STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2318

State of Minnesota,
Appellant,

vs.

Kenneth James Klang,
Respondent.

Filed August 26, 2013
Affirmed
Kalitowski, Judge

Kandiyohi County District Court
File No. 34-CR-12-610

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

Jennifer K. Fischer, Kandiyohi County Attorney, Nathan C. Midolo, Assistant County Attorney, Willmar, Minnesota (for appellant)

Sharon E. Jacks, Minneapolis, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Cleary, Judge; and Willis, 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

KALITOWSKI, Judge

Appellant State of Minnesota challenges a pretrial order suppressing evidence and dismissing for lack of probable cause the complaint that charged respondent Kenneth James Klang with aiding an offender to avoid arrest-harbor/conceal in violation of Minn. Stat. § 609.495, subd. 1(a) (2010). The state argues (1) respondent does not have standing to challenge the admission of a third party's statement made in respondent's apartment; (2) the police did not exceed the scope of respondent's consent to search his apartment; and (3) respondent's knowledge of the specific predicate crime is not an element of the offense. We affirm.

FACTS

Willmar police officer Michael Holme was dispatched to respondent's apartment after the building manager reported that Shea Johnson, the subject of an outstanding felony arrest warrant, was present there in violation of a no-trespass order. When respondent answered his door, Officer Holme informed him that the building manager had seen Johnson enter the apartment and that there was a felony warrant out for Johnson's arrest. Respondent told Officer Holme that Johnson was not in the apartment and that Officer Holme could go in and look.

After entering the apartment, Officer Holme came across LeeAnn Behrens, whom he recognized, in the living room; he found no one in the bedrooms. The bathroom door was locked, and the shower was running, but no one answered when Officer Holme

knocked on the door. Respondent twice told Officer Holme that his brother, not Johnson, was in the bathroom and that his brother would be upset if they disturbed him.

After two additional officers entered the apartment, Officer Holme directed Behrens into an already-searched bedroom so he could speak with her away from respondent. He asked her whether Johnson was in the bathroom, and Behrens nodded her head to indicate yes.

Officer Holme returned to the living room area and, after he told respondent he knew Johnson was in the bathroom, respondent told Johnson to come out. Johnson came out and was arrested. Respondent was later charged by complaint with aiding an offender to avoid arrest-harbor/conceal. The district court dismissed the complaint, concluding that law enforcement exceeded the scope of respondent's consent to search his apartment.

D E C I S I O N

The state may appeal a probable-cause dismissal order based on a legal determination, provided the state shows clearly and unequivocally that (1) the district court's decision will have a critical impact on its ability to prosecute the case and (2) the district court's decision was error. Minn. R. Crim. P. 28.04, subd. 1(1); *State v. Barrett*, 694 N.W.2d 783, 787 (Minn. 2005). Dismissal of a charge satisfies the critical impact prong. *State v. Poupard*, 471 N.W.2d 686, 689 (Minn. App. 1991). Thus, we consider whether the state has shown that the district court clearly and unequivocally erred.

"[T]he test of probable cause is whether the evidence worthy of consideration . . . brings the charge against the prisoner within reasonable probability." *State v. Florence*,

306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976) (quotation omitted); *see also* Minn. R. Crim. P. 11.04, subd. 1(a) ("The court must determine whether probable cause exists to believe that an offense has been committed and that the defendant committed it."). We review de novo the district court's dismissal for lack of probable cause based on a legal determination. *State v. Linville*, 598 N.W.2d 1, 2 (Minn. App. 1999).

I.

We first address the threshold issue of standing. The state argues for the first time on appeal that respondent does not have standing to challenge the admission of Behrens's statement. An appellate court generally will not decide issues which were not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001) (holding that the state waived its right to raise standing on appeal by failing to raise it before the district court). We "may deviate from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Roby*, 547 N.W.2d at 357.

Fourth Amendment rights are personal rights. *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 966 (1969). Accordingly, to have Fourth Amendment standing an individual must allege that a search or seizure infringed upon his "own legitimate expectation of privacy." *State v. Reynolds*, 578 N.W.2d 762, 764 (Minn. App. 1998). Here, respondent's challenge is based on his expectation of privacy in his home and the limits of the consent he gave to the police to be present there. Thus, we conclude

that respondent has Fourth Amendment standing to challenge the questioning of Behrens and the admission of her statement.

II.

The state next argues that the district court erred when it determined that because law enforcement exceeded the scope of respondent's consent to search his apartment, the resulting evidence must be suppressed and the complaint dismissed. We disagree.

When reviewing "the legality of a search, we will not reverse the district court's findings unless they are clearly erroneous or contrary to law." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (quotation omitted). When the facts are not in dispute and the district court's decision is a question of law, we "independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

The United States and Minnesota Constitutions protect individuals from unreasonable searches and seizures by police. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search conducted without a warrant is unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). But a warrant is not required when valid and voluntary consent to search is given. *Othoudt*, 482 N.W.2d at 221-22.

A consensual search is limited in scope by the terms of its authorization. *Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401 (1980); *State v. Bunce*, 669 N.W.2d 394, 399 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003). The scope of consent is measured by an objective-reasonableness standard: "what would the typical reasonable person have understood by the exchange between the officer and the

[individual]?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803-04 (1991). A search that exceeds the scope of consent is unreasonable and violates the Fourth Amendment. *Bunce*, 669 N.W.2d at 399.

The district court concluded that law enforcement exceeded the scope of respondent's consent to search when Officer Holme took Behrens into an already-searched bedroom for the express purpose of questioning her away from respondent. The state argues that respondent's failure to limit or narrow his scope of consent indicates that the officer acted lawfully. We disagree.

The record indicates that respondent did limit his scope of consent; respondent told Officer Holme he could only "come in and look." Respondent did not give Officer Holme permission to remain in his apartment after looking and not finding Johnson. And when Officer Holme tried the bathroom door and discovered it was locked, respondent specifically told Officer Holme not to disturb the person in there, clearly limiting the officer's permissible conduct. Because a reasonable person could understand from the exchange between respondent and Officer Holme that once Officer Holme looked and did not see Johnson, respondent expected Officer Holme to leave, we cannot say the district court clearly and unequivocally erred.

The state also argues that respondent's failure to object when Officer Holme returned to the bedroom to question Behrens indicates that Officer Holme was acting with respondent's consent. In some circumstances, a failure to object may indicate tacit consent to an officer's conduct. *See State v. Powell*, 357 N.W.2d 146, 148-49 (Minn. App. 1984) (concluding that, after mother permitted officer to come in to speak with

Powell, mother's failure to object when officer went beyond the entryway and into the basement after seeing someone duck into a dark room indicated that officer acted within the scope of mother's consent), *review denied* (Minn. Jan. 15, 1985); *United States v. Gordon*, 173 F.3d 761, 764, 766 (10th Cir. 1999) (noting that Gordon's failure to object to a search of a padlocked bag after he gave police the key indicated he consented to the search). But a failure to object is not automatically proof of consent. *State v. Doren*, 654 N.W.2d 137, 142 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003). Here, we cannot say it was clear and unequivocal error for the district court to conclude that respondent's failure to protest when Officer Holme took Behrens from the living room to a bedroom to question her away from respondent did not indicate that respondent consented to Officer Holme's action.

Finally, the state argues that Officer Holme's conduct was permissible as noncustodial on-site questioning. But in making this argument, the state fails to address the key factual circumstance here: Officer Holme conducted the questioning in an area of the apartment that he had searched but returned to for the express purpose of questioning Behrens privately. Thus, we cannot say the district court clearly erred in determining that Officer Holme's questioning was not incidental to the search, but rather was a separate action undertaken after he completed a full search of the apartment.

We conclude that the state has not met its burden to prove clearly and unequivocally that the district court erred when it found that law enforcement acted outside of respondent's consent and suppressed the resulting evidence.

III.

The state further argues that the district court erred in its alternative basis for suppressing the evidence when it interpreted Minn. Stat. § 609.495, subd. 1(a), as requiring the state to show that respondent had knowledge of the specific predicate crime committed by Johnson. We agree.

Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). Under Minn. Stat. § 609.495, subd. 1(a),

> [w]hoever harbors, conceals, aids, or assists by word or acts another whom the actor knows or has reason to know has committed a crime . . . with intent that such offender shall avoid or escape from arrest, trial, conviction, or punishment, may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than $5,000, or both if the crime committed or attempted by the other person is a felony.

The goal of statutory interpretation "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). We "must give effect to a statute's plain meaning when the words are unambiguous." *Gerding v. Comm'r of Pub. Safety*, 628 N.W.2d 197, 200 (Minn. App. 2001) (citing *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986), *review denied* (Minn. Aug. 15, 2001)).

The words of Minn. Stat. § 609.495, subd. 1(a), are unambiguous. A person is guilty under the statute if he aids an offender whom he "knows or has reason to know has committed a crime," with the intent that the offender "avoid or escape from arrest . . . or punishment," and "the crime committed or attempted by the other person is a felony."

Minn. Stat. § 609.495, subd. 1(a). A reading of the statute's plain language does not indicate that a defendant must know what underlying crime the offender committed or whether it was a felony.

In *State v. Hager*, 727 N.W.2d 668, 673-75 (Minn. App. 2007), we concluded that a defendant's right to a unanimous verdict requires that the *jury* identify the specific criminal act committed by the aided offender. But *Hager* does not stand for the proposition that a defendant charged with harboring an offender must have knowledge of the offender's specific predicate criminal act. Thus, we conclude that the district court clearly and unequivocally erred when it cited *Hager* and determined that the state was required to show that respondent knew what Johnson's specific underlying offense was.

Finally, respondent offers several alternative grounds on which to uphold the district court's dismissal. But because we conclude that the district court did not clearly and unequivocally err by dismissing for lack of probable cause after suppressing Behrens's statement and the subsequent discovery of Johnson, we need not consider respondent's proffered alternatives.

Affirmed.