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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0242**

State of Minnesota,
Respondent,

vs.

Scotty Nicolas Perez,
Appellant.

**Filed March 13, 2017
Affirmed
Bratvold, Judge**

Polk County District Court
File No. 60-CR-14-937

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Stauber,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges his convictions of two fifth-degree controlled-substance crimes, arguing that (1) the district court erred by failing to suppress evidence from the

search of a car that was improperly impounded, (2) the evidence was insufficient to support the finding that appellant sold a controlled substance, and (3) the district court erred by failing to suppress appellant's statements that were obtained in violation of the Fifth Amendment. Because we conclude that appellant did not raise the impoundment issue below, the state presented sufficient evidence that appellant gave marijuana to the car driver in exchange for transportation, and any error from not suppressing appellant's statements was harmless, we affirm.

FACTS

On May 23, 2014, at approximately 10:54 p.m., Officers Burman and Thompson were on patrol in East Grand Forks, Minnesota, when they saw a white Impala without front or rear license plates but with a temporary permit in the rear window. Officer Burman initiated a traffic stop and, as he approached the car, tried to read the permit but was unable to because it was faded. Officer Burman spoke with the driver and saw two other occupants, a front-seat passenger and a back-seat passenger, appellant Scotty Nicolas Perez.

Officer Burman testified that, in talking with the driver, he smelled the odor of marijuana coming from the car and saw that the driver's eyes were dilated. Officer Burman asked the driver if there was insurance on the car and he responded no. Officer Burman then asked the driver to open the back door so he could see the temporary permit. After the rear door opened, the smell of marijuana was stronger; Officer Burman removed the permit from the rear window and determined it was valid.

Officer Burman returned to his squad car and told Officer Thompson that he smelled marijuana in the car, the driver was "bugged out on something," and there was no proof of

insurance. Officer Burman remained in the squad car and filled out a citation for the insurance violation, while Officer Thompson approached the car.

Officer Thompson asked the driver to step out of the car, and told the driver that “he knew there was marijuana in the car.” The driver reached into the glove box and gave the officer a small plastic zip bag with “a nugget of marijuana” inside. The driver said he got the marijuana from Perez “for free.”

The officers arrested the driver and Perez. In a search of the car, the officers found two bags in the rear seat where Perez had been sitting; one bag contained an empty pickle jar that smelled of marijuana, along with 30 plastic zip bags. The other bag contained a second pickle jar with 28 grams of marijuana, along with 33 small zip bags. In a later search of Perez, the officers found a digital scale with marijuana residue on it, two glass pipes, Zig Zag papers, \$25 cash, two cell phones, and an \$800 money-transfer receipt from Walmart. At some point, the car was impounded.

At the police station, Officer Schrage interviewed the driver. In a taped statement, the driver stated that he met Perez through the front-seat passenger, who is a relative, and that he had only met Perez once before. He stated that he picked up Perez and the other passenger and drove them to the mall where he saw Perez sell marijuana to two people. The driver repeated that Perez gave him a small bag of marijuana “for free.” He explained that he “wasn’t gonna charge [Perez] anything for the ride,” but Perez gave him the marijuana and stated “well here, take this anyway.”

Officer Schrage also interviewed Perez. After Officer Schrage read Perez his *Miranda* rights, Perez spelled his name, gave his birthdate, and they had the following exchange:

Q: Phone number?

A: It's um, um, I don't even feel good right now. If you don't mind, I'm gonna exercise my rights to remain silent 'till further notice. That's fine, you can just go ahead and just charge me with, with what you're charging me.

Q: With possession of marijuana with intent to deliver and to sell. I was hoping to maybe sort something out with you and help your situation out especially on a Memorial Day weekend.

A: Oh no, I'm fine, sir.

Q: Okay. Which phone is yours? So we can get rid of the other one? The flip phone or the smart phone? Or are they both yours?

A: The, you can just throw them away if you want.

Q: They're evidence and I, they're somebody's property. I'm not gonna just toss 'em.

A: Oh, alright. Yeah, well, you can just toss 'em if you want.

Q: Can I look through them before I toss them then?

A: They're not mine, so.

Q: They're not yours? But you were using them earlier today, you just borrowed 'em?

A: I'm sorry, excuse me sir?

Q: Were you using them earlier today?

A: No, I'm, I'm saying like, earlier I just told you. I ain't really feeling well, so.

Q: Okay, that's 'cause you're about to go to jail,

A: Exactly, if you don't mind, I'd like to exercise my right to just remain silent.

Q: Okay.

A: No further questions answered.

The interview ended. Officer Schrage later searched the contents of the cell phones without a warrant and found text messages about selling marijuana.

In a pretrial suppression motion, Perez challenged the initial stop, the expansion of the stop to search the car, the police interrogation about the cell phones, and the warrantless search of the cell phones. After hearing testimony and receiving other evidence, the district court denied the motions. Perez waived his right to a jury trial and the parties proceeded with a stipulated evidence trial.¹ The district court issued written findings and convicted Perez of two counts of fifth-degree controlled-substance crimes under Minn. Stat. § 152.025, subd. 1(b)(1) (2014). The district court sentenced Perez to 13 months on count one and stayed execution. This appeal follows.

DECISION

I. Car search

The United States and Minnesota Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The Fourth Amendment applies to an investigatory stop of a vehicle. *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 694–95 (1981). The Minnesota Supreme Court has held that the principles of *Terry v. Ohio* apply when evaluating the

¹ During district court proceedings, the parties stated that they were proceeding with a stipulated facts trial under Minn. R. Crim. P. 26.01, subd. 3. On appeal, Perez correctly notes that, because the parties stipulated to the evidence and not to the facts, this was a bench trial under Minn. R. Crim. P. 26.01, subd. 2.

reasonableness of seizures during traffic stops even when a minor law has been violated. 392 U.S. 1, 88 S. Ct. 1868 (1968); *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). Under *Terry*, a brief investigatory stop requires reasonable suspicion of criminal activity. 392 U.S. at 21–22, 88 S. Ct. at 1880. The stop must be “based upon ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’” *State v. Pike*, 551 N.W.2d 919, 921–22 (Minn. 1996) (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). If, after a valid stop, an officer forms a reasonable, articulable suspicion of other illegal activity, expanding the scope of the stop to investigate that activity is permitted under the Fourth Amendment. *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003).

On appeal, Perez concedes that the initial stop was justified because “[f]ailure to properly display vehicle registration is a violation of the law and thus provided a legitimate basis for stopping” the car. Perez nonetheless challenges the district court’s denial of his suppression motion, arguing that vehicle impoundment was not justified based on lack of insurance and the officer’s observation of dilated pupils.

The state responds that while Perez challenged the initial stop and the expansion of the stop at a pretrial hearing, he did not raise vehicle impoundment in the district court. Initially, the state argues that Perez waived the impoundment issue under Minn. R. Crim. P. 10.01, subd. 2, by failing to include it in his motion or raise it at the suppression hearing; alternatively, the state argues that Perez forfeited the impoundment issue. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (noting that “waiver is the intentional

relinquishment . . . of a known right” and forfeiture is a “failure to make a timely assertion of a right”) (quotation omitted).

We apply a mixed standard of review to a district court’s pretrial order on a motion to suppress evidence; factual findings are reviewed for clear error and legal determinations are reviewed de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). However, appellate courts “will not review issues that are raised for the first time on appeal unless a decision is necessary in the interests of justice.” *Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001). The purpose behind the rule “is to encourage the development of a factual basis for claims at the district court level.” *Gauster*, 752 N.W.2d at 508 (quotation omitted).

In Perez’s statement of the legal issues in his appellate brief, he acknowledges that the “specific” impoundment issue “was not raised below.” In his reply brief, Perez argues that, by challenging the expansion of the stop and the car search in the district court, he preserved the impoundment issue. Additionally, Perez urges the court to consider the issue in an exercise of discretion.

Initially, we conclude that Perez forfeited the impoundment issue. In Perez’s pretrial suppression motion and during the pretrial hearing, he did not argue that vehicle impoundment was improper. *State v. Needham*, 488 N.W.2d 294, 296–97 (Minn. 1992) (holding that pretrial suppression motion should specify with reasonable particularity the grounds for suppression so that state has advance notice and can meet its burden at the hearing). Next, we determine that the record is insufficient for this court to examine the impoundment issue. During the pretrial hearing, the witnesses were not questioned regarding when the decision to impound the car was made or whether the car search

occurred before or after impoundment. The district court, therefore, made no factual findings regarding impoundment. In short, there are no details about the impoundment in the record. Thus, the impoundment issue is not properly before this court and we decline to address it. *See generally Gauster*, 752 N.W.2d at 508–09 (declining to consider state’s argument that car search was justified under the automobile exception because state did not raise the issue in the district court and record was insufficient for appellate review).

Additionally, the district court upheld the expansion of the stop, including the search of the car, based on the automobile exception to the warrant requirement. *See, e.g., State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978) (upholding car search under automobile exception based on marijuana odor); *State v. Ortega*, 749 N.W.2d 851, 854 (Minn. App. 2008) (same), *aff’d*, 770 N.W.2d 145 (Minn. 2009). Here, the district court found that the officer had probable cause to search the car based on the odor of marijuana during initial contact with the driver, the stronger odor of marijuana upon opening the rear door, and, upon further questioning, the driver’s production of a zip bag containing marijuana. Perez appears to challenge these findings, specifically claiming that the squad recording contradicted the officer’s sworn testimony. Based on our review of the squad recording and the officer’s testimony, the district court’s findings are supported by the record and not clearly erroneous. We conclude that the district court did not err in denying Perez’s motion to suppress evidence from the car search.

II. Sufficiency of the evidence

Perez argues that the evidence was insufficient to convict him of a fifth-degree controlled-substance crime because the record lacks evidence that he sold marijuana to the

driver. The state responds that the district court found Perez guilty of two counts for the sale of marijuana: count one involved the exchange of a small quantity of marijuana to the driver for transporting Perez; count two involved the possession of marijuana with the intent to sell. The state further argues that the driver's recorded statement provides ample support for these findings. Alternatively, the state contends that this court may vacate the conviction on count one and remand for resentencing on count two because Perez makes no challenge to his conviction under count two.

When considering a claim of insufficient evidence, this court analyzes the record and determines if the evidence, viewed in the light most favorable to the state, was sufficient to convict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A verdict will be upheld where the evidence shows the factfinder, acting with due regard for the presumption of innocence and the necessity of the state providing proof of guilt beyond a reasonable doubt, could reasonably find the defendant guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). We assume the factfinder believed the state's witnesses and disbelieved evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We apply “the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence.” *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

A person is guilty under Minn. Stat. § 152.025, subd. 1(b)(1), if the person has sold a mixture “containing marijuana or tetrahydrocannabinols, except a small amount of marijuana for no remuneration.” In *State v. Hart*, this court held that the legislature intended, by referring to “no remuneration,” to “take the person who shares a small amount

of marijuana with an acquaintance out of the felony category.” 393 N.W.2d 707, 709 (Minn. App. 1986) (footnote omitted). A small amount of marijuana is defined as 42.5 grams or less. Minn. Stat. § 152.01, subd. 16 (2014). To sell means “to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture.” Minn. Stat. § 152.01, subd. 15a(1) (2014).

Perez asserts that the remuneration element requires that the sale must be “bargained for.” Because the evidence established that the driver received the marijuana “for free,” Perez contends the record does not support his conviction. Additionally, Perez also argues that, while he may have offered the marijuana in exchange for transportation, the driver declined the offer.

The issue raised by Perez initially requires the court to consider the language of the relevant statute. The interpretation of a statute is a legal question we review de novo. *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011). “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2016). If a statute’s language is clear, we apply the plain meaning of the statute. *Leathers*, 799 N.W.2d at 608. We are to “construe words and phrases according to rules of grammar and according to their most natural and obvious usage unless it would be inconsistent with the manifest intent of the legislature.” *State v. Garcia-Gutierrez*, 844 N.W.2d 519, 521 (Minn. 2014) (quoting *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)).

Minnesota Statutes chapter 152 does not define “remuneration.” This court uses a “common sense approach” when deciding “whether the ‘remuneration’ element of a crime

has been satisfied.” *State v. Blahowski*, 499 N.W.2d 521, 524 (Minn. App. 1993), *review denied* (Minn. June 22, 1993). We note that, in other statutes, the legislature has not limited remuneration to monetary compensation. *See, e.g.*, Minn. Stat. § 62A.436 (2014) (“‘[C]ompensation’ includes pecuniary or nonpecuniary remuneration of any kind.”). In common usage, remuneration is defined as payment or compensation. *Black’s Law Dictionary* 1437 (10th ed. 2014). Payment is the “[p]erformance of an obligation by the delivery of money *or some other valuable thing* accepted in partial or full discharge of the obligation.” *Id.* at 1,309 (emphasis added). Compensation is “[r]emuneration *and other benefits* received in return for services rendered.” *Id.* at 342 (emphasis added). Additionally, this court has recognized that remuneration can occur in monetary and non-monetary forms. *Hart*, 393 N.W.2d at 709–10 (stating remuneration is “the actual, constructive or attempted transfer or delivery of a controlled substance for remuneration, *whether in money or other consideration*”) (emphasis added) (quotation omitted). Thus, remuneration can take many forms, including transportation.

In *Blahowski*, this court affirmed a conviction of a fifth-degree controlled-substance crime after considering a challenge to the sufficiency of the evidence to prove a sale of marijuana. 499 N.W.2d at 526. In that case, officers testified that they observed four people in a car, one of whom exited, went behind a house into an alley, and then returned. *Id.* at 522. The scenario repeated, and, in a later search, police found marijuana on one of the passengers, not on the defendant. *Id.* at 523. The evidence also included that the car contained marijuana in baggies, and a centigram scale; the defendant had over \$1,000 cash on his person. *Id.*

This court affirmed the jury conviction after concluding that there was “ample evidence” to show that the defendant intended to sell the marijuana for remuneration based on, among other things, the evidence of suspicious behavior, marijuana that appeared to be packaged for sale, a large amount of cash, and a scale typically used by drug dealers. *Id.* at 524. This court concluded that a common-sense approach to the evidence showed “there [was] no evidence Blahowski was sharing a small amount of marijuana with an acquaintance” and “[t]he evidence that supports finding intent to sell *also supports finding intent to sell for remuneration.*” *Id.* (emphasis added).

Here, the district court found, but neither Perez nor the driver admitted, that Perez gave the marijuana to the driver in exchange for transportation. Many of the same circumstances are present here as in *Blahowski*. These circumstances support the inference reflected in the district court’s express findings, specifically, that the driver “did not pay anything for the marijuana” he received from Perez and the marijuana “was for driving defendant and [the front-seat passenger] around.”

The evidence included that Perez was in possession of 28 grams of marijuana, baggies typically used for packaging marijuana for sale, a digital scale, two pipes, rolling papers, and an \$800 money-transfer receipt. Additionally, the driver, who had met Perez only once before, was asked to drive Perez to the mall where he saw Perez conduct two drug sales. Finally, the driver stated that he was not going to “charge” Perez for the ride, but Perez gave him the marijuana and said to “take” it “anyway,” which he did.

Applying a common-sense, objective approach to determining whether the remuneration element has been satisfied, we conclude that the evidence sufficiently

supports the district court's finding that Perez gave the driver marijuana in return for transportation. We conclude, as did this court in *Blahowski*, that "[t]he [factfinder] had adequate evidence to convict . . . and was entitled to believe the state's version of the facts." 499 N.W.2d at 524. Therefore, Perez's claim of insufficient evidence fails.

III. Interrogation of Perez

The United States and Minnesota Constitutions provide that individuals have the right to be free from compelled self-incrimination. U.S. Const. amend. V; Minn. Const. art I, § 7. The measures set forth in *Miranda v. Arizona* "protect suspects from the inherently coercive nature of custodial interrogations." *State v. Ortega*, 798 N.W.2d 59, 67 (Minn. 2011); *see also* 384 U.S. 436, 86 S. Ct. 1602 (1966). Statements provided during custodial interrogation are inadmissible unless *Miranda* rights are validly waived. *Id.* In order to effectively invoke *Miranda* rights, "an unambiguous and unequivocal invocation of the right to remain silent is required." *State v. Day*, 619 N.W.2d 745, 749 (Minn. 2000). "Once implicated, the defendant's right to remain silent must be scrupulously honored and the interrogation must cease." *Id.* (quotation omitted). "Investigating officers violate the accused's right to remain silent when they refuse to stop the interrogation or attempt to wear down the accused's resistance and force a change of mind." *State v. Marshall*, 642 N.W.2d 48, 54 (Minn. App. 2002), *review denied* (Minn. May 28, 2002).

When determining whether a person is in custody, was interrogated, and waived or invoked *Miranda* rights, this court reviews the district court's factual findings for clear error. *State v. Horst*, 880 N.W.2d 24, 31 (Minn. 2016). The district court's legal conclusions are reviewed de novo. *Id.* This court will order a new trial if the district court

erred in its conclusions regarding *Miranda* violations, unless the error “was harmless beyond a reasonable doubt.” *Id.*

Perez argues that Officer Schrage’s continued questioning regarding the cell phones found in the car, and Perez’s subsequent statement that officers could throw away the cell phones, led to the discovery of text messages regarding drug sales that violated his previously-invoked right to remain silent. The state concedes on appeal that Perez was in custody at the time of Officer Schrage’s questioning and that Perez had unequivocally asserted his right to remain silent before Officer Schrage inquired about the cell phones.

In its written findings, the district court concluded that no Fifth Amendment violation occurred, characterizing the questions as “routine booking questions.” “Routine booking questions” are exempted from *Miranda*’s protections. *Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S. Ct. 2638, 2650 (1990); *State v. Whitehead*, 458 N.W.2d 145, 149 (Minn. App. 1990), *review denied* (Minn. Sept. 14, 1990). Routine booking questions include questions that collect “biographical data necessary to complete booking or pretrial services,” or record-keeping information. *Muniz*, 496 U.S. at 601, 110 S. Ct. at 2650. Any answers to routine booking questions are not subject to suppression. *Id.*

The district court determined that “[i]t is not apparent from the record that” the questions regarding the cell phones were intended to elicit an incriminating response from Perez. However, a review of the record indicates that Officer Schrage questioned Perez about the cell phones because he believed they contained evidence. Officer Schrage’s report of the incident also states that he was concerned that “remote-wiping” could occur on one of the phones. There is no evidence that Officer Schrage asked the questions to

gather biographical data, or to complete booking. Thus, the district court erred in concluding that these were “routine booking questions.” *Cf. State v. Heinonen*, __ N.W.2d __, 2017 WL 393787, at *4 (Minn. App. Jan. 30, 2017) (holding officer’s request for defendant’s consent to provide DNA sample was not interrogation under *Miranda* because it merely requested consent to search and was not likely to elicit an incriminating response).

This court, however, will not order a new trial if the error was “harmless beyond a reasonable doubt.” *Horst*, 880 N.W.2d at 31. Harmless error means that the verdict did not result from the error. *State v. Sterling*, 834 N.W.2d 162, 171 (Minn. 2013). In determining harmless error, an appellate court looks to how the evidence was used at trial, “whether it was used in closing argument,” and whether the defendant rebutted the evidence. *Id.*

Here, Perez’s statements and the text messages were received into evidence, but the district court did not rely on this evidence in making its findings of fact and determining Perez’s guilt. Therefore, we conclude that admission of the evidence was harmless beyond a reasonable doubt. *See State v. Davis*, 820 N.W.2d 525, 534 (Minn. 2012) (finding harmless error where purportedly inadmissible statement put appellant at crime scene, but the “mere presence at the scene of a crime does not establish that [appellant] aided or abetted criminal activity”). Accordingly, even in light of the Fifth Amendment violation, a new trial is unnecessary.

Affirmed.