STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1959

State of Minnesota,
Respondent,

vs.

Terry Lee West,
Appellant.

Filed November 6, 2017
Affirmed
Bjorkman, Judge

Polk County District Court
File No. 60-CR-11-1260

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Richard Kenly, Backus, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

BJORKMAN, Judge

For the second time, appellant challenges multiple controlled-substance convictions based on events that occurred in mid-2011. In December 2013, this court reversed his

convictions based on improper denial of an omnibus hearing. On remand, a jury once again convicted appellant of third-degree and fifth-degree sale of a controlled substance, and fifth-degree possession of a controlled substance. He now argues that (1) the district court erred by not suppressing (a) two custodial statements that he made without receiving a *Miranda* warning, (b) evidence obtained when police executed a search warrant at his residence, and (c) his testimony from his initial sentencing hearing; (2) the district court abused its discretion by admitting audio and video recordings made during a controlled purchase; (3) the district court erred by imposing a mandatory minimum sentence under Minn. Stat. § 609.11 (2010); and (4) the district court abused its discretion by denying his request for a continuance to enable his expert witness to testify. We affirm.

FACTS

On May 20, 2011, police met with an informant who said that appellant Terry West was supplying him with marijuana for resale each month. That same day, police worked with the informant to complete a controlled purchase of marijuana at West's residence. Through audio and video recordings, police observed West give the informant two handfuls of marijuana and tell him he could pay for it later.

On June 1, based on the controlled purchase and the details the informant supplied, police obtained and executed a search warrant for West's residence and surrounding property. During the search, police discovered and seized more than 6,000 grams of usable marijuana, additional physical evidence consistent with the cultivation and sale of marijuana, and firearms and ammunition. Police also questioned West briefly without

giving a *Miranda* warning, eliciting incriminating statements regarding the controlled purchase, then arrested him.

West was subsequently charged with (1) conspiring to commit third-degree sale of a controlled substance, (2) third-degree sale of a controlled substance, (3) fifth-degree possession of a controlled substance, (4) fifth-degree sale of a controlled substance, and (5) two counts of selling a controlled substance without affixing a tax stamp.

Twice while West was in jail, a police investigator met with West to serve him with property receipts or forfeiture notices. Each time, West became upset and made incriminating statements to the investigator. The investigator did not provide a *Miranda* warning but told West that he would not discuss his case.

After several substitutions of defense counsel and various pretrial motions, the district court determined that West waived his right to an omnibus hearing. West thereafter waived his right to a jury trial, the state dismissed the conspiracy and tax-stamp charges, and the three remaining controlled-substance charges were submitted to the district court on a stipulated record. The district court found West guilty and conducted a sentencing hearing to determine whether West possessed a firearm at the time of the offenses, triggering a mandatory minimum sentence under Minn. Stat. § 609.11. West elected to testify at the hearing. He addressed both his firearms collection and his marijuana business, including the controlled purchase.

Shortly after the sentencing hearing, the state charged West with perjury based on his testimony. At the perjury trial, the district court admitted the recordings of the controlled purchase, the physical and photographic evidence from the search of West's

residence, and West's statements to police at the time of the search and while he was in jail. A jury found West guilty, and we affirmed his perjury conviction. *State v. West*, No. A16-0614 (Minn. App. Jan. 30, 2017).

In the meantime, West appealed his controlled-substance convictions, challenging the district court's determination that he had waived his right to an omnibus hearing. We reversed and remanded, instructing the district court to permit West to file a suppression motion and, if any evidence were to be suppressed, to vacate West's conviction and conduct a new trial. *State v. West*, No. A13-0198 (Minn. App. Dec. 30, 2013), *review denied* (Minn. Mar. 18, 2014).

On remand, West moved to suppress the evidence obtained from the execution of the search warrant, as well as his statements to law enforcement at the time of the search and while he was in jail. The district court conducted an omnibus hearing, denied West's motion to suppress the warrant and his jail statements, granted West's motion to exclude statements he made at the time of the search, and ordered a new trial.

West subsequently moved to "exclude" from the new trial his testimony from the prior sentencing hearing. The district court conducted a second omnibus hearing and denied the motion. West again waived his right to a jury trial and agreed to submit the controlled-substance charges to the court on the testimony and exhibits from the perjury trial. The district court found West guilty of all three charges and determined that he possessed firearms at the time of two of the offenses. The district court sentenced West to 36 months' imprisonment. West appeals.

D E C I S I O N

I. The district court did not err by denying West's motions to suppress.

"When reviewing a district court's pretrial order on a motion to suppress evidence, [appellate courts] review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

West argues that the district court erred by not suppressing his two jail statements, evidence obtained from the warranted search, and his sentencing testimony. We address each argument in turn.

A. West's Jail Statements

West argues that the district court erred by failing to suppress the incriminating statements he made to police while in jail because he was not given a *Miranda* warning.[1] "Statements made by a suspect during custodial interrogation are generally inadmissible unless the suspect is first given a *Miranda* warning." *State v. Edrozo*, 578 N.W.2d 719, 724 (Minn. 1998). But a *Miranda* warning is required only if a suspect "is both in custody and subject to interrogation." *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010). We determine whether an individual was interrogated by independently examining the totality

[1] The state's appellate brief suggests in a footnote that West is collaterally estopped from raising this argument because it was decided adversely to him in the perjury case. The state does not substantively analyze the collateral-estoppel factors or address critical distinctions between the perjury case and this controlled-substance case. Accordingly, we decline to consider collateral estoppel.

of the circumstances based on the facts as found by the district court. *State v. Jackson*, 351 N.W.2d 352, 355 (Minn. 1984).

Interrogation includes both express questioning and "its functional equivalent," meaning "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90 (1980). Indeed, "even express questions are not always interrogation" if not reasonably likely to elicit a response that is incriminating. *State v. Tibiatowski*, 590 N.W.2d 305, 309 (Minn. 1999). The crux of the inquiry is whether, from the suspect's perspective, the police conduct reflects "a measure of compulsion above and beyond that inherent in custody itself." *Edrozo*, 578 N.W.2d at 724-25.

The district court made the following findings regarding West's interactions with the investigator. When the investigator met with West at the jail on June 13 to serve him with property receipts or forfeiture notices, West spontaneously began to talk about his case. The investigator told West he did not want to talk about the case without West's lawyer present and offered to organize a meeting with West's lawyer. But West continued to talk to the investigator and made incriminating statements. The investigator returned on June 30 with another property receipt. This time he brought an audio recorder. When West again began to speak about his case, the investigator repeated his caution and reiterated his willingness to organize a meeting with West and his lawyer. West continued to make incriminating statements, which the investigator recorded.

West contends that these circumstances amount to interrogation because the investigator "hoped the disclosures would be incriminating" and operated a hidden recorder during the second jail encounter. We are not persuaded. A police officer does not interrogate a suspect simply by hoping, or even planning for the possibility, that he will incriminate himself. *See id.* at 725 (upholding admission of statements defendant made to a fellow suspect while they were left alone with a hidden recording device). And while West was tired and upset at the time of the conversations, nothing in the record indicates that the investigator caused or took advantage of West's condition by asking about his alleged offenses. On this record, we conclude that the investigator did not subject West to interrogation, so no *Miranda* warning was required. Accordingly, the district court did not err in denying West's motion to suppress his incriminating statements to the investigator.[2]

B. Search Warrant

When reviewing the decision to issue a search warrant, we consider only whether the issuing judge had "a substantial basis for concluding that probable cause existed." *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). Our review is limited to the information in the warrant application and the supporting affidavit. *Id.* at 384-85. We consider the totality of the circumstances alleged to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998) (quotation omitted). We defer to the

[2] West also argues, without any supporting legal authority, that the district court erred in relying on the jail statements in determining West's guilt. This argument fails because the district court did not err in declining to suppress those statements.

issuing judge's determination of probable cause. *State v. Holiday*, 749 N.W.2d 833, 839 (Minn. App. 2008).

West argues that the search warrant was invalid because it was based on stale information. The "freshness of the information" in a warrant application bears on probable cause. *Souto*, 578 N.W.2d at 747. Indications of "ongoing criminal activity" remain fresh for a longer period of time than a single instance of criminal conduct. *Id.* at 750. For example, a span of weeks between initial information of illegal activity and the warrant application is permissible when the activity involves "repeated sales of drugs." *State v. Cavegn*, 356 N.W.2d 671, 673 (Minn. 1984) (quotation omitted).

West contends that the information police gleaned from the informant and the controlled purchase on May 20 was stale by June 1 because there was no evidence of an ongoing criminal operation. We disagree. The warrant application contains a detailed description of precisely such an operation. The informant told the police officers that he had been selling marijuana for ten years. He indicated that he stopped obtaining marijuana from his prior source "one or two years ago" and had "recently" been buying from West on a monthly basis. The same day, the informant obtained marijuana from West during a controlled purchase that police captured on a portable recording device. During the purchase, West gave the informant two handfuls of what was subsequently confirmed to be marijuana, telling him that he could pay for it later. Also visible in the room during the sale was what appeared to be a growing marijuana plant.

This information indicates an ongoing operation in which West regularly, over the course of one or two years, sold the informant substantial quantities of marijuana for resale.

We note the informant supplied much of the information against his own penal interest. *See Souto*, 578 N.W.2d at 750 (stating that admissions against interest bolster an informant's credibility). And his description of his drug partnership with West was corroborated when, during the controlled purchase, West readily provided a substantial quantity of marijuana to the informant and trusted the informant to pay for it at a later date. *See Holiday*, 749 N.W.2d at 841 (stating that corroboration of even minor details "lends credence to an informant's tip and is relevant to the probable-cause determination"). In sum, the totality of the circumstances presented in the warrant application amply establish probable cause to believe that West had been engaged in ongoing drug sales before and on May 20, such that police were reasonably likely to find evidence of that criminal activity on June 1. The district court did not err in denying West's motion to suppress evidence obtained in the execution of the search warrant.

C. West's Sentencing Testimony

A defendant's trial testimony generally is admissible against him in later proceedings. *Harrison v. United States*, 392 U.S. 219, 222, 88 S. Ct. 2008, 2010 (1968). But if the defendant's prior testimony "was compelled by the admission of illegal evidence," it should be suppressed. *State v. Clark*, 296 N.W.2d 372, 375 (Minn. 1980).

West argues that he was compelled to testify at his sentencing hearing because "illegal evidence" was admitted at his first trial. He points to the statement he made to law enforcement at the time of the search agreeing that he had "fronted" marijuana to the informant during the controlled purchase; the statement was suppressed on remand because it was obtained in violation of *Miranda*. We agree with the district court that the admission

of this evidence did not compel West's sentencing testimony. Indeed, West's own arguments belie his claim of compulsion. Most notably, West contends that he testified at the sentencing hearing to "convince [the district court] that he did not possess firearms for the purpose of drug dealing." The earlier admission of his unlawfully obtained statement about providing marijuana to the informant had no bearing on that purpose. On this record, we discern no error in the admission of West's testimony from the sentencing hearing.[3]

II. West waived his challenge to the admission of audio and video recordings of the controlled purchase.

Generally, we review a district court's evidentiary rulings for an abuse of discretion. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). A defendant appealing the admission of evidence has the burden to show both error and resulting prejudice. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). West gives only cursory treatment to his evidentiary challenge in his brief, offering neither legal argument nor supporting authority. Mere assertion of error is insufficient to preserve the issue for appeal. *See Brooks v. State*, 897 N.W.2d 811, 818-19 (Minn. App. 2017), *review denied* (Minn. Aug. 8, 2017). We conclude that West has waived this evidentiary challenge.

III. The district court did not err by imposing a three-year sentence based on West's possession of firearms at the time of his offenses.

A defendant who possesses a firearm at the time he commits a felony controlled-substance offense is subject to a mandatory prison sentence of at least three years. Minn.

[3] West again asserts without any supporting legal authority that the district court erred in relying on his sentencing testimony to find him guilty. We disagree because the district court did not err in denying the motion to suppress this testimony.

Stat. § 609.11, subds. 5, 9. Possession of a firearm may be actual or constructive, though a court considering constructive possession should examine "all aspects of the firearm," including its nature, type, condition, and location relative to the drugs, to determine the degree to which its presence increased the risk of violence. *State v. Royster*, 590 N.W.2d 82, 85 (Minn. 1999). Where, as here, the relevant facts are undisputed, application of Minn. Stat. § 609.11 is a question of law, which we review de novo. *See State v. Kolla*, 672 N.W.2d 1, 6 (Minn. App. 2003).

The district court found, and West does not dispute, that West constructively possessed 12 firearms in his residence when police conducted the search. Many of the firearms were loaded and readily accessible to him at that time, including two loaded pistols that were within his reach when the police arrived. West simultaneously possessed in an outbuilding on his property a quantity of marijuana well in excess of the felony threshold amount. And West does not directly challenge the district court's finding that his possession of numerous firearms substantially increased the risk of violence.

West contends only that the mandatory minimum sentence should not apply because there was little or no marijuana—less than the quantity required for a felony—found within his residence, where he stored the firearms. In essence, he urges this court to read a proximity requirement into Minn. Stat. § 609.11 in cases of constructive possession. We expressly declined to do so in *Salcido-Perez v. State*, 615 N.W.2d 846, 848 (Minn. App. 2000) (citing *Royster*, 590 N.W.2d at 85), *review denied* (Minn. Sept. 13, 2000), and West has identified no legal authority for us to deviate from that holding. Accordingly, we conclude that the district court did not err by sentencing West under Minn. Stat. § 609.11.

IV. The district court did not abuse its discretion by denying a trial continuance.

A district court has discretion to grant or deny a trial continuance. *State v. Larson*, 788 N.W.2d 25, 30-31 (Minn. 2010). This discretion affords the district court the ability to control the timing of a trial, which "is critical in ensuring sound judicial administration and a speedy trial for all criminal defendants." *State v. Sanders*, 598 N.W.2d 650, 655 (Minn. 1999). Factors that weigh against granting a continuance include lack of diligence in preparing for trial, *see State v. Courtney*, 696 N.W.2d 73, 82 (Minn. 2005), and previous continuances granted to the defendant, *Sanders*, 598 N.W.2d at 654. We will not reverse a conviction for denial of a continuance unless the district court abused its discretion and the denial prejudiced the defendant by materially affecting the outcome of the trial. *Larson*, 788 N.W.2d at 30-31.

West argues that the district court abused its discretion by denying him a trial continuance to accommodate his expert witness's schedule. And he asserts that the denial was prejudicial because it deprived him of "the ability" to have his expert testify. We consider the district court's ruling in context. West's trial was scheduled to begin on Monday, April 18, 2016. Counsel's April 14 continuance request indicated the defense expert was not available until April 22. West had already received two trial continuances due to the same expert witness's scheduling conflicts. Those continuances and other scheduling delays had already delayed the trial more than ten months. In denying West's third continuance request, the district court reminded West that he had received several months' notice of the April 18 trial date. The district court also noted that it provided as close to a day certain for trial as possible and "it's up to counsel to make sure that their

witnesses are lined up and available." Although the court denied West's request, it indicated that it would adjust the trial schedule, if possible, to accommodate West's expert witness. But West elected to forgo a jury trial and submit the controlled-substance charges to the district court based on the record from his perjury trial, without testimony from the expert witness.

On this record, we discern no abuse of discretion by the district court. Indeed, the record demonstrates the district court's repeated efforts to afford West an opportunity to present expert testimony while also moving West's protracted case toward a final resolution and simultaneously maintaining a fair and organized court calendar. Striking such a balance is exacting and careful work that falls within a district court's broad discretion. The district court's denial of West's continuance request does not amount to an abuse of discretion.

Affirmed.