STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1357

State of Minnesota,
Appellant,

vs.

Sharlene Melissa Stewart,
Respondent.

Filed March 13, 2017
Affirmed
Larkin, Judge

Nobles County District Court
File No. 53-CR-16-568

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

Kathleen Kusz, Nobles County Attorney, Matthew O. Loeffler, Assistant County Attorney, Worthington, Minnesota (for appellant)

Mark Nyvold, Fridley, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

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

LARKIN, Judge

In this pretrial appeal, the state challenges the district court's suppression of evidence found during a search of respondent's bedroom in her grandmother's home, after her grandmother consented to the search. Because the record does not establish that respondent's grandmother had mutual use of respondent's bedroom and, therefore, authority to consent to the search, we affirm.

FACTS

On June 23, 2016, Detective Lonnie Roloff of the Nobles County Sheriff's Department conducted a welfare check at a residence at 502 3rd Avenue in Wilmont. A Wilmont city maintenance worker told Roloff that he had found E.S. lying in the street, asking for help. E.S. told Roloff that her granddaughter, respondent Sharlene Melissa Stewart, was acting "crazy," and that she had pushed and hit E.S.

Deputy Melissa Einck of the Nobles County Sheriff's Department arrived at the scene and spoke with Stewart, who was upset and sobbing. Stewart stated several times that she was not trying to harm her grandmother and that she was only trying to help her. Stewart admitted that she had been drinking brandy and might be a little drunk. Stewart told Deputy Einck that she "mushed up her blood pressure pills and [E.S.'s] own medication and put some on [E.S.'s] pizza," which E.S. ate, and that she "put blood pressure medicine and heart medicine in [E.S.'s] wine."

Deputy Einck conveyed Stewart's statements to E.S. E.S. confirmed that she takes a variety of medications daily. E.S. did not know that Stewart had put medications on her

pizza or in her wine. E.S. reported that Stewart had pulled her hair and hit her. Deputy Einck arrested Stewart for assault, handcuffed her, and escorted her to a squad car. There, Deputy Einck asked Stewart if there were any drugs or paraphernalia in her room. Stewart replied, "Yes, probably." Deputy Einck asked, "Can I go and look?" Stewart agreed to the search. Stewart also agreed to take a preliminary breath test, which showed an alcohol concentration of 0.214.

Once Stewart was in the squad car, Deputy Einck asked E.S. if she could search the residence for drug paraphernalia. E.S. responded that the officers could "look wherever [they] wanted to." Deputy Einck entered E.S.'s home, located what she believed to be Stewart's bedroom, and found strips of aluminum foil, a small plastic baggie, and a glass pipe in the bedroom. The glass pipe and plastic baggie field-tested positive for methamphetamine.

Appellant State of Minnesota charged Stewart with adulteration of a substance, fifth-degree controlled-substance crime, and fifth-degree assault. Stewart moved to suppress the evidence obtained from her bedroom. The district court granted the motion after an evidentiary hearing, reasoning that Stewart had standing to challenge the search and that the state had "not proven an exception to the requirement of a search warrant to enter [Stewart's] bedroom." The district court found that Stewart's "will was overborne by her situation [and] her consent was not valid" and that "[E.S.] did not have authority to consent to a search of [Stewart's] bedroom." The district court dismissed the controlled-substance charge for lack of probable cause based on its suppression order. The state appeals.

D E C I S I O N

The state's ability to appeal in a criminal case is limited. *State v. Lugo*, 887 N.W.2d 476, 481 (Minn. 2016). The state may generally appeal "from any pretrial order" where the "district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subds. 1(1), 2(2)(b); *see Lugo*, 887 N.W.2d at 485 (noting that appellate courts do not defer to a district court's pretrial legal conclusions on appeal). An order that dismisses some but not all of the charges has a critical impact on the prosecution's case and the outcome of the trial. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009). Because the district court dismissed the controlled-substance charge in this case based on its suppression order, the critical-impact requirement is satisfied.

I.

When reviewing a district court's pretrial order on a motion to suppress evidence, this court reviews the district court's factual findings for clear error and its legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

The United States and Minnesota Constitutions prohibit unreasonable government searches of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. An individual may invoke this protection by showing that she has a subjective expectation of privacy in the place searched and that her expectation of privacy is one that society recognizes as reasonable. *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003); *see also State v. Richards*, 552 N.W.2d 197, 204 (Minn. 1996) (stating that an individual must establish a "legitimate expectation of privacy relating to the area searched

or the item seized" to invoke the Fourth Amendment's protection). An individual's status as an overnight guest at a home alone is enough to show that the individual has an expectation of privacy in the home that society is prepared to recognize as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 96-97, 110 S. Ct. 1684, 1688 (1990).

The state contends that the "district court erred when it found that [Stewart] established that she had a subjective expectation of privacy in the residence at 502 3rd Avenue in Wilmont," arguing that "the district court did not receive any evidence in support of [its] finding" that Stewart had a subjective expectation of privacy. Stewart counters that "the State waived its opportunity to assert lack of standing, and the record in any event demonstrates standing."

The state may waive the issue of standing "by failing to raise it in an omnibus hearing in the [district] court." *Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001). Stewart argues that the state "did not say it was contesting standing" at the omnibus hearing and that because the state "did not put the defense on notice it was contesting standing, and that . . . Stewart therefore had to prove standing, it was not necessary for the defense to present evidence of her expectation of privacy in the bedroom in which she stayed at her grandmother's home." Stewart asserts that the state first raised its standing challenge in a memorandum to the district court filed after the omnibus hearing.

Regardless of the timing of the state's standing challenge, the factual record is adequate for this court to determine the issue, without prejudice to Stewart. We therefore address the state's standing challenge on the merits, while reminding the state that its failure to timely challenge standing in the district court may result in the issue being waived

on appeal. *See id*. (affirming court of appeals' standing determination "on the basis that the state waived its right to raise the issue by failing to assert it before the trial court").

As support for its standing challenge, the state notes that Stewart did not testify in support of her motion and did not offer any other evidence. The state's standing challenge suggests that an evidentiary record cannot establish a person's subjective expectation of privacy unless the person presented direct evidence regarding the issue. We are not aware of any caselaw setting forth such a requirement or precluding a district court from finding a subjective expectation of privacy circumstantially.[1] And in this case, the state's own evidence circumstantially established that Stewart had a subjective expectation of privacy in her bedroom in her grandmother's home. Detective Roloff testified that Stewart was staying at the residence "temporarily because of some things that had happened a month or two months prior" and had been living there for "at least a month." Deputy Einck testified that she had been to the residence "numerous times," that she asked Stewart whether there were any drugs or paraphernalia in "[Stewart's] room," that she asked Stewart if she could search Stewart's room, and that she knew the bedroom she searched was Stewart's bedroom "from prior police contacts." As the district court reasoned, "[e]ven if [Stewart] did not 'live' at the 502 3rd Avenue residence, all evidence points to her being at the very least an overnight guest."

[1] "'Direct evidence' is '[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.'" *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (quoting *Black's Law Dictionary* 596 (8th ed. 2004)). "'Circumstantial evidence' is defined as '[e]vidence based on inference and not on personal knowledge or observation' and '[a]ll evidence that is not given by eyewitness testimony.'" *Id.* (quoting *Black's Law Dictionary* 595).

The state relies on *State v. Stephenson* in support of its argument that the record does not establish Stewart's subjective expectation of privacy, but that reliance is misplaced. 760 N.W.2d 22 (Minn. App. 2009). *Stephenson* involved an order for protection that forbade the defendant from entering or staying at his spouse's residence. *Id.* at 23. The defendant nonetheless argued that he had a subjective and reasonable expectation of privacy in the residence because he owned it. *Id.* at 25. This court rejected that argument, finding that "[n]ot only has [the defendant] failed to present evidence that he had a subjective expectation of privacy," his "conduct demonstrates otherwise." *Id.* This court noted that the defendant hid in the bathroom of the residence when an officer knocked on the door, suggesting that he did not have a subjective expectation of privacy in the residence. *Id.*

Unlike *Stephenson*, an order for protection did not prohibit Stewart from staying at E.S.'s residence. Instead, the record establishes that Stewart was a welcome, overnight guest at the residence, if not a temporary resident. Moreover, Stewart did not behave in a way that suggested she did not have a subjective expectation of privacy in her bedroom at the residence. Instead, Stewart authorized the officers to search her bedroom, demonstrating control that is consistent with a subjective expectation of privacy. Because the record establishes that Stewart had a subjective, reasonable expectation of privacy in her bedroom at her grandmother's home, she may challenge the constitutional validity of the search.

II.

The state contends that the district court erroneously found that "[it] did not show that Deputy Einck and Investigator Roloff obtained consent to search the residence." The district court determined that Stewart's consent was invalid and that E.S. did not have authority to consent to a search of Stewart's bedroom. The state does not challenge the district court's finding that Stewart's consent was invalid. We therefore limit our review to the district court's determination that E.S. did not have authority to consent to the search.

"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) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). The state bears the burden of establishing that an exception to the warrant requirement applies. *Id.*

Consent is an exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973). A third party has authority to consent to a search if the person "possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993 (1974). "[A] finding of mutual use is the essential ingredient of effective consent." *Licari*, 659 N.W.2d at 251 (quotation omitted). Third-party consent is valid "where, under an objective standard, an officer reasonably believes the third party has authority over the premises and could give consent to enter." *State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 2801 (1990)). "[I]f the facts possessed by police would not establish actual authority

to consent under the law, police reliance on those facts cannot be reasonable." *Licari*, 659 N.W.2d at 253.

On one hand, courts generally presume that spouses have mutual use of their entire residence. *See, e.g., United States v. Almeida-Perez*, 549 F.3d 1162, 1172 (8th Cir. 2008) (noting that a spousal relationship between occupants gives rise to the presumption that one has authority to consent to a search of the other's property); *United States v. Duran*, 957 F.2d 499, 505 (7th Cir. 1992) (holding that "a spouse presumptively has authority to consent to a search of all areas of the homestead"); *United States v. Whitfield*, 939 F.2d 1071, 1074-75 (D.C. Cir. 1991) (stating that officers "may assume that a husband and wife mutually use the living areas in their residence and have joint access to them so that either may consent to a search."). On the other hand, courts presume that landlords do not have mutual use of rented premises. *Licari*, 659 N.W.2d at 251.

The law is less clear regarding adults who live with their parents or other relatives. In *State v. Kinderman*, 271 Minn. 405, 409-10, 136 N.W.2d 577, 580 (1965), the supreme court held that a parent's consent to the search of his 22-year-old son's room was valid, reasoning that a child "whether he be dependent or emancipated" does not have "the same constitutional rights of privacy in the family home which he might have in a rented hotel room" and that in "considering the reasonableness of a search of a home when the search is consented to by the father, the protection afforded to the child must be viewed in light of the father's right to waive it." In *State v. Schotl*, 289 Minn. 175, 178-79, 182 N.W.2d 878, 880 (1971), the supreme court held that a parent's consent to the search of her 22-year-old son's room was valid where (1) the parent owned the home, (2) the son made a

one-time $100 payment to stay in the home, (3) it did not appear that the son "had an exclusive right to possession of the room or that he used it regularly," and (4) the record "establishe[d] that other members of the family had equal access to, and use of, the room."

The state does not cite *Kinderman* or *Schotl*. In addition, both cases were decided prior to *Licari*, the most recent Minnesota Supreme Court case discussing third-party consent. In *Licari*, the supreme court emphasized the mutual-use requirement, heavily relying on *United States v. Whitfield*, 939 F.2d at 1073-74. *Licari*, 659 N.W.2d at 250-51, 253. In *Whitfield*, a homeowner consented to a search of her 29-year-old son's room in her house. 939 F.2d at 1072-73. Officers testified that they understood that the parent owned the house, her son's room was locked, and that she had "free access" to the room. *Id.* The D.C. Circuit held that the parent's consent to the search of her adult son's room was invalid because the parent's assertions, even if true, were insufficient to establish mutual use. *Id.* at 1074-75.

The pivotal issue in this case is whether E.S. had mutual use of Stewart's bedroom. If there was mutual use, E.S. was authorized to consent to the search. Moreover, if the officers reasonably believed that E.S. had mutual use and, therefore, authority to consent to the search, the officers could rely on that belief. Stewart argues that "the absence of a showing of mutual use means Stewart's grandmother had no authority to consent."

Instead of addressing the mutual-use criterion, the state relies on *State v. Por Hue Vue* and argues that the officers obtained valid consent to search the residence because E.S. consented and Stewart did not object. 753 N.W.2d 767 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). But *Por Hue Vue* involved a co-tenant spouse's consent to search a

house and the other co-tenant spouse's lack of objection or consent to the search. *See id.* at 769. The consenting spouse's authority to consent was not at issue. *Id.* Once again, courts presume that spouses have common use of shared premises. *See, e.g.*, *Almeida-Perez*, 549 F.3d at 1172; *Duran*, 957 F.2d at 505; *Whitfield*, 939 F.2d at 1074-75. Thus, *Por Hue Vue* does not address the critical question in this case: whether E.S. had mutual use of Stewart's bedroom or the officers reasonably believed E.S. had mutual use.

Because the state has not articulated a valid basis to reject the district court's determination that E.S. did not have authority to consent to a search of Stewart's bedroom, we affirm the district court's suppression order.

Affirmed.