STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1286

State of Minnesota,
Respondent,

vs.

Brian Jacob Ehlert,
Appellant.

Filed April 30, 2012
Affirmed
Johnson, Chief Judge

Chisago County District Court
File No. 13-CR-08-921

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

Janet Reiter, Chisago County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Center City, Minnesota (for respondent)

Steven J. Meshbesher, Adam T. Johnson, Meshbesher & Associates, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and Randall, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

JOHNSON, Chief Judge

Brian Jacob Ehlert was found guilty of manufacturing methamphetamine. Ehlert came to the attention of law enforcement when a confidential informant provided information that Ehlert was manufacturing methamphetamine at his residence, which led to the execution of a search warrant, which revealed materials indicative of a methamphetamine laboratory. Before trial, Ehlert moved to obtain disclosure of the identity of the confidential informant, but the district court denied the motion. On appeal, Ehlert argues that the district court erred by not disclosing the identity of the confidential informant and by not conducting an *in camera* review of the confidential informant's identity to determine if disclosure is necessary. We affirm.

FACTS

In March 2008, a confidential informant (CI) provided information to Dan Neitzel, an investigator with the Chisago County Sheriff's Office, to the effect that Ehlert was manufacturing methamphetamine in a building on the rural property at which he resided. The CI provided Investigator Neitzel with a description of the property. The CI admitted to having previously been involved with the manufacture of methamphetamine but professed to having been "clean" for two years.

After receiving the tip, Investigator Neitzel conducted an investigation. He drove to Ehlert's address, verified the CI's description of the property, and concluded that the property was a viable location for manufacturing methamphetamine. He also visited local pharmacies and learned that Ehlert had been purchasing the maximum amount of

pseudoephedrine allowed by law at each pharmacy. Based on this information, Investigator Neitzel obtained a warrant to search the property where Ehlert resided.

When law enforcement officers conducted the search, they found numerous items on the property that are consistent with a methamphetamine laboratory, including boxes of pseudoephedrine, beakers and other glassware, a plastic bottle and plastic tubing, numerous lithium ion batteries, and a 40-pound tank of anhydrous ammonia. Investigator Neitzel also interrogated Ehlert, who, after a waiver of his *Miranda* rights, admitted to manufacturing methamphetamine on his property for several years and further admitted that the items seized on his property belonged to him.

In May 2008, the state charged Ehlert with first-degree manufacturing methamphetamine, a violation of Minn. Stat. § 152.021, subd. 2a(a) (2006); fifth-degree possession of methamphetamine while in possession of a firearm, a violation of Minn. Stat. §§ 152.025, subd. 2(1), 609.11, subds. 5(a), 9 (2006); and possession of anhydrous ammonia with intent to manufacture methamphetamine, a violation of Minn. Stat. § 152.0262, subd. 1 (2006). In December 2010, Ehlert moved for disclosure of the CI's identity or, in the alternative, an *in camera* hearing to determine whether the CI's identity should be disclosed. The district court denied Ehlert's motion in February 2011.

The first count of the complaint was tried to the district court in May 2011 pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found Ehlert guilty of that offense. The second and third counts were dismissed. The district court stayed imposition of a sentence and placed Ehlert on probation for 30 years. Ehlert appeals.

D E C I S I O N

I. Identity of Confidential Informant

Ehlert first argues that the district court erred by denying his motion for disclosure of the CI's identity.

The state may have a legitimate interest in protecting the identity of a person who aids law enforcement. *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008). This interest must give way, however, "when the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* (quotation omitted). A defendant who seeks disclosure of a CI's identity has the burden of establishing that the need for disclosure overcomes the state's interest in protecting its sources. *Id.* The weighing of interests must be done on a case-by-case basis. *Id.* The supreme court has articulated four non-exhaustive factors: (1) whether the informant is a material witness; (2) whether the informant's testimony is material to the issue of the defendant's guilt; (3) whether the officer's testimony is suspect; and (4) whether the testimony of the informant might demonstrate an entrapment defense. *Id.* (quoting *Syrovatka v. State*, 278 N.W.2d 558, 561-62 (Minn. 1979)). We apply an abuse-of-discretion standard of review to a district court's decision regarding disclosure of a CI's identity. *Id.*

Ehlert concedes that the third and fourth *Syrovatka* factors are not present in this case. Accordingly, his argument is confined to the first and second factors. With respect to the first factor, the relevant caselaw distinguishes between whether a CI was a participant in the alleged criminal activity, an eyewitness to the alleged criminal activity,

or merely a transmitter of information regarding the alleged criminal activity. *Id.* at 91. Ehlert does not contend that the CI either participated in or witnessed Ehlert's manufacture of methamphetamine. The relevant caselaw "ascribe[s] little, if any, weight to a defendant's interest in disclosure in cases where an informant is a mere transmitter," although this factor is "not conclusive in the overall analysis" or dispositive in all cases. *Id.* Nonetheless, the first factor weighs against disclosure.

With respect to the second factor, the relevant caselaw considers the specific offense charged and the evidence relating to the charged offense. *Id.* More specifically, the caselaw asks whether there is a likelihood that "an informer's testimony will be helpful to [the] defendant in overcoming an element of the crime charged." *Id.* (quoting *Syrovatka*, 278 N.W.2d at 562). If not, disclosure generally is not required. *Id.* Here, Ehlert contends that disclosure is warranted because the CI had previously been involved in the same type of criminal activity with which Ehlert was charged, namely, the manufacture of methamphetamine. This contention, by itself, does not demonstrate that disclosure would be helpful to Ehlert's defense. The CI's previous conduct is unrelated to the allegations against Ehlert, which means that Ehlert cannot show that the CI's testimony would be "material to the issue of guilt." *Id.* Simply put, nothing in the record suggests either that the CI has any information that would be helpful to Ehlert's defense or that disclosure of the CI's identity would lead to the discovery of exculpatory evidence that is in the possession of other persons. *See id.* at 91-92. In this way, the facts of this case are different from those of *Rambahal*, in which the CI possessed information that

could be used to defeat the state's allegations. *See id.* at 92. Thus, the second factor also weighs against disclosure.

As stated above, the *Syrovatka* factors are a non-exhaustive list. Ehlert offers one additional justification for disclosure: his attorney's desire to cross-examine the CI to attack his or her credibility. This part of Ehlert's argument is illogical. The state did not call the CI as a witness at trial, and there is nothing in the record to suggest that, at the time of Ehlert's motion, the state intended to call the CI as a witness at trial. Thus, the defense had no reason to impeach the CI's credibility. Impeachment of a CI simply is not a reason for a district court to disclose a CI's identity if the state does not intend to call the CI as a witness at trial.

Ehlert has failed to carry his burden of establishing that his interest in disclosure of the CI's identity outweighs the public interest in confidentiality. *See id.* at 90. Thus, Ehlert is not entitled to disclosure of the CI's identity.

II. *In Camera* Review

Ehlert also argues, in the alternative, that the district court erred by not conducting an *in camera* review of materials concerning the CI's identity and the information possessed by the CI, which Ehlert contends might have caused the district court to determine that the CI's identity should be disclosed.

The showing required for an *in camera* review of a CI's identity is less than the showing required for outright disclosure of the CI's identity. *State v. Moore*, 438 N.W.2d 101, 106 (Minn. 1989). "All that is needed to justify an *in camera* inquiry is a minimal showing of a basis for inquiry but something more than mere speculation by the

defendant that examination of the informant might be helpful." *Id.* To satisfy this lesser burden, "[t]he defendant must explain precisely what testimony he thinks the informant will give and how this testimony will be relevant to a material issue of guilt or innocence." *Syrovatka*, 278 N.W.2d at 562. But when the CI is "merely a transmitter of information rather than an active participant in or material witness to the crime," an *in camera* hearing generally is not required. *See State v. Litzau*, 650 N.W.2d 177, 184 (Minn. 2002).

Ehlert repeats the arguments discussed above in part I and contends that his asserted justification for disclosure at least satisfies the lower standard applicable to an *in camera* review. But Ehlert's argument also fails to satisfy this lower standard because he has nothing more than speculation that the CI might possess exculpatory information or that disclosure of the CI's identity might allow defense counsel to obtain exculpatory information from other sources. *See Moore*, 438 N.W.2d at 106. In addition, Ehlert's argument fails to justify an *in camera* review because the CI is "merely a transmitter of information rather than an active participant in or material witness to the crime." *See Litzau*, 650 N.W.2d at 184. Thus, Ehlert is not entitled to an *in camera* review of the CI's identity and the information possessed by the CI.

In sum, the district court did not err by denying Ehlert's motion concerning the identity of the state's confidential informant.

Affirmed.