STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1007

State of Minnesota,
Respondent,

vs.

Robert Tew,
Appellant.

Filed September 29, 2009
Affirmed
Peterson, Judge

Itasca County District Court
File No. 31-CR-07-3703

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

John J. Muhar, Itasca County Attorney, 123 Fourth Street Northeast, Grand Rapids, MN, 55744 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Lydia M. Villalva Lijo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this appeal from a conviction of fifth-degree controlled-substance crime, appellant argues that (1) because the search warrant for his residence improperly authorized a nighttime search, the district court erred by not suppressing evidence seized from his residence; (2) the state failed to prove that the substance given to a police officer was marijuana; and (3) the district court erred by admitting a marijuana flag into evidence. We affirm.

FACTS

At about 10:30 p.m. on October 8, 2007, Grand Rapids Police Officer Robert Stein stopped a vehicle being driven by Randy Clark after Stein saw that a taillight on the vehicle was not working. Stein smelled an odor of marijuana coming from the vehicle and asked Clark about it. Clark removed a small amount of marijuana, about one-eighth of an ounce, from his pocket and gave it to Stein. Clark stated that he had purchased the marijuana from appellant Robert Joseph Tew a few minutes earlier for $20. Clark gave Stein appellant's address and apartment number and described the door to appellant's apartment as being decorated for Halloween with yellow caution tape.

Clark agreed to go with Stein to the Itasca County Sheriff's Department to give a statement. In his statement, Clark stated that when he went to appellant's apartment, appellant said that he had no marijuana for sale, but he agreed to sell some that he had for his personal use. Also, appellant showed Clark a letter that said that there was too much traffic at appellant's apartment, and appellant told Clark not to come back.

Stein applied for a search warrant to search appellant's apartment. The warrant application stated the following facts. Stein learned from Officer Dorholt, the head of the Grand Rapids Drug Task Force, that when Dorholt had previously arrested appellant, appellant had in his possession marijuana and a large amount of cash. Stein also learned that in June 2005, Dorholt had interviewed Cindy Mutchler, who reported buying from appellant on a regular basis. Mutchler stated that appellant was buying large amounts of marijuana on a weekly basis and that she had seen as much as four pounds of marijuana at his residence. Stein learned that a concerned citizen had reported that a lot of people parked in the parking lot for appellant's apartment, made calls on cell phones, and then went into appellant's apartment and left within about five minutes. A confidential reliable informant (CRI) reported such activity occurring during the evening of October 8, 2007. At the time of the current offense, appellant was on probation for a controlled-substance crime.

The warrant application requested authorization for a nighttime search because narcotics are easily moved and destroyed and appellant was known to sell drugs during nighttime hours. The district court issued a search warrant with authorization for a nighttime search.

When they executed the search warrant, officers found the unsmoked portions of three hand-rolled marijuana cigarettes. On the floor in the master bedroom, officers found two plastic baggies that contained marijuana particles. One of the baggies had a corner torn out in a manner consistent with a packaging method used by drug dealers. A hand-held digital scanner capable of monitoring police traffic was plugged in and turned

on in the master bedroom. Also found were a glass smoking device that contained burned marijuana; an aerosol can with a hidden compartment that could be used to hide narcotics or valuables; a cigarette rolling machine; a digital scale, which is an item typically used by drug dealers; and a flag stating the history of marijuana.

Appellant was charged with one count of fifth-degree controlled-substance crime in violation of Minn. Stat. § 152.025, subd. 1(1) (2006) (sale of one or more mixtures containing marijuana or Tetrahydrocannabinols). Appellant moved to suppress the evidence discovered during the search of his apartment, arguing that the warrant improperly authorized a nighttime search. The district court denied the motion, and the case was tried to a jury.

Clark testified at trial that he had short-term memory problems due to a brain injury he suffered four years earlier. Clark testified that he did not recall Stein stopping his vehicle. When Clark was shown a transcript of his statement to Stein, he testified that he did not recall making the statement and that reviewing it did not aid his memory. Clark recalled speaking with Stein two days before trial and admitted telling Stein that someone had made a threat to him about what happens to "snitches" if they testify.

Clark testified that on October 8, 2007, when he finished working at 10:00 or 10:30 p.m., he and his girlfriend went to appellant's apartment to "get some weed." Clark did not recall what happened at appellant's apartment or who sold him the marijuana, but he did recall that he did not have marijuana when he went to appellant's apartment and that he bought one-eighth of an ounce of marijuana at the apartment.

Over appellant's objection, the district court admitted a redacted version of Clark's

statement to Stein into evidence at trial. Also, the parties stipulated that information about two *Spreigl* incidents involving appellant would be admitted into evidence at trial. The jury was told that appellant sold about 60 grams of marijuana on September 28, 2005, for $170 at his home in Marble. The jury also learned that appellant possessed about 224 grams of marijuana in a vacuum cleaner and about 20 grams of marijuana on a couch on September 29, 2005, at his home in Marble.

Appellant testified and admitted smoking marijuana on the offense date but said that he was no longer selling marijuana at that time. Appellant testified that Clark asked appellant if appellant knew where Clark could get some marijuana, and appellant said that he did not. Appellant denied selling marijuana to Clark.

Three of appellant's friends testified that they were at appellant's apartment when Clark came there. Appellant and his friends testified that appellant's apartment was a gathering place for appellant's friends, who enjoyed playing video games on appellant's Xbox 360 game system. Appellant and his friends testified that appellant did not leave the room while Clark was present and that appellant did not sell marijuana to Clark on October 8, 2007.

The jury found appellant guilty as charged. The district court found that the current conviction was a probation violation and executed appellant's sentences for two previous offenses, each for one year and one day, to run concurrently. The district court sentenced appellant to a stayed term of 13 months for the current offense. This direct appeal challenging the conviction followed.

D E C I S I O N

I.

When reviewing a pretrial order on a motion to suppress evidence, this court independently reviews the facts to determine as a matter of law whether the district court erred in its ruling. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). The district court's underlying factual findings are reviewed under the "clearly-erroneous" standard. *Id.*

A nighttime-execution provision in a search warrant must be supported by a "reasonable suspicion that a nighttime search is necessary to preserve evidence or to protect officer or public safety." *State v. Jackson*, 742 N.W.2d at 163, 168 (Minn. 2007). A reasonable suspicion requires something "more than an unarticulated hunch" but less than an "objectively reasonable belief." *State v. Wasson*, 615 N.W.2d 316, 320-21 (Minn. 2000). Police "must be able to point to something that objectively supports the suspicion at issue." *Id.* at 320. "Facts justifying an unannounced entry must be presented to the magistrate at the time of application. Failure to supply the necessary supportive facts to the issuing magistrate will nullify the warrant and facts later presented . . . will not bring the warrant back to life." *Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001) (citation omitted).

The search warrant was executed on appellant's apartment at 2:30 a.m. The search-warrant application stated the following reasons for a nighttime search:

> Your Affiant knows that narcotics are easily moved and destroyed. Your affiant learned from members of the Drug Task Force that [appellant] deals narcotics during night time

> hours. Your Affiant learned that [appellant] received an eviction notice and is to be out of his apartment in the next few days.

The district court determined:

> The only allegation that supports issuance of a nighttime warrant is the allegation that [appellant] "deals narcotics during night time hours." The mere allegation of nighttime sales is not, however, sufficient to support the issuance of the nighttime warrant.
>
> The nighttime warrant in the present case was appropriate because the allegation of nighttime sales was supported by actual evidence of sales at night. Not only did Mr. Clark's purchase of drugs occur during nighttime hours, but the affidavit also included evidence in the form of a report[] from a "concerned citizen" that lots of people would park in the apartment building parking lot, call on their cell phones and then go into defendant's apartment for about five minutes, and that a "CRI" reported that "multiple people were coming and going" from [appellant's] apartment on the evening of the execution of the search warrant. The foregoing evidence supports a reasonable inference that people were going to [appellant's] apartment to purchase drugs and that [appellant] was selling drugs during nighttime hours.

Cases from courts in other jurisdictions support the district court's determination. *See Ariz. v. Jackson*, 571 P.2d 266, 268 (Ariz. 1977) (concluding nighttime warrant proper when drug sales occurred at all times during day and night); *Ariz. v. Eichorn* 694 P.2d 1223, 1227-28 (Ariz. App. 1984) (stating "two suspected prior night sales of narcotics reasonably support an inference that the contraband might not be present on the subject premises the next morning"); *Idaho v. Fowler*, 674 P.2d 432, 439-40 (Idaho App. 1983) (stating that surveillance showing several evening buys made it reasonable to believe controlled substances might not be present by morning). We agree with the

district court that the nighttime-execution provision in the search warrant was supported by a reasonable suspicion that a nighttime search was necessary to preserve evidence. The warrant application indicated that appellant was selling marijuana on the night that the warrant was requested, and it was reasonable to suspect that the selling activity could stop before morning.

II.

Appellant argues that the evidence was insufficient to prove that the substance Clark turned over to the police was marijuana. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

The baggie that Clark gave to Stein was introduced at trial as exhibit number 2, and Stein identified the baggie as the one-eighth ounce of marijuana that Clark took from his front pants pocket. Stein, who had been trained in identifying controlled substances, opined that the substance was marijuana based on its color, consistency, and scent. Defense witness Matthew Broadrick, a person with considerable familiarity with marijuana, was shown exhibit 2, and when asked what it was, testified that he had no doubt that it was marijuana.

Appellant argues that "there is no evidence in the record that Officer Stein opened the sandwich bag and smelled the substance inside" and that "Stein did not testify regarding the color of the substance or the consistency of the substance." But Stein testified that he is able to identify marijuana based on "[c]olor, consistency and scent." When shown exhibit 2, Stein testified as follows:

> Q . . . Based on what you earlier testified to as to how you identify marijuana, what is your opinion as to Exhibit No. 2; what is it?
> A That is marijuana.

Appellant also raises issues regarding the weight of the substance that Clark gave Stein. But weight is not an element of fifth-degree sale of marijuana. *See* Minn. Stat. § 152.025, subd. 1(1) (elements of fifth-degree sale of marijuana). The evidence shows that both Stein and Broadrick were familiar with marijuana and both identified the substance in exhibit 2 as marijuana. Assuming that the jury believed this testimony, as we must, the evidence was sufficient to prove that the substance that Clark gave Stein during the traffic stop was marijuana. *See State v. Olhausen*, 681 N.W.2d 21, 29-30 (Minn. 2004) (when substance was not scientifically tested, circumstantial evidence and officer testimony may be presented to jury to attempt to prove identity of substance).

III.

"Evidentiary rulings are committed to the [district] court's discretion and will not be reversed absent a clear abuse of discretion." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). "Appellate courts largely defer to the trial court's exercise of discretion in

evidentiary matters and will not lightly overturn a [district] court's evidentiary ruling." *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 2006).

If the district court erred in admitting evidence, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). It is the appellant's burden to show error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Appellant argues that because the flag found in his apartment was irrelevant to the issue of whether appellant sold marijuana to Clark, the district court erred in admitting the flag into evidence. The state argues that because the flag showed the history of marijuana, it was relevant to showing that appellant knew that the substance that Clark gave Stein was marijuana. Even if the district court erred in admitting the flag, in light of all of the other items associated with marijuana use that were found during the search of appellant's apartment, appellant has failed to establish a reasonable possibility that the flag significantly affected the verdict.

Affirmed.