STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0292

State of Minnesota,
Respondent,

vs.

Steven Harold Anderson,
Appellant.

Filed July 8, 2008
Affirmed
Johnson, Judge

Clay County District Court
File No. K9-04-394

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

Brian Melton, Clay County Attorney, 807 North 11th Street, Moorhead, MN 56560 (for respondent)

Charles F. Clippert, Special Assistant State Public Defender, 525 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Willis, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

A Clay County jury found Steven Harold Anderson guilty of theft by swindle and theft by false representation because he deceived Pamela Costello into providing him

with $6,000 in cash, approximately $7,000 in charges to her credit card, and more than $200 in charges to her cellular-telephone account. The state's evidence portrayed an elaborate scheme in which Anderson convinced Costello that he was an undercover federal agent sent to protect her and her family from becoming embroiled in an investigation of the Clay County Sheriff, who was a relative of Costello's.

Anderson appeals, making four arguments: (1) the district court lacked jurisdiction because his crimes were committed outside the state of Minnesota; (2) Clay County was an improper venue for trial, and the district court improperly instructed the jury on venue; (3) the district court erroneously overruled his *Batson* objection; and (4) the district court erroneously declined to conduct an in camera review of Costello's Clay County personnel file. We conclude that there was no error with respect to any of these issues and, thus, affirm.

FACTS

In August 2002, Anderson was confined in the Becker County jail after being charged with forging checks to purchase several automobiles. At the time, Costello was employed by Becker County as a jailer but resided in Clay County. Anderson asked Costello if Clay County Sheriff Larry Costello was her husband. Costello responded by saying that the sheriff is Costello's husband's cousin. Anderson later told Costello that Sheriff Costello was under investigation for illegal activities concerning firearms. Anderson suggested that Costello's husband and other relatives also were involved in the illegal activities. Anderson said that he was a federal government agent who had been placed in the jail to protect Costello and her family. He told her that when the

government "took down a family," the rest of the family would lose "everything." Anderson told Costello that if she cooperated with him, he would protect her family and her children, and her husband would receive a lighter sentence. All of these statements, Costello later learned, were not true.

Costello began to believe Anderson's statements after several incidents that bolstered his credibility. Costello testified that she had been subpoenaed to be a witness at an upcoming civil trial involving Sheriff Costello, but Anderson assured her that the government did not want her involved and that he would take care of the situation. The next day, she received a telephone call from a person who told her that the subpoena was being withdrawn and that she did not need to testify. In addition, Costello's son and brother were scheduled to be deployed to Iraq. Anderson assured her that they would be safe. Soon thereafter, the deployments were cancelled.

While an inmate at the Becker County jail, Anderson duped Costello into giving him the password to the voice-mail box on Costello's cellular telephone, which he used to listen to her messages. Meanwhile, he warned her that she was being monitored and told her that if she made "one more move," the government would be "coming in after your husband." Anderson later persuaded Costello to buy him a cellular telephone so that he would "know when things are going to happen." Costello provided him with a cellular telephone because she believed that she was cooperating with the government and that it was necessary for Anderson to continue to "protect everyone." Costello testified that she was scared and confused, believing that her house was "bugged." She was reluctant to

talk to anyone because she did not know whom to trust. Anderson assured Costello that he would reimburse her for the expenses incurred.

These events took place between August 10, 2002, and June 20, 2003, during which time Anderson was detained in the Becker County jail. Because Anderson had manipulated many of the jailers at Becker County, he was transferred to the Clearwater County jail, where he remained for approximately two months. On one occasion, Anderson convinced Costello to visit him and to bring $5,000 in bail money and another $1,000 in spending money. Costello changed her mind about giving Anderson bail money, but she did give Anderson a check for $1,000. Anderson then was transferred to the Jackson County jail. Despite being transferred frequently, Anderson remained in contact with Costello, both by telephone and by in-person visits.

On October 9, 2003, Anderson was transferred to the county jail in Morton County, North Dakota. After arriving there, Anderson told Costello that as long as he was in the Morton County jail, "he couldn't finish his job" and "couldn't protect" her or her family. He told her that if she did not bail him out, her "family would be harmed." Costello then provided Anderson with $5,000 in bail money, which he used to secure his release, three days after his arrival.

After his release from the Morton County jail, Anderson persuaded Costello to obtain a motel room for him in Fargo, North Dakota. Costello testified that she did so, not as a gift but because she wanted to cooperate with the government. After his release, Anderson told Costello that he was starting a business that would be a front for the government's involvement with her and that the business would employ her. Using an

alias, Anderson purchased vehicles and met with realtors and contractors to make arrangements for the new business venture. Costello signed an employment contract with Anderson's new company in November 2003. Anderson persuaded Costello to give him her credit-card numbers and, on one occasion, a credit card. He told her that the credit cards would facilitate the government's reimbursement. Anderson used the credit card and Costello's credit-card numbers to make ATM withdrawals of approximately $4,000 and to make between $2,500 and $3,000 in purchases, including more than $1,300 for lodging, more than $600 for clothing, and more than $300 for food. Costello testified that, throughout her interactions with Anderson, her primary concern was the threat of harm to her and to her family. She testified that she was not romantically involved with Anderson and that she complied with his requests only because she felt threatened.

Anderson later introduced himself to Costello's best friend, Debra Dawson. Anderson offered Dawson a bookkeeper position in his new company. Anderson visited Dawson and her husband, Jeffrey Dawson, at their home. When Jeffrey Dawson learned about the credit cards, the hotel room, and the cellular telephone, he called local law enforcement, which began an investigation in late December 2003. With the assistance of the Federal Bureau of Investigation, the investigating detective confirmed that Anderson was not a federal government agent. Anderson never provided any reimbursement to Costello.

In February 2004, Anderson was charged in Clay County with three counts of theft by false representation, in violation of Minn. Stat. § 609.52, subds. 2(3), 3(2), 3(3)(a) (2002), and three counts of theft by swindle, in violation of Minn. Stat. § 609.52, subds.

2(4), 3(2), 3(3)(a) (2002). The charges were based on (1) Anderson's receipt of $6,000 in cash, (2) Anderson's use of Costello's cellular-telephone account, and (3) Anderson's use of Costello's credit-card account. At the conclusion of a five-day trial in October 2006, a jury returned verdicts of guilty on all counts. The jury found the value of the stolen property with respect to counts 1, 2, 5, and 6 was between $2,500 and $35,000, and the value with respect to counts 3 and 4, which relate to the cellular-telephone charges, was less than $250.

On December 4, 2006, the district court sentenced Anderson on counts 1 and 5 to 26 months of imprisonment, with a concurrent sentence on count 3 of 90 days of imprisonment. The district court gave Anderson credit for time served in the amount of 856 days. Because Anderson had served his sentence, the district court released him and ordered that he establish a payment plan for a fine and restitution. Anderson appeals.

ISSUES

I. Did the district court have jurisdiction over the charged offenses?

II. Was venue proper in Clay County, and did the district court properly instruct the jury regarding venue?

III. Did the district court clearly err by overruling Anderson's *Batson* objection?

IV. Did the district court abuse its discretion by denying Anderson's request for an in camera review of Costello's Clay County personnel file?

D E C I S I O N

I. Jurisdiction

Anderson first argues that the district court did not have jurisdiction to try him for crimes that he contends were committed outside of Minnesota. "Jurisdiction is the court's power to hear and decide disputes." *State v. Simion*, 745 N.W.2d 830, 837 (Minn. 2008). Jurisdiction is a question of law, which this court reviews de novo. *Id.*; *State v. R.M.H.*, 617 N.W.2d 55, 58 (Minn. 2000).

As a constitutional matter, a criminal defendant may be tried only in the district "wherein the crime shall have been committed." Minn. Const. art. I, § 6. The supreme court has held that "'some operative event' or 'part of the crime charged must be committed within' Minnesota in order for Minnesota courts to have jurisdiction." *Simion*, 745 N.W.2d at 838 (quoting *State v. Smith*, 421 N.W.2d 315, 319 (Minn. 1988) (quotation omitted)).

In this case, Anderson engaged in conduct within the state of Minnesota that satisfies at least one of the elements of each offense of which he was convicted. Proof of theft by false representation requires evidence that the defendant obtained property or performance of services by "intentionally deceiving the third person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made." Minn. Stat. § 609.52, subd. 2(3) (2002). Proof of theft by swindle requires evidence that the defendant obtained property or services from another person "by swindling, whether by artifice, trick, device, or any other means." Minn. Stat. § 609.52, subd. 2(4) (2002). The state presented abundant evidence

that Anderson made false representations to Costello and engaged in "artifice, trick, [or] device," *id.*, while he was an inmate at the Becker County jail. That evidence is sufficient to establish that "some operative event" or "part of the crime charged" was committed within Minnesota. *Simion*, 745 N.W.2d at 838 (quotations omitted). That Anderson and Costello were outside the state of Minnesota when Anderson obtained the bail money and used Costello's credit card does not defeat jurisdiction.

Anderson argues that the events that occurred in Minnesota were too distant in time to be the basis of jurisdiction. Anderson has not cited any caselaw that would allow the passage of time to create an exception to the "operative event" test. In any event, the argument is not persuasive because Anderson left Minnesota for North Dakota only four months before he was charged, and he remained in contact with Costello throughout that four-month period.

Thus, the district court had jurisdiction over the offenses of which Anderson was convicted.

II. Venue

Anderson argues that venue was improper in Clay County and that the district court erroneously instructed the jury with respect to venue. "[V]enue deals with convenience and location of trial rather than with the power of the court to hear the action in the first place." *Smith*, 421 N.W.2d at 320. In a criminal case, venue is proper "in the county where the offense was committed." Minn. Stat. § 627.01, subd. 1 (2002). "'County where the offense was committed' means any county where any element of the offense was committed or any county where the property involved in an offense is or has

been located or where the services involved in an offense were provided." *Id.*, subd. 2. The interpretation of a venue statute is a question of law, which this court reviews de novo. *State v. Wolf*, 592 N.W.2d 866, 869 (Minn. App. 1999), *aff'd*, 605 N.W.2d 381 (Minn. 2000).

The term "venue" may refer to the proper place for trial or to an element of an offense, which are two distinct concepts. *State v. Eibensteiner*, 690 N.W.2d 140, 150 (Minn. App. 2004). Anderson has raised issues concerning both concepts.

A. Proper Place for Trial

Anderson argues that Clay County was an improper venue. Objections to venue are waived unless asserted before the commencement of trial. Minn. R. Crim. P. 10.01, 24.01 cmt. There is no indication in the record that Anderson objected to being tried in Clay County before the commencement of trial. Thus, Anderson has waived the argument that Clay County was an improper place for trial. *See State v. Blooflat*, 524 N.W.2d 482, 484 (Minn. App. 1994) (holding that defendant waived objection to improper venue by failing to object before trial).

Even if Anderson had objected, his argument would fail. If offenses have been committed in two or more counties, the state may aggregate the offenses and prosecute the defendant in any county in which one of the offenses was committed. Minn. Stat. § 609.52, subd. 3(5) (2002). At least one of Anderson's offenses was "committed" in Clay County because that is where Costello's property was located before Anderson wrongfully obtained it. In *State v. Billington*, 228 Minn. 79, 36 N.W.2d 393 (1949), the supreme court held that for the purposes of determining proper place of trial under

section 627.01, fraud was "committed" both where the victim was located and where the fraudulent check had been delivered. *Id.* at 86, 36 N.W.2d at 396-97. Costello resided in Clay County when she was swindled by Anderson.

Anderson argues in response that the felony charges against him could not be aggregated under section 609.52, subdivision 3(5), because that statute allows only misdemeanors to be aggregated. Anderson misreads the statute when he argues that the last clause, "all of the offenses aggregated under this paragraph," limits aggregation to the misdemeanor thefts discussed in paragraph 5. The statute permits aggregation of offenses charged under "this subdivision," which means all of subdivision 3. Subdivision 3 provides the maximum sentences for all theft crimes under section 609.52, including both felony and misdemeanor crimes. Minn. Stat. § 609.52 subd. 3(1)-(5). Accordingly, section 609.52, subdivision 3(5), permits the aggregation of both misdemeanors and felonies. Thus, Clay County was a proper place for trial.

B. Jury Instruction Concerning Venue

Anderson also argues that the district court erroneously instructed the jury that charges to Costello's credit card occurred in the county where she resided. That instruction allowed the jury to find that the offense of theft of Costello's credit-card funds occurred in Clay County. District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Jury instructions "must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d

150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

The state correctly points out that venue is not a statutorily enumerated element of the charged offenses. But the district court nonetheless included a venue requirement in its jury instructions. This court has recognized venue to be an element of every crime charged. *Eibensteiner*, 690 N.W.2d at 150; *State v. Bahri*, 514 N.W.2d 580, 582 (Minn. App. 1994) ("It is clear that the state must prove beyond a reasonable doubt that the charged offense occurred in the charging county."), *review denied* (Minn. June 15, 1994). The state bears the "burden of proving venue." *State v. Franklin*, 692 N.W.2d 82, 84 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. Apr. 19, 2005).

For count 3, the court instructed the jury, over the objection of Anderson's counsel, as follows:

> For purposes of determining whether the first element of the theft by false representation has been proven beyond a reasonable doubt, you are instructed that any charges to the victim's cellular telephone account, which occurred as a result of the defendant's wrongful conduct, are considered to have occurred in the county of the victim's primary residence.

The district court gave corresponding instructions on counts 4 through 6.

During the instructions conference, the district court explained that it would define the location of Costello's property by her place of residence rather than by the place from which Anderson electronically accessed those accounts or by the headquarters of the financial institutions that serviced the accounts. Anderson has not cited any legal authority that conflicts with the instructions given by the court. In fact, the district

court's instructions are consistent with *Billington*, which suggests that the property of a victim of financial fraud is located with the victim. 228 Minn. at 86, 36 N.W.2d at 396-97. Thus, the district court did not err in its instructions.

III. *Batson* Objection

Anderson also argues that the district court improperly denied his objection to the state's exercise of a peremptory strike of the only Hispanic person on the venire panel. "Whether there is racial discrimination in the exercise of a peremptory challenge is a factual determination to be made by the district court and is entitled to great deference on review." *State v. Taylor*, 650 N.W.2d 190, 200-01 (Minn. 2002); *see also State v. James*, 520 N.W.2d 399, 403-04 (Minn. 1994). "[T]he district court's determination will not be reversed unless it is clearly erroneous." *State v. McDonough*, 631 N.W.2d 373, 385 (Minn. 2001); *see also James*, 520 N.W.2d at 404.

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986). Under *Batson*, there are three steps for challenging an allegedly discriminatory strike. First, the defendant must make a prima facie showing of a discriminatory strike. Second, the prosecution must provide a race-neutral explanation for its strike. Finally, the court must determine whether there has been purposeful discrimination. *Id.* at 96-98, 106 S. Ct. at 1723-24; *see also Snyder v. Louisiana*, 128 S. Ct. 1203, 1207 (2008). Race-neutral explanations do not need to be "persuasive." *State v. Reiners*, 664 N.W.2d 826, 832 (Minn. 2003) (quotation omitted). Rather, the explanation will be deemed race-neutral

"[u]nless a discriminatory intent is inherent in the prosecutor's explanation." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995) (quotation omitted).

As a preliminary matter, the state argues that this court may not consider the *Batson* objection because Anderson has provided only a partial transcript of the voir dire proceedings. The state has not identified any caselaw holding that an incomplete transcript precludes all consideration of a *Batson* objection. As a practical matter, the absence of a complete transcript sometimes may curtail a defendant's ability to demonstrate error. But in this case, we are not hampered in our ability to consider Anderson's arguments with the limited transcript that is available.

During voir dire, the prosecutor asked whether any of the veniremembers had "a spouse or friend or close family member that would be in the field of law enforcement." The stricken juror, R.D., responded that she "knew quite a few officers," that she "had all their cards," but that she did not "know them by name anymore," with the exception of one person not relevant to this case, whom she knew well. R.D. explained that she knew the officers because "they used to visit at the apartments when they were called there."

After the state sought to strike R.D., Anderson objected on the ground that R.D., who is Hispanic, was the only member of an "ethnic minority" on the venire. Although Anderson is not a member of a racial or ethnic minority, he may object to the state's peremptory strike of a prospective juror that is motivated by racial discrimination. *See State v. Blanche*, 696 N.W.2d 351, 365 (Minn. 2005). Hispanic ethnicity is a protected racial classification for *Batson* purposes. *State v. Pendleton*, 725 N.W.2d 717, 726 (Minn. 2007).

The prosecutor responded to the objection by stating that the decision to strike R.D. was not based on her race but was made because she had several interactions with law enforcement. The prosecutor was aware that R.D.'s husband previously was involved with the court system, possibly as a criminal defendant. The district court overruled the *Batson* objection after concluding that both of the prosecutor's stated reasons for having stricken R.D. were race-neutral, particularly in light of the fact that no other jurors had similar contacts with law enforcement.

The district court did not clearly err by overruling Anderson's objection. A prosecutor's concern about a veniremember's prior contact with law-enforcement officers or experience with the criminal-justice system is a valid, race-neutral reason for exercising a peremptory strike because such persons could be unduly sympathetic to a criminal defendant. *See Pendleton*, 725 N.W.2d at 726. There are additional reasons for concern in this case because the victim, Costello, worked in law enforcement, and the case related tangentially to the Clay County Sheriff. The district court reasonably determined that the state's reasons for striking R.D. were race-neutral. *See Reiners*, 664 N.W.2d at 832. Thus, the district court did not clearly err by denying Anderson's *Batson* objection.

IV. In Camera Review of Costello's Clay County Personnel File

Finally, Anderson argues that the district court erred by refusing to conduct an in camera review of Costello's Clay County personnel file. "[D]ue process requires that 'criminal defendants have the right to the government's assistance in . . . put[ting] before a jury evidence that might influence the determination of guilt." *State v. Hummel*, 483

N.W.2d 68, 71 (Minn. 1992) (quoting *Ritchie v. Pennsylvania*, 480 U.S. 39, 56, 107 S. Ct. 989, 1000 (1987)). When the defendant seeks confidential records, courts prefer in camera review. *State v. Burrell*, 697 N.W.2d 579, 604 (Minn. 2005). Nonetheless a defendant requesting *in camera* review "must make at least some 'plausible showing' that the information sought would be material and favorable to his defense." *Id.* at 605 (quoting *Hummel*, 483 N.W.2d at 72). The required showing can be broken down into two parts: first, a showing that the sought-after information "could be related to the defense" and, second, a showing that the documents to be reviewed are "reasonably likely to contain" such information. *Hummel*, 483 N.W.2d at 72. A reviewing court considers district court rulings on in camera motions for abuse of discretion. *State v. Renneke*, 563 N.W.2d 335, 337 (Minn. App. 1997).

Anderson argues that the district court should have reviewed the records concerning Costello's prior employment with Clay County because those records perhaps could have been used to impeach Costello's credibility. Anderson's request was based on the supposition that Costello's Clay County personnel file might show that Costello had been disciplined during her employment at the Clay County jail for engaging in inappropriate relationships with inmates and giving them special favors, such as cellular telephones and alcohol. The district court denied Anderson's request, without prejudice to his ability to renew the request if additional information came to light.

The state argues that Anderson failed to make the required showing. It appears that the state focuses on the second prong—whether the personnel file is "reasonably

likely" to contain information concerning prior misconduct by Costello. The district court appears to have been very skeptical, explaining its ruling as follows:

> [A]ll of the witnesses who have testified in this case have stated nothing whatsoever which would raise [a] scintilla of evidence to establish even any speculation that there is any document in the possession of [Clay County] . . . which would state or establish that Pamela Costello was reprimanded, criticized, discharged, or in any way adversely spoken to because of her relationship or dealings with the defendant.
>
> There's never been an affidavit filed by any individual to so establish, and without some evidence to support the intrusion upon privacy of this witness into her private records of employment in Clay County, the Public Data Act compels that the court not go in . . . .
>
> If the defense counsel does have any witness who has personal knowledge of any kind, however minimal, I will readdress this issue, but in the absence of [that] . . . I will not readdress this issue . . . .

Defense counsel did not attempt to subpoena any witness to testify that Costello engaged in inappropriate relationships during her employment with Clay County. Furthermore, although Anderson's counsel had subpoenaed Sheriff Costello, counsel withdrew the subpoena after the district court's ruling and did not call Sheriff Costello to the witness stand. It appears that Anderson's request was based on attenuated rumors, obtained, in unexplained ways, from other inmates, whom Anderson's counsel declined to call as witnesses. In *Renneke*, this court stated, "To allow discovery of prior complaints against an officer solely on the ground that they may possibly bear on the officer's credibility is too broad. It could support such disclosure in almost every criminal prosecution." 563 N.W.2d at 339; *see also Burrell*, 697 N.W.2d at 605 (expressing concerns about

"proverbial fishing expedition"). Thus, we conclude that the district court did not abuse its discretion in declining to conduct an in camera review of the Clay County personnel file on the ground that Anderson had not made a "plausible showing" that the file would contain information favorable to his defense. *Burrell*, 697 N.W.2d at 605.

Affirmed.