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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0109**

State of Minnesota,
Respondent,

vs.

Michael Anthony Lindsey,
Appellant.

**Filed January 14, 2013
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-CR-11-4690

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

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

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his conviction of second-degree assault, arguing that (1) the district court erred by denying his pretrial-suppression motion, (2) his stipulated-facts

trial was not valid and constituted plain error, and (3) he received ineffective assistance of counsel. We affirm.

FACTS

At 11:20 p.m., on February 7, 2011, victim A.R. called 911 twice. During the first call, she told the operator that she was in the house of her boyfriend, appellant Michael Lindsey, that he had assaulted her, including threatening her with a knife, and that he refused to allow her to leave. During the second call, A.R. told the operator that Lindsey had “beat [her] up” and that she had left the house. During both calls, A.R. was crying.

At 11:24 p.m., Minneapolis Police Officer David Swierzewski arrived at Lindsey’s house¹ and located A.R., who was “shaking, crying, and appeared very frightened.” A.R. told Officer Swierzewski that Lindsey was angry, upset, and intoxicated; she and Lindsey had fought because Lindsey believed A.R. broke his TV; Lindsey threw the TV at her; Lindsey hit her several times; Lindsey had a knife and refused to let her leave his bedroom; Lindsey told A.R. that if she left, he would cut off his ankle monitoring bracelet, drive to her sister’s house in Crystal, and kill her sister; Lindsey had been violent towards the police in the past, was very aggressive, and would possibly be violent; and Lindsey was on supervised release for making terroristic threats against an ex-girlfriend. A.R. also told Officer Swierzewski that at least one other man was in Lindsey’s house, and A.R. thought that maybe two men were in the house. Officer Swierzewski did not observe that A.R. was physically injured, and A.R. refused medical attention.

¹ The house was that of Lindsey’s mother.

After additional officers, including Officer Jesse Trebesch, arrived and surrounded the house, A.R. told Officer Trebesch the same facts that she related to Officer Swierzewski and also said that one of the men in the house was Lindsey's nephew, with whom Lindsey had fought two weeks earlier. The police made numerous attempts to contact the inhabitants of the house by knocking on the doors, announcing that they were the police, shining flashlights into the windows of the house, activating their emergency lights, calling the telephone number listed for the house, and attempting to find family members who lived across the street. Ultimately, the police forcibly entered the house. Upon entry, Lindsey's nephew approached the officers and said that although he heard them knocking, Lindsey had instructed him not to answer the door. The nephew also said that he had not heard A.R. and Lindsey fighting that night, but that Lindsey and A.R. were "always fighting."

After the police sent a K-9 unit up the stairs, Lindsey came down and police immediately handcuffed and arrested him. Police then looked through the house to determine whether a third man was present. They did not find anyone else in the house but did see a knife in plain view in Lindsey's bedroom. Two or three hours later, the police re-entered the house with a search warrant.

Respondent State of Minnesota charged Lindsey with second-degree assault. Lindsey moved to suppress the knife that the police found in his bedroom, and the state moved to admit Lindsey's prior conviction of second-degree assault as *Spreigl* evidence. The district court denied Lindsey's suppression motion and granted the state's *Spreigl* motion. Lindsey waived his right to a jury trial and proceeded with a stipulated-facts trial

under Minn. R. Crim. P. 26.01, subd. 3(a). The stipulated evidence included a Minneapolis police report from the incident on February 7, 2011; a Columbia Heights police report from November 29, 2010, of a domestic disturbance between A.R. and Lindsey which resulted in Lindsey's arrest but no charges against him; photographs of A.R., which revealed facial bruises, Lindsey's mother's house, the knife and TV found in the house, and A.R.'s torn clothing found in Lindsey's bedroom; the audio recording and transcript of A.R.'s 911 calls; a memorandum that described a police interview of A.R. on October 17, 2011; and the fact that A.R. was married to someone other than Lindsey at the time of the incident. The district court found Lindsey guilty.

This appeal follows.

D E C I S I O N

Denial of Suppression Motion

Lindsey argues that the district court erred by admitting the knife because the exigencies of the situation did not justify the warrantless entry by police into the house. “When reviewing a pretrial order on a motion to suppress, we review the district court’s factual findings under our clearly erroneous standard. We review the district court’s legal determinations . . . de novo.” *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012) (citation omitted).

The United States Constitution and the Minnesota Constitution both guarantee “[t]he right of the people to be secure in their persons, houses, papers and effects” against “unreasonable searches and seizures.” U.S. Const. amend. IV; Minn. Const. art. 1, § 10. “The touchstone of the Fourth Amendment is reasonableness” *State v. Johnson*, 813

N.W.2d 1, 5 (Minn. 2012) (quotation omitted). “It is a basic principle of constitutional law that warrantless searches are presumptively unreasonable.” *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008). But “because the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions.” *Id.* (quotations omitted). “One such exception is exigent circumstances [as] [w]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” *Id.* (quotations omitted). To justify a warrantless search based on the exigencies of the situation, the state must show “the presence of probable cause that an individual has committed a felony and exigent circumstances related to its investigation.” *State v. Lussier*, 770 N.W.2d 581, 586 (Minn. App. 2009) (citing *State v. Outhoudt*, 482 N.W.2d 218, 223 (Minn. 1992)), *review denied* (Minn. Nov. 17, 2009). Lindsey does not dispute the existence of probable cause, so we address only whether the exigencies of the situation justified the warrantless police entry into the house.

Two tests are used to determine whether the exigencies of a situation justify a warrantless search: “(1) single factor exigent circumstances, and (2) in the absence of any of these factors, a totality of the circumstances test.” *Shriner*, 751 N.W.2d at 541–42 (quoting *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990)) (other quotation omitted). Single factors that create exigent circumstances include hot pursuit, imminent destruction or removal of evidence, protection of human life, likely escape of a suspect, and fire. *Gray*, 456 N.W.2d at 256. “It is only when ‘none of the single factor exigent

circumstances is clearly implicated’ that we apply a ‘totality of the circumstances’ test to determine whether exigent circumstances are present.” *Shriner*, 751 N.W.2d at 542 (quoting *Gray*, 456 N.W.2d at 256). “Whether exigent circumstances exist is an objective determination, and the individual officer’s subjective state of mind is irrelevant.” *Id.*

Here, the district court applied the totality-of-the-circumstances test and concluded that the exigencies of the situation justified the warrantless entry by the police. We agree.

Under the totality-of-the-circumstances test, the court considers six factors adopted by the supreme court in *Gray* from *Dorman v. United States*, 435 F.2d 385, 392–93 (D.C. Cir. 1970):

- (a) whether a grave or violent offense is involved;
- (b) whether the suspect is reasonably believed to be armed;
- (c) whether there is strong probable cause connecting the suspect to the offense;
- (d) whether police have strong reason to believe the suspect is on the premises;
- (e) whether it is likely the suspect will escape if not swiftly apprehended; and
- (f) whether peaceable entry was made.

Gray, 456 N.W.2d at 256. “[T]here is no requirement that all of the *Dorman* factors be equally satisfied before a warrantless search is justified.” *State v. Hummel*, 483 N.W.2d 68, 73 (Minn. 1992); *see State v. Johnson*, 689 N.W.2d 247, 252 (Minn. App. 2004) (concluding that the totality-of-the-circumstances test justified a warrantless entry of property when only four of the *Dorman* factors were present), *review denied* (Minn. Jan. 20, 2005). The *Dorman* factors are “not exhaustive,” *Gray*, 456 N.W.2d at 256, and “[d]etermining whether exigent circumstances exist under the totality of the circumstances is a flexible approach that encompasses all relevant circumstances.”

Shriner, 751 N.W.2d at 541 (quotations omitted). In addition to the *Dorman* factors, a court may consider several other circumstances. See *Gray*, 456 N.W.2d at 257 (considering “the risk of danger, the gravity of the crime and likelihood that the suspect is armed” (quoting *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 1690 (1990))).

Here, the district court determined that “four of the six *Dorman* factors support a finding that exigent circumstances existed at the time of the forced entry” and that Lindsey posed a risk of harm to “himself and to the other persons present inside the house,” which “further support[ed] the existence of exigent circumstances.” Lindsey challenges the court’s finding on the first *Dorman* factor—whether the offense was a violent one, arguing that the offense was not violent because A.R. did not show signs of “injury or bruising” and “refused medical help,” even though she claimed that he repeatedly punched her. Lindsey’s argument is unpersuasive.

The Minnesota Legislature has defined second-degree assault as a violent offense. See Minn. Stat. § 609.1095, subd. 1(d) (2010) (including second-degree assault in definition of “[v]iolent crime”). Moreover, the district court’s determination that the offense was a violent one is supported by the record. Without repeating the facts in their entirety, the facts reveal that A.R. twice called 911 crying and reporting that Lindsey assaulted her. She supplemented her report when the police arrived. We conclude that the district court’s determination that a violent offense was involved was not clearly erroneous.

Lindsey also challenges the district court’s determination that the warrantless entry was supported by the risk of harm to Lindsey and to “other persons present inside the

house.” He argues that because he did not threaten to hurt himself or his nephew, the belief by police that he might do so is baseless and not supported by testimony. Lindsey attempts to bolster his argument with the fact that the police waited 20 to 40 minutes before entering the house. Lindsey’s argument is unpersuasive. The concern by police that Lindsey might take action that would risk his own welfare or jeopardize his nephew’s safety was reasonable under the circumstances.

The district court did not err by determining, based on the *Dorman* factors and the totality of the circumstances, that the existence of exigent circumstances justified a warrantless entry by police into Lindsey’s house.

Validity of Stipulated-Facts Trial

Relying almost entirely on *Dereje v. State*, 812 N.W.2d 205, 211 (Minn. App. 2012), *review granted* (Minn. June 27, 2012), Lindsey argues that his trial “was not a valid stipulated-facts trial because the parties did not stipulate to the *facts*, although the facts were very much in dispute. Instead, the state submitted *evidence* that included police reports, photographs, audio recordings of the 911 calls and their transcripts.” Lindsey argues that the invalidity of his stipulated-facts trial affected his substantial rights, requiring reversal of his conviction.

In *Dereje*, this court concluded that a stipulated-facts trial was not valid because the parties submitted a body of evidence to the district court rather than submitting solely facts agreed upon by the parties. 812 N.W.2d at 209–11. The supreme court has accepted review of *Dereje*, so it is not a final decision and therefore does not have precedential effect. *See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d

173, 176 (Minn. 1988) (stating that decisions of court of appeals become “final by virtue of the denial of petition for further review”); *see also State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998) (stating that when supreme court granted review of court of appeals case and did not affirm but remanded, court of appeals case was “not binding precedent”), *review denied* (Minn. July 16, 1998). Because *Dereje* is not controlling authority in this case, we consider whether Lindsey’s stipulated-facts trial conformed to Minn. R. Crim. P. 26.01, subd. 3.

In a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3(a), “[t]he defendant and the prosecutor may agree that a determination of defendant’s guilt, or the existence of facts to support an aggravated sentence, or both, may be submitted to and tried by the court based on stipulated facts.” “[I]n a stipulated-facts trial under rule 26.01, subd. 3, the facts are not disputed,” but a stipulated-facts trial does not reduce the state’s burden of proof, *State v. Mahr*, 701 N.W.2d 286, 292 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005), and both parties are permitted to offer evidence to the court. Before the stipulated-facts trial begins, the defendant must waive his right to testify, call witnesses, and question or hear the prosecution’s witnesses. Minn. R. Crim. P. 26.01, subd. 3(a). After the parties submit the case, the “court must proceed . . . as in any other trial to the court.” *Id.*, subd. 3(d). And a defendant may raise issues on appeal as from any trial to the court. *Mahr*, 701 N.W.2d at 292.

Although the facts are not disputed in a stipulated-facts trial—disputed facts being the antithesis of stipulated facts—this court has affirmed a conviction that resulted from a stipulated-facts trial when a district court considered a disputed body of evidence over a

defendant's objection. In *State v. Eller*, 780 N.W.2d 375, 381 (Minn. App. 2010), *review denied* (Minn. June 15, 2010), this court upheld the district court's consideration of the probable-cause portion of a criminal complaint as sufficiently competent and reliable evidence of a prior conviction. We rejected the appellant's argument that the court's consideration of the evidence was improper because "the sole purpose for which appellant stipulated to the complaint was to inform the court of the offenses with which appellant had been charged." *Eller*, 780 N.W.2d at 381. Although we agreed that "a defendant may qualify his stipulation to the admission of the criminal complaint in a stipulated-facts trial for th[e] limited purpose" of informing the court of the offenses with which a defendant has been charged, we noted that the appellant "did not object to, or otherwise qualify his stipulation as to how the complaint could be used." *Id.* We "discern[ed] no error in the district court's treatment or use of the facts alleged in the factual portion of the probable-cause section of the complaint . . . because [the appellant] stipulated to the complaint as evidence." *Id.*

Here, as in *Eller*, Lindsey stipulated to all of the evidence that the state submitted to the district court, submitted his own evidence, and did not object or otherwise qualify his stipulation as to how the evidence would be used.

Lindsey also argues that the stipulated-facts trial was invalid because the district court "determined credibility not based on live testimony but from pieces of paper." Lindsey's argument lacks merit. Lindsey waived his right to "(1) testify at trial; (2) have the prosecution witnesses testify in open court in [his] presence; (3) question those prosecution witnesses; and (4) require any favorable witnesses to testify for [his] defense

in court.” Minn. R. Crim. P. 26.01, subd. 3(a). He therefore waived his right to have the district court determine the credibility of witnesses through live testimony.

Ineffective Assistance of Counsel

Lindsey argues that he received ineffective assistance of counsel at his stipulated-facts trial that constituted structural error because his counsel did not subject the state’s case to meaningful adversarial testing.

A criminal defendant has a constitutional right to a fair trial. U.S. Const. amend. XIV § 1; Minn. Const. art. I, § 7; *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005) (“Due process guarantees in our state and federal constitutions include the right to a fair trial.”). Lindsey cites *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063 (1984), in which the United States Supreme Court stated that “a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal.” “Claims of ineffective assistance of counsel are reviewed de novo because they involve mixed questions of fact and law.” *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). Generally, to prevail on an ineffective-assistance-of-counsel claim, a defendant “must show that his trial counsel’s representation fell below an objective standard of reasonableness *and* that there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (quotation omitted) (emphasis added). But “[c]ertain counsel-related errors . . . may be structural errors, which do not require a showing of prejudice [because] the situation presents circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *State v. Dalbec*, 800 N.W.2d 624, 627

(Minn. 2011) (quotation omitted). One such circumstance is “when counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Id.* (quotation omitted).

Lindsey argues that his trial counsel’s assistance was so ineffective that it constituted structural error because his counsel did not challenge the state’s case, including challenging A.R.’s credibility. Specifically, he complains that, at his stipulated-facts trial, his counsel failed to bring to the district court’s attention (1) the lack of bruising on A.R.’s face despite her statement to the police that Lindsey punched her so hard she blacked out, (2) the lack of injuries on A.R.’s face from the knife with which Lindsey allegedly threatened her, and (3) the fact that Lindsey always kept in his room the knife with which he allegedly threatened A.R. But all of these facts were included in the stipulated evidence submitted to the district court. Moreover, Lindsey’s trial counsel challenged the stipulated evidence submitted by the state, including A.R.’s credibility, by submitting the stipulation that A.R. was married to someone other than Lindsey at the time of the incident and the Columbia Heights police report. And Lindsey’s trial counsel orally challenged A.R.’s credibility during the stipulated-facts trial.

Based on our careful review of the record, we conclude that Lindsey’s argument that he received ineffective assistance from his trial counsel and that it constituted structural error is entirely lacking merit. Lindsey voluntarily waived his right to a jury trial, elected to proceed with a stipulated-facts trial, and stipulated without objection or qualification to the state’s exhibits.

Affirmed.