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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1192

State of Minnesota,
Respondent,

vs.

Keith Eugene Washington,
Appellant.

Filed May 8, 2017
Affirmed in part, reversed in part, and remanded
Klaphake, Judge[*]

Hennepin County District Court
File No. 27-CR-15-34366

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

Michael O. Freeman, Hennepin County Attorney, Cheri A. Townsend, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Stauber, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Keith Eugene Washington asks us to reverse his convictions for attempted criminal sexual conduct, first-degree aggravated robbery, and first-degree assault, challenging the seizure and search of his grocery bag, the warrantless collection of his DNA, the admission of *Spreigl* evidence, and other pro se issues. He also challenges his sentence. Because the district court did not err on the Fourth Amendment and evidentiary issues, and because Washington's pro se arguments lack merit, we affirm his convictions. But because the district court improperly imposed a life sentence for an attempt crime, we reverse Washington's sentence and remand for resentencing.

DECISION

I. Seizure and Search of Grocery Bag

"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). When the facts are not disputed, we must determine whether an officer's actions constituted a seizure and if the officer gave an adequate basis for the seizure. *Id.*

The United States and Minnesota Constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Evidence seized in violation of these protections should be suppressed. *See Terry v. Ohio*, 392 U.S. 1, 13, 88 S. Ct. 1868, 1875 (1968); *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). Generally, warrantless searches are "per se unreasonable," and "unless one of the

well-delineated exceptions to the warrant requirement applies," a warrantless search is unconstitutional. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001) (quotations omitted). "The state bears the burden of establishing an exception to the warrant requirement." *Id.*

Washington argues that the district court erred by denying his motion to suppress evidence obtained from the search of his grocery bag, including the victim's cellphone and DNA. The district court ruled that the officers' conduct was part of a valid *Terry* stop and frisk for officer safety. Washington does not challenge the legality of the stop; rather, he argues that the seizure and search of the grocery bag violated the Fourth Amendment because it exceeded the scope of the stop and frisk.

A *Terry* stop is limited "to that which occasioned the stop, to the limited search for weapons, and to the investigation of only those additional offenses for which the officer develops a reasonable, articulable suspicion within the time necessary to resolve the originally-suspected offense." *Diede*, 795 N.W.2d at 845 (quoting *State v. Wiegand*, 645 N.W.2d 125, 136 (Minn. 2002)). The search is limited to patting down the individual's outer clothing in order to determine if they are armed. *See Harris*, 590 N.W.2d at 104. Expansion of the scope of the stop is reasonable if it satisfies "an objective[] totality-of-the-circumstances test." *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012). Circumstances giving rise to a reasonable, articulable suspicion of criminal activity can include conflicting stories. *See id.* at 353; *see also United States v. Sanchez*, 417 F.3d 971, 975 (8th Cir. 2005) ("[C]onflicting stories may provide justification to expand the scope of the stop and detain the occupants." (quotation omitted)).

Washington concedes that police might have had legitimate concerns about whether the grocery bag he carried could have housed a weapon. He gave officers conflicting explanations of where he obtained his groceries, which supported a reasonable suspicion. But he nonetheless argues that removal of the bag was improper, citing *State v. Crook*, 485 N.W.2d 726 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). In *Crook*, this court ruled that police improperly expanded a *Terry* stop by removing a murder suspect's baseball cap, purportedly because the suspect could have hidden a small weapons or drugs underneath the cap or in the cap's brim. 485 N.W.2d at 728–29.

Here, witnesses reported that Washington might be carrying a weapon. Police therefore had two reasons to seize the grocery bag before conducting Washington's *Terry* frisk: a grocery bag could offer Washington immediate access to a weapon and his possession of the bag would physically hamper the police in conducting the frisk. Thus, this case is not controlled by *Crook*, and we hold that the officers' seizure of Washington's bag was within the scope of a *Terry* frisk.

Washington argues alternatively that, even if police properly seized the bag, they had no basis for opening or looking inside it. We agree with Washington that the search of the bag exceeded the scope of the *Terry* stop, as removal of the bag from Washington's reach was sufficient to ensure the officers' safety and to facilitate their frisk. But "[i]f the state can establish by a preponderance of the evidence that the fruits of a challenged search 'ultimately or inevitably would have been discovered by lawful means,' then the seized evidence is admissible even if the search violated the warrant requirement." *Diede*, 795

N.W.2d at 849 (quoting *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003)).[1] "The inevitable discovery doctrine involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Licari*, 659 N.W.2d at 254 (quotation omitted). We agree with the state that police would have inevitably discovered the contents of the grocery bag incident to Washington's lawful arrest because during the stop they discovered that he had an outstanding arrest warrant. The state's briefing does not clarify the scope of its inevitable-discovery argument, but we note that the doctrine applies equally to the challenged seizure.

Washington argues that the state cannot claim inevitable discovery because it did not establish the factual record necessary to prove that officers were aware of the arrest warrant. He asserts that the state's argument "that lawful means to accomplish the search could have been available even though not pursued" has been squarely rejected by Minnesota appellate courts. *See State v. Hatton*, 389 N.W.2d 229, 234 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986). As noted in *Hatton*, applying the exception merely upon a showing that lawful means could have been available even though not pursued would render the protection meaningless. *Id*. The *Hatton* court declined to uphold an illegal search by reasoning that police could have legitimately obtained the evidence via a search warrant. *Id.* There was no evidence in *Hatton* that police would have inevitably

[1] The supreme court authorizes our consideration of the inevitable-discovery justification, even though the state did not argue inevitable discovery to the district court. *See State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003). We reject Washington's argument that *Grunig* is inapplicable.

discovered the evidence, and this court declined to speculate on whether they could have obtained a warrant to legitimize the search. *Id.* That is not the case here.

The record evidence shows that after police identified Washington, they searched his name and discovered an outstanding warrant for his arrest. The search-warrant application states, "Officers stopped to speak with this individual and identified him as BERNARD MONROE WASHINGTON 06/18/1976. WASHINGTON was found to have a felony warrant for Assault. WASHINGTON was arrested." Washington also stated in his closing argument, "[T]hey ran my name when they stopped me." And other documents submitted to the district court further corroborate the existence of the arrest warrant. On these facts, it was more likely than not that police would have arrested Washington on the outstanding warrant when he was identified during the *Terry* stop. *See State v. Robb*, 605 N.W.2d 96, 101 n.2 (Minn. 2000) (stating that deputies with an arrest warrant "had no discretion regarding whether to arrest" the defendant). Because the officers could have lawfully searched Washington's grocery bag incident to his lawful arrest on a warrant, we conclude that the search of the grocery bag was lawful under the inevitable-discovery rule.

The *Terry* stop and search of the grocery bag pass constitutional muster.

II. DNA Swabbing

Washington claims that the district court erred by denying his motion to suppress DNA swabs of his hands that linked the victim's DNA to his person. Where the facts are undisputed, we review a pretrial suppression decision de novo. *State v. Onyelobi*, 879 N.W.2d 334, 342–43 (Minn. 2016).

We are troubled by the fact that a warrantless search of Washington's hands took place, even though officers had sufficient time to obtain a warrant to collect DNA from other parts of Washington's body. But we need not reverse if the state proves that the error was harmless beyond a reasonable doubt. *State v. Barajas*, 817 N.W.2d at 204, 220 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012). The relevant inquiry is "whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* (quotation omitted). This standard is not met if "the jury's verdict is surely unattributable" to the erroneously admitted evidence. *Id.* (quoting *State v. King*, 622 N.W.2d 800, 811 (Minn. 2001)). "When determining whether a jury verdict was surely unattributable to an erroneous admission of evidence, the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant." *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

Other than the disputed DNA evidence, the evidence of Washington's guilt included his proximity to the crime within minutes after its occurrence, his likeness to the victim's description of the perpetrator, other properly admitted DNA evidence taken from the victim's clothing and Washington's body that linked Washington to the victim, the victim's recognition of Washington's voice at trial, and Washington's possession of the victim's missing phone. The disputed DNA evidence was offered by the state among other DNA evidence properly admitted at trial and was not emphasized. At closing, the state summarized all of the DNA evidence and explained that the DNA on Washington's finger

confirmed that he had contact with the victim's body. On this record, we conclude that the jury's guilty verdict is surely unattributable to the challenged DNA evidence.

III. *Spreigl* Evidence

Washington argues that the district court erred by allowing two witnesses, A.M. and S.F., to testify about his prior bad acts. Evidence of a defendant's prior bad acts, or *Spreigl* evidence, is inadmissible to show propensity, but can be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). We review a district court's decision to admit "evidence of other crimes, wrongs, or acts for an abuse of discretion." *State v. Welle*, 870 N.W.2d 360, 365 (Minn. 2015). We will affirm the verdict unless the appellant can demonstrate he was prejudiced by the erroneous admission of the evidence. *See id*. at 366.

The district court allowed the state to introduce evidence of two incidents, one involving A.M. in 2015 and the other involving S.F. in 2000. The court determined that both incidents were relevant to prove intent, and that the 2000 incident was also relevant to prove identity.

Washington argues that intent was not disputed, but he stated at trial that the state "failed to prove what [his] intent [was]." As with every other element of a crime, the state bore the burden to prove the intent element beyond a reasonable doubt, and the *Spreigl* evidence was probative of that element. The supreme court has recognized that the state's need for evidence alone does not serve as an independent ground for its admission, however. *See State v. Ness*, 707 N.W.2d 676, 690 (Minn. 2006). To do so would require a district court to know the strength of the prosecution's case before commencement of

trial. *See id.* The state's need for the evidence should be treated as one of many factors in weighing the probative value of *Spreigl* evidence. *See id.* When the state moved to admit the *Spreigl* evidence, it could not have predicted whether Washington would contest intent.

Further, "[a] high degree of similarity between the [*Spreigl*] incident and the crime charged assists the jury in determining the intent of the defendant." *Sanderson v. State*, 601 N.W.2d 219, 223 (Minn. App. 1999), *review denied* (Mar. 28, 2000). Both S.F. and A.M. testified that Washington attacked, straddled, and choked them into unconsciousness. S.F. awoke to find Washington having sex with her, and Washington had sex with A.M. hours after her attack but while she was in a weakened condition. In the current offense, the victim testified that the perpetrator struck her in the back of the head, knocked her to the ground, straddled her, and choked her until she passed out. She awoke with her shirt pulled down past her bra and her pants unbuttoned and slightly pulled down. The similarities between the prior incidents and the current offense demonstrate a common aim in Washington's attacks that is probative of his intent.

Washington also argues that the 2000 incident is not relevant to prove his identity. To establish identity, the *Spreigl* incident must be similar to the charged offense either in time, location, or modus operandi. *State v. Johnson*, 568 N.W.2d 426, 434 (Minn. 1997) (citing *State v. Landin*, 472 N.W.2d 854, 859 (Minn. 1991)). A *Spreigl* crime need not be a "signature" crime if it is sufficiently or substantially similar to the crime charged. *Id.* Absolute similarity is not required to establish relevancy. *Id.* But the greater the similarity, the greater the likelihood the *Spreigl* evidence is relevant. *Id.*

Washington argues that the *Spreigl* incidents are sufficiently distinct from the charged incident because the charged offense was "an ambush assault, committed by a person totally unknown to the victim, in the middle of the night, outdoors." We disagree. Despite differences in time, location, and context, the modus operandi of the *Spreigl* incidents and the charged offense are strikingly similar. The particular similarity of attacking the victim, straddling her, and choking her into unconsciousness is sufficient to establish relevance, even though the attacks occurred in different locations and at different times. The *Spreigl* incidents are therefore probative of Washington's identity.

Washington also argues that the potential for unfair prejudice outweighed any probative value because there were multiple incidents, prior sexual conduct acts are particularly prejudicial, and the superficial similarities of the prior incidents to the current offense were likely too influential on the jury. *Spreigl* evidence is inadmissible if its probative value is outweighed by its potential for unfair prejudice to the defendant. Minn. R. Evid. 404(b). Unfair prejudice "is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). In determining whether the probative value of evidence outweighs its potential for unfair prejudice, we balance the relevance of the evidence, "the State's need to strengthen weak or inadequate proof," and the risk that the evidence will be used as propensity evidence. *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009).

The state needed A.M. and S.F.'s testimony in part to prove Washington's specific intent to commit criminal sexual conduct and to prove Washington's identity. Identity was

the weakest part of the state's case, and it was the element that Washington contested most consistently throughout the proceedings. On balance, we hold that the district court did not clearly abuse its discretion by admitting the *Spreigl* evidence. We therefore do not consider Washington's argument that the error prejudiced him at trial.

IV. Sentencing

Washington and the state agree that the district court erred by imposing a life sentence under Minnesota Statutes section 609.3455, subdivision 4(a) (2014), for attempted first-degree criminal sexual conduct. We review sentencing statutes de novo. *See State v. Noggle*, 881 N.W.2d 545, 547 (Minn. 2016).

Minnesota Statutes section 609.3455, subdivision 4(a), provides that, if certain conditions are met, and "[n]otwithstanding the statutory maximum penalty otherwise applicable to the offense, the court shall sentence a person to imprisonment for life if the person is convicted of violating section 609.342, 609.343, 609.344, 609.345, or 609.3453." In *Noggle*, the supreme court ruled that attempt crimes under Minnesota Statutes section 609.17 (2014) are not "violations" of the criminal sexual conduct statutes for purposes of imposition of a ten-year conditional-release term mandated by Minnesota Statutes section 609.3455, subdivision 6 (2014). *Noggle*, 881 N.W.2d at 550–51. Likewise here, attempt crimes under section 609.17 are not listed as eligible for life-sentence enhancement under section 609.3455, subdivision 4(a), and the reasoning of *Noggle* applies. We therefore reverse Washington's criminal-sexual-conduct sentence and remand for resentencing.

V. Pro Se Arguments

Washington raises four additional arguments in a pro se supplemental brief: (1) the district court seated biased jurors, (2) the state committed prosecutorial misconduct, (3) his speedy-trial rights were violated, and (4) deficiencies in the proceedings amounted to reversible "cumulative error." We have considered these additional arguments and find them to be either meritless or unsupported by legal authority and argument.

Affirmed in part, reversed in part, and remanded.