STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0070

State of Minnesota,
Respondent,

vs.

Alcide Thomas Cloutier,
Appellant.

Filed January 14, 2013
Affirmed in part and reversed in part
Kirk, Judge

St. Louis County District Court
File No. 69DU-CR-11-266

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

Mark S. Rubin, St. Louis County Attorney, Leslie E. Beiers, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven J. Wright, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Halbrooks, 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 Alcide Thomas Cloutier challenges his conviction of one count of being a felon in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1b (2010), and one count of reckless discharge of a firearm within a municipality in violation of Minn. Stat. § 609.66, subd. 1(a) (2010). Because the evidence to convict appellant of reckless discharge of a firearm was insufficient as a matter of law, we reverse that conviction, and affirm the remaining conviction.

FACTS

At about 10:30 p.m. on January 22, 2011, appellant entered the woods of a country club in Duluth and shot himself in the abdomen with a .270 caliber high-powered rifle. Either shortly before he shot himself or shortly afterwards, he sent a text message to his former girlfriend, K.R., telling her he had been shot. She replied, with a message stating something to the effect of, "How in the f—k did you manage that?"

Leaving the rifle in the woods, appellant ran to the nearby neighborhood, knocked on the door of a home with its porch light on, and asked for help. The occupants of the home refused to let appellant in, but called 911 and retreated to the basement to await the police. Appellant lay on the porch and also called 911 from his cell phone.

Duluth Police Officer Robert Hurst was first to arrive on the scene. While waiting for an ambulance to arrive, Officer Hurst questioned appellant as to what had happened, but was only able to get limited information because appellant was having difficulty speaking. Appellant managed to tell Officer Hurst that he was driving his car when he

saw a woman being assaulted. Appellant claimed that he got out to intervene, but one of the males assaulting the woman shot him with a rifle or a sawed-off shotgun. After appellant left in an ambulance, Officer Hurst secured the porch and collected a cell phone that was on the porch near where appellant had been laying.

A short time later, while officers were canvassing the neighborhood and searching for a suspect, Officer Hurst was asked by another police officer to look for a recently dialed number in the cell phone. That officer, who had gone to the hospital where appellant was being treated, told Officer Hurst that appellant had called someone in relation to his children, or may have been on the way to pick up his children when he was shot. Officer Hurst looked in the phone. Officer Hurst admitted that, at that time, he had a sense that the shooting was part of criminal activity gone bad. He also knew that one of his fellow officers had spoken to a witness who reported having heard the gunshot and then saw a man run out of the woods. Officer Hurst indicated that he felt some urgency to learn more about the shooting because he did not know how grave appellant's condition was or whether he might die from the gunshot wounds.

When he looked in the phone, Officer Hurst saw the text message from K.R. This led him to believe that K.R. knew what had happened to appellant. He called the number that the text message came from and spoke to K.R.

Meanwhile, a Duluth police officer who is trained as a human tracker was investigating the nearby woods on the country club property. He came across a fresh trail of footprints leading into and out of the woods. At the end of the trail of footprints he

discovered a rifle and a case in the snow. The rifle had a spent cartridge in the chamber. Officer Hurst did not learn of these developments until after he looked in the cell phone.

During interviews with the police, at trial, and now on appeal, appellant has maintained his version of the story. He explains that the rifle was found in the woods because, after he was shot, the shooters fled and left the rifle behind. Appellant claims that, in an effort to make the area safe, he picked up the gun, ran into the woods, dropped it there, and returned to the neighborhood to seek medical attention for his gunshot wound.

After a jury trial, appellant was convicted and sentenced to serve concurrent sentences of 90 months in prison for being a felon in possession of a firearm and 24 months for reckless discharge of a firearm in a municipality. The sentences are an upward durational departure based on jury-determined aggravating factors. This appeal follows.

D E C I S I O N

I. The district court did not err by admitting evidence arising from a warrantless search of appellant's cell phone.

Appellant challenges the district court's admission of evidence obtained as a result of the police's search of his cell phone, arguing that there were no exigent circumstances to justify the search, and that the district court's admission of the evidence was not harmless beyond a reasonable doubt. "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)).

Under the Fourth Amendment to the United States Constitution, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Article I, section 10, of the Minnesota Constitution has a parallel provision.

To be protected by the Fourth Amendment, the item or place that is the object of the search must be one where appellant had a legitimate expectation of privacy. *See Stoner v. California*, 376 U.S. 483, 490, 84 S. Ct. 889, 893 (1964). "[A] person has the same reasonable expectation of privacy in the concealed digital contents of a cellular telephone as a person has in the concealed physical contents of a container." *State v. Barajas*, 817 N.W.2d 204, 216-17 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012).

Subject to certain exceptions, searches conducted without a warrant are per se unreasonable. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). The state bears the burden of showing that a warrantless search was justified by a recognized exception in order to avoid suppression of evidence acquired from the search. *State v. Lussier*, 770 N.W.2d 581, 586 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). The state contends that Officer Hurst's search of appellant's cell phone was justified by the exception for exigent circumstances and the closely related emergency-aid exception.

There are generally two types of tests for exigent circumstances: (1) where a single factor creates the exigency justifying the search, and (2) where the search is justified by an examination of the totality of the circumstances. *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). The state contends that this case presents a single-factor exigency. Among the single-factor exigencies that have been recognized as sufficient to justify a warrantless search is the "likely escape of the suspect." *Id.*

At the moment when Officer Hurst looked at the contents of the cell phone he knew that appellant claimed he was shot by a suspect still at large and that the police were actively searching for that suspect. He also knew that, apparently in contradiction to appellant's limited description of events, at least one witness had heard a gunshot and shortly thereafter saw a man run out of the woods. Appellant provided only limited information to Officer Hurst when he was lying on the porch awaiting an ambulance. Officer Hurst could reasonably believe that someone willing to use the gun may be at large. Given the urgency of the situation, the little information that the police had, the apparent possibility that appellant had not told the police all the details of what occurred, and the chance that an armed, violent suspect was roaming in this residential area, a reasonable officer could conclude that appellant's cell phone would hold a clue as to who the shooter was. While it is true that Officer Hurst also professed to have a gut feeling that something was amiss in appellant's story, whether the exigent circumstances exist is an objective determination, and does not depend on the officer's subjective motives. *State v. Shriner*, 751 N.W.2d 538, 542 (Minn. 2008). Here—apart from any suspicions

that Officer Hurst harbored—the circumstances had acquired the requisite urgency to justify a search of the cell phone.

The state also contends that Officer Hurst's warrantless search of the cell phone was justified by the emergency-aid exception. The emergency-aid exception recognizes that, in limited circumstances, "law enforcement officers, in pursuing a community-caretaking function, 'may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" *State v. Lemieux*, 726 N.W.2d 783, 787-88 (Minn. 2007) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947 (2006)). As with the exception for exigent circumstances, the state bears the burden of showing the validity of a warrantless search under the emergency-aid exception, and the officer's belief that an emergency justified the search must be objectively reasonable. *State v. Othoudt*, 482 N.W.2d 218, 223 (Minn. 1992). The emergency-aid exception is justified if the police "have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property," and "[t]here must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." *Lemieux*, 726 N.W.2d at 788.[1]

[1] In *Brigham City*, the United States Supreme Court rejected a third factor involving the subjective motives of the officers. 547 U.S. at 404-05, 126 S. Ct. at 1948. In *Lemieux*, the Minnesota Supreme Court suggested that this factor may still be relevant under our state's jurisprudence. 726 N.W.2d at 790. However, if a police officer harbors a subjective motive for the warrantless search that corresponds to an objectively reasonable emergency, than this factor is satisfied. *Id.* Officer Hurst explained—and the district court believed—that at least one of his motives for searching the cell phone was to secure a phone number that could be used to find out if appellant's children were in danger.

The circumstances here justify the application of the emergency-aid exception. Officer Hurst was asked to search the cell phone by a fellow officer. It was unclear to Officer Hurst whether appellant was on the way to pick up his children or had recently called someone to pick up his children. As discussed earlier, Officer Hurst knew that it was possible that an armed suspect could be at large and he did not know where the children were located. Moreover, the record indicates that it was a very cold night and it was not known to Officer Hurst whether the children were safe from the elements.

Appellant argues that the state has failed to show that "actual children were in actual danger," but that argument misconstrues the analysis. Under appellant's tautological approach, Officer Hurst would be required to verify that appellant was on his way to pick up his children before he could search the cell phone to find out if appellant was on his way to pick up his children. Instead, our inquiry focuses on whether the police had reasonable grounds for believing an emergency was at hand with an immediate need for assistance protecting life or property. Given the still-unfolding facts, Officer Hurst had reasonable grounds for believing that appellant's children were in danger. And appellant's cell phone was a reasonable place to search for recent contacts related to the location and safety of the children.

Moreover, even if the district court erred in admitting the evidence, the error is considered harmless unless this court determines that "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994); *see also State v. Nelson*, 355 N.W.2d 134, 137 (Minn. 1984) ("The erroneous admission of evidence seized in violation of a [F]ourth

[A]mendment right is harmless when it is merely cumulative of other overwhelming evidence of guilt."). An erroneous admission of evidence by the district court does not merit reversal unless this court determines that the error was harmless beyond a reasonable doubt. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). "The error is harmless if the jury's verdict is surely unattributable to the error." *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) (quotations omitted). The state bears the burden of persuasion under the harmless-error analysis. *State v. Reed*, 737 N.W.2d 572, 583–84 (Minn. 2007).

Appellant unconvincingly argues that the evidence used to convict him would be insufficient were it not for the text messages uncovered during the warrantless search of the cell phone. According to appellant, the text messages and evidence that resulted from them were used to explain appellant's motive to shoot himself. But motive is not an element of either charge that appellant faced, and the state correctly notes that the jury heard significant evidence of appellant's guilt, unrelated to the text message. The jury heard from a medical examiner who testified that the bullet struck appellant at close-contact range, from neighbors who saw a single individual emerge from the woods, from a human tracker who saw a single set of tracks leading into and out of the woods, and the report of a crime-scene investigator who found fabric patterns consistent with the wound appellant suffered. Moreover, when appellant took the stand and was cross-examined by the prosecution, he appeared to change some of the details of his story, including whether the car he followed ran a red light and the number of people who were in the car. The

jury had ample evidence to convict appellant without the evidence obtained from his cell phone.

II. The state failed to present sufficient evidence to sustain appellant's conviction for reckless discharge of a firearm in a municipality.

Appellant next argues that the state presented insufficient evidence to sustain his conviction for reckless discharge of a firearm in a municipality. Specifically, appellant contends that the state failed to prove that he consciously disregarded a substantial and unjustifiable risk that his actions posed a risk of harm to the public.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, viewed in a 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). This 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). The verdict should not be disturbed 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 crime. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of a felony under Minn. Stat. § 609.66, subd. 1a(a)(3), which proscribes "recklessly discharg[ing] a firearm within a municipality." "[O]ne acts recklessly by creating a substantial and unjustifiable risk that one is aware of and disregards." *State v. Engle*, 743 N.W.2d 592, 595 (Minn. 2008). "Reckless" refers to the risk created by conduct as well as the potential consequences that flow from the conduct. *State v. Cole*, 542 N.W.2d 43, 52 (Minn. 1996). We are not persuaded that a jury could

reasonably conclude that appellant's act of shooting himself in the abdomen in the isolated woods of a country club exhibited a reckless disregard for the safety of others.

For appellant to reach the site where he shot himself, he had to walk at least 50 yards into the golf course and another 30 to 40 feet into the woods. He fired one shot into his abdomen with a gun configured to fire a single bullet at a time. The shot, when it exited appellant's back, was traveling in a westerly direction, away from the residential area. The state presented testimony that the rifle appellant used to shoot himself was high-powered and that the bullets had the potential to travel three blocks, but this testimony did not address the effect on the bullet's trajectory of first passing through appellant's body. The spent bullet was found a few feet away from where appellant shot himself.

The reckless-discharge statute does not criminalize every gunshot ever fired within a municipal boundary. It prohibits reckless discharge of a weapon. Under the circumstances here, there exists a *plausible* risk that someone could have been hit by the shot fired by appellant. But the reckless-discharge statute requires *substantial* risk of such harm. That type of risk is not present here. Furthermore, the weight of the risk apparently was not disregarded by appellant. He did not select an area where residences, or people, were visible downrange. He selected secluded woods, late at night, and a considerable distance from a residential area. And the shot was aimed away from those homes. Even if the jury believed all of the state's evidence, it was not justified in concluding that appellant's actions were criminally reckless. We therefore reverse his conviction of reckless discharge of a firearm in a municipality.

III. Appellant did not lack effective assistance of counsel.

Appellant has filed a pro se supplemental brief arguing that his conviction should be reversed because he suffered from ineffective assistance of counsel, thereby preventing him from convincing the jury that his version of events was true. To prevail on an assertion of ineffective assistance of counsel, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Judicial scrutiny of counsel's performance is highly deferential. *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 1035 (2000). "Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

We have carefully considered each of appellant's contentions and conclude that all of the conduct he complains of is conduct that fell squarely within his trial counsel's discretion. Appellant did not lack effective assistance of counsel.

Affirmed in part and reversed in part.