an ineligible person. Appellant argues that the district court erred by denying his motion to suppress evidence of the firearms and that the evidence is insufficient to sustain his convictions. Appellant raises additional issues in a pro se supplemental brief. We affirm.

FACTS

On June 9, 2010, at 9:04 a.m., Ramsey County deputies responded to a report of a possible burglary at 475 Spring Hill Road in Vadnais Heights. Deputies identified appellant Benjamin Joseph Hill and Octavius Johnson at the scene with a U-Haul truck. Hill told the deputies that he and Johnson were helping V.M. move from 475 Spring Hill Road because the house was in foreclosure. Deputies were unable to contact V.M. to verify this information and left the scene.

At 12:17 p.m., V.M. called the police and reported that his residence at 475 Spring Hill Road had been burglarized. V.M. reported that a large number of items were stolen, including furniture. V.M.'s girlfriend reported that she saw people unloading some of V.M.'s furniture from a U-Haul truck outside a business located at the intersection of Earl Street and Maryland Avenue in Saint Paul.

Saint Paul police officers found Hill and Johnson at 1058 East Maryland Avenue with items later identified as stolen property from V.M.'s residence. The officers found a

U-Haul truck parked on a street a short distance away at 1079 East Rose Avenue.[1] The truck contained a rental agreement between U-Haul and Hill. V.M. came to the scene and identified items that were in the truck and outside 1058 East Maryland Avenue as his stolen property. But V.M. reported that several of his items were still missing, including a bedroom set consisting of a headboard, footboard, dresser, night stand, tall mirror, and bench; glass coffee and end tables; a split king-size box spring; a JVC surround sound system; an Elite surround sound system; round and rectangular mirrors; a cherry wood clock; and a fax machine and printer.

The officers arrested Hill. During the booking process, Hill identified 1028 East Rose Avenue, Saint Paul as his home address. Hill's driver's license also listed 1028 East Rose Avenue as his home address. On June 10, Ramsey County Deputy Thomas Rudenick obtained a warrant to search 1028 East Rose Avenue. The warrant authorized law enforcement to search for the items that were still missing from V.M.'s residence. The warrant also authorized officers to search for (1) "[a]ny invoices, receipts, pawn slips, notes, and or other documents that pertain to the purchase, acquisition and/or transfer of the property listed above"; (2) "[o]ther property determined to be stolen as verified by the examination of serial numbers and/or other unique markings and confirmed via the National Crime Information Center Computer System and/or other means"; (3) "[n]otes, writings, address books, phone books and/or lists, personal planners and/or other documents tending to identify other victims or co-conspirators"; and

[1] Both the search-warrant applications and the district court appear to use East Rose Street and East Rose Avenue interchangeably. Hill has not raised this as an issue. Thus, for convenience, we use East Rose Avenue throughout this opinion.

(4) "[b]illings, letters, and/or other documents evidencing owner/renter/occupant of the premises."

When officers executed the warrant, the individuals who resided at 1028 East Rose Avenue identified themselves as Hill's parents. They told the officers that Hill stored personal property in their basement. The officers searched a file cabinet in the basement and found a .357 Magnum revolver.

Deputy Rudenick also obtained a warrant to search 1058 East Maryland Avenue, where Saint Paul police officers had encountered Hill, Johnson, and V.M.'s stolen property. Hill's business, "Hill's Pizzeria," was located at that address. The warrant for 1058 East Maryland Avenue authorized law enforcement to search for the same items listed in the warrant for 1028 East Rose Avenue. Officers executed the warrant and found a Ruger P90 semi-automatic pistol in an uncovered ventilation duct above a treadmill in the basement. The Ruger P90 was wrapped in a pair of gloves.

Respondent State of Minnesota charged Hill with two counts of possession of firearm by an ineligible person. Hill moved the district court to suppress evidence of the firearms, arguing that law enforcement lacked probable cause to search 1028 East Rose Avenue and Hill's Pizzeria because there was an insufficient nexus between Hill's criminal activity and either address. Hill also argued that both firearms were found in areas beyond the scope of the search warrants. The district court held a suppression hearing and denied Hill's motion.

The case was tried to a jury. At trial, the state presented the following testimony from Allison Dolenc, an analyst at the Minnesota Bureau of Criminal Apprehension

(BCA). Dolenc tested DNA found on both of the firearms. The .357 Magnum contained "a mixture from two or more individuals" and "[t]here was a predominant DNA profile obtained from that that matched Mr. Hill." The Ruger P90 contained "a mixture from three or more individuals" with a "predominant DNA profile that matched Mr. Hill." Further, a "substantial amount" of Hill's DNA was obtained from the two firearms and she would not expect that amount to come from a "secondary transfer" of DNA from a piece of clothing or other item. Dolenc testified that, based on her training and experimentation in the laboratory, she had never seen DNA transferred from an article of clothing such as a glove or sock to a firearm.

Hill testified that he had never seen, touched, or possessed either firearm. But he believed that the gloves wrapped around the Ruger P90 belonged to him. The jury found Hill guilty of both charges. The district court sentenced Hill to serve two concurrent 60-month prison terms, and this appeal follows.

D E C I S I O N

I.

Hill first challenges the district court's denial of his motion to suppress evidence of the firearms. Hill contends that the search-warrant application did not establish probable cause to search 1028 East Rose Avenue.

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached judge based on a finding of probable cause. *See* Minn.

Stat. § 626.08 (2008); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). "When determining whether a search warrant is supported by probable cause, we do not engage in a de novo review." *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, "when reviewing a district court's probable cause determination made in connection with the issuance of a search warrant, an appellate court should afford the district court's determination great deference." *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). This court limits its "review to ensuring that the issuing judge had a substantial basis for concluding that probable cause existed." *McGrath*, 706 N.W.2d at 539. In doing so, we examine the totality of the circumstances. *State v. Holiday*, 749 N.W.2d 833, 839 (Minn. App. 2008).

> The task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Wiley, 366 N.W.2d 265, 268 (Minn. 1985) (quotation omitted).

"[C]ourts must be careful not to review each component of the affidavit in isolation." *Id.* "[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause." *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). "Furthermore, the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants." *Wiley*, 366 N.W.2d at 268 (quotation omitted).

Hill makes several arguments regarding why the search-warrant application did not establish probable cause to search 1028 East Rose Avenue. None is persuasive. Hill asserts that 1028 East Rose Avenue is his parents' home and argues that "the nexus between [his] suspected criminal activity and his parents' home is . . . tenuous" and that the "information in the warrant affidavit [does not] provide a substantial basis for believing the disputed property would be found at [his] parents' home." "When the request of the court is for the issuance of a warrant to search a particular location, there must be specific facts to establish a direct connection between the alleged criminal activity and the site to be searched." *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998).

> [T]he required nexus between the place to be searched and the items to be seized need not rest on direct observation; instead, the nexus may be inferred from the totality of the circumstances, including the type of crime involved, the nature of the items sought, the extent of an opportunity for concealment, and reasonable assumptions about where a suspect would likely keep that evidence.

State v. Ruoho, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Although Hill refers to 1028 East Rose Avenue as his "parents' home," the search-warrant application states that Hill's driver's license listed the Rose-Avenue address as his address and that Hill provided that address as his home address when he was booked after his arrest. So although Hill's parents may live at 1028 East Rose Avenue, the issuing judge appropriately considered that location to be Hill's residence when determining probable cause. We do as well. *See State v. Secord*, 614 N.W.2d 227, 229 (Minn. App. 2000) ("In determining whether probable cause exists, both the district court

and the reviewing court may consider only the information in the application for the search warrant."), *review denied* (Minn. Sept. 13, 2000).

Under the totality of the circumstances, the search-warrant application established the required nexus between the suspected burglary and 1028 East Rose Avenue. Deputies saw Hill loading items from V.M.'s residence into a U-Haul at 9:04 a.m. V.M. called the police to report a burglary at 12:17 p.m. So, Hill had at least three hours to conceal the items taken from V.M.'s residence. Although the police found many of the items with Hill outside of the pizzeria, several items were missing. Moreover, the police had located the U-Haul truck on the street near 1079 East Rose Avenue, and Hill had identified 1028 East Rose Avenue as his home. Under the circumstances, it was reasonable for the police to assume that Hill may have concealed the missing stolen items at 1028 East Rose Avenue. *See State v. Flom*, 285 N.W.2d 476, 477 (Minn. 1979) (stating that "the normal place defendant would be expected to keep [stolen] items would be at his house"); *Rosillo v. State*, 278 N.W.2d 747, 749 (Minn. 1979) ("Since the normal place that defendant would be expected to keep those [stolen] coins which he could not carry would be at his residence, the search was properly authorized.").

Hill also argues that the search-warrant application did not establish probable cause to search for "receipts, pawn slips, notes, or invoices." The search-warrant application states that "[a]ffiant, based upon past experience and training knows that individuals involved in burglaries do so for financial or other gains" and "when property is obtained, sold and/or transferred, invoices, receipts, pawn slips, notes, and/or other documents are frequently generated." Hill argues that the application "contains no

'specific facts' that would justify a reasonable belief that documents relating to the transfer of [V.M.'s] property would be found at [1028 East Rose Avenue] or . . . at the pizzeria." He contends that it is "unlikely that [he] had the time or opportunity to sell or otherwise dispose of any property from [V.M.'s] residence."

Hill's argument is unavailing. Hill had at least three hours to sell or otherwise dispose of the stolen property, and several items from V.M.'s residence were still missing. And, just as there was a fair probability that the stolen items would be found at the residence that Hill had identified as his home, it was reasonable for the issuing judge to believe other items related to the crime might be found there as well. *See State v. Miller*, 666 N.W.2d 703, 714 (Minn. 2003) ("A judge, based on the information provided regarding the nature and circumstances of a crime, may use common sense to draw reasonable inferences as to what evidence is likely to be found."); *Wiley*, 366 N.W.2d at 268 (stating that the "task of the issuing [judge] is simply to make a practical, common-sense decision" (quotation omitted)).

Hill's last argument regarding probable cause to search 1028 East Rose Avenue is that the search-warrant application did not establish probable cause to believe that evidence of other crimes would be found at that location and that the searches "cannot be justified for reasons unrelated to the [V.M.] burglary." Hill is correct that the application "contains no 'specific facts' that provide a substantial basis for concluding there was a reasonable possibility police would find evidence of other crimes" at his house. But because the application established probable cause on other grounds, Hill's argument is unavailing. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial

rights must be disregarded."). In sum, the issuing judge had a substantial basis to conclude there was probable cause to search 1028 East Rose Avenue.

Hill also contends that the "police exceeded the scope of the search warrants" by searching the file cabinet at 1028 East Rose Avenue and the ventilation duct at Hill's Pizzeria. "A search pursuant to a warrant may not exceed the scope of that warrant." *State v. Soua Thao Yang*, 352 N.W.2d 127, 129 (Minn. App. 1984). "The test for determining whether a search has exceeded the scope of the warrant is one of reasonableness, and, in close cases, probable cause will be found to support a search under a warrant where absent the warrant the decision would be otherwise." *Id.* To determine whether the conduct of an officer executing a search warrant was reasonable, appellate courts look at the totality of the circumstances. *State v. Thisius*, 281 N.W.2d 645, 645-46 (Minn. 1978).

"[A] search is limited in scope to those areas where one would reasonably expect to find the items identified in the search warrant." *State v. Mollberg*, 310 Minn. 376, 383, 246 N.W.2d 463, 468 (1976). And "any container situated within a residence that is the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant." *State v. Wills*, 524 N.W.2d 507, 509 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995). We review de novo the issue of whether a search exceeded the scope of the warrant. *See id.* at 509-12 (reviewing de novo the issue of whether a search exceeded the scope of a warrant and stating that "this court independently reviews a pretrial order suppressing evidence to determine whether the evidence must be suppressed as a matter of law").

We agree that the large stolen items, such as furniture, could not have been concealed in the file cabinet or ventilation duct. Nonetheless, it was reasonable to believe that some of the smaller items listed on the warrant—particularly receipts, pawn slips, notes, or invoices—could be hidden in either a file cabinet or in the gloves in the ventilation duct. And it was reasonable to expect that stolen items and other evidence of a crime would be found in a hiding place such as the ventilation duct. We therefore conclude that the officers did not exceed the scope of the search warrants.

In conclusion, the district court did not err by denying Hill's motion to suppress evidence of the firearms.

II.

Hill next challenges the sufficiency of the evidence to sustain his convictions. He argues that his "convictions must be reversed because the state's evidence does not prove beyond a reasonable doubt that [he] physically possessed or exercised dominion and control over the firearms found at his pizzeria and [at 1028 East Rose Avenue]." The state may obtain a conviction of possession of a firearm by an ineligible person

> by establishing either actual or constructive possession. In order to prove constructive possession, the state must show: (a) that the police found the item in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found the item in a place to which others had access, there is a strong probability, inferable from the evidence, that defendant was consciously exercising dominion and control over it at the time.

State v. Breaux, 620 N.W.2d 326, 334 (Minn. App. 2001) (citation omitted).

An appellate court assesses the sufficiency of the evidence supporting a conviction by determining whether the legitimate inferences drawn from the evidence on the record would permit a jury to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). This court's review is limited to a close analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when determining guilt depends mainly on the resolution of conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

An appellate court applies heightened scrutiny when reviewing a verdict based on circumstantial evidence. *Pratt*, 813 N.W.2d at 874. The circumstances proved must be consistent with guilt and inconsistent with any other rational hypothesis. *Id*. Minnesota courts employ a two-step process when reviewing convictions based on circumstantial evidence. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, the reviewing court identifies the circumstances proved. *Id*. In doing so, the court views the evidence in the light most favorable to the verdict. *See Pratt*, 813 N.W.2d at 874 (stating that the

supreme court had considered the evidence "in the light most favorable to the verdict" when determining the circumstances proved). The court defers to the fact-finder's acceptance and rejection of proof and to its credibility determinations. *Andersen*, 784 N.W.2d at 329; *see also State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (stating that juries are "in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony").

Next, the reviewing court examines the reasonableness of the inferences that can be drawn from the circumstances proved, including inferences of innocence as well as guilt. *Andersen*, 784 N.W.2d at 329. All of the circumstances proved must be consistent with guilt and inconsistent with any other rational hypothesis negating guilt. *Id*. at 330. The reviewing court does not defer to the fact-finder's choice between rational hypotheses. *Id*. at 329-30. But a rational hypothesis that negates guilt must be based on more than mere conjecture or speculation. *Id*. at 330. "[A] defendant is not relying on conjecture or speculation when the defendant . . . points to evidence in the record that is consistent with a rational theory other than guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010) (quotation omitted).

Here, the circumstances proved are that the police found a firearm in the basement of Hill's parents' house where he kept his belongings and another firearm hidden in Hill's place of business. The predominant DNA profile on each firearm matched Hill's DNA. The only reasonable inference from the circumstances proved is that Hill had physically possessed both firearms.

Hill argues that the evidence "does not exclude the possibility that the swabs were contaminated or that the DNA got on the firearms from a secondary source." But Hill does not point to any evidence in the record that the DNA swabs were contaminated. *See State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) ("We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture."). And the jury heard testimony from Dolenc that she would not expect the amount of Hill's DNA that was found on the firearms to come from a "secondary transfer." The jury was free to credit her testimony. Moreover, Hill testified that he did not touch or possess either firearm. Because the jury convicted him of both charges, the jurors clearly did not believe his testimony. *See Andersen*, 784 N.W.2d at 329 (stating that in determining the circumstances proved, "we defer, consistent with our standard of review, to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State" (quotation omitted)). In sum, Hill's theories of innocence are not supported by the record. They are based on conjecture or speculation, and they do not provide a basis for relief. *See Al-Naseer*, 788 N.W.2d at 480. We conclude that the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did.

III.

In his pro se supplemental brief, Hill argues that "there should have been separate trials for the separate guns because they were found at two different times at two different locations." Under Minn. R. Crim. P. 17.03, subd. 3(1)(a), the district court, upon motion, must sever offenses or charges if they are not related. But "failure to move for severance

constitutes a waiver unless defendant can show good cause for relief from the waiver." *State v. Hudson*, 281 N.W.2d 870, 872 (Minn. 1979). When "the record is silent as to the reasons defense counsel failed to move to sever, it is just as possible that it was a deliberate decision by the defense counsel based on reasons of strategy." *State v. Moore*, 274 N.W.2d 505, 507 (Minn. 1979). Because Hill does not establish good cause for his failure to move for severance, this issue is waived.

Hill also raises a chain-of-custody issue and argues that "the gun found at 1058 Maryland by officer Tammy Alba" was "turned in to the evidence room by a different officer . . . with no report written about the transferring of the evidence." To establish chain of custody,

> [a]dmissibility should not depend on the prosecution negativing all possibility of tampering or substitution, but rather only that it is reasonably probable that tampering or substitution did not occur. Contrary speculation may well affect the weight of the evidence accorded it by the factfinder but does not affect its admissibility.

State v. Johnson, 307 Minn. 501, 505, 239 N.W.2d 239, 242 (1976). Hill does not provide anything other than speculation that tampering or substitution occurred. We therefore discern no error in the district court's decision to admit evidence of the firearm.

Hill's remaining pro se arguments address the validity of the searches, which we have analyzed above.

Affirmed.