STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0092

State of Minnesota,
Respondent,

vs.

Jeremy James McNitt,
Appellant.

Filed August 7, 2017
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Dakota County District Court
File No. 19HA-CR-14-1327

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Arthur R. Martinez, Matthew T. Martin, Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Bjorkman, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HOOTEN, Judge

On appeal from three convictions of possession of pornographic work involving minors, appellant argues (1) the district court erred in denying his pretrial motion to dismiss counts two and three on the basis that those counts were barred by the statute of limitations; (2) the district court erred in denying his motions to suppress evidence; and (3) the evidence was insufficient to convict appellant of the charged offenses. We affirm in part, reverse appellant's convictions on counts two and three, and remand.

FACTS

In October 2011, a Minneapolis police officer working on the Internet Crimes Against Children Task Force identified a computer sharing suspected child pornography files over peer-to-peer online networks. After identifying the internet protocol (IP) address of the computer, the task force officer submitted several administrative subpoenas to the internet service provider who assigned that IP address. The responses from these subpoenas revealed the location of the computer as appellant Jeremy James McNitt's residence in Eagan, Minnesota.

In November 2011, based on the information gathered by the task force officer, Eagan police obtained and executed a search warrant for McNitt's residence. When officers began the search, McNitt was not present. He arrived shortly thereafter and was questioned for approximately one hour. In the course of the search, officers seized an external hard drive that was later found to contain child pornography.

In April 2014, McNitt was charged by complaint with one count of possession of pornographic work involving minors. McNitt moved the district court to suppress all evidence seized as a result of the administrative subpoenas and all statements made by McNitt during the execution of the November 2011 search warrant. In March 2016, the district court denied McNitt's motions.

In July 2016, six days before trial, the state amended the complaint to add two counts of possession of pornographic work involving minors. McNitt moved to dismiss the additional counts as beyond the statute of limitations, and the district court denied McNitt's motion. After a bench trial, McNitt was found guilty of all three counts of possession of pornographic work involving minors. The district court stayed imposition of sentence, placed McNitt on supervised probation for five years, and ordered concurrent conditions of probation, including jail time, sex offender treatment, and registration as a predatory offender. This appeal follows.

D E C I S I O N

I.

McNitt argues that the district court erred by denying his motion to dismiss counts two and three when the state amended the complaint to add those counts after the statute of limitations had run. We agree.

Minnesota Statutes section 628.26(k) (2010) provides that, for offenses of this nature, "indictments or complaints shall be found or made and filed in the proper court within three years after the commission of the offense." It is not disputed that the original

complaint was filed in accordance with Minn. Stat. § 628.26(k); however, the complaint was amended over four years after police seized McNitt's external hard drive.

The district court denied McNitt's motion to dismiss counts two and three from the amended complaint, relying on *State v. Dwire*, 409 N.W.2d 498 (Minn. 1987), for the principle that filing a complaint or indictment tolls the statute of limitations. However, a closer examination reveals that the holding of *Dwire* is not broad enough to encompass the facts presented here.

Dwire stated that "the statute of limitations was, in effect, 'tolled' during the pendency of an indictment *containing a defect curable by amendment*." 409 N.W.2d at 503 (emphasis added). Here, the original complaint against McNitt had no defect. It is not disputed that the state knew at the outset that McNitt's hard drive contained "multiple video files of obvious child pornography," and included that language in the original complaint. The state made what appears to be a tactical decision to charge McNitt with a single count without identifying whether McNitt would be prosecuted for possession of the hard drive itself, or for specific videos or images. *See State v. Bakken*, 883 N.W.2d 264, 267–69 (Minn. 2016) (identifying that an offender may be prosecuted for either knowingly possessing computer containing child pornography, possessing images of child pornography, or both). The state instead maintained throughout the several years between filing the original complaint and trial that the state would amend the complaint to add additional counts if the case went to trial.

The district court and the state also rely on *State v. Gruska*, No. C8-95-414, 1995 WL 579422, at *1 (Minn. App. Oct. 3, 1995), an unpublished decision of this court that

read *Dwire* to state that the statute of limitations is tolled by filing a complaint or indictment, even absent a defect in that complaint or indictment. We first note that unpublished opinions from this court are not binding authority. Minn. Stat. § 480A.08, subd. 3(c) (2016). More important, however, *Gruska* does not address the specific circumstances here. In *Gruska*, the state amended the complaint against Gruska to add two counts of theft by swindle with intent to exercise temporary control to a complaint that already contained two counts of theft by swindle. 1995 WL 579422, at *1. In other words, the counts added by the state in *Gruska* were on different levels of the vertical severity scale for the same underlying conduct that had already been charged.

Here, the state did not amend the complaint to add a greater encompassing or lesser included offense that criminalized the same conduct at a different level of severity than the offense already charged. Instead, the state added two additional counts for possession of pornographic work involving minors at the same severity level as the original charge, thereby tripling the number of charges, and increasing the possible sentence, against McNitt.

The Minnesota Supreme Court has held that in the child pornography context, when a defendant possesses multiple pornographic works, possession of each work is a separate chargeable offense. *Bakken*, 883 N.W.2d at 268. Although *Bakken* addressed the nature of possession of separate pornographic works in the sentencing context, the underlying logic is applicable in the charging context as well. In determining whether Bakken's possession of each of the seven pornographic works was part of a single behavioral incident, the supreme court concluded that Bakken did not commit each

possession crime at the same time, because while "a crime of possession is a continuing offense, it is complete when the offender takes possession of the prohibited item." *Id*. at 270 (citation omitted).

The facts of *Bakken* are similar to those here. Like Bakken, McNitt possessed multiple pornographic works, all downloaded at different times over the course of several weeks onto a single hard drive. As *Bakken* holds, these were separate offenses, constituting separate conduct, and it is logically impossible that a charge or indictment for one offense could toll the statute of limitations for the other two offenses.[1]

Accordingly, we conclude that the district court erred as a matter of law in determining that the statute of limitations was tolled when the state filed the first count, and we reverse McNitt's convictions on counts two and three of the complaint and remand to the district court with instructions to vacate those convictions.

[1] Although we do not base our decision on the presence or absence of prejudice to the defendant, we note that at oral argument, the state argued that the decision to amend the complaint did not prejudice McNitt. According to the state, adding counts made it easier for McNitt to defend himself at trial, as he would no longer have to prepare a defense for every video or image on his hard drive, but instead could limit his defense to just three files. This argument borders on the absurd.

The investigator presented evidence that the logs from McNitt's peer-to-peer sharing software listed over 900 files which had been partially or fully downloaded over the pertinent time period. While the investigator testified that not all of these files were on the hard drive when it was seized, we cannot agree with the state that a defendant is not prejudiced by not knowing until a week before trial how many counts he faces when each count carries a penalty of up to five years in prison, and he may be sentenced consecutively for each count. *See* Minn. Stat. § 617.247, subd. 4(a) (2010); Minn. Sent. Guidelines 6 (2011).

II.

Before trial, McNitt made three motions to suppress evidence, which the district court denied. "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).

a. Police use of peer-to-peer software to learn IP address of computer sharing suspected child pornography files

McNitt first argues that the district court erred by not suppressing evidence obtained as a result of police use of peer-to-peer software to learn the IP address of the computer sharing suspected child pornography files. McNitt asserts that law enforcement used technology "not commonly accessible to the public" to learn the IP address of the computer sharing the suspected child pornography files, and such a search was prohibited by the United States Supreme Court's decision in *Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 2046 (2001) (holding that when "the [g]overnment uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant").[2] This argument is without merit.

Generally, under the Fourth Amendment of the United States Constitution, "the question whether a warrantless search . . . is reasonable and hence constitutional must be

[2] McNitt argued below that this conduct also violated Minn. Const. art. I, § 10. However, he does not raise that argument here.

answered no." 533 U.S. at 31, 121 S. Ct. at 2042. However, before determining if a warrantless search is reasonable, we much first ask "whether or not a Fourth Amendment 'search' has occurred." *Id*. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id*. at 33, 121 S. Ct. at 2042 (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967) (Harlan, J., concurring)). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" because this exposure demonstrates a lack of subjective expectation of privacy. *Katz*, 389 U.S. at 351, 88 S. Ct. at 511.

Here, the district court found that while McNitt was sharing the files police flagged as suspected child pornography, his IP address was accessible to any member of the general public also on the network. This finding is supported by testimony in the record and is not clearly erroneous.

Therefore, because McNitt knowingly exposed his IP address to the public, he has no Fourth Amendment protection in that information, and the district court did not err in denying his motion to suppress evidence gathered using his IP address.

b. Police use of administrative subpoena to connect IP address of computer to McNitt's residence

McNitt next argues that police use of administrative subpoenas to link the IP address police discovered to his name and address violated his rights under Minn. Const. art. I, § 10. The "authority to subpoena and require the production of any records of . . . subscribers of private computer networks including Internet service providers" that "are

relevant to an ongoing legitimate law enforcement investigation" is explicitly authorized by Minn. Stat. § 388.23, subd. 1 (2010). Thus, although he does not explicitly frame his argument in this manner, we interpret McNitt's position as an argument that Minn. Stat. § 388.23, subd. 1, is unconstitutional as applied to him and analyze it as such.

Addressing this issue in the context of the Fourth Amendment to the U.S. Constitution, the Eighth Circuit has held that a defendant "cannot claim a reasonable expectation of privacy in the government's acquisition of his subscriber information, including his IP address and name from third-party service providers." *United States v. Wheelock*, 772 F.3d 825, 828 (8th Cir. 2014) (alteration omitted) (quotations omitted). This is because "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [that third party] to Government authorities, even if the information is revealed [by the defendant] on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624 (1976).

McNitt nevertheless implicitly argues that Minn. Stat. § 388.23, subd. 1, violates the protections afforded by the Minnesota Constitution. It is well settled that even when the language employed in the Minnesota Constitution exactly mirrors the language employed in the United States Constitution, the Minnesota Constitution may still provide "broader individual rights." *State v. Murphy*, 380 N.W.2d 766, 770 (Minn. 1986). However, "[a] defendant's rights to challenge any search under Article I, Section 10 of the Minnesota Constitution are coextensive with [the defendant's] rights under the Fourth

Amendment to the United States Constitution." *State v. Griffin*, 834 N.W.2d 688, 695–96 (Minn. 2013) (quotation omitted).

Therefore, to determine whether the use of an administrative subpoena infringes on McNitt's protected privacy interest, we must conduct a two-part inquiry to determine (1) if McNitt had a subjective expectation of privacy in the information given by him to his internet service provider; and (2) if that subjective expectation of privacy was one society is prepared to accept as reasonable. *State v. Jordan*, 742 N.W.2d 149, 156 (Minn. 2007). In the first part, our inquiry focuses "on the individual's conduct and whether the individual sought to preserve something as private." *Griffin*, 834 N.W.2d at 696 (quotation omitted). McNitt bears "the burden of establishing that the challenged search violated his reasonable expectation of privacy." *Jordan*, 742 N.W.2d at 156.

McNitt did not testify, did not call any witnesses, or offer any evidence. As a result, the record contains no indication that McNitt had a subjective expectation of privacy in the subscriber information he provided to his internet service provider.

McNitt argues, however, that under what he calls "the limited third party doctrine," any personal information given to a third party service provider cannot be reached by investigators without a warrant. McNitt admits that this is not the current state of the law in Minnesota, but nevertheless asks this court to extend the protections of the Minnesota Constitution to all persons who, as subscribers, provide their personal information to third

party internet service providers under all circumstances. The Minnesota Supreme Court has not adopted the limited third party doctrine, and we decline to do so here.[3]

McNitt has failed to meet his burden of demonstrating a subjective expectation of privacy. Therefore, we conclude that the district court did not err in denying McNitt's motion to suppress evidence gathered as a result of the administrative subpoenas.

c. Police questioning of McNitt without first informing him of his *Miranda* rights

McNitt next argues that the district court erred by denying his motion to suppress statements he made to police when he was questioned before receiving a *Miranda* warning. This argument is without merit.

Miranda v. Arizona provides procedural safeguards that protect an individual's Fifth Amendment privilege against self-incrimination. 384 U.S. 436, 478–79, 86 S. Ct. 1602, 1630 (1966). "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).

Whether a suspect is in custody and entitled to a *Miranda* warning is a mixed question of fact and law. *State v. Horst*, 880 N.W.2d 24, 31 (Minn. 2016). We review a district court's findings of fact for clear error, but "review independently the legal

[3] The Minnesota Supreme Court has explicitly declined to reach whether a typical subscriber has an expectation of privacy in the personal information held by a third party service provider. *State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006). However, we note that in *Gail*, the supreme court determined that it could not conclude the defendant had a subjective expectation of privacy in information held by the third party service provider because the defendant "did not testify or call any witnesses to support a finding that he had an expectation of privacy in the records." *Id.*

conclusion regarding whether the interrogation was custodial." *Id.* "[Appellate courts] grant considerable, but not unlimited deference to the district court's fact-specific resolution of whether the interrogation was custodial," if the district court applied the proper legal standard. *Id.* (alteration omitted) (quotation omitted).

"An interrogation is custodial if, based on all the surrounding circumstances, a reasonable person under the circumstances would believe that he or she was in police custody of the degree associated with formal arrest." *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010) (quotation omitted). In considering the totality of the circumstances, "no factor alone is determinative." *Id.*

> Factors indicative of custody include (1) the police interviewing the suspect at the police station; (2) the suspect being told he or she is a prime suspect in a crime; (3) the police restraining the suspect's freedom of movement; (4) the suspect making a significantly incriminating statement; (5) the presence of multiple officers; and (6) a gun pointing at the suspect.

State v. Vue, 797 N.W.2d 5, 11 (Minn. 2011) (quotation omitted). Factors that indicate a suspect is not in custody include:

> (1) questioning the suspect in his or her home; (2) law enforcement expressly informing the suspect that he or she is not under arrest; (3) the suspect's leaving the police station without hindrance; (4) the brevity of questioning; (5) the suspect's ability to leave at any time; (6) the existence of a nonthreatening environment; and (7) the suspect's ability to make phone calls.

Id.

The circumstances surrounding McNitt's questioning are not disputed. In determining whether McNitt's statements should be suppressed, the district court weighed the factors outlined in *Vue*:

> Factors indicative [McNitt] was not in custody include: he was interviewed at his home, only three officers were present, he was never told he was the prime suspect, the environment was non-threatening with no guns pointed, he was allowed to make a phone call to his brother, he made no significantly incriminating statements, and he was told multiple times he was not under arrest. Factors indicative [McNitt] was in custody include: he was not allowed immediate access to his phone when he asked [the officer] if he could text his trainer. However, [McNitt] was later allowed to text his trainer after an officer retrieved [McNitt's] phone from [McNitt's] car.

The district court then concluded that McNitt was not in custody for *Miranda* purposes.

Our review of the record indicates that the district court's factual findings are not clearly erroneous. The district court employed the correct standard for determining whether McNitt's interrogation was custodial. Given the weight of factors indicating McNitt was not in custody as compared to those factors indicating McNitt was in custody, we conclude that the district court did not err in denying McNitt's motion to suppress statements he made to police when questioned before being issued a *Miranda* warning.

III.

Finally, McNitt argues that the evidence presented is not sufficient to convict him of the charged crimes. We disagree.

In evaluating a claim of insufficiency of the evidence, we conduct "a painstaking review of the record to ascertain whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the

defendant was guilty of the offense charged." *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010) (alteration omitted) (citation and quotation omitted). A verdict will stand if the factfinder, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that the defendant was proven guilty of the offense charged." *Id*. (alteration omitted). We employ the identical standard for a bench trial as we would for a jury trial. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004).

To prove McNitt violated Minn. Stat. § 614.247, subd. 4 (2010), the state must prove three elements beyond a reasonable doubt: the files in question were child pornography; McNitt possessed the files; and McNitt knew or had reason to know the "content and character" of the files. Knowledge of the content and character of the files includes either actual knowledge or a subjective awareness "of a substantial and unjustifiable risk that the work involves a minor." *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007) (quotation omitted).

Prior to trial, McNitt "stipulated that the three files at issue were in fact child pornography." Therefore, the only elements that were at issue at trial were McNitt's possession of the files and McNitt's knowledge of the content and character of the files. The state offered only circumstantial evidence to prove these elements.

When evaluating a conviction based on circumstantial evidence, the first task is to identify the circumstances proved. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). In so doing, we view the evidence presented in the light most favorable to the verdict and presume the jury accepted the evidence consistent with the circumstances proved and

rejected conflicting evidence. *Id*. We then "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved," including those inferences inconsistent with guilt. *Id*. (quotation omitted). Ultimately, a conviction based on circumstantial evidence will be upheld if the inferences drawn from the entire constellation of circumstances proved are "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id*. at 330, 332.

With respect to the element of possession, the circumstances proved include the fact that the files in question were discovered on an external hard drive seized from the nightstand of the bedroom in McNitt's apartment, where McNitt lived alone. The officer who interviewed McNitt testified that when he questioned McNitt about whether he possessed any child pornography, McNitt answered that the only evidence the officer would find on the external hard drive would be links to text stories from a specific internet website. The officer testified that links to text stories from that specific website were found on the external hard drive. McNitt's specific knowledge of the contents of the external hard drive supports an inference that McNitt possessed the external hard drive and does not support any other reasonable inference.

With respect to the element of knowledge, the circumstances proved include evidence that McNitt's internet search history contained search terms "jailbait," "Lolita," "tween," "dad kid," "dad kid porn videos," "nubiles," "father daughter," "mother son," "brother sister," "taboo," and "babies." The investigating officer testified that in this context, "Lolita" means "prepubescent child" and "tween" means "a child going from being prepubescent to pubescent."

Further, the three files in question were named: "(PTHC incest) Sister suck the penis and masturbating brother and friend"; "16 Year Old Lolita Masturbates her Ten Year Old Preteen Sister"; and "2008 Private-Rachel-12Yo." The officer testified that in this context, "PTHC" is an acronym standing for preteen hard-core. The state also produced evidence that the file entitled "(PTHC incest) Sister suck the penis and masturbating brother and friend" was among the ten most recent files opened on the hard drive.

The circumstances proved support an inference that McNitt had, at minimum, a subjective awareness of a substantial and unjustifiable risk that the files at issue contained pornographic materials involving a minor. The evidence does not support any other reasonable inference.

Because the state provided evidence of facts which, when combined with the reasonable inferences supported by those facts, could lead a factfinder to reasonably conclude that McNitt was guilty of violating Minn. Stat. § 617.247, subd. 4, and is inconsistent with any other conclusion, we conclude that McNitt's conviction was supported by the evidence.

Affirmed in part, reversed in part, and remanded.