STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0222

State of Minnesota,
Respondent,

vs.

Roberto Franco,
Appellant.

Filed June 24, 2013
Affirmed
Peterson, Judge

Ramsey County District Court
File No. 62-CR-10-5482

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

John J. Choi, Ramsey County Attorney, David E. Miller, Kaarin Long, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

Scott Selmer, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Toussaint, 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

PETERSON, Judge

In this appeal from a conviction of possession of a firearm by an ineligible person, appellant argues that the district court (1) erred in upholding the validity of a warrant to search the residence where a controlled buy occurred, (2) erred in denying appellant's motion to compel disclosure of the confidential informant's identity, (3) materially misstated the law on constructive possession, and (4) erred in evidentiary rulings. Appellant also argues that he is entitled to reversal of his conviction because the state failed to preserve material evidence and because the evidence was insufficient to prove constructive possession. We affirm.

FACTS

In July 2011, Detective Shawn Scovill of the Dakota County Drug Task Force learned that Vincent Colunga was selling large quantities of methamphetamine. Using a confidential informant (CI), Scovill arranged three controlled buys of methamphetamine from Colunga.

The third controlled buy occurred at a residence located at 171 Annapolis Street East in St. Paul. Task-force detectives gave the CI money to buy the methamphetamine and conducted audio and visual surveillance of the entire transaction. The CI met with Colunga at a pre-arranged location, and Colunga instructed the CI to drive to 171 Annapolis Street. At the residence located there, a man later identified as Rafale Ybarra came to a side door and provided the methamphetamine to the CI.

Within 72 hours after the controlled buy, Scovill applied for and obtained a search warrant dated July 7, 2010, to search the residence at 171 Annapolis and the person of Ybarra. The search-warrant application states:

> Your affiant conducted an interview with the CI following the controlled buy. The CI stated that he/she has been in the residence at 171 Annapolis Street East, St. Paul MN 55107 on two previous occasions within the past four months. The CI stated he/she knew the owner of the residence as "RAFA." On one of these occasions the CI personally observed the owner of the residence remove methamphetamine from a pan located in the kitchen. The CI described the pan as a spaghetti boiling pot. The CI stated that the pan was full of methamphetamine and estimated the weight at approximately five pounds.
>
> Your affiant spoke with the St. Paul Police Department Narcotics Unit and provided them with the address of 171 Annapolis Street East. Agents of the St. Paul Narcotics Unit were able to identify Rafale Ybarra DOB/10-25-1966 as a possible match for the address and nickname.

The CI positively identified Ybarra from his driver's license photo.

Officers executed the search warrant on July 13, 2010. Several people were present in the home, including appellant Roberto Franco, who lived there. They stated that Ybarra lived next door. During execution of the search warrant, a detective found a .22-caliber revolver inside a pillow under a shelf in the basement. Following execution of the search warrant, Scovill interviewed appellant and Gilbert Castillo, who also lived at 171 Annapolis. Appellant admitted that the gun belonged to him, although he stated that he kept it outside in a car. Castillo did not say anything about the gun during his statement to Scovill.

Appellant was charged with being an ineligible person in possession of a firearm. The district court denied appellant's pretrial motions to suppress evidence discovered during the search and to compel disclosure of the CI's identity, and the case was tried to a jury.

Castillo testified at trial that during the interview with Scovill, in response to a question whether there was anything else in the house that Scovill should know about, he replied, "Yes, there's a gun downstairs. The gun is mine." Witnesses who were present during execution of the search warrant testified that they overheard Castillo tell a detective that the gun belonged to him.

The jury found appellant guilty as charged. This appeal followed sentencing. By special-term order, this court granted in part respondent's motion to strike appellant's brief and appendix, striking exhibit 14 and references to it from appellant's brief and appendix. Exhibit 14 is an affidavit documenting defense counsel's alleged conversation with a juror after trial and is not a part of the appellate record. *See* Minn. R. Civ. App. P. 110.01.

D E C I S I O N

I.

When reviewing whether a search warrant is supported by probable cause, we afford great deference to the district court's probable-cause determination. *State v. Rochefort,* 631 N.W.2d 802, 804 (Minn. 2001). Our only consideration is "whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed." *State v. Jenkins,* 782 N.W.2d 211, 222-23 (Minn. 2010) (quotation omitted).

There is a strong preference for searches conducted pursuant to a search warrant, and "doubtful or marginal cases should be largely determined by the deference to be accorded to warrants." *Rochefort*, 631 N.W.2d at 804.

Probable cause is to be determined under a "totality of the circumstances" test:

> The task of the issuing magistrate 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.

Jenkins, 782 N.W.2d at 223 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). When determining whether a search-warrant application establishes probable cause, the reviewing court "is restricted to consider[ing] only the information presented at the time of the application for the search warrant." *State v. Gabbert*, 411 N.W.2d 209, 212 (Minn. App. 1987) (quotation omitted).

Appellant argues that the search warrant was defective because the supporting affidavit contains internal inconsistencies and contradictions. In describing the controlled buy, Scovill stated that "the CI observed an *unknown* Hispanic male individual provide Colunga with an amount of suspected methamphetamine." (Emphasis added.) In describing the interview with the CI after the controlled buy, Scovill stated that the CI "knew the owner of the residence as 'RAFA'" and had once, during the previous four months, observed him "remove methamphetamine from a pan located in the kitchen." These statements are not contradictory but rather, considered together, indicate that the

CI did not know the individual's full name. When shown Ybarra's driver's license photo, the CI positively identified him.

Appellant also argues that the search warrant was defective because Ybarra lived next door to, not at, 171 Annapolis. To be valid, a search warrant must establish "a direct connection, or nexus, between the alleged crime and the particular place to be searched." *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998). "[I]nformation linking the crime to the place to be searched" is a relevant factor when determining whether a nexus exists. *Id.* Although the CI may have been mistaken about Ybarra owning the residence at 171 Annapolis, the search-warrant application established a nexus between the sale of methamphetamine and 171 Annapolis in that a controlled buy occurred there within three days before the search warrant was issued, and the CI saw Ybarra remove methamphetamine from a pan in the kitchen during the preceding four months.

Appellant argues that providing the address of the residence to be searched was insufficient to meet the constitutional requirement that the place to be searched must be particularly described. The purpose of the particularity requirement is to prevent general exploratory searches and to "minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate." 2 Wayne R. LaFave, *Search and Seizure* § 4.5, at 709 (5th ed. 2012). Nothing in the record indicates that the address was insufficient to positively identify the residence to be searched, and the residence was known to officers executing the warrant. No additional information was needed to satisfy the particularity requirement. *See State v. Gonzales*, 314 N.W.2d 825, 827 (Minn. 1982) (rejecting argument that search warrant was defective

when warrant and application contained incorrect address); *State v. Kessler*, 470 N.W.2d 536, 539 (Minn. App. 1991) (reversing order suppressing evidence when application and warrant listed house number incorrectly but officers executing warrant had been shown the premises by informant and searched correct premises).

Appellant argues that the district court erred by allowing Scovill to bolster the CI's credibility with testimony at the *Rasmussen* hearing instead of relying solely on the information in the search-warrant application. Even if allowing the testimony for purposes of bolstering credibility was error, the error was harmless because the search-warrant application contained information that established the CI's credibility. "An informant's reliability may be established by sufficient police corroboration of the information supplied, and corroboration of even minor details can lend credence to the informant's information where the police know the identity of the informant." *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998) (quotation omitted). The search-warrant application describes the officers' corroboration of the information that the CI provided about Colunga's physical description and address area and the identities, physical descriptions, and residence areas of three of Colunga's associates. This corroboration is sufficient to establish the CI's reliability. *See State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1990) (stating that police corroboration of defendant's phone number, location of defendant's residence, and fact that defendant's house had an attached garage was relevant to probable-cause determination); *State v. Holiday*, 749 N.W.2d 833, 841 (Minn. App. 2008) (stating that police corroboration of defendant's name, nickname, physical description, gang affiliation, and vehicle information lent credence to information

provided by CI and bolstered CI's reliability, noting that nickname and gang affiliation were facts that would generally be known only to someone familiar with defendant). The CI's participation in the controlled buy at 171 Annapolis also indicated reliability. *See State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004) (stating that, "in narcotics cases, 'controlled purchase' is a term of art that indicates reliability").

Appellant argues that the search-warrant application is vague as to when detectives began conducting video surveillance and who conducted the visual and audio surveillance. Although the application does not state the address where visual surveillance began, it shows that the officers maintained surveillance of the CI from the time of their initial contact until after the CI completed the controlled buy. It was not necessary to identify the officers who conducted surveillance because knowledge possessed by other detectives is imputed to Scovill. *See State v. Lemieux*, 726 N.W.2d 783, 789 (Minn. 2007) (stating that when evaluating propriety of an officer's search or seizure, "the officer who conducts the search [or seizure] is imputed with knowledge of all facts known by other officers involved in the investigation, as long as the officers have some degree of communication between them."); *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 559 (Minn. App. 2005) ("The collective knowledge of the police may provide the basis for an investigatory stop.").

Appellant argues that Scovill implied in the search-warrant application that officers used a recording device to monitor the controlled buy but never produced evidence that a recording existed. The application states that the officers maintained "constant surveillance" but does not refer to a recording. The fact that the controlled buy

was monitored does not necessarily mean that it was recorded, and nothing in the record supports appellant's contention that failure to produce a recording indicates deception by Scovill.

Appellant cites no authority to support his argument that the failure to recover the government-buy-fund money invalidates the search warrant, and we find the argument unpersuasive.

Appellant characterizes the search as a mistaken search of the wrong house and argues that, even if the search warrant was valid, police were required to stop the search upon learning that Ybarra lived next door. But, as already stated, Ybarra's ownership of or residence at 171 Annapolis was not the nexus between the crime and the place to be searched. The nexus was the fact that the crime of sale of methamphetamine had occurred at 171 Annapolis.

The judge who issued the search warrant had a substantial basis for determining that probable cause existed, and the district court did not err in determining that the search warrant was supported by probable cause.

II.

We review a district court's order regarding disclosure of a CI's identity for an abuse of discretion. *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008). A defendant who seeks disclosure must show that the need for disclosure outweighs the state's interest in protecting its sources. *Id.*

> Disclosure of an informant's identity in order to establish police perjury or recklessness in obtaining a search warrant is permitted when the defendant has sufficiently challenged the

> veracity of the affidavit of the applicant for the search warrant and disclosure is necessary to complete the evidentiary attack on the affidavit.

State v. Moore, 438 N.W.2d 101, 106 (Minn. 1989).

Appellant argues that "there did not exist a substantial basis for crediting the hearsay of the informant because the police did not corroborate the informant's hearsay information" or "substantiate the reliability of the informant by describing the history of the informant's reliability in the search warrant application." But, as already discussed, the search-warrant application contained information that established the CI's credibility, specifically, that the CI was known to police; officers corroborated the information provided by the CI about Colunga's physical description and address area and the identities, physical descriptions, and residence areas of three of Colunga's known associates; and the CI participated in the controlled buy at 171 Annapolis.

Appellant also objects to the CI's failure to describe the house with particularity. But officers observed the controlled buy as it occurred at 171 Annapolis. And the district court conducted an in camera interview of the CI, during which the CI positively identified the house in two photographs and gave a description of the house where the controlled buy occurred that was consistent with the description of the house located at 171 Annapolis.

Because appellant failed to sufficiently challenge the veracity of the affidavit supporting the search-warrant application, the district court did not abuse its discretion in denying appellant's motion to disclose the CI's identity.

III.

A district court has broad discretion in drafting jury instructions, but the instructions viewed as a whole must accurately state the law. *State v. Hooks*, 752 N.W.2d 79, 86 (Minn. App. 2008). The standard jury instruction on possession states: "A person possesses [a firearm] if it is on [his] person. A person also possesses a [firearm] if it was in a place under his exclusive control to which other people did not normally have access, or if the person knowingly exercised dominion and control over it." 10A *Minnesota Practice* CRIMJIG 32.42 (2006); *see also State v. Willis*, 320 N.W.2d 726, 728-29 (Minn. 1982) (applying constructive-possession doctrine to firearm-possession case).

The district court instructed the jury that, in addition to actual possession, a "person possesses a firearm if it was in a place under his exclusive control to which other people did not normally have access, or if found in a place to which others had access, he knowingly exercised dominion and control over it." In cases addressing the sufficiency of the evidence to prove constructive possession, the second part of the constructive-possession test has been stated as requiring a showing that, "if the police found [the firearm] in a place to which others had access, that there is a strong probability, inferable from the evidence, that the defendant was, *at the time*, consciously exercising dominion and control over it." *State v. Porter*, 674 N.W.2d 424, 429 (Minn. App. 2004) (emphasis added). Appellant argues that the district court erred by not including the phrase "at the time" in the jury instruction. But the district court's instruction was in accordance with the recommended jury instruction, and the court instructed the jury that an element of the

offense was that it took place on or about July 13, 2010. The district court's instruction on constructive possession accurately stated the law and was not an abuse of discretion.

IV.

Evidentiary rulings lie within the district court's discretion and will not be reversed absent an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Appellant argues that the district court erred by not allowing him to call as a witness the person who typed the rough draft of the transcript of Scovill's interview with appellant. But Scovill reviewed the transcript of the interview that was admitted into evidence at trial and testified that it accurately represented his interview with appellant. And the district court instructed the jury that the audiotape should control and that the transcript was provided only to assist them in listening to the audio recording.

Appellant also argues that the district court erred by not allowing him to call Colunga and Ybarra to testify about the controlled buy. But their testimony was not relevant to appellant's guilt or innocence on the firearm charge; it was relevant to the validity of the search warrant, and the validity of the search warrant was not an issue before the jury.

The district court did not err in excluding the testimony of the typist, Colunga, and Ybarra.

V.

Appellant argues that he is entitled to reversal of his conviction because police failed to preserve text messages generated during the course of their investigation of

Ybarra between July 7 and 16, 2010. The state's destruction of evidence can give rise to a due-process violation when the defendant shows that the evidence has apparent and material exculpatory value or is potentially useful and was destroyed by the state in bad faith. *State v. Hawkinson*, 829 N.W.2d 367, 372 (Minn. 2013). Exculpatory evidence is evidence that tends to negate or reduce guilt. Minn. R. Crim. P. 9.01, subd. 1(6).

Appellant did not request the contents of the text messages until November 3, 2010, almost four months after the search occurred and the complaint was filed. Scovill testified about a text message he received from the CI providing the 171 Annapolis address for the controlled buy. Because the location of the controlled buy was not relevant to appellant's guilt or innocence of the firearm charge, the text lacked exculpatory value, and appellant cites no evidence of other text messages. Even if the text was potentially useful, appellant has made no showing of bad faith by the state. Because appellant has failed to show that the requested evidence was exculpatory or was destroyed by the state in bad faith, there is no basis for this court to conclude that a due-process violation occurred.

VI.

In considering a claim of insufficient evidence, our review is limited to an analysis of the record to determine whether the evidence, viewed in a light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Hurd*, 763 N.W.2d 17, 26 (Minn. 2009). We 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 that the defendant was guilty of the charged

offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). And we assume that "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).

Appellant cites the stricter standard of review that applies to convictions based solely on circumstantial evidence. *See State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994) (stating that "conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence"). But appellant admitted to Scovill that the gun found during the search belonged to him. After Scovill asked appellant about methamphetamine and marijuana found during the search, the following exchange took place:

> Scovill: . . . There's a, there's a gun, a little twenty-two or something like that.
> Appellant: Yeah. And I was, I was the one who told where. I told you guys where it was just right up front. Hey you know what, I have a pistol in the car but I keep [it] out there. I don't steal nothin'. Even to this day, it took me a lot to have one in the house because of the kids. My kids, can't have a . . . pistol keep it in the house. How stupid would that be. There would be an accident. I can't do that, you know.
> Scovill: Alright, that pistol belongs to you though?
> Appellant: Yes.

Because appellant's admission is direct evidence, we do not apply the stricter standard that applies to convictions based entirely on circumstantial evidence. *See State v. Weber*, 272 Minn. 243, 254, 137 N.W.2d 527, 535 (1965) (stating that defendant's admissions constituted direct and not circumstantial evidence).

The fact that the gun was found in the house and not in the vehicle does not preclude a finding that appellant consciously exercised dominion and control over the

gun. *Cf. State v. LaBarre*, 292 Minn. 228, 231, 237, 195 N.W.2d 435, 438, 441 (1972) (evidence, including defendant's admissions, was sufficient to prove that defendant constructively possessed narcotics despite fact that defendant was not at residence occupied by several other people at time police found narcotics). The credibility of the testimony that Castillo told Scovill that the gun belonged to him was an issue for the jury to determine. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). We note that Castillo's trial testimony that he told Scovill that there was a gun downstairs and the gun was his varied significantly from the statement that Castillo gave Scovill during the investigation, in which he did not say anything about the gun. The evidence that the gun was found in the house where appellant lived and matched appellant's description of the gun, together with appellant's admission that the gun belonged to him, were sufficient to prove that appellant consciously exercised dominion and control over the gun.

Affirmed.