STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1406

State of Minnesota,
Respondent,

vs.

Mario Dewayne Nelson,
Appellant.

Filed September 17, 2018
Affirmed
Hooten, Judge

Ramsey County District Court
File No. 62-CR-15-1551

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, 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

HOOTEN, Judge

On appeal from his conviction for possession and sale of cocaine, appellant argues that the search warrant allowing the search of his car was not supported by probable cause,

and that the district court erred by failing to suppress evidence found on cellphones in his car during the execution of the search warrant and by admitting hearsay statements of his passenger as evidence at trial. We affirm.

FACTS

In late December 2014, Officer Michael Dunaski of the St. Paul Police Department received information from a confidential reliable informant (CRI) with whom he had worked in the past that a man nicknamed "Bam" was selling crack cocaine in St. Paul. The CRI specified that Bam sold the drugs out of a gray 2002 Trailblazer with the assistance of a female driver. The CRI also gave Officer Dunaski the license plate number for the Trailblazer and the address of a parking lot where Bam was selling drugs. Officer Dunaski conducted an independent investigation based on this information. In the course of his investigation, he observed someone matching Bam's description go to the specified parking lot in the gray Trailblazer, exit the Trailblazer, enter a vehicle that had pulled up alongside him, and stay in it for a short time before they both left. Officer Dunaski believed, based on his training and experience, that this was consistent with drug dealing.

The Ramsey County District Court issued a search warrant on December 30 based on the above information. The warrant specified that law enforcement could search Bam and the Trailblazer for, amongst other things, drugs, drug paraphernalia, cellphones, and the information stored on any cellphones found.

On January 7, 2015, Officer Marshall Titus of the St. Paul Police Department saw the gray Trailblazer and pulled it over. In the car was a male driver and a female passenger. Officer Dunaski came to the scene and saw that the driver—appellant Mario Nelson—was

the same person he had observed during his investigation. The passenger of the vehicle was a woman named B.P. Officer Dunaski noticed that B.P.'s pants were undone or unzipped. The officer later explained that, in his experience, the crotch of a person's pants "is often a quick stash spot in an emergency situation." B.P. indicated to Officer Dunaski that she had marijuana in her pants. A female officer, Colleen Rooney, was called to the scene to assist in searching B.P. and recovering the marijuana. B.P. was placed in the back of Officer Rooney's squad car with the door open and her legs outside of the car while Officer Rooney began a search of her body. Within a minute of being placed in the squad car, B.P. indicated that she wished to speak to one of the other officers. Officer Joshua Raichert, a St. Paul Police officer who was also on the scene, spoke with B.P. on the sidewalk next to the squad car about two and a half minutes after she was initially put in the squad car. During the conversation, which was not recorded, B.P. told Officer Raichert that Nelson had handed her something just prior to being pulled over and that she had hidden it in her underwear. B.P. then removed from her pants some bags containing what appeared to be marijuana and crack cocaine and gave them to Officer Raichert.

Officer Dunaski and the other officers searched the Trailblazer. They found and seized two cellphones. B.P. and Nelson were brought to the jail. Officer Raichert then interviewed B.P. at the jail. The interview, which took place more than an hour and a half after Officer Titus pulled the Trailblazer over, was audio recorded. In the interview, B.P. reiterated what she had told Officer Raichert on the sidewalk earlier. She also confirmed that she gave the officers the plastic bags with the drugs at the scene. After the interview, officers brought B.P. back to the Trailblazer, and she was not booked into the jail.

Nelson was charged with one count of second-degree controlled substance crime (sale of cocaine) and one count of third-degree controlled substance crime (possession of cocaine). He moved to compel the identity of the CRI, to suppress evidence, including the cellphones found in the Trailblazer, and to dismiss the case for lack of probable cause. The district court denied Nelson's motions. During the ensuing jury trial, B.P. was called as a witness. When asked about January 7, 2015, she testified that she did not remember anything from that day and invoked her Fifth Amendment right against self-incrimination. The state had Officer Raichert testify regarding his conversation with B.P. on the sidewalk. Defense counsel objected, arguing that this was hearsay. The district court overruled the objection, concluding that the testimony fell under the excited-utterance exception to the hearsay rule. The state also offered into evidence the audio recording of B.P.'s jail interview. Defense counsel objected to this as well, but the district court allowed it in as an excited utterance. During his testimony, Officer Dunaski also read off text messages found on one of the cellphones found in the Trailblazer. Some of these messages related to drug use and drug sales.

The jury found Nelson guilty of second-degree controlled substance crime. He was sentenced to 95 months in prison. This appeal follows.

D E C I S I O N

Nelson makes three principal arguments on appeal. He first argues that the search warrant was not supported by probable cause. He then argues that the district court should have suppressed the evidence found on the cellphone because either the police needed a second warrant to search his phone or, alternatively, there was insufficient probable cause

to support a search of the phone in the first warrant. And finally, he argues that B.P.'s hearsay statements to Officer Raichert were not excited utterances and should not have been admitted as substantive evidence at trial.

I. Probable Cause

Nelson argues that there was insufficient probable cause to support the issuance of the search warrant. We review a district court's decision to issue a search warrant to see if there was a "substantial basis for concluding that probable cause existed." *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). We limit our review to the information contained in the warrant application and its supporting affidavit. *Id.* at 384–85. And we apply the totality-of-the-circumstances test articulated by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 2332 (1983). *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998). The *Gates* court explained that:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Gates, 462 U.S. at 238–39, 103 S. Ct. at 2332 (quotation omitted). In conducting this review, we afford great deference to the district court's decision to issue a search warrant. *State v. Rochefort*, 631 N.W.2d 802, 804–05 (Minn. 2001); *see also Gates*, 462 U.S. at 236, 103 S. Ct. at 2331 ("[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review."). Thus, close "cases should be largely

determined by the preference to be accorded to warrants." *Fawcett*, 884 N.W.2d at 385 (quotation omitted).

Nelson splits his probable-cause argument into four parts. He argues that (1) the warrant affidavit did not establish the CRI's veracity; (2) the affidavit did not establish the CRI's basis of knowledge for the tip; (3) the police did not adequately corroborate the CRI's tip; and (4) the warrant was inappropriate because it did not establish a nexus between the criminal activity and the places to be searched.

A. Veracity

An informant's veracity is one of the important things to consider when analyzing the totality of the circumstances of the issuance of a warrant. *See Gates*, 462 U.S. at 238, 103 S. Ct. at 2332. In Minnesota, we sometimes refer to this as reliability. *See State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998) (using "veracity" and "reliability" interchangeably). In *Ward*, this court identified six "considerations" or factors to determine "the reliability of an informant who is confidential but not anonymous to police." *Id.* The factors are:

> (1) a first-time citizen informant is presumably reliable; (2) an informant who has given reliable information in the past is likely also currently reliable; (3) an informant's reliability can be established if the police can corroborate the information; (4) the informant is presumably more reliable if the informant voluntarily comes forward; (5) in narcotics cases, "controlled purchase" is a term of art that indicates reliability; and (6) an informant is minimally more reliable if the informant makes a statement against the informant's interests.

State v. Ross, 676 N.W.2d 301, 304 (Minn. App. 2004) (citing *Ward*, 580 N.W.2d at 71).

Nelson essentially argues that the warrant affidavit did not provide enough information for the district court to properly assess the confidential informant's veracity. In examining the warrant affidavit, we note that factors one, five, and six do not apply. And it is unclear whether the fourth factor applies. However, the second and third factors do apply, and they support the issuance of the search warrant.

The second factor is the past reliability of the informant. *Id.* In *State v. Wiley*, the Minnesota Supreme Court considered a statement in an affidavit that an informant "has been used over several years successfully" and interpreted this to mean "that the informant had provided accurate information to the police in the past." 366 N.W.2d 265, 269 (Minn. 1985). The supreme court held that this was sufficient for the magistrate to find that the informant had provided reliable information. *Id.* And in citing to the same passage from *Wiley*, this court in *Ross* explained that "[t]he second factor is fulfilled by a simple statement that the informant has been reliable in the past." 676 N.W.2d at 304. We further stated that "[t]here is no need for law-enforcement officers to provide specifics of the informant's past veracity." *Id.* The warrant affidavit in this case explained that

> The CRI has provided information that has led to search warrants being written & executed, several arrests being made, and the recovery of narcotics. Many of these arrests resulted in successful prosecution. Your Affiant has worked with this CRI previously and information received from them has been deemed to be very accurate and reliable.

This statement more than satisfies the demands of *Ross* and *Wiley*. And, contrary to Nelson's requests, we will not demand more of law enforcement than our binding precedent already requires.

The third factor addresses police corroboration of the CRI's information. *Id.* Officer Dunaski conducted an investigation after receiving the information about Bam. He saw a man matching the CRI's description of Bam drive to the parking lot that the CRI had described, in the car that the CRI had described, and appear to deal drugs as the CRI had described. In short, the CRI's veracity was corroborated by Officer Dunaski's investigation. And because factors two and three strongly support the CRI's veracity, Nelson's argument on the issue fails.

B. Basis of Knowledge

An informant's basis of knowledge is another important thing to consider when analyzing the totality of the circumstances of the issuance of a warrant. *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332; *State v. Cook*, 610 N.W.2d 664, 668 (Minn. App. 2000), *review denied* (Minn. July 25, 2000). An informant's basis of knowledge can be shown two ways. It can be demonstrated by first-hand information like a controlled buy. *Cook*, 610 N.W.2d at 668. Or it can be demonstrated "indirectly through self-verifying details that allow an inference that the information was gained in a reliable way and is not merely based on a suspect's general reputation or on a casual rumor circulating in the criminal underworld." *Id.* The affidavit does not indicate that the CRI had first-hand information about Nelson, so we instead look for self-verifying details.

This court undertook such an analysis in *Cook* after it determined that the informant in that case did not have direct knowledge for a tip. *Id.* The court looked at the details provided by the informant and determined that they "did not predict any future behavior on Cook's part. Rather, the details were simply a report of Cook's appearance and present

location, details easily obtainable by anyone, not necessarily by someone with inside information on Cook." *Id.* at 669. The *Ross* court also undertook this analysis. 676 N.W.2d at 304–05. In doing so, the *Ross* court distinguished its case from *Cook*, explaining that the informant in *Ross* had provided information that "predicted future behavior," including that the defendant "would appear at a specified address at a specified time in a described vehicle, all of which was verified by law-enforcement prior to the search." *Id.* at 305.

We conclude that this case is akin to *Ross*. Unlike *Cook*, where the "details did not predict any suspicious behavior," 610 N.W.2d at 668, the details provided by the CRI here did the same thing as in *Ross* and "predicted future behavior," 676 N.W.2d at 305. Most significantly, the CRI accurately predicted—as confirmed by Officer Dunaski's investigation—that a man matching Bam's description would drive a gray 2002 Trailblazer to a specified parking lot to deal drugs. Accordingly, Nelson's argument that the warrant affidavit did not establish the CRI's basis of knowledge is unpersuasive.

C. Corroboration

Nelson asserts that the warrant affidavit's veracity and basis-of-knowledge deficiencies are not saved by police corroboration. But this argument is moot since we have already held that the veracity and basis of knowledge were not deficient in the first place, obviating the need for any such saving. Moreover, Officer Dunaski's corroborative investigation already factored into both analyses when we determined that the officer's observations of a man matching Bam's description using the gray Trailblazer to conduct

what appeared to be a drug deal in the specified parking lot supported both the veracity and basis of knowledge of the CRI's tip.

D. Nexus

Nelson's last argument with regard to the warrant is that there was an insufficient nexus between the evidence sought and the places to be searched. Probable cause requires "that there is a fair probability that the evidence will be found at the specific site to be searched." *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). In other words, there must be a sufficient nexus between the two. *Id.* This nexus can be inferred from the totality of the circumstances and does not require direct observation of the evidence of the "crime at the place to be searched." *Id.* Circumstances to be considered in making this determination "are the type of crime, the nature of the items sought, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items." *Id.* at 623. In this case, the evidence sought was evidence of drug dealing, and the places to be searched were Bam and the Trailblazer. The CRI in this case told law enforcement that Bam was using a Trailblazer with a specific license plate number to sell drugs. Officer Dunaski performed his own investigation and saw someone who appeared to be Bam using the specified Trailblazer to conduct what appeared to be a drug sale. There could be no more logical places for officers to search than the person described as selling drugs and the vehicle described as being used to sell those drugs.

None of Nelson's arguments are persuasive. We conclude that the district court had a substantial basis for issuing the search warrant.

II. The Cellphone

Nelson next argues that the district court erred by not suppressing the information taken from the cellphones. When reviewing pretrial orders on motions to suppress evidence, we review the findings of fact for clear error and the legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

Nelson asserts that the warrant did not authorize a search of the cellphones. But our review of the warrant shows that it specifically authorized law enforcement to search Bam and the Trailblazer for property, including "cellular phones . . . , pagers, electronic storage devices" and "[a]ll electronic contents, information, and files of the phone memory, SIM card memory, or other data storage device, including but not limited to voice mail, email, text messages, call logs, contact lists, digital images, and videos." Accordingly, we conclude that the search warrant contemplated and authorized law enforcement to search the cellphones.

Nelson argues in the alternative that the warrant's authorization to search the cellphones was not supported by probable cause because the warrant affidavit "provided no basis to believe that a cellphone would contain evidence of a crime or that its data would contain evidence of criminal activity." This asks us to determine if there was a substantial basis for finding probable cause, *Fawcett*, 884 N.W.2d at 384, by using a totality-of-the-circumstances test, *Gates*, 462 U.S. at 238–39, 103 S. Ct. at 2332, and affording "great deference" to the district court's determination, *Rochefort*, 631 N.W.2d at 804–05.

Nelson focuses on whether there was a direct connection or nexus between the evidence sought and the cellphones. Probable cause requires "that there is a fair probability

that the evidence will be found at the specific site to be searched." *Yarbrough*, 841 N.W.2d at 622. This nexus can be inferred from the totality of the circumstances. *Id.* Some of those circumstances considered "are the type of crime, the nature of the items sought, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items." *Id.* at 623.

Courts have long recognized that cellphones are used in the drug trade. *See United States v. Lazcano-Villalobos*, 175 F.3d 838, 844 (10th Cir. 1999) ("[C]ellular telephones are recognized tools of the drug-dealing trade."); *United States v. Sasson*, 62 F.3d 874, 886 (7th Cir. 1995) (referring to cellphones as one of the "usual trappings" of a person involved in the drug trade). In this case, the search warrant was issued because there was probable cause to believe that Bam was dealing drugs out of a gray 2002 Trailblazer. It flows logically that if Bam were dealing drugs from the Trailblazer, he could be using a cellphone to arrange the sales. Considering the totality of the circumstances and the great deference we accord to warrant-issuing magistrates, we conclude that there was a substantial basis for the district court's probable cause determination authorizing a search of the cellphones found in the gray Trailblazer.

III. Hearsay

Nelson next argues that the district court erred by admitting B.P.'s hearsay statements about the drugs as excited utterances. Rulings on admission of evidence are reviewed for an abuse of discretion. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017).

Hearsay is not admissible unless it falls under an exception. Minn. R. Evid. 802. Minn. R. Evid. 803 provides hearsay exceptions, including excited utterances. Minn. R. Evid. 803(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*; *see also State v. Davis*, 820 N.W.2d 525, 536 (Minn. 2012). There are three requirements that must be met for hearsay to qualify as an excited utterance: (1) there was a startling event or condition; (2) the hearsay statement relates to the startling event or condition; and (3) the declarant was "under a sufficient aura of excitement caused by the event or condition to insure the trustworthiness of the statement." Minn. R. Evid. 803 1989 comm. cmt; *see also State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986).

The district court found that the circumstances preceding B.P.'s statement—Nelson handing B.P. drugs as the police were stopping Nelson's Trailblazer and asking her to hide them—constituted a startling event. This finding supports the first two requirements for an excited utterance: there was a startling event and the statement relates to it. *See Daniels*, 380 N.W.2d at 782. We conclude that based upon this record, the district court did not clearly err in its finding.

That leaves the third requirement, which asks whether B.P. was sufficiently under the aura of the exciting event when she made the statement. *See id.* Nelson argues that B.P.'s statement fails this requirement because of the amount of time that had passed between Officer Titus pulling the Trailblazer over and B.P.'s statement on the sidewalk. But our caselaw is clear that "[t]here are no strict temporal guidelines for admitting an excited utterance." *State v. Martin*, 614 N.W.2d 214, 223–24 (Minn. 2000) (quotation

omitted). So while the lapse of time between the stop and the sidewalk interview with Officer Raichert distinguishes B.P.'s statement from a typical excited utterance, it is not dispositive in deciding whether the statement was an excited utterance.

The district court based its finding that B.P. was under the aura of the exciting event on Officer Raichert's testimony that B.P. appeared nervous and desperate when she spoke to him.[1] "The trial court, in its discretion, determines whether the declarant was under the aura of excitement, and we review the determination for an abuse of discretion." *Id.* at 224 (quotation and citation omitted). Even if this is not a typical example of an excited utterance, we cannot say that the district court abused its discretion in determining that B.P. was under the aura of the exciting event when there was testimony that supported this finding.[2]

We also note that even if B.P.'s statement were not an excited utterance it would fit under the residual hearsay exception.

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the

[1] Nelson briefly argues that the state did not properly lay a foundation that B.P. was still under the stress of the exciting event. We conclude that Officer Raichert's testimony about his observation of B.P.'s mental state is a sufficient foundation for the finding that B.P. was still under the stress of the exciting event.

[2] The district court also admitted B.P.'s later statement from the jail as an excited utterance. This statement was given over an hour and a half after the exciting event and in a different setting. We conclude that the jail statement does not fall under the excited-utterance exception, but that its admission at trial was harmless because it was duplicative of B.P.'s prior statement. *See State v. Vang*, 774 N.W.2d 566, 576–77 (Minn. 2009).

> general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807. In determining whether a statement falls under the residual exception, Minnesota courts are to consider the totality of the circumstances, "looking to all relevant factors bearing on trustworthiness to determine whether the extrajudicial statement has circumstantial guarantees of trustworthiness equivalent to the other Rule 803 hearsay exceptions." *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006) (quotation omitted). B.P.'s statement to the police that she had the drugs in her pants was trustworthy because she made it against her own penal interests by implicating herself in a crime and it implicated Nelson, who she had a close personal relationship with at the time, in the crime as well. *See State v. Ortlepp*, 363 N.W.2d 39 (Minn. 1985) (noting that statement was more reliable because it was made against declarant's penal interest); *see also Davis*, 820 N.W.2d at 537 (stating that "declarant's relationship to the parties" is relevant to statement's trustworthiness).[3] Looking to Rule 807's requirements, we are satisfied that the statement is evidence of a material fact and that it is more probative than other evidence available. We are also satisfied that the interests of justice would best be served because Nelson had the opportunity to cross-examine both B.P. and Officer Raichert with regard to the statement. We conclude that the totality of the circumstances would favor admitting B.P.'s statement under the residual exception were it not admissible as an excited utterance.

[3] The issue is not before us since the parties did not raise the issue below or on appeal, but we note that B.P.'s statement may fall under the statement against penal interest exception to hearsay since her statements tended to inculpate her in drug dealing and obstruction of justice by hiding evidence. Minn. R. Evid. 804(b)(3).

The search warrant was supported by probable cause because the warrant affidavit demonstrated the CRI's veracity, the CRI's basis of knowledge, and the nexus between the evidence sought and the places to be searched. The search warrant also specifically contemplated a search of the cellphones found in the gray Trailblazer, and the authorization to search the cellphones was supported by probable cause because cellphones are commonly used in the drug trade and there was a fair probability that evidence of criminal activity would be found on the cellphones. And finally, the district court did not abuse its discretion in admitting B.P.'s statements made at the scene of the arrest.

Affirmed.