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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1147

State of Minnesota,
Respondent,

vs.

Allen Lawrence Scarsella,
Appellant.

Filed April 29, 2019
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-15-33503

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Florey, Judge; and Kirk, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

Appellant challenges his assault and riot convictions, arguing that he is entitled to a new trial on the grounds of newly discovered evidence, which the state suppressed in violation of *Brady v. Maryland*, and because the district court erred when it failed to suppress certain cell phone evidence, which was the product of an insufficiently particular warrant that was unsupported by probable cause. Appellant also argues that he is entitled to a new trial because the district court abused its discretion when it gave an unmodified jury instruction dealing with the revival of an aggressor's right to self-defense. Finally, he argues the state presented insufficient evidence necessary to convict him of riot in the second degree. Because (1) even if the state inadvertently failed to disclose the alleged newly discovered evidence, appellant was not prejudiced; (2) the warrant was severable, particularized, and supported by probable cause; (3) the district court did not abuse its discretion by giving the standard jury instruction; and (4) there was sufficient evidence presented to sustain the riot charge, we affirm.

FACTS

In November 2015, appellant Allen Lawrence Scarsella shot five African American men during a protest taking place at the Fourth Police Precinct in North Minneapolis. Appellant was charged by amended complaint with one count of second-degree armed riot; five counts of second-degree assault with a dangerous weapon—substantial bodily harm; and one count of first-degree assault—great bodily harm. Appellant asserted self-defense,

arguing that one of the victims had threatened him with a knife before any gun shots were fired.

Shortly after the shooting, police officers obtained a warrant to search appellant's cell phone. The warrant authorized the officers to gather "all data contained in the cell phone including: call logs, contact list, voice mails, text messages, photos, videos, and recordings." The evidence recovered from the cell phone search include a bevy of racially insensitive communications (some of which discussed shooting African Americans), photos, and a video of appellant at a gun range, which displayed his ability to hit targets on a quick-draw. Appellant moved to suppress the cell phone evidence, arguing that the warrant was insufficiently particular and unsupported by probable cause. The district court denied his motion and the evidence was admitted.

The jury trial lasted over two weeks and more than 30 witnesses were called to testify. Both sides submitted a great deal of evidence concerning appellant's alleged use of defensive force. And before the case was submitted to the jury, appellant requested the district court modify the standard jury instructions to state that the right to self-defense is not forfeited by words alone, and that appellant could not be considered the aggressor just because he had a gun. The district court denied appellant's request. The jury found appellant guilty on all charged counts. The district court sentenced appellant to 182 months in prison.

After sentencing but before his appeal, appellant discovered that Officer Schroeder, a police officer uninvolved with the shooting investigation, believed that one of the shooting victim's, W.H., had a reputation for violence. Officer Schroeder had told another

officer, Officer Aguirre, who was at the police station on the night of the shooting, to inform the defense team that he was willing to share this information; but Officer Aguirre was believed to have forgotten to do so. This court granted appellant's motion to stay the appeal in order to initiate postconviction proceedings. Appellant filed a postconviction petition arguing that the state failed to disclose the police officer's opinion evidence regarding the victim's reputation for violence; and argued that this opinion constituted newly discovered evidence. The district court denied the petition. This court, thereafter, lifted the stay of the appeal.

Appellant now argues that he is entitled to a new trial because (1) the opinion evidence of W.H.'s reputation for violence should have been disclosed and constitutes newly discovered evidence, (2) the district court erred when it failed to suppress the evidence discovered on his cell phone, and (3) the evidence presented at trial did not support giving the revival of an aggressor's right to self-defense jury instruction and the instruction misstated the law. Appellant also asks this court to vacate his riot in the second degree conviction because the state failed to present sufficient evidence necessary to support the jury's determination on that charge.

D E C I S I O N

I. The post-trial discovery of W.H.'s reputation for violence

A. Brady violation

Appellant argues that the district court erred when it failed to award him a new trial because the state's failure to disclose Officer Schroeder's opinion—that one of the victim's had a violent reputation—amounted to a *Brady* violation. Under *Brady*, "suppression by

the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

A new trial should be granted under *Brady* when the petitioner shows that (1) the evidence at issue was favorable to the accused, either because it is exculpatory or it is impeaching, (2) the evidence was suppressed by the state, either willfully or inadvertently, and (3) prejudice to the accused resulted. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citations omitted). *Brady* violations present mixed questions of law and fact, which this court reviews de novo. *Id.* at 460.

At trial, appellant raised the theory of self-defense as justification for his use of force. A self-defense claim has four elements: (1) an absence of aggression or provocation by the party claiming self-defense; (2) an actual and honest belief that great bodily harm would result; (3) a reasonable basis for this belief; and (4) a lack of reasonable means to retreat or avoid the physical conflict. *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). The evidence of W.H.'s reputation for violence would have been admissible to establish that appellant was not the initial aggressor under the first element of his self-defense claim. *State v. Chavez-Nelson*, 882 N.W.2d 579, 588 (Minn. 2016).

It is undisputed that Officer Schroeder's opinion evidence would have been favorable to appellant. *See id.* However, it makes no difference whether or not the state

inadvertently or willfully suppressed the evidence because the absence of Officer Schroeder's opinion did not prejudice appellant.

In determining whether the withheld evidence prejudiced appellant, this court must consider (1) whether the evidence would have been admissible at trial and (2) if there is a "reasonable probability" that it would have made a difference in the result. *Gorman v. State*, 619 N.W.2d 802, 806 (Minn. App. 2000). "A different result is 'reasonably probable' when the government's evidentiary suppression undermines confidence in the outcome of the trial." ***Id.*** at 807. The court makes this determination "by considering the effect the undisclosed evidence would have had in the context of the whole trial record." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010).

It is important to reiterate that the evidence could have been used by appellant to cast doubt that he was the initial aggressor. But to that point, there was ample other evidence that appellant was not the aggressor in the incident. For example, the jury heard testimony that the protesters were "hostile," and approached appellant and his friends. Further, when appellant and his friends began to leave, they were followed by W.H. and a group of protesters. Appellant told the protesters to "leave us alone" and to "get back." Witnesses heard the protesters threaten to "beat [appellant's] ass." Appellant also claimed to have been punched and recalled a protester say "white boy, you're gonna die." Appellant's friend was punched. But, over the course of the trial, it was established that the only person to have definitively seen W.H. possess a knife was appellant, and no knife was recovered.

Moreover, even if the jury believed appellant's weapon claim, the jurors may still have rationally determined that appellant could not legitimately respond to that threat by immediately firing eight shots at precise, regular intervals at multiple individuals, some of whom were not near appellant and some of whom were trying to run away. To that end, the evidence showed that two in appellant's group were able to retreat to avoid any danger presented by the protesters. This evidence could have led the jury to infer that appellant had a reasonable possibility of retreating to avoid the danger. *See State v. Austin*, 332 N.W.2d 21, 24 (Minn. 1983) (holding that a person generally has a duty to retreat and avoid danger before using deadly force). Finally, the fact that W.H. was first shot in the back and then again in his leg as he was trying to get up significantly undercuts appellant's self-defense theory.

Consequently, after examining the whole trial record, we conclude that there is not a reasonable probability that the outcome of the trial would have been different, and the opinion of one officer about W.H.'s reputation is insufficient to undermine confidence in the outcome.

B. Newly discovered evidence

Appellant additionally argues that Officer Schroeder's opinion concerning W.H.'s reputation for violence constitutes newly discovered evidence that justifies a new trial.

> When determining whether to grant a new trial based upon newly discovered evidence, a defendant must prove the following: (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative,

> impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997).

But appellant is not entitled to a new trial on the grounds of newly discovered evidence for the same reasons as he is not entitled to a new trial under *Brady*; because the newly discovered evidence would not have "probably produced an acquittal or a more favorable result." *Id.*; s*ee Walen*, 777 N.W.2d at 217 ("[The] standard under a *Brady* analysis is more favorable to a defendant than the fourth prong of the newly-discovered evidence test.").

C. Evidentiary hearing

Appellant argues that even if he is not entitled to a new trial, he is at least entitled to an evidentiary hearing. In its postconviction order, the district court determined that appellant was not entitled to an evidentiary hearing because, even if taken as true that Officer Schroeder would have testified to W.H.'s reputation for violence, it would not have changed the outcome of the trial.

A postconviction court must hold an evidentiary hearing unless the petition and the files and records of the proceeding conclusively show that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2018). "In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). A postconviction court "may not find a postconviction affiant unreliable without first holding an evidentiary hearing to assess the affiant's

credibility. *Anderson v. State*, 913 N.W.2d 417, 423 (Minn. 2018). We review the district court's decision to deny a petition without a hearing for abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

The postconviction court accepted as true that Officer Schroeder would have testified to W.H.'s reputation for violence. Thus, taking appellant's factual statements as true, the petition conclusively showed that appellant was not entitled to relief on either basis claimed. Consequently, the district court did not abuse its discretion when it failed to award appellant an evidentiary hearing.

II. The cell phone evidence

Before trial, appellant filed a motion to suppress, requesting the suppression of all evidence recovered from his cell phone. The motion was denied. Appellant argues on appeal that he is entitled to a new trial because the warrant authorizing the search of his cell phone was unsupported by probable cause and violated the particularity clause of the Fourth Amendment to the U.S. Constitution and article I, section 10 of the Minnesota Constitution.

The warrant at issue authorized the search of "all data contained in the cell phone including: call log, contact list, voice mails, text messages, photos, video, and recordings." Based on this language, the district court concluded that the issuing judge authorized an insufficiently particular warrant when he permitted the officers to search and seize "all data contained in the cell phone." We agree.

The Supreme Court has held that cell phone searches must comply with the warrant requirements. *Riley v. California*, 573 U.S. 373, 401, 134 S. Ct. 2473, 2493 (2014). The

Federal and State Constitutions provide that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. Const. amend. IV; Minn. Const. art. I, § 10; *see Marron v. United States*, 275 U.S. 192, 195, 48 S. Ct. 74, 75 (1927). The particularity clause requires a particular description of both the place to be searched and the thing to be seized. *Groh v. Ramirez*, 540 U.S. 551, 560-61, 124 S. Ct. 1284, 1291-92 (2004). Failure to comply with either prong violates that particularity requirement and renders the warrant invalid. *Id.* at 557.

The Minnesota Supreme Court has stated that "when determining whether a clause in a search warrant is sufficiently particular, the circumstances of the case must be considered, as well as the nature of the crime under investigation and whether a more precise description is possible under the circumstances." *State v. Miller*, 666 N.W.2d 703, 713 (Minn. 1990). Considering the vast amount of sensitive personal information contained in cell phones, and the nature of the crime under investigation, a more precise description was available under the circumstance. *See Riley*, 134 S. Ct. at 2490-91 (discussing the type of personal information contained in cell phones).

After determining that the "all data" clause was not sufficiently particular, the district court proceeded to apply the severance doctrine. Under the severance doctrine, "the insufficient portions of the warrant are stricken and any evidence seized pursuant thereto is suppressed, but the remainder of the warrant is still valid. . . . Therefore, seizures made pursuant to the valid portions of the warrant are constitutional, and items so seized are not subject to suppression." *State v. Hannuksela*, 452 N.W.2d 668, 673 (Minn. 1990).

The severance doctrine reflects "the need to balance the considerable social costs of suppressing evidence of guilt against the need to deter police misconduct." *United States v. Gaplin*, 720 F.3d 436, 448 (2nd Cir. 2013). After severing the "all data" clause, the specific list would have made a constitutionally prohibited general search impossible. *Hannuksela*, 452 N.W.2d at 673. However, severance is not an available remedy when no part of the warrant is supported by probable cause and listed with sufficient particularity. *Gaplin*, 720 F.3d at 448. Appellant argues that the severed list is unsupported by probable cause and is insufficiently particular.

A. Probable cause determination

Appellant argues that the affidavit supporting the warrant did not provide sufficient probable cause necessary to justify searching the areas of his phone identified in the severed list. "When reviewing a district court's decision to issue a search warrant, [a reviewing court's] only consideration is whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed." *State v. Jenkins*, 782 N.W.2d 211, 222-23 (Minn. 2010) (quotation omitted). The Minnesota Supreme Court has consistently held that, "when reviewing a district court's probable cause determination made in connection with the issuance of a search warrant, an appellate court should afford the district court's determination great deference." *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001).

When presented with a search warrant application, the issuing judge, must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime

will be found in a particular place." *Illinois v. Gates*, 462 U .S. 213, 238, 103 S. Ct. 2317, 2332 (1983). "Elements bearing on this probability determination include information establishing a nexus between the crime, objects to be seized and the place to be searched." *Jenkins*, 782 N.W.2d at 223.

Under this guidance, there was a substantial basis for the judge's conclusion that evidence of the crime would be found in appellant's "call log, contact list, voice mails, text messages, photos, videos, and recordings." The affidavit provided a nexus to the cell phone, as it specifically indicated that appellant had used his cell phone to call a friend to communicate that he "shot five protesters" at the "Black Lives Matter Protest[.]" The affiant also believed that appellant's phone held "information regarding the . . . shooting." *See Miller*, 666 N.W.2d at 714 (an officer's statements based on training and experience are a proper factor to consider when evaluating whether a search warrant is supported by probable cause).

Considering these facts, it was reasonable to infer that appellant had used his phone to communicate with others regarding his involvement in the shooting, whether through phone calls or other forms of electronic communication. Those other means of communication would include voicemails, video calls, text messages, and recordings. The affidavit also alleged that the shooting was done at a Black Lives Matter protest. It is common knowledge that there is widespread use of cell phones and other mobile devices at protests—appellant was indeed using his phone at the protest—and these devices are commonly used to electronically record evidence at these types of events. Thus, it was reasonable to infer that appellant's phone was likely to contain photos and videos of

appellant's actions at the protest—before, during, or after the shooting. Consequently, we defer to the issuing judge's determination that there was probable cause to believe evidence of a crime would be present in the areas of appellant's phone specifically listed in the warrant.

B. Particularity

Appellant argues that the itemized list is still insufficiently particular because the list is too ill-defined and gave too much discretion to police to conduct a limitless search. We are not persuaded. Fourth Amendment jurisprudence recognizes that such a level of specificity is not always possible. *See State v. Fawcett*, 884 N.W.2d 380, 387 (Minn. 2016) (requiring consideration of "whether a more precise description is possible under the circumstances." (quotation omitted)). And contrary to appellant's argument, the severed list did not allow police to engage in a general exploratory search. *Hannuksela*, 452 N.W.2d at 674.

While it is true that the remaining severed terms were somewhat vague, and we express concern over the lack of any temporal limitations, the supreme court has indicated that "a warrant need only be as specific as the nature of the material sought will allow." *Id.* And when the officer applied for the warrant, all the circumstances surrounding the shooting were not known. What the officers knew was that appellant had used his phone to communicate about the alleged crime immediately following the shooting. Additionally, the nature of the crime under investigation encompassed more than appellant simply going to the protest and firing his weapon. As the state indicates, the police did not know if appellant had communicated with others, what mediums of communication were used, if

appellant had a motive for the shooting, or more generally, why he was even there. Yet, the fact that appellant had been using his phone immediately following the shooting demonstrated that the specifically listed items could aid in answering these questions.

Consequently, because the severed warrant was sufficiently particular and supported by probable cause, the district court did not err when it declined to suppress the items discovered pursuant to the particularized list.

III. Jury instruction

The district court, over appellant's objection, provided the jury with an instruction on the revival of an aggressor's right to self-defense. The district court used CRIMJIG 7.07, which states:

> If the defendant began or induced the assault that led to the necessity of using force in the defendant's own defense, the right of the defendant to stand his ground and thus defend himself is not immediately available to him. Instead, the defendant must first have declined to carry on the assault and have honestly tried to escape from it, and must clearly and fairly have informed the adversary of a desire for peace and of abandonment of the assault. Only after the defendant has done that will the law justify the defendant in thereafter standing his ground and using force against the other person.

10 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Criminal,* CRIMJIG 7.07 (4th ed. 2016). Appellant argues that the evidence did not support giving the revival of the aggressor's right to self-defense instruction and the instruction misstates the law. We disagree.

The district court has discretion in deciding whether or not to give a jury instruction. *State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006). "But a party is entitled to a jury

instruction if there is evidence to support it," and this court, "[i]n evaluating whether a rational basis exists in the evidence for a jury instruction," views the evidence "in the light most favorable to the party requesting the instruction." *Id.*

Appellant argues that the revival of an aggressor's right to a self-defense jury instruction was improper because the evidence failed to show that he was the initial aggressor, or that he "began or induced" the assault. In *Edwards*, the Minnesota Supreme Court interpreted "began or induced" to contemplate conduct that "is a good deal greater than mere conversation." *Id.* at 411-12. Appellant states that even if there was evidence that he called the protesters the n-word, merely using that word is not conduct that is "a good deal greater than mere conversation," because the epithet does not threaten or promise violence. But there is no caselaw holding that "more than conversation" means words that threaten or promise violence. *See State v. Carridine*, 812 N.W.2d 130, 145 (Minn. 2012) (stating that the court did not define what is considered more than conversation).

Appellant's suggestion that shouting the n-word—at a group of African American men who were attending a Black Lives Matter protest in support of an African American man who was shot by a white police officer—is not conduct that is a good deal greater than mere conversation is unpersuasive. Additionally, appellant arrived at the protest wearing a mask, understood that the protesters were wary of people covering their faces with masks, and refused to take off the mask when asked by the protesters. There was substantial evidence that appellant's conduct was "greater than mere conversation."

Appellant also argues that the instruction did not fairly or accurately explain what conduct qualifies a person as an aggressor under the law. Appellant's argument here

parallels his prior argument. Appellant contends that because his alleged use of the n-word was not language that promises or threatens violence, the instruction left the jury free to determine that he began or induced the assault "based upon non-qualifying conduct." Considering appellant's behavior could be considered qualifying conduct, and that the instruction allowed the jury to find that it was, appellant's argument fails. The district court did not abuse its discretion in giving the instruction.

IV. Sufficiency of the evidence

Appellant argues there was insufficient evidence for the jury to convict him of riot in the second degree. *See* Minn. Stat. § 609.71, subd. 2 (2014). For appellant to be found guilty, the state was required to prove that appellant, among other things, disturbed the public peace. *Id.* The public peace means "tranquility enjoyed by a community when good order reigns amongst its members." *State v. Winkels*, 283 N.W. 763, 764 (Minn. 1939).

Our review of the sufficiency of the evidence is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Fields*, 679 N.W.2d 341, 348 (Minn. 2004) (quotation omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary," especially when there is conflicting testimony. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) (citation omitted).

Appellant argues that he did not disturb the peace because peace did not exist at the protest before his arrival. But there was ample evidence that peace existed at the protest prior to appellant's arrival. For example, there was testimony that the day had been calm

prior to the shooting. One witness testified that the week had been "tense," however, "that night was sort of the first night that everybody started to relax again. There was dancing, there was singing, they were serving food. Where I was standing for most of the night was around a fire pit and . . . it was a really nice night." While there was evidence from witnesses that some protesters were yelling profanities at police and damaging property, those same witnesses noted that the protesters included children and people holding hands in prayer. Because the evidence, when viewed in the light most favorable to the verdict, supported the jury's finding that peace existed at the protest prior to the group's arrival, appellant's argument fails.

Affirmed.