STATE OF MINNESOTA
IN COURT OF APPEALS
A11-456

State of Minnesota,
Respondent,

vs.

Cary Francis Schmidt,
Appellant.

Filed April 16, 2012
Affirmed in part, vacated in part, and remanded
Stoneburner, Judge
Klaphake, Dissenting

Ramsey County District Court
File No. 62CR0913167

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

John J. Choi, Ramsey County Attorney, David P. Pinto, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and

Cleary, Judge.

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

STONEBURNER, Judge

Appellant challenges his convictions of first- and second-degree assault. Appellant argues that the district court committed reversible error by concluding that the warrant to search his home was valid and denying his motion to suppress the evidence seized. Appellant also argues, and the state agrees, that because second-degree assault is a lesser-included offense of first-degree assault, the district court erred by entering convictions on both charges. Because the district court did not err in denying appellant's motion to suppress but erred in sentencing appellant to both first- and second-degree assault for the same conduct, we affirm the conviction of first-degree assault, but we reverse and remand for vacation of the conviction of second-degree assault.

FACTS

At approximately 9:00 p.m. on July 4, 2009, 14-year-old G.J.F. was shot in the neck while he was outside in his residential neighborhood with other people lighting fireworks near the intersection of Belvedere Street and Oakdale Avenue. He was transported to the hospital in critical condition.

Sgts. Bryant Gaden and James Gray, investigators with the St. Paul Police homicide unit, took control of the scene of the shooting. Because no one at the scene was able to provide any useful information regarding a suspect, the type of weapon used, or the direction from which the shot came, they began to canvass the neighborhood, asking residents if anyone heard or saw anything relevant to the shooting. They were concerned that another shooting might occur or that there might be other victims in the area.

Gaden spoke with M.G., whose residence was east of the intersection, on the odd-numbered side of the street. M.G. had just returned from an errand but told Gaden that just before he left on the errand he saw a man he knew as his neighbor from across the street—at 216 Belvedere—walking into that residence carrying a brown rifle with a scope. Gray, meanwhile, spoke with P.P., whose residence was at 245 Belvedere. P.P. reported that his uncle, whom he did not identify by name, had told him that several hours earlier he had seen a white male pointing a rifle up in the air on the even side of Belvedere.

Gaden, Gray, and other officers approached the residence at 216 Belvedere approximately two hours after the shooting. At the suppression hearing, Gaden testified that there were very high shrubs and bushes, some over five or six feet high, in and around the property, making it hard to see around the property. Gaden knocked on the front door of 216 Belvedere, noting that the structure was a vertical duplex. After the officers had knocked and yelled several times, a man yelled down from the upper level to say that he could not come down because he was in a wheelchair. It was later determined that the upstairs unit is totally separate from the lower level and that the occupant, who is wheelchair-bound, had been at home throughout the evening.

While Gaden was at the front door, Gray walked around the side of the house toward the back. Gray walked up, right next to a window, and looked in. He saw a large shotgun and a box of small-caliber ammunition on a bed. There was light in the room from a closet, and the district court found that Gray was able to see these items in plain view from the light in the room, although Schmidt asserts on appeal, without citation to

the record, that it is "undisputed" that Gray shined a flashlight into the widow. Because the ammunition was not for the shotgun and the officers had learned that G.J.F. had been shot with a small-caliber bullet, Gray was concerned that there was another gun in or around the home. He continued toward the garage located behind the house. He shined a flashlight through a garage window and saw a man, later identified as appellant Cary Francis Schmidt, lying face down on a couch.

Gaden joined Gray at the garage. Gray flashed his light into the garage window, yelled "police," and kicked at the door. Schmidt did not respond, so the officers forced their way into the garage. When Schmidt did not respond to the officers' commands, they grabbed him and moved him to the ground. They determined that he was not visibly injured and was not armed. He appeared to be intoxicated.

Schmidt did not respond to questions but indicated he was the homeowner. He would not confirm whether anyone else was inside the house. Gaden, concerned that there might be someone in the house injured or with a weapon, asked for permission to enter the house. Schmidt said there was a key on the garage wall, but officers could not locate it. They told Schmidt that they would have to enter by kicking in the door. Schmidt asked them to cut a screen instead, so Gaden entered the house through a window and opened the front door. Gaden explained to the officers who entered the house that they were only in the house to make sure there was no one injured inside and that the house was safe. The district court found that the search lasted approximately four minutes. The canine unit detected human odor from a closet. Officers opened the closet door. No one was inside the closet, but the officers observed several weapons, including

a rifle. After confirming that no injured or armed person was in the house, the officers exited and waited outside the house for a search warrant.

Gaden returned to police headquarters to prepare a search warrant application and supporting affidavit based on his recollection of conversations and events. Gaden's affidavit supporting the warrant application includes the facts stated above and the fact that the bullet from the shooting was a .22-caliber bullet. The search warrant was granted. During the search, a .22-caliber rifle, later connected to the shooting, was seized from the closet.

Schmidt was ultimately charged with one count of first-degree assault and one count of second-degree assault. The district court denied his motion to suppress evidence that was seized in the search and, after a bench trial, found Schmidt guilty of both counts. The district court entered convictions on both counts and sentenced Schmidt to 86 months in prison for first-degree assault. On appeal, Schmidt challenges the district court's denial of the motion to suppress, arguing that the warrant was not valid, and asserts that the district court erred by entering convictions on both counts.

D E C I S I O N

I. Standard of Review

In reviewing pretrial suppression orders, this court independently reviews the facts and determines, as a matter of law, whether the district court erred by failing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). This court accepts the district court's underlying factual determinations unless they are clearly erroneous. *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007). "Clearly erroneous means manifestly

contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Novack v. Nw. Airlines, Inc.*, 525 N.W.2d 592, 597 (Minn. App. 1995) (quotation omitted).

Schmidt argues that the district court erred by denying his motion to suppress because the police used information obtained in an illegal search and made material misrepresentations in the warrant application, rendering the search warrant invalid.

II. Validity of warrant

A. Warrantless searches of garage and home

1. Looking through the bedroom window

The United States Constitution and Minnesota Constitution prohibit unreasonable searches and seizures and require that search warrants be supported by probable cause. U.S. Const. amends. IV, XIV, § 1; Minn. Const. art. I, § 10. "This constitutional protection extends to all places where an individual has a reasonable expectation of privacy, including the home and its curtilage." *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 746 (Minn. App. 2004). "A dwelling's curtilage is generally the area so immediately and intimately connected to the home that within it, a resident's reasonable expectation of privacy should be respected." *Garza v. State*, 632 N.W.2d 633, 639 (Minn. 2001). The Minnesota Supreme Court has held that the curtilage of a home includes the garage. *State v. Crea*, 305 Minn. 342, 345, 233 N.W.2d 736, 739 (1975). Areas of curtilage which are impliedly open to public use, such as driveways and porches, may be searched without a warrant because they do not offer a person a reasonable expectation of privacy. *Id.* "What a person knowingly exposes to the public,

even in his own home…, is not subject to Fourth Amendment protection." *State v. Carter*, 569 N.W.2d 169, 177 (Minn. 1997) (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967), *rev'd on other grounds by Minnesota v. Carter*, 525 U.S. 1301, 119 S. Ct. 469 (1998).

"Pursuant to the exclusionary rule, evidence recovered during an unlawful search may not be introduced at trial." *State v. Martinez*, 579 N.W.2d 144, 148 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). "Warrantless searches are presumptively unreasonable unless one of a few specifically established and well-delineated exceptions applies." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (quotations omitted).

The district court concluded that Gray saw a shotgun and a box of small-caliber ammunition in plain view as he walked past an unobstructed window to a lighted room. The district court found that the area in which Gray was walking to reach the backyard was "impliedly open." The plain-view exception to the warrant requirement contemplates that the police are lawfully in a place that produces a plain view of an incriminating article. *Licari*, 659 N.W.2d at 254.

Schmidt argues that the plain-view exception cannot apply because Gray used a flashlight to see the shotgun and ammunition box, thereby looking into an area that was not impliedly open to the public and in which Schmidt had an expectation of privacy. But the district court found that the light in the room allowed Gray to see the shotgun and ammunition box through the window, and we cannot find support in the record for Schmidt's assertion that Gray used a flashlight.

Based on the record from the suppression hearing, however, Gray stepped off of the driveway that led to the garage and appears to have been in the protected curtilage when he peered into the bedroom window. Four factors can be used to determine the extent of a home's curtilage: (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." *State v. Krech*, 403 N.W.2d 634, 636-37 (Minn.1987) (quotation omitted).

Photographs of the house introduced at the suppression hearing and Gray's testimony show that Gray would have had to step off of a driveway onto grass and go between bushes to be right next to the window to peer through it. And there is no evidence that anyone walking on the driveway would have been able to see either the shotgun or the box of ammunition.

Citing *U.S. v. Weston*, 443 F.3d 661, 667 (8th Cir. 2006), the state argues that the initial entry into the yard was lawful because the intrusion "was limited and was reasonably necessary to further a legitimate law enforcement purpose." But the supreme court has rejected the argument that reasonable suspicion of criminal activity and limited intrusion are enough to justify a warrantless search of a home or its curtilage. *See Carter*, 569 N.W.2d at 178 (stating that *Katz* made clear that "conduct that would constitute an illegal search does not become something less merely because the police had reasonable suspicion and embarked on a search of limited intrusiveness. As such, we once again reject the notion that a little bit of information justifies a little bit of search.").

Nonetheless, we conclude that Gray's conduct was justified by probable cause and exigent circumstances, despite Schmidt's argument to the contrary. *See State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (holding that a warrantless search can be justified by probable cause and exigent circumstances). And this court may affirm a district court decision on grounds other than those relied on by that court. *See generally Dukes v. State*, 718 N.W. 2d 920, 921-22 (Minn. 2006).

Probable cause to search exists if there is a fair probability that, based on the totality of the circumstances, the object of the search will be found in a particular place. *State v. Carter*, 697 N.W.2d 199, 204-205 (Minn. 2005). Exigent circumstances exist based on two tests: the presence of a single factor or the "totality of the circumstances." *State v. Shriner*, 751 N.W.2d 538, 541-42 (Minn. 2008). Under the single-factor test, "one fact alone" may create exigent circumstances justifying a warrantless search. *Id.* at 542 (emphasis omitted). "The following single factors, standing alone, are considered to support exigent circumstances: (1) hot pursuit of a fleeing felon; (2) imminent destruction or removal of evidence; (3) protection of human life; (4) likely escape of the suspect; and (5) fire." *State v. Lussier*, 770 N.W.2d 581, 587 (Minn. App. 2009); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99, 87 S. Ct. 1642, 1646 (1967). We conclude that the totality of the circumstances in this case and the protection of human life justified Gray's conduct even if, by stepping off of the driveway and going up next to the window, caused him to enter the curtilage.

2. Looking into and entering the garage

The district court determined that Gray's warrantless search of the garage by looking into the garage with a flashlight and entering the garage was not unlawful because probable cause and exigent circumstances existed, and, alternatively, the emergency-aid exception applied. Schmidt does not address the emergency-aid exception on appeal. We conclude that the district court correctly determined that probable cause and exigent circumstances justified the intrusion into Schmidt's garage. The same circumstances that justified peering into the house justified peering into the garage, and once Gray looked into the garage, Schmidt's unresponsive body in the garage added to the exigency. Because we conclude that the search of the garage was justified, we do not reach the alternative emergency-aid exception except to note that, once the officers observed an unresponsive person, it appears that this exception also justified entry into the garage.

3. Entry into Schmidt's home

The district court found that Schmidt did not consent to the warrantless entry into his home, but it concluded that entry was justified by probable cause and protection-of-life exigent circumstances. We agree.

A warrantless search must be "strictly circumscribed by the exigencies which justify its initiation[.]" *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 2413 (1978) (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26, 88 S. Ct. 1868, 1882 (1968)). Any search of a residence following a warrantless entry must be "limited by the type of emergency involved. It cannot be used as the occasion for a general voyage of discovery unrelated

to the purpose of the entry." *Lemieux*, 726 N.W.2d at 788. Here the officer's search of the house lasted for approximately four minutes and was limited to a determination that the upper-level, wheelchair-bound resident was safe and that no one else was in the house, injured, or carrying a weapon. The officers did not remove anything from the house during this limited search and properly waited for a search warrant. Because the unwarranted searches were all justified by exceptions to the warrant requirement, the facts discovered in those searches were properly included in the warrant application.

B. Misstatements in warrant application

Schmidt argues that material misrepresentations in the warrant application make the warrant invalid. Specifically, Schmidt asserts that there were material misrepresentations in Gaden's affidavit supporting the application because the affidavit (1) contained witness statements that were not included in his subsequent police report; (2) did not state that P.P.'s uncle's information about seeing Schmidt with a rifle related to hours before the shooting and did not specify the location; (3) failed to give a timeframe for what witnesses said they saw; and (4) did not reveal that officers had threatened to kick down Schmidt's front door.

A warrant application must "provide the magistrate with sufficient *factual* information regarding the circumstances which the affiant believes establish probable cause." *State v. Doyle*, 336 N.W.2d 247, 249 (Minn. 1983) (quotations omitted) (emphasis in original). If the district court is to perform its "neutral and detached" function and not serve merely as a rubber stamp for the police, then it "must be provided with more than the mere opinions, conclusions or beliefs of the affiant." *Id.* at 50. "If it

is established that the affiant deliberately falsified or recklessly disregarded the truth in his affidavit, then the [district] court should set aside the false statements (or supply the omissions) and decide whether the affidavit still establishes probable cause." *Id.*

The determination of the validity of a warrant that contains misstatements or misrepresentation of facts is based on whether (1) the misrepresented or misstated facts were material to establishing probable cause and (2) the facts were deliberately or recklessly misrepresented or misstated in the affidavit. *State v. Causey*, 257 N.W.2d 288, 292-93 (Minn. 1977). In a case involving a challenge to a warrant based on facts omitted from a warrant application, the test is whether, once a defendant has established reckless or intentional omission of facts, the district court should supply the omissions and decide whether the affidavit established probable cause. *Doyle*, 336 N.W.2d at 250. "Determinations of credibility of witnesses at the omnibus hearing are left to the [district] court, and those determinations will not be overturned unless clearly erroneous." *State v. Smith*, 448 N.W.2d 550, 555 (Minn. App. 1989), *review denied* (Minn. Dec. 29, 1989).

The district court found that Schmidt presented no evidence to show that the warrant affidavit was the "product of deliberate falsehood or reckless disregard for the truth." The record supports this finding, and we conclude that none of the challenged misstatements were sufficiently material to preclude probable cause and that none of the alleged omissions affected the existence of probable cause.

When reviewing a district court's probable-cause determination in issuing a search warrant, this court grants the district court "great deference" and limits its review to considering "whether the issuing judge had a substantial basis for concluding that

probable cause existed." *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). This deferential standard of review supports the strong constitutional preference for searches conducted pursuant to a warrant. *Id.* at 805. "A search warrant is supported by probable cause if there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Fort*, 768 N.W.2d 335, 342 (Minn. 2009). Minnesota courts afford great deference to the issuing judge's determination of probable cause. *Rochefort*, 631 N.W.2d at 805.

"[I]n examining the issuing judge's basis for finding probable cause, we look only to information presented in the affidavit and not to information that the police possessed but did not present in the affidavit . . . ." *Carter*, 697 N.W.2d at 205. "Elements bearing on this probability include information linking the crime to the place to be searched and the freshness of the information." *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998). We examine the totality of the circumstances to determine whether there were "specific facts to establish a direct connection between the alleged criminal activity and the site to be searched." *Carter*, 697 N.W.2d at 205 (quotation omitted).

Based on the totality of the circumstances in this case, the warrant application reflected a fair probability that evidence of a crime would be located at Schmidt's residence. The warrant application was not based solely on the information gleaned from the warrantless searches. The application included information from witnesses near the scene of the shooting, and information from two separate and named witnesses regarding a weapon and the identity, place of residence, and behavior of Schmidt. Because the warrantless searches were supported by probable cause and exigent circumstances, the

police lawfully gathered further evidence in support of a warrant, including the view of the shotgun and ammunition on the bed, the inability to locate the lower-level occupant of the house, the unresponsiveness of Schmidt after finding him prone on a couch in the garage, and a small-caliber shotgun in a closet in the house. The issuing judge had a substantial basis, based on the facts provided in the affidavit, for concluding that probable cause existed. The district court did not err by concluding that the warrant was supported by probable cause.

III. Sentencing

Schmidt argues, and the state agrees, that the district court erred by entering convictions on both first- and second-degree assault for the same conduct. We agree. "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2010). We vacate the conviction of second-degree assault and remand for correction of the record to reflect only conviction of first-degree assault.

IV. Pro Se Arguments

Schmidt's pro se supplemental brief on appeal is comprised exclusively of his version of the events to support his argument that the district court erred by failing to suppress evidence that was a result of a "false application for a search warrant" and to dispute the veracity of the officer's testimony and evidence in general. The brief does not include legal argument. Issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). And "[a]n assignment of error in a brief based on 'mere assertion' and not supported by argument or

authority is waived unless prejudicial error is obvious on mere inspection." *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006). There is no obvious prejudicial error in this case, and we decline to further address Schmidt's pro se argument.

Affirmed in part, vacated in part, and remanded.

KLAPHAKE, Judge

I respectfully dissent. A bedrock principle of both the United States and Minnesota Constitutions is that warrantless searches are presumptively unreasonable. U.S. Const. amend. IV; Minn. Const. art. I, § 10. This principle is subject to a limited number of exceptions, including that of exigent circumstances. *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008).

The term "exigent circumstances" implies urgency, a situation requiring immediate intervention. *See Black's Law Dictionary* 655 (9th ed. 2009) ("requiring immediate action or aid"). Our courts do not lightly set aside the constitutional mandate for a search warrant; a fleeing felon, imminent destruction of evidence, protection of human life, a suspect's escape, or fire are the types of exigent circumstances that justify a warrantless search or seizure. *Shriner*, 751 N.W.2d at 542. In addition to these single factors, a court may consider whether, in the totality of the circumstances, an exigent situation exists that permits police to dispense with the warrant requirement. *Id.*

Three police searches are subject to our scrutiny under the exigent-circumstances doctrine. As to the first, I will reluctantly concede that the officers' intrusion into the curtilage of appellant's residence in order to peer into a window may have been justified by a totality-of-circumstances exigency: a shooting resulting in injury, reports of a resident of the home carrying a rifle, and concern for human life when there was no answer at the residence. Likewise, these same circumstances may have justified the officers' second action of peering into the garage, where they discovered appellant in a semi-conscious state. But the third, the forcible entry into appellant's home, cannot be

justified by exigent circumstances: at that time, more than two hours had passed since the shooting, and police had determined that the resident of the other half of the duplex was unharmed and apparently unalarmed; appellant, the homeowner, was alive, uninjured and heavily intoxicated; the residence was locked with no visible signs of illicit entry; and there were no signs of injury or violence.

A warrantless search cannot be based on inchoate fears of what, in an officer's belief, could have happened. Even under exigent circumstances, a court must question "whether there is evidence that would lead a prudent and reasonable official to see the need to act. The officer must be able to point to specific and articulable facts which, taken with rational inferences from those facts, reasonably warrant that intrusion." 3 Wayne R. LaFave, *Search and Seizure* § 6.6(a), at 452-53 (4th ed. 2004) (quotations omitted). While admirable, a mere concern that someone else could be injured, without any specific and articulable facts to demonstrate an urgent concern, is not sufficient to support a warrantless search. I would reverse.