STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0292

State of Minnesota,
Respondent,

vs.

Zachary Phillip Harding,
Appellant.

Filed January 8, 2024
Affirmed in part, reversed in part, and remanded
Wheelock, Judge

Clay County District Court
File No. 14-CR-21-1619

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Pamela L. Foss, Chief Assistant County Attorney, Moorhead, Minnesota (for respondent)

Dane DeKrey, Ringstrom DeKrey PLLP, Moorhead, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Gaïtas, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Following a court trial, appellant was convicted of 27 counts of possession of child pornography as a registered predatory offender in violation of Minn. Stat. § 617.247,

subd. 4(b)(2) (2020), based on images and videos found on an SD card[1] that was seized from his residence following the execution of two search warrants. He claims that the district court erred by denying his motion to suppress the SD card because its discovery flowed from the illegal search and seizure of other evidence during the execution of the initial, allegedly invalid search warrant. He also claims that the district court sentenced him based on an erroneous criminal-history score. Because the district court did not err in denying appellant's motion to suppress the SD card, we affirm appellant's convictions, but because the district court's calculation of his criminal-history score was incorrect, we reverse and remand for resentencing.

FACTS

On May 6, 2021, the Moorhead Police Department received a report that appellant Zachary Phillip Harding had engaged in domestic abuse against his girlfriend, P.N., and that he possessed a firearm. P.N. reported that Harding had threatened to harm her and her family and that Harding had a firearm. When an officer conducted a welfare check, P.N. said that she did not have access to a cell phone.

Detective Nicholas Wiedenmeyer was assigned to investigate the report. He conducted a name search and learned that Harding was required to register as a predatory offender and was under supervision in Minnesota for convictions in the State of Virginia. Based on his experience, Wiedenmeyer suspected that Harding was prohibited from

[1] An SD card serves as supplemental data storage for a cell phone.

owning or possessing firearms because, to his knowledge, this is typically a condition of supervision for convicted felons.

On May 10, 2021, Wiedenmeyer learned from Harding's supervising agent that Harding was prohibited from owning or possessing a firearm and that Harding had signed a form acknowledging that condition when he was released from prison in Virginia on January 24, 2020. Wiedenmeyer then conducted a search of Harding's criminal history, which showed that Harding's convictions were for felony possession of child pornography in Virginia[2] and indicated that Harding was disqualified from possessing a firearm.[3] Finally, Wiedenmeyer inquired with a local agent for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) who also believed that Harding would be prohibited from owning or possessing a firearm both federally and in Minnesota based on the information Wiedenmeyer had gathered.

Wiedenmeyer applied the same day for a warrant to search Harding and P.N.'s residence for firearms and ammunition (firearms warrant). In the attached affidavit,

---

[2] Harding's criminal record in Virginia identifies his Virginia convictions and sentences as felonies; however, determining whether a crime committed in another state qualifies as a felony under Minnesota law requires a factual and legal inquiry. *Cf.* Minn. Sent'g Guidelines cmt. II.B.504 (Supp. 2005) (stating that "[s]entencing courts should consider the nature and definition of the foreign offense, as well as the sentence received by the offender"). At the relevant time here, Minnesota defined a felony as "a crime for which a sentence of imprisonment for more than one year may be imposed." Minn. Stat. § 609.02, subd. 2 (2020), *amended by* 2023 Minn. Laws ch. 52, art. 6, § 4, at 736. Harding's sentences for the Virginia convictions were exactly 12 months each.

[3] One of the criminal-history reports in the record lists Harding's "Firearms Disqualified Status" as "D" for "disqualified," and the other report lists "X" for "unknown." The reports include text that defines "D" and "X."

Wiedenmeyer stated, "Your Affiant knows Zachary Phillip Harding . . . to be prohibited from owning and or possessing a firearm from his previous felony conviction and also terms of his current probation status." The district court issued the firearms warrant, and Wiedenmeyer, Detective Nicholas Schultz, and other officers executed it the next day. When officers knocked on the front door of the residence and announced themselves, they heard noises coming from inside that caused them to suspect that Harding was hiding evidence of a crime. Wiedenmeyer directed the occupants to come to the door and to "stop moving and digging around." Harding initially ignored Wiedenmeyer's orders, then complied about one-and-a-half minutes later.

During this search, officers found three cell phones. One of the officers found a Samsung Galaxy cell phone folded into clothing in a dresser drawer in a bedroom. That officer observed that the cell phone was fully charged and protected by facial-recognition security and that its SD-memory-card port was empty and relayed this information to Wiedenmeyer. Wiedenmeyer questioned Harding about all three cell phones, and Harding denied that any of them were his. Wiedenmeyer called Harding's supervising agent about the cell phones, and the agent directed him to seize and search them on the agent's behalf.

Officers also found and seized a firearm, a safe containing ammunition, a holster, drugs, and drug paraphernalia. Officers gave Harding a copy of the search warrant before arresting him and removing him from the residence. Upon learning that the warrant was for firearms, Harding "chuckled" and said, "That's what this is about?" Harding did not see the inventory receipt with the list of items seized before officers took him into custody.

Harding called P.N. from the jail on a recorded line multiple times that day. During the calls, Harding instructed P.N. to tell officers that the items found during the search were hers. He also instructed her to search the floor of one of the bedrooms for an SD card and suggested that P.N. have a friend help her look for it, imploring her to "search that entire f---ing bedroom as hard as you can if it takes you all day." Harding told P.N. to bury the SD card in the backyard of the residence and remember where she buried it.

P.N. notified Wiedenmeyer that Harding had called her from the jail and that the content of the calls would be of interest to him. Wiedenmeyer alerted Schultz, who obtained and listened to recordings of the phone conversations. After listening to the calls, Schultz drafted a second search-warrant application for SD cards and any other electronic storage devices in Harding's residence based on the following information: Harding's criminal history; Harding's delay in answering the door and that he appeared to be hiding items when the officers came to the residence; that the cell phone was hidden underneath clothing in a drawer, fully charged and missing an SD card; the content of Harding's calls with P.N., including that he was "very concerned and nervous while talking about the SD card"; and Harding's reaction to learning that the initial warrant was for firearms. Schultz executed the warrant (SD-card warrant) less than an hour after it was issued, locating an SD card that contained several images and videos depicting child pornography.

The state initially charged Harding with ten counts of possession of pornographic works as a predatory offender in violation of Minn. Stat. § 617.247, subd. 4(b)(2). Harding moved to suppress the cell phone and SD card on multiple grounds. Relevant to this appeal, Harding first argued that the firearms warrant was invalid because the warrant application

relied on a material misrepresentation to establish probable cause: that Harding was "prohibited from owning or possessing a firearm from his previous felony conviction." He asserted that this statement was false because the sentences for his Virginia convictions did not constitute "felonies" under Minnesota law. Second, he argued that the officer who found the cell phone in the drawer illegally seized it when they observed its charge level and the absence of an SD card; that the cell-phone seizure was beyond the scope of the firearms warrant; that even if his supervising agent could authorize the seizure, the seizure occurred before any authorization was given; and that the SD card was fruit of the illegal seizure of the cell phone.

The district court held a contested omnibus hearing on Harding's motions. The officer who found the cell phone in the drawer did not testify at the hearing. Harding's supervising agent testified at the hearing that Wiedenmeyer had already seized the cell phone when he called the agent, but Wiedenmeyer testified that the cell phone remained in the dresser drawer until the agent directed him to seize it. Wiedenmeyer testified that he did not recall "hitting any buttons" on the cell phone that would have allowed him to determine the charge level but stated that there would have been "minor manipulation" of the cell phone by whoever first discovered it and that, in his experience with smartphones in general, "just the action of picking that cell phone up will cause that cell phone to react in a certain way." He also opined that the cell phone may have been manipulated by the officer who first found it only to move it out of the way so the officer could continue searching for the items named in the search warrant, which may have been "in or around and underneath" the cell phone and clothing in the drawer. Wiedenmeyer also testified

that the empty SD-card port would have been visible from the exterior part of the cell phone. Wiedenmeyer explained that he initially questioned Harding about the cell phones as part of the investigation of the "domestic portion of this complaint."

The district court rejected Harding's arguments that the firearms warrant was invalid and that the cell phone was illegally seized at the moment of its discovery in the drawer. And although the district court determined that the cell phone was illegally seized when it was removed from Harding's residence at the supervising agent's direction, the district court did not suppress the SD card because it determined that the SD card was not fruit of the illegal seizure of the cell phone.

The state amended the complaint and ultimately charged Harding with 28 counts of child-pornography possession. Following a stipulated-facts court trial under Minn. R. Crim. P. 26.01, subd. 4, the district court found Harding guilty of 27 counts of child-pornography possession and acquitted him of one count. The district court convicted Harding of each of the 27 counts and imposed sentences for six of the offenses, four of which were consecutive.

Harding appeals.

DECISION

Harding challenges the district court's denial of his motion to suppress in three ways, arguing that the firearms warrant was invalid, that the officers illegally searched and seized his cell phone at the moment they touched it, and that the SD card was the fruit of illegal searches and seizures. Harding also argues that the district court sentenced him based on an erroneous criminal-history score. We first address Harding's arguments

related to the motion to suppress the SD card before turning to his argument challenging his sentencing.

I. The district court did not err by denying Harding's motion to suppress the SD card.

Harding's challenges to the district court's denial of his motion to suppress the SD card, which contained the child pornography upon which his convictions here are based, focus on the both the firearms warrant and the SD-card warrant. Harding argues that the SD card should have been suppressed under the exclusionary rules that "[e]vidence obtained through an illegal seizure is not admissible to support a conviction" and "evidence discovered by exploiting previous illegal conduct is inadmissible." *State v. Bergerson*, 659 N.W.2d 791, 797 (Minn. App. 2003) (quotation omitted). Evidence obtained through illegal law-enforcement conduct is considered "the fruit of the poisonous tree" and may not be admitted unless the state proves the evidence was obtained "by means sufficiently distinguishable to be purged of the primary taint." *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)), *rev. denied* (Minn. Dec. 11, 2001). Harding asserts three distinct errors in the district court's analysis of the two search warrants to support his argument that the SD card should have been suppressed. We are not persuaded.

A. The district court did not err by determining that the firearms warrant was not based on a deliberate or reckless misrepresentation of fact material to probable cause and that the firearms warrant was valid.

Harding first argues that the district court erred by not suppressing the SD card because the firearms warrant, which he alleges led to the SD card's eventual discovery,

was invalid. He argues that the affidavit supporting the warrant contained a statement of material fact that was "objectively false" and made with intentional or reckless disregard of the truth and that probable cause for the warrant did not exist without the statement. The district court determined that there was "no evidence in the record to suggest" that Wiedenmeyer "deliberately made a statement that was false or in reckless disregard of the truth" and that the firearms warrant was not invalid on that basis.

The United States and Minnesota Constitutions provide that search warrants must be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. "A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)). We start with the presumption that an affidavit supporting an application for a search warrant is valid. *Franks*, 438 U.S. at 171. "When a defendant seeks to invalidate a warrant, the two-prong *Franks* test requires a defendant to show that (1) the affiant deliberately made a statement that was false or in reckless disregard of the truth, and (2) the statement was material to the probable cause determination." *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quotations omitted). This court reviews a district court's findings of fact on the first prong for clear error and a district court's legal determination on the second prong de novo. *Id.*

Harding asserts that Wiedenmeyer's statement in the warrant application that Harding was "prohibited from owning or possessing a firearm from his previous felony conviction" was false because his previous convictions from Virginia did not constitute

felonies under Minnesota law.[4] In its order granting a hearing on this issue, the district court determined that Wiedenmeyer's statement was material to probable cause because it was unlikely the firearms warrant would have been granted without the statement that Harding had prior felonies. On the first prong, the district court determined that there was "no evidence in the record to suggest" that Wiedenmeyer "deliberately made a statement that was false or in reckless disregard of the truth" because Wiedenmeyer took multiple steps to confirm his suspicion that Harding was prohibited from owning or possessing a firearm. The district court described the multi-step process in which Wiedenmeyer engaged and upon which he based his belief that Harding was prohibited from possessing firearms, including analyzing criminal-history reports from two law-enforcement databases, confirming that information with Harding's supervising agent, and consulting with an ATF agent.

The parties do not dispute the district court's determination that the statement was material to probable cause. Harding disputes only the district court's finding on the first prong, arguing that the district court's finding was clearly erroneous because (1) Wiedenmeyer's statement was "objectively false" given Harding's assertion that his Virginia convictions were not felonies under Minnesota law and, (2) in its analysis, the district court incorrectly credited Wiedenmeyer's testimony and improperly focused on the

[4] We express no opinion as to whether the statement was false. It is not clear from the record whether Harding's Virginia convictions rendered him ineligible to possess a firearm, and the district court did not resolve that issue. We note, however, that to succeed on his argument that the firearms warrant was invalid because it relied on a false statement in the warrant application, it would have to be false that Harding was ineligible to possess a firearm.

quantity, rather than the quality, of the steps Wiedenmeyer took to confirm that Harding was prohibited from possessing a firearm. To show that Wiedenmeyer's statement was intentional or reckless, Harding posits that Wiedenmeyer knew it would be best to ask a county attorney about whether Harding was prohibited from possessing a firearm but chose to consult with law enforcement because law enforcement would be more likely to supply facts supporting probable cause. And Harding further suggests that Wiedenmeyer contacted two members of law enforcement rather than one to make it appear that he did his due diligence when he did not.

Harding's argument that the statement was "objectively false"[5] does not succeed, however, because the question here is not only whether the statement was false, but whether the affiant possessed the requisite state of mind in making the false statement. Under *Franks*, a defendant may attack a facially sufficient affidavit to deter police from *intentionally or recklessly* misrepresenting facts in order to obtain search warrants. *State v. Doyle*, 336 N.W.2d 247, 250 (Minn. 1983) (citing *Franks*, 438 U.S. at 155-56). Harding must therefore show that any misrepresentation about his eligibility to possess a firearm was intentional or reckless.

The district court based its factual finding on Wiedenmeyer's testimony and the criminal-history reports that were introduced as exhibits. "Determinations of credibility of witnesses at the omnibus hearing are left to the [district] court, and those determinations will not be overturned unless clearly erroneous." *State v. Smith*, 448 N.W.2d 550, 555

[5] The state does not concede that the detective's statement was objectively false.

(Minn. App. 1989), *rev. denied* (Minn. Dec. 29, 1989). Wiedenmeyer testified that the criminal-history report he reviewed showed felony convictions, that he believed they would qualify as felonies in Minnesota, and that he did not know whether or how the length of the Virginia sentences might change that determination. He testified that he relied on information from Harding's supervising agent to confirm that Harding was convicted of felonies. Wiedenmeyer also testified that he believed the ATF agent to be familiar with the law and therefore competent to give an opinion on whether Harding was eligible to possess a firearm. Harding questions the quality and sincerity of Wiedenmeyer's efforts and identifies sources he contends Wiedenmeyer should have consulted, but offers no evidence that demonstrates that Wiedenmeyer intentionally or recklessly made a false statement in the firearms-warrant application.

Based on our review of the record, we discern no clear error in the district court's factual finding that Wiedenmeyer did not make a statement material to probable cause in the firearms-warrant affidavit knowing the statement was false or in reckless disregard of the truth. Thus, the district court did not err by determining that the firearms warrant was valid and denying Harding's motion to suppress the SD card on that basis.

B. The state failed to satisfy its burden to prove that the officers' inspection of the cell phone was not an illegal search and seizure.

Harding next argues that the district court erred because it incorrectly determined the timing of the illegal search and seizure of the cell phone that he alleges led to the SD

card's eventual discovery.[6] He asserts that because the officer who first found the cell phone could not have discovered its charge level and the absence of an SD card without manipulating it beyond the scope of the firearms warrant, the court should have determined that the illegal seizure of the cell phone occurred the instant an officer touched it in the drawer instead of when the officers removed the cell phone from Harding's residence.

"The State bears the burden of proving that police obtained the challenged evidence in accord with the Constitution." *State v. Molnau*, 904 N.W.2d 449, 451 (Minn. 2017). When reviewing a pretrial order on a motion to suppress, we review the district court's factual findings for clear error and its legal determinations de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012).

We first reject Harding's argument, citing *State v. Barajas*, that "minimal touching" of a cell phone is a search. 817 N.W.2d 204 (Minn. App. 2012), *rev. denied* (Minn. Oct. 16, 2012). In *Barajas*, this court determined that photographs obtained from a warrantless search of a flip phone were the product of an illegal search because the flip phone's exterior did not "betray[] its contents" and accessing the photographs required the officer to "physically open the cellular telephone, make deliberate key strikes, and navigate the telephone's internal memory." *Id.* at 216. Because the manipulation of the cell phone in

[6] The district court granted Harding's motion to suppress the cell phone and anything found on the cell phone, and it denied his motion to suppress the SD card and Harding's statements about the SD card. Although the motion was granted as to the cell phone, Harding challenges the district court's ruling as to precisely *when* the search and seizure of the cell phone occurred. In its order, the district court found "that the phone was not seized until [the agent] directed Detective Wiedenmeyer to do so." Harding appeals that ruling to support his argument that the SD card was fruit of that illegal act, an argument we address in the next section of this opinion.

Barajas was more than minimal, and because the cell phone in that case was a flip phone and the cell phone here is a smartphone, *Barajas* is not determinative.

Here, the district court rejected Harding's argument that the officer who first encountered the cell phone seized it, finding that "[t]here is nothing in the record that indicates the phone was seized or manipulated in any way other than to be picked up and moved in the drawer while officers were searching for guns and ammunition," that "[i]t would be nearly impossible to move a smart phone without touching the screen," and that "simple movement, motion, or touching of a cell phone screen can illuminate a cell phone when the power is turned on."

We agree that merely touching or moving the cell phone was reasonable given its location within the dresser drawer because a firearm or ammunition could also be stored in a dresser drawer. But the record contains insufficient information about what the officer who first found the cell phone did with it and how the officer identified the charge level and empty SD-card port before relaying those facts to Wiedenmeyer. And because that officer was not called as a witness and there was no other testimony or evidence from which we can discern what the officer did upon finding the cell phone, we are unable to conclude that the information about the cell phone was constitutionally acquired.

Wiedenmeyer testified that he encountered the cell phone during the firearms-warrant search after another officer found it hidden in clothes in a dresser drawer. He testified that he did not remember if the other officer brought the cell phone to him or if he was brought to the location where the cell phone was found. The record also does not

contain evidence about how the particular model of cell phone or its settings would affect how the cell phone reacted to particular movements or manipulations.[7]

Thus, while it is *possible* that the officer who found the cell phone discovered the charge level and empty SD-card port without exceeding the scope of the firearms warrant, we are unable to conclude as much from the record before us. The state, therefore, did not meet its burden to prove that the officers did not exceed the scope of the firearms warrant at the time the officers inspected the cell phone, and we must conclude that the officers' illegal seizure of the cell phone began when they manipulated the phone sufficiently to learn it was fully charged, protected by facial recognition, and had an empty SD-card port.

C. The SD card found during the second search was not fruit of the illegal search and seizure of the cell phone.

Having resolved the question of whether the cell phone's seizure during the first search occurred earlier in time than when it was removed from Harding's residence, we next consider Harding's argument that the SD card that officers found when executing the SD-card warrant was the fruit of the earlier illegal search and seizure and whether, taking into consideration our conclusion about the timing of the cell-phone seizure, the state proved that the SD card was obtained "by means sufficiently distinguishable to be purged of the primary taint." *Olson*, 634 N.W.2d at 229 (quoting *Wong Sun*, 371 U.S. at 488).

[7] The officer who found the cell phone also observed that it was protected by facial-recognition technology—an observation that may have required only that the officer pick it up but could have required that the officer manipulate the cell phone in other ways. As with the charge level and empty SD-card port, without additional information in the record, we are left to speculate about how the officer obtained this information.

Harding asserts that the district court erred by not suppressing the SD card, arguing that the SD card was the fruit of the officers' illegal seizure of the cell phone during the search for firearms because if the cell phone had not been searched and seized during the firearms-warrant search, the officers would not have had probable cause for the SD-card warrant. He specifically alleges that if officers had not illegally discovered the cell phone's charge level and the absence of an SD card, they would not have been suspicious about the cell phone and thus would not have asked him if he owned it during the search. He also asserts that had the officers not asked him about the cell phone during the search, he would not have made the incriminating statements to P.N. about the SD card.

Evidence discovered through an illegal search or seizure "is 'fruit of the poisonous tree,' and to be admissible the state must prove that the evidence was obtained 'by means sufficiently distinguishable to be purged of the primary taint.'" *Bergerson*, 659 N.W.2d at 797 (quoting *Olson*, 634 N.W.2d at 229). Evidence is not "'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun*, 371 U.S. at 487-88. Rather, the relevant concern is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *State v. Warndahl*, 436 N.W.2d 770, 775 (Minn. 1989) (quoting *Wong Sun*, 371 U.S. at 488).

To determine whether evidence is fruit of the poisonous tree, we examine the following factors:

> (1) the purpose and flagrancy of the officer's misconduct, (2) the presence of intervening circumstances, (3) whether it is likely the evidence would have been obtained in the absence of the illegality, and (4) the temporal proximity of the illegality and the evidence alleged to be the fruit of the illegality.

Bergerson, 659 N.W.2d at 797. "No single factor is dispositive." *Id.* "Rather, we must balance all of these factors." *Id.* We conduct this analysis de novo. *See State v. Davis*, 910 N.W.2d 50, 55 (Minn. App. 2018).

Purpose or Flagrancy of the Misconduct

First, we examine the purpose or flagrancy of the officers' misconduct, which is "especially important, because the aim of the exclusionary rule is to deter police misconduct by removing the incentive to disregard constitutional guarantees." *State v. Bale*, 267 N.W.2d 730, 733 (Minn. 1978). As we explained already, the record evidence does not include details about what the officers did with the cell phone during the firearms-warrant search, but Harding concedes in his brief that the officers' conduct "was not particularly flagrant," and we perceive no reason to disagree. There is no evidence that officers obtained the firearms warrant as a pretext to search for cell phones or that officers were looking for anything other than the items named in the warrant when they happened upon the cell phone. Indeed, the officers found the cell phone in a dresser drawer, which is a reasonable place to look for a firearm and ammunition. We also agree with the district court's reasoning that seizing the cell phone from Harding's residence was not flagrant

because the officers believed that Harding's supervising agent had authority to direct them to do so.

Intervening Circumstances

Second, we examine whether there were intervening circumstances "sufficient to purge the illegality of its primary taint." *Bergerson*, 659 N.W.2d at 798 (quotation omitted). Harding implicitly concedes that his recorded statements to P.N. supported probable cause for the SD-card warrant but asserts that if officers had not unlawfully searched or seized his cell phone, he would not have been worried about the cell phone and would never have made those statements. In essence, Harding asserts that but for the unlawful seizure of the cell phone, the intervening circumstances supporting probable cause for the SD-card warrant would not have existed.

We do not apply "but-for causation" to determine whether evidence is fruit of the poisonous tree. *Wong Sun*, 371 U.S. at 487-88 (explaining that evidence is not "'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police" (emphasis added)); *Bale*, 267 N.W.2d at 732 (rejecting a but-for-causation argument that evidence seized shortly after a warrantless arrest was fruit of the poisonous tree). Even if intervening circumstances are part of a "causal chain" of events initially brought on by an illegality, such circumstances are sufficiently distinguishable from the illegality if they are also brought about by an "intervening act of [a] defendant's free will." *Bale*, 267 N.W.2d at 733.

Here, a number of intervening circumstances occurred after officers found the cell phone in the dresser drawer. Officers asked Harding if the cell phone was his, which he

denied. Harding laughed and was visibly relieved when he learned that the initial warrant was for firearms. After officers took Harding into custody, they left the search-inventory list at the residence. Harding later called P.N. and instructed her to tell officers the cell phones and other items were hers. After P.N. relayed what was on the inventory list to Harding, he pleaded with her to find the SD card and hide it. P.N. advised officers to listen to the calls, and after listening to them, officers applied for the SD-card warrant. While nearly all of these circumstances share a "but-for" relationship with the illegal search and seizure, they were not the inevitable results of it—especially Harding's recorded statements to P.N., which he made of his own free will.

When we examine intervening circumstances, the question is not whether the circumstances are "inextricably interwoven, but whether the state is seeking to exploit the illegality of its agents to gain some advantage." *City of St. Louis Park v. Berg*, 433 N.W.2d 87, 90 (Minn. 1988); *see also Warndahl*, 436 N.W.2d at 776 (explaining that the primary purpose of the exclusionary rule is to deter police misconduct). The officers here did not use the illegally seized cell phone to coerce or provoke Harding to call P.N. or make incriminating statements in hopes of securing probable cause for the SD-card warrant. *See State v. Sickels*, 275 N.W.2d 809, 814 (Minn. 1979) (determining that officers did not exploit an illegality because "the police did not engage in any oppressive or coercive questioning"). And officers did not apply for the SD-card warrant until after P.N. prompted them to listen to the phone calls. We conclude that the officers did not exploit their search and seizure of the cell phone by engaging in oppressive or coercive behavior causing any of the intervening circumstances to arise, including Harding's incriminating statements

about the SD card, and that the intervening circumstances here were "sufficient to purge the illegality of its primary taint."

Likelihood the Evidence Would Have Been Obtained Absent the Illegality

Third, we examine the likelihood that the SD card would have been obtained absent the illegality. Harding makes the same "but-for" argument here, and again, we reject it because the fruit-of-the-poisonous-tree analysis is not a but-for test. *Wong Sun*, 371 U.S. at 487-88. Importantly, this factor—whether officers would have discovered the SD card absent the illegality—is outweighed by the intervening circumstances in this case. *See Olson*, 634 N.W.2d at 229 (holding that evidence was not fruit of the poisonous tree because intervening circumstances weighed strongly against suppression and outweighed close temporal proximity). Because Harding's recorded statements qualify as strong intervening circumstances that are distinguishable from the illegality—the search and seizure of the cell phone—we need not decide whether the other circumstances independently justified the officers' suspicion or supported probable cause for the SD-card warrant. Even if we were to consider this factor, however, we would conclude that Harding's incriminating statements and relief at the firearms warrant being only for firearms and ammunition are other circumstances that independently supported probable cause for the SD-card warrant separate from the search and seizure of the cell phone.

Temporal Proximity

Fourth, we examine the temporal proximity between the illegality and the evidence alleged to be the fruit of the illegality. "A close temporal proximity favors exclusion." *Bergerson*, 659 N.W.2d at 799 (quotation omitted). In cases where probable cause for a

search warrant arises from exploitation of an earlier illegality, we have examined the temporal proximity between the illegality and the officers' suspicion that led to the second search. *See, e.g.*, *Davis*, 910 N.W.2d at 55 (analyzing the proximity between "the officer's information gathering during the illegal detention and his suspicion that led to the search"); *Bergerson*, 659 N.W.2d at 799 (analyzing the proximity between an unlawful traffic stop and the seizure of evidence that led to a search).

Harding argues that the temporal proximity here supports suppression of the SD card because the officers' suspicion about the cell phone arose immediately when they seized it and officers applied for and executed the second warrant within about 12 hours after the seizure of the cell phone. We have concluded that temporal proximity weighs in favor of suppression when the temporal proximity between the illegality and the discovery of evidence alleged to be fruit of the illegality is immediate. *See Davis*, 910 N.W.2d at 55 (determining that temporal proximity supported suppression when it was "nearly immediate"); *Bergerson*, 659 N.W.2d at 799 (determining that temporal proximity weighed in favor of suppression when officers "immediately seized" evidence during an unlawful traffic stop); *Olson*, 634 N.W.2d at 229 (determining that close temporal proximity existed when the time between an unlawful arrest and the discovery of evidence was a "short time"). In contrast, we have concluded that a temporal proximity of hours weighs against suppression when intervening circumstances are strong. *See State v. Grover*, 402 N.W.2d 163, 166 (Minn. App. 1987) (analyzing a suppression argument in the context of an ineffective-assistance-of-counsel challenge and determining that temporal proximity weighed against suppression when the defendant made terroristic threats "hours"

after the allegedly illegal arrest). Here, we conclude that 12 hours is not "immediate" and that, under the circumstances of this case, the temporal proximity does not weigh in favor of suppression.

Moreover, the amount of time that passed between the illegal search and seizure and the application for the SD-card warrant was sufficient to allow multiple intervening circumstances to occur—one of which was Harding's incriminating statements. We are persuaded that the temporal proximity here is attributable to those statements. Officers did not apply for the second search warrant until after they had listened to the recorded phone calls. Because Harding urged P.N. to hide the SD card with the help of a friend, the officers reasonably suspected that the evidence might be hidden or destroyed if they did not obtain and execute the SD-card warrant the same day.

On balance, these four factors weigh against concluding that the SD card was fruit of the poisonous tree. Harding's incriminating statements are strong intervening circumstances that are sufficiently distinguishable from the officers' misconduct and are not the result of exploitation by the state. The purpose of the exclusionary rule would not be served by suppressing the SD card in this case. We conclude that the SD card was obtained by means sufficiently distinguishable to be purged of the primary taint. We therefore affirm the district court's denial of Harding's motion to suppress the SD card as fruit of an illegal search or seizure.

II. The district court abused its discretion by sentencing Harding using an initial criminal-history score of one.

Harding argues that he should not have been assigned an initial criminal-history score of one because the state did not satisfy its burden to prove that his prior convictions for possession of child pornography in Virginia did not arise out of a single course of conduct. We review a district court's calculation of a defendant's criminal-history score for an abuse of discretion, and we review de novo its interpretation and application of the sentencing guidelines. *State v. Oreskovich*, 915 N.W.2d 920, 926 (Minn. App. 2018). "The state has the burden of proving by a preponderance of the evidence 'the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal history score.'" *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008) (quoting *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983)), *rev. denied* (Minn. July 15, 2008). "When a defendant's sentence is based on an incorrect criminal-history score, his case must be remanded for resentencing." *State v. Woods*, 945 N.W.2d 414, 416-17 (Minn. App. 2020).

The district court sentenced Harding according to an initial criminal-history score of one based on its application of the sentencing guidelines to his criminal record, which included 31 convictions from the State of Virginia.[8] First, the district court determined that the convictions for possession of child pornography must be treated as gross

[8] Harding's criminal record in Virginia includes 32 total convictions: 31 convictions for felony possession of child pornography and one conviction for misdemeanor battery. The district court considered only the 31 child-pornography convictions in its criminal-history-score calculation.

misdemeanors rather than felonies pursuant to Minnesota Sentencing Guidelines 2.B.5.b (2020).[9] Second, it determined that it must apply the rule that each gross misdemeanor equals one unit and four units equal one criminal-history point pursuant to Minnesota Sentencing Guidelines 2.B.3 (2020).

In addition, when multiple prior gross-misdemeanor convictions arise from a single course of conduct and involve multiple victims, the district court may assign a maximum of two units. Minn. Sent'g Guidelines 2.B.3.d. When multiple prior convictions arise from a single course of conduct and involve a single victim, the district court may assign only one unit. Minn. Sent'g Guidelines 2.B.3.c, d. "The State bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

At the sentencing hearing, Harding argued that the Virginia convictions for possession of child pornography should not count for more than one unit because the state did not prove that the offenses were not part of a single course of conduct or that they involved multiple victims. The state did not rebut Harding's argument. But the district court sentenced Harding using an initial criminal-history score of one based on its determination that Harding had sufficient gross-misdemeanor units to equal one point.

[9] Minnesota Sentencing Guidelines 2.B.5.b provides that an out-of-state conviction "may be counted as a felony only if it would *both* be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Although Harding's Virginia offenses would be defined as felonies in Minnesota, his sentences were not equivalent to felony sentences under Minnesota law.

Whether multiple offenses arose out of a single course of conduct presents a mixed question of fact and law. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). When the facts are undisputed, we review de novo whether multiple acts form a single course of conduct. *State v. McCauley*, 820 N.W.2d 577, 591 (Minn. App. 2012), *rev. denied* (Minn. Oct. 24, 2012). Here, Harding does not challenge the facts contained in the Virginia conviction and sentencing order, the criminal-history reports, or the probation agreement. Thus, our review focuses on whether his Virginia convictions arose from a single course of conduct, and we apply the same-course-of-conduct rule set forth in Minn. Stat. § 609.035 (2020) and caselaw interpreting that statute. *State v. Nordby*, 448 N.W.2d 878, 879-80 (Minn. App. 1989) (applying section 609.035's same-course-of-conduct rule to prior convictions in computing a criminal-history score).

To determine whether multiple prior offenses formed a single course of conduct, we consider the following factors: "(1) whether the offenses occurred at substantially the same time and place, and (2) whether the conduct was motivated by an effort to obtain a single criminal objective." *Bakken*, 883 N.W.2d at 270 (quotations omitted). "The application of this test depends heavily on the facts and circumstances of the particular case." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011); *see Bakken*, 883 N.W.2d at 270 ("Determining whether multiple offenses are part of a single behavioral incident[10] is not a 'mechanical' exercise . . . .").

[10] "Legal authorities use the terms 'single course of conduct' and 'single behavioral incident' interchangeably. In the Guidelines, this is referred to as 'single course of conduct.'" Minn. Sent'g Guidelines cmt. 2.B.116 (2020).

In the context of convictions for possession of child pornography, the offense is completed when the defendant takes possession of the illegal materials. *Bakken*, 883 N.W.2d at 270. Regarding place, relevant facts may include the defendant's physical location when the defendant took possession of the illegal materials, *see id.*, and whether the materials were downloaded from or stored on separate devices or software programs, *see McCauley*, 820 N.W.2d at 591. Regarding single criminal objective, we consider "whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime." *State v. Barthman*, 938 N.W.2d 257, 267 (Minn. 2020) (quoting *State v. Krampotich*, 163 N.W.2d 772, 776 (Minn. 1968)). Possessing child pornography to satisfy sexual urges is generally too broad of a purpose to constitute a single criminal objective, but we also consider whether the offenses were committed at substantially different times. *See Bakken*, 883 N.W.2d at 271 & n.5 (observing that when "an offender repeatedly commits the same offense . . . the timing of those offenses is relevant to determining whether the offender had a *single* criminal objective, or merely the *same* criminal objective").

The record here contains limited information about the facts and circumstances of Harding's prior convictions—the Virginia order, the criminal-history reports, and the probation agreement lack a description of the factual basis for the convictions. The only information in the record with any detail about the convictions is from the Virginia district court's conviction and sentencing order showing that convictions for all of the offenses were entered on the same day, the date of the offense for all but one of the offenses was identified as an identical 60-day time period, all of the convictions were for violations of

same statute, and the sentences for each conviction were of equal duration and imposed consecutively. There is insufficient record evidence to support a conclusion that the Virginia offenses did not arise out of a single course of conduct.[11] Therefore, the state did not meet its burden, and Harding is entitled to resentencing based on a corrected criminal-history score.

Because Harding objected to the district court's calculation at sentencing, the state is not permitted to develop the record further on remand. *See Outlaw*, 748 N.W.2d at 356 (allowing the state to develop the sentencing record on remand because the defendant failed to object). On the existing record, Harding has one misdemeanor unit for his prior possession-of-child-pornography convictions. Because four misdemeanor units are needed to assign one criminal-history point and he only had one unit, Harding had an initial criminal-history score of zero at the time of his sentencing in this case.[12]

We therefore reverse Harding's sentences and remand with instructions for the district court to resentence Harding using an initial criminal-history score of zero and to exercise its discretion to impose a sentence within the guidelines range.

---

[11] The district court did not make any findings about whether Harding's convictions for possession of child pornography involved multiple victims, and our review of the record confirms that it does not contain sufficient information to discern whether those convictions were for offenses involving multiple victims.

[12] Although Harding concedes that he has one misdemeanor unit for the Virginia battery conviction, the district court did not include this conviction in its calculation. We express no opinion as to whether the battery conviction constitutes a misdemeanor unit, and we note that, even if the unit for battery is included, Harding's initial criminal-history score is still zero.

In sum, we conclude that the district court did not err by denying Harding's motion to suppress the SD card because the district court correctly determined first that the firearms-warrant application did not contain a deliberate or reckless misrepresentation of fact that was material to probable cause and that the firearms warrant was not invalid, and second that the SD card was not fruit of an illegal search or seizure. We further conclude that because the district court erred in its calculation of Harding's initial criminal-history score, we must reverse and remand to the district court to correct Harding's sentences.

Affirmed in part, reversed in part, and remanded.