This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1334

State of Minnesota,
Respondent,

vs.

Lanny David Green,
Appellant.

Filed November 4, 2008
Affirmed
Connolly, Judge

Cottonwood County District Court
File No. K8-04-400

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

L. Douglas Storey, Cottonwood County Attorney, 1044 Third Avenue, Windom, MN 56101 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

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

CONNOLLY, Judge

Appellant was convicted of three felony counts of second-degree criminal sexual conduct and one felony count of first-degree criminal sexual conduct. He argues that there was not probable cause for the district court to authorize the search warrants that led to his arrest. He further challenges the sufficiency of the evidence for his first-degree criminal sexual conduct conviction. Because the search warrants were supported by probable cause and there was sufficient evidence to sustain his conviction, we affirm.

FACTS

In August 2004, suspicions were raised about inappropriate sexual contact between appellant and a four-year old girl, E.Q.[1] Another child, K.P., was present when the contact took place between appellant and E.Q. In an effort to obtain information, Watonwan County Human Services Social Worker Charlayne Larson interviewed K.P.

Larson interviewed six-year old K.P. on September 2, 2004, at the sheriff's office in Watonwan County. Larson was not aware of any abuse suffered by K.P. when the interview began. Larson's protocol during an interview was to develop a rapport with the child, go through an anatomy identification, followed by a touching inquiry, and close with asking the child who they would feel safe telling about any abuse that may happen in the future.

---

[1] Appellant was convicted in a separate jury trial of first and second-degree criminal sexual conduct as to E.Q. That conviction was affirmed by this court and by the Minnesota Supreme Court. *State v. Green*, 747 N.W.2d 912 (Minn. 2008), *aff'g* No. A06-218 (Minn. App. June 19, 2007).

Larson established K.P.'s names for different body parts by using a diagram. K.P. described the vaginal area, both on the diagram and on an anatomically correct doll, as her "private" or "bad private." During the interview, K.P. told Larson that appellant had touched her privates. Larson asked K.P. to demonstrate where appellant had touched her on the anatomically correct doll. K.P. pointed to the vaginal area and responded as follows:

> LARSON: Can you show me with this doll just where [appellant] touched you? On your clothes?
> K.P.: Like this.
> LARSON: Like where?
> K.P.: Right here.
> LARSON: Did he touch you here, or did he touch inside there?
> K.P.: Inside.
> LARSON: Did it hurt, or did it not hurt? What?
> K.P.: It did hurt.

K.P. confirmed the penetration a second time during the interview:

> LARSON: Okay. How come you don't like [appellant]?
> K.P.: Because he touches in my bad privates.
> LARSON: Oh, because he touches you in the bad privates?
> K.P.: Uh-huh. (affirmative)
> LARSON: And you think—this is what you told me the bad privates were here. Okay? Did he touch you here, or did he touch you inside there?
> K.P.: Inside.

The interview concluded with K.P. stating that she could tell her mother, Uncle Buck, or appellant's mother if she was improperly touched again.

On September 3, 2004, Watonwan County Sheriff's Office Investigator Robert Young applied for a search warrant of appellant's premises. That search warrant was issued and the search conducted on September 4, 2004. Officer Young found a disk in

the drawer of one of appellant's computer desks that was labeled "keep out" in appellant's handwriting. That disk contained pictures of naked children, including one of K.P. naked in appellant's bathroom, showing her vaginal area.[2]

On October 20, 2004, K.P. was interviewed by a Colleen Brazil, a forensic interviewer from a medical evaluation center established to evaluate children for the possibility of physical or sexual abuse. K.P. told Brazil that appellant touched her with his fingers, underneath her underpants but on the outside of her private parts. At trial, Brazil testified that K.P.'s prior statement to Larson about the finger going on the inside of her vaginal area and K.P's statement to her about the finger staying on the outside were not necessarily inconsistent. Brazil stated that a young child may have difficulty understanding the difference between inside and outside. Furthermore, when abuse occurs on more than one occasion, it may be difficult for the child to separate the incidents and know which incident the interviewer is inquiring about.

Appellant was charged with multiple counts of criminal sexual conduct involving K.P. and another victim, R.O., and possession of child pornography. Approximately four months before trial, the state dismissed all of the child pornography counts. At the time of trial, appellant was facing three counts of criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subd. 1(a) (2004), six counts of criminal sexual conduct in the second degree in violation of Minn. Stat. § 609.343, subds. 1(a), (b) (2004), one count of criminal sexual conduct in the fourth degree in violation of Minn.

---

[2] Appellant brought a motion to suppress all evidence obtained as a result of the September 3, 2004, and October 8, 2004, search warrants. The district court held an omnibus hearing and denied the motion to suppress.

Stat. § 609.345, subd. 1(b) (2004), and one count of criminal sexual conduct in the fifth degree in violation of Minn. Stat. § 609.3451, subd. 1(1) (2004). Appellant waived his right to a jury trial.

At a bench trial, over two years after the interviews, K.P. testified that she could not remember if appellant ever touched her somewhere she did not like and did not remember talking to people about that subject in the past. K.P. did not respond to several questions concerning her private parts at the trial.

R.O., who was 15 years old at the time of trial, testified that she used to stay at appellant's house when she was 12 or 13 years old to help him take care of K.P. On one occasion, appellant rubbed R.O.'s buttocks with his hand. She told him to stop. R.O. further testified that one night she woke up and appellant had his hand in her pants.

Appellant testified on his own behalf at trial. Appellant stated that he never put his finger inside of K.P.

The district court found appellant guilty of two counts of second-degree criminal sexual conduct involving R.O., one count of first-degree criminal sexual conduct involving K.P., and one count of second-degree criminal sexual conduct involving K.P.[3] The district court sentenced appellant to the presumptive guidelines sentence of 144 months for the first-degree criminal sexual conduct conviction and to lesser concurrent sentences on the remaining second-degree criminal sexual conduct convictions. This appeal follows.

[3] All other counts were dismissed by the state.

D E C I S I O N

I. There was a substantial basis for the district court to conclude that probable cause existed to issue the search warrants.

Appellant argues that the first search-warrant application failed to establish probable cause to search appellant's computers. Furthermore, appellant contends that because the application for the second search warrant relied upon evidence seized during execution of the first search warrant, the district court erred by not suppressing all evidence obtained from appellant's computers as a result of the search warrants.

We review the district court's determination of probable cause to issue a search warrant to ensure that there was a substantial basis to conclude that probable cause existed. *State v. Harris*, 589 N.W.2d 782, 787-88 (Minn. 1999). A substantial basis in this context means a "fair probability," given the totality of the circumstances, "that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted). This court accords great deference to a district court's determination that probable cause exists to issue a search warrant. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). In marginal or close cases, the preference is for finding probable cause. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985).

Officer Young submitted a detailed seven-page application and supporting affidavit for the first search warrant. This application and affidavit carefully stated the facts Officer Young knew concerning the allegations of criminal sexual conduct against appellant and his reasons for believing that he would find evidence relating to the known

victims and other evidence of child pornography in appellant's house. Office Young stated that, based on his training and experience, he was "aware that those who get sexual gratification from . . . interacting with minors generally maintain photographs, images, videos, and/or magazines of such persons. Further, they consider those items as prized and valued possessions. Generally they may be hidden but they are rarely destroyed, discarded or thrown away."

In its order denying appellant's motion to suppress the evidence obtained as a result of the two searches, the district court focused on the nexus between the alleged crime and the location that was the subject of the search warrant[4] and Officer Young's training and experience.[5] The district court concluded that a sufficient nexus existed between the alleged criminal sexual conduct and the nature of the items sought at appellant's residence. The district court based its conclusion on the fact that the judge who issued the search warrant properly relied on Officer Young's training and experience when issuing the search warrants. The district court summarized its analysis:

> Based on the totality of the circumstances, the Court finds that there were facts that [the issuing judge] could have relied on, in addition to Officer Young's training and experience, that support [appellant] having images of sexual assault of E.Q. and K.P. on his computer and/or other items listed in the warrant. Even though these pieces of information may not be substantial alone to support a finding of probable cause to

---

[4] The Minnesota Supreme Court requires a sufficient nexus between the alleged crime and the location that is the subject of a requested search warrant. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998).

[5] "[T]he Minnesota Supreme Court [has] held that a police affiant's training and experience can be a proper factor to consider in making a probable-cause determination." *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

> search [appellant's] home computer, camera equipment, and other effects, these pieces of information could have combined to create sufficient probable cause.

Lastly, the district court determined that because the first search warrant was supported by probable cause, evidence obtained under the second search warrant, also supported by probable cause, was not fruit of an invalid search. Based on the district court's analysis, we conclude that there was a substantial basis to find that probable cause existed to issue both search warrants.

There was a sufficient nexus between the alleged criminal sexual conduct and the search warrant because it was appropriate for the issuing judge to consider Officer Young's training and experience when determining if probable cause existed. *See State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004) ("[T]he Minnesota Supreme Court [has] held that a police affiant's training and experience can be a proper factor to consider in making a probable-cause determination."), *review denied* (Minn. Apr. 20, 2004). Based on his experience and training, spanning over 25 years, Officer Young believed that it was likely that an individual accused of committing improper sexual acts with children would have visual evidence of those acts, or similar occurrences, on a computer, camera, or other device. The facts supporting this conclusion included appellant's roommate stating that appellant spent a great deal of time on his computer communicating with several unknown young girls between the ages of 10 and 15 years old, K.P.'s statement that appellant took pictures of her at bedtime, and the knowledge that individuals generally conceal improper sexual conduct and child pornography within their homes. This information, along with his training and experience, made it apparent

to Officer Young that it was likely that evidence relating to the improper sexual conduct with E.Q. or K.P. "and/or other previously unknown young persons/juveniles/victims" would be found in appellant's home. We agree. The totality of the circumstances indicated that there was a nexus between the alleged crime and the items sought in the search warrant.

Appellant further argues that because there was not a substantial basis to conclude that probable cause existed to issue the first search warrant, the second search warrant, which relied on evidence obtained from the execution of the first search warrant, yielded "fruit of the poisonous tree" that should have been suppressed. Because the first search warrant was supported by probable cause, this argument fails.

Lastly, it appears that even if the search warrants lacked probable cause, admission of the evidence was harmless because it was not the sole indication of appellant's guilt. *See State v. Nelson*, 355 N.W.2d 134, 137 (Minn. 1984) ("The erroneous admission of evidence seized in violation of a fourth amendment right is harmless when it is merely cumulative of other overwhelming evidence of guilt.") If the district court has erred in admitting evidence, the reviewing court determines whether 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). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.*

Appellant argues that the searches provided evidence of sexual or aggressive intent as required by the second-degree criminal sexual conduct convictions.[6] Therefore, according to appellant, if the search warrants were invalid, there was no evidence of sexual or aggressive intent and he could not be convicted of second-degree criminal sexual conduct. It appears, however, that the district court considered other indications of sexual or aggressive intent. The district court stated

> [t]hat in making the finding that [appellant's] acts were committed with sexual or aggressive intent, the Court has considered all of the facts and circumstances presented in this case. These facts and circumstances include the presence of the young girls in the residence of [appellant], either being provided care by [appellant] or assisting [appellant] in providing care to young children; the extensive computer usage in the residence with young, naked females being a prevalent content and access of the computer media; the decision to allow Spreigl evidence to show the motive and intent and lack of mistake; the photographic evidence of a posed, naked young child that was being cared for by [appellant] showing up in a digital media in an erased form in his residence; the impeachment of [appellant] by his conviction in Watonwan County to evaluate the veracity of the statements made by [appellant], as well as the testimony provided by [appellant].

In determining the presence of sexual or aggressive intent, the district court considered the evidence obtained through the searches, but it was not the only evidence that established intent. Therefore, even if the search warrant evidence had been suppressed, the result would have been the same.

[6] "[S]exual contact," as used in Minn. Stat. § 609.343, subd. 1(a), requires that the act be committed with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(a) (2004).

II. The evidence at trial was sufficient for the district court to convict appellant of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a).

Appellant argues that because K.P. testified that she did not remember appellant touching her in an improper manner, and because K.P.'s prior statements did not clearly demonstrate that appellant's finger had penetrated her vagina, the evidence was insufficient to support appellant's conviction for first-degree criminal sexual conduct.

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, when viewed in the 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). The reviewing 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 reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The same standard of review applies to bench trials. *State v. Fisler*, 374 N.W.2d 566, 569 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985).

Minn. Stat. § 609.342, subd. 1(a), states that "[a] person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." There is no question that K.P. was under 13 years of age at the

time of the alleged assault, or that appellant is 36 months older than K.P. Therefore, the key to this analysis is whether or not appellant sexually penetrated K.P.

K.P. told Larson that she was touched on the "inside" of her "bad privates" and that it hurt. Larson stated that she interpreted "inside" to mean underneath the underwear, not necessarily inside the vaginal area. On cross-examination, however, appellant's counsel asked: "Miss Larson, as we sat and watched the video tape, she clearly told you that Lanny put one finger inside of her and that it hurt, correct?" Larson responded affirmatively. K.P. told Brazil that appellant touched her on the outside of her vagina, but inside of her underwear. Brazil testified that this answer did not necessarily conflict with K.P.'s earlier statement indicating that appellant penetrated her with his finger.

The factfinder makes determinations as to credibility. *See State v. Ferguson*, 729 N.W.2d 604, 613 (Minn. App. 2007) ("And credibility determinations on conflicting testimony are the exclusive province of the fact-finder."). Here, the district court, acting as the factfinder, concluded that "[appellant] penetrated [K.P.]; this penetration being by the digit or finger of [appellant] into the vaginal or genital opening of [K.P.]; such intrusion being however slight." When viewed in a light most favorable to the conviction, this evidence was sufficient to sustain the verdict.

Affirmed.