STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1270

State of Minnesota,
Respondent,

vs.

Bryan Dion Harris,
Appellant.

Filed September 15, 2009
Reversed and remanded
Peterson, Judge

Ramsey County District Court
File No. 62-K4-07-003779

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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 second-degree controlled-substance crime, appellant argues that the district court erred by admitting (1) evidence found during a police search and (2) evidence of a prior cocaine-possession offense. We reverse and remand.

FACTS

On October 7, 2007, a woman called the front desk from room 111 of the Exel Inn in St. Paul. The desk clerk testified that the woman, who was whispering and sounded scared, said that a man in the room with her had a lot of drugs on him. The woman then hung up and called 911, stating that there were drugs in the room and that the room had been rented with a false ID. Before the police arrived, the woman contacted the front desk to call a cab and left; the desk clerk did not obtain any information about the woman. The woman later called the desk clerk while the police were at the hotel and asked if appellant had been arrested, but she declined to speak to the police.

St. Paul Police Officer Murray Prust arrived at the hotel and spoke to the desk clerk. At some point, Officer Douglas Whittaker arrived, and both officers went to room 111. According to the desk clerk, she accompanied the officers, and the door to room 111 was closed and locked. According to the officers, the door to room 111 was slightly ajar because something was stuck in the door to prevent it from closing. Whittaker testified that through the crack of the door he could see a vacuum cleaner and someone's legs on the bed. The officers knocked on the door and announced themselves several

times, with no response. The officers then pushed the door open and saw an unconscious man on the bed. They received no response from the man, but they did not believe that he was in any distress. The officers saw "a great deal of evidence" that there were narcotics in the room, including crack cocaine, marijuana, the kind of plastic bags used to package narcotics, cut straws, a scale with white residue on it, burn marks on the bed, and a vacuum cleaner that had been used to vacuum up cocaine. They also saw that the phone had been unplugged from the wall.

The officers identified the man as appellant Bryan Dion Harris based on a photo ID next to the bed. They shook his legs and yelled to him in order to wake him. The officers handcuffed appellant because of the narcotics in the room and the presence of a knife within appellant's reach. They asked appellant if he knew where the renter of the room was, and appellant responded that he had not seen him. They asked him if they could look around, and he responded: "Go ahead. It's not my room." At that point, he lay back on the bed and fell asleep. After completing their search of the room, the officers determined that appellant was responsible for the drugs in the room and placed him under arrest. When they searched appellant incident to the arrest, the officers discovered a bag of cocaine in his left front pants pocket.

According to the hotel's registry, room 111 was initially rented by a white male with the last name Carr. The hotel requires visitors to provide photo identification and to sign in on a visitor log book. The registry showed several different visitors to both room 111 and an unidentified room between October 2nd and October 7th. Appellant's name did not appear on the registry. The desk clerk testified that she had seen appellant several

days earlier in the breakfast room of the hotel. She did not see him again until the police removed him from the hotel.

Appellant was charged with second-degree controlled-substance crime in violation of Minn. Stat. § 152.022, subd. 2(1) (2006). Appellant moved to suppress the cocaine found in his pocket. Following a hearing, the district court denied the motion on the grounds that appellant lacked an expectation of privacy in the room and the police entry was justified by exigent circumstances.

Before trial, the state filed notice that it intended to offer at trial evidence that appellant had committed a cocaine-possession offense in 2003. Near the end of the state's case, the district court heard arguments regarding the evidence of appellant's 2003 offense. The district court admitted the evidence to refute the anticipated defense argument that appellant did not knowingly possess the cocaine. The prosecutor then read a statement to the jury regarding appellant's prior offense. The defense argued that the state failed to prove that appellant knowingly possessed the cocaine, based on the possibility that somebody put the cocaine in appellant's pocket while he slept.

The jury found appellant guilty, and he was sentenced to a stayed 69-month term and a $10,000 fine and placed on probation for 25 years with conditions that included one year in the Ramsey County Correctional Facility for Men and successful completion of the Minnesota Teen Challenge Program. This appeal followed.

D E C I S I O N

I.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing--or not suppressing--the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We accept the district court's underlying factual determinations unless they are clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

The district court found that appellant had neither a subjective nor an objective expectation of privacy in room 111. The court determined that he lacked a subjective expectation of privacy because he was sleeping in the room with the door open and that he lacked an objective expectation of privacy because there was no evidence of "the nature of his relationship to Room 111." Appellant argues that based on the fact that he was sleeping when the officers arrived and the fact that he was eating breakfast in the hotel several days earlier, he had an expectation of privacy in room 111.

A two-step test is used to determine whether a person can invoke the protections of the Fourth Amendment. *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003). First, the court looks at whether the person "exhibited an actual subjective expectation of privacy" in the area searched. *Id.* Second, the court looks at "whether that expectation is reasonable." *Id.* The person asserting Fourth Amendment rights has the burden of demonstrating both that he had a subjective expectation of privacy and that his expectation of privacy was reasonable. *State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006)

(burden of proving "subjective expectation of privacy"); *State v. Jordan*, 742 N.W.2d 149, 156 (Minn. 2007) (burden of proving "reasonable expectation of privacy").

Subjective expectation of privacy

To invoke the protections of the Fourth Amendment, appellant must first demonstrate that he had a subjective expectation of privacy in the hotel room. *B.R.K.*, 658 N.W.2d at 571. Whether a person has a subjective expectation of privacy depends upon "whether the individual [sought] to preserve [something] as private." *Id.* (alteration in original) (quotation omitted). A person's attempts to conceal activities or items may indicate a subjective expectation of privacy. *Id.* at 571-72. A person may exhibit a subjective expectation of privacy by attempting to exclude the police or others from the area. *State v. Sletten*, 664 N.W.2d 870, 876 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003); *see United States v. Bolden*, 545 F.3d 609, 620 (8th Cir. 2008) (affirming finding that defendant exhibited no subjective expectation of privacy based on, among other factors, "failure to exclude others from entering the premises"). This court has held that a person exhibited a subjective expectation of privacy when he was in a hotel room with the door closed and locked. *Sletten*, 664 N.W.2d at 876; *see also State v. Carter*, 569 N.W.2d 169, 174 (Minn. 1997) (person demonstrated a subjective expectation of privacy by being inside an apartment with doors shut and blinds drawn).

The record supports the district court's conclusion that appellant lacked a subjective expectation of privacy in the room. Although the desk clerk testified that the door to room 111 was closed and locked, both police officers testified that it was braced open and slightly ajar to the extent that Whittaker could see appellant inside. Given the

police testimony, the district court's determination that the door was ajar was not clearly erroneous. Because appellant left the door unlocked and ajar, made no effort to conceal his activities in the room, and made no effort to exclude anybody from the room, he did not exhibit a subjective expectation of privacy in room 111.

Objective expectation of privacy

To invoke the protections of the Fourth Amendment, appellant must also demonstrate an "expectation[] of privacy that society is prepared to recognize as reasonable." *State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006) (quotations omitted). A person is entitled to an expectation of privacy if he or she is an "overnight guest" or has "long-standing ties to the premises." *Sletten*, 664 N.W.2d at 876. Guests who are "merely permitted on the premises" are not entitled to Fourth Amendment protection. *Id.* This analysis has been applied in cases addressing whether a person had a reasonable expectation of privacy in a hotel room. *Id.*; *see also United States v. Williams*, 521 F.3d 902, 906 (8th Cir. 2008) ("Mere visitors to someone else's hotel room do not have a reasonable expectation of privacy." (quotation omitted)); *United States v. Sturgis*, 238 F.3d 956, 958-59 (8th Cir. 2001) (finding no reasonable expectation of privacy where defendant did not rent a hotel room and was "merely visiting" the renter of the room).

In *Sletten*, this court held that the defendant lacked a reasonable expectation of privacy in a hotel room. *Sletten*, 664 N.W.2d at 877. The Sletten court "underscore[d] the fact that while [the defendant] may have legitimately been on the premises, . . . he was not a registered guest in the hotel room," the room was in the name of a different person, the defendant did not have a key to the room, the defendant failed to demonstrate

his social relationship to the woman who rented the room or that she "gave [the defendant] permission to stay in the room even as a social guest," and neither the renter of the room nor the person who the defendant claimed to be his host was present in the room when the police entered. *Id.*

Appellant has similarly failed to demonstrate that he had a reasonable expectation of privacy in room 111. Appellant was not the renter of room 111 and did not provide any evidence of his relationship to the renter of room 111. He was not listed in the visitor registry as a visitor to room 111. The fact that he was sleeping in the room at 8 a.m. and his presence in the hotel breakfast room several days earlier might support an inference that appellant was in the room overnight, but these facts do not prove that appellant was anything more than a mere visitor to the room. The district court did not err by denying appellant's motion to suppress on the ground that he lacked a reasonable expectation of privacy in room 111. Because appellant cannot invoke the protections of the Fourth Amendment, we will not address whether the warrantless entry was justified by exigent circumstances.

II.

We review the district court's decision to admit *Spreigl* evidence for abuse of discretion. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). "A defendant who claims the [district] court erred in admitting evidence bears the burden of showing the error and any resulting prejudice." *Id*.

The district court admitted evidence of appellant's prior cocaine-possession offense. The court found that, because the state anticipated the defense to argue that the

cocaine was planted on appellant, the prior offense was relevant to show that appellant had knowledge of the cocaine. At the close of the state's case, the prosecutor read the following statement to the jury:

> On July 31, 2003 at around 2:00 p.m. a woman on the eastside of St. Paul made a 911 call. She called the police because [appellant] would not leave her apartment. During a pat-down search of him, the police found in [appellant's] right pants pocket a baggie of cocaine that weighed 1.8 grams.

The district court instructed the jury that the evidence not be used to prove character or conformity with such character, but for the limited purpose of determining whether appellant committed the charged offense.

Minnesota courts generally exclude evidence "connecting a defendant with other crimes, except for purposes of impeachment . . . if he takes the stand on his own behalf." *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). However, evidence of prior crimes may be admitted "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). "If it is unclear whether other crimes evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded." *State v. Courtney*, 696 N.W.2d 73, 83 (Minn. 2005). To be admissible, *Spreigl* evidence "must be relevant and material" and the "probative value of the evidence must not be outweighed by the potential prejudice." *State v. Clark*, 755 N.W.2d 241, 260 (Minn. 2008).

Appellant argues that the *Spreigl* evidence was not relevant because it did not have any tendency to make it more or less probable that he knowingly possessed the cocaine.

He also argues that the potential for prejudice outweighs the probative value of the evidence.

Relevance of the evidence

When determining whether *Spreigl* evidence is relevant and material, the court should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the prior offense and the charged offense in terms of time, place, or modus operandi. *Courtney*, 696 N.W.2d at 83. "[T]he district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *State v. Ness*, 707 N.W.2d 676, 687 (Minn. 2006) (quotation omitted).

The evidence of appellant's 2003 offense was admitted to prove that appellant knowingly possessed the cocaine and that it was not planted on him. The state may use *Spreigl* evidence to prove knowledge or intent if knowledge or intent is an element of the charged crime. *State v. Boykin*, 285 Minn. 276, 281, 172 N.W.2d 754, 758 (1969). In *Boykin*, the defendant was charged with intentionally receiving a stolen dryer. The state introduced evidence that he possessed a stolen TV. *Id.* The court held that this evidence "makes it difficult for [the defendant] to argue that he did not know the dryer was stolen also." *Id.* at 281-82, 172 N.W.2d at 758. The court explained, "It may be possible to be unaware that one has one stolen item; but when he has two stolen items, it is harder to argue that he does not know what is happening." *Id.*

To convict a person of unlawful possession of a controlled substance, the state must prove that the person consciously possessed the substance and that the person "had actual knowledge of the nature of the substance." *State v. Florine*, 303 Minn. 103, 104,

226 N.W.2d 609, 610 (1975). Under the reasoning in *Boykin*, the *Spreigl* offense would be relevant if appellant claimed that he did not know that the substance found in his pocket was cocaine. Previous possession of cocaine would make it more probable that appellant knew that the substance found later was cocaine. But appellant did not claim that he did not know what the substance found in his pocket was; he claimed that he did not know that there was a substance in his pocket at all. The "precise disputed fact" was whether the cocaine was planted on appellant. The fact that appellant possessed cocaine in the past is not relevant to whether appellant knew that there was something in his pocket when the police entered room 111.

Probative value of the evidence weighed against risk of unfair prejudice

The district court must also "balance the probative value of the evidence against its potential to be unfairly prejudicial." *Ness*, 707 N.W.2d at 686. "The prosecution's need for other-acts evidence should be addressed in balancing probative value against potential prejudice. . . ." *Id.* at 690. The state may need evidence if "as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue." *Id.* (quoting *State v. Bolte*, 530 N.W.2d 191, 197 n.2 (Minn. 1995).

The risk of prejudice in admitting evidence of appellant's prior offense was high. The "overarching concern" in admitting *Spreigl* evidence "is that the evidence might be used for an improper purpose, such as suggesting that the defendant's prior bad acts show that he has a propensity to commit the present bad acts." *State v. Washington*, 693 N.W.2d 195, 200 (Minn. 2005); *see also State v. Vanhouse*, 634 N.W.2d 715, 722 (Minn. App. 2001) (Randall, J., dissenting) (stating that "it is impermissible to use [prior crimes]

as propensity evidence because it creates an undue prejudicial effect that the jury will convict appellant based on his prior bad acts" (emphasis omitted)), *review denied* (Minn. Dec. 11, 2001). The fact that appellant possessed cocaine in the past did not make it more probable that he knew in the present situation that there was something in his pocket unless the evidence is used for the improper purpose of suggesting that his prior possession shows that he has a propensity to possess cocaine. Because the probative value of the *Spreigl* evidence was low and the risk that the jury would improperly use the evidence as propensity evidence was high, the district court abused its discretion in admitting the evidence.

Prejudice from wrongfully admitted evidence

Because we hold that it was error to admit the *Spreigl* evidence, we examine the entire record to "determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Bolte*, 530 N.W.2d at 198 (quotation omitted). "[I]f there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *Id.* (quotation omitted)

Although the circumstances in which appellant was found strongly suggest that he was involved in some drug-related activity, the calls to the hotel's front desk and the 911 call from room 111 create a reasonable possibility that the verdict might have been more favorable to appellant if the evidence of his 2003 offense had not been admitted. The first call to the front desk apparently was made by a frightened woman in room 111 who reported that a man in the room had a lot of drugs. The woman then called 911 and

reported that there were drugs in the room and that the room had been rented with a false ID. Instead of leaving the room and waiting for the police to respond to her 911 call, the woman left the hotel before police arrived. When the officers arrived in the hotel room, appellant was unconscious, and it was difficult for the officers to wake him. The woman later called the front desk to see if appellant had been arrested, but she refused to speak to the police. And although the woman had placed her calls from room 111, when the police arrived, the room's telephone was unplugged from the wall. These peculiar facts are consistent with the theory that the woman found herself in a bad situation that she wanted to report without getting drawn into further. But they are also consistent with the theory that the woman planted the drugs on appellant because she wanted him arrested, which could potentially create a reasonable doubt in the jurors' minds as to whether appellant knew that the cocaine was in his pocket. Because the evidence that appellant possessed cocaine in 2003 would tend to dispel any thoughts that jurors might have had that the woman planted the cocaine on appellant, there is a reasonable possibility that the verdict may have been more favorable if the *Spreigl* evidence had not been admitted.

Reversed and remanded.