

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0370**

State of Minnesota,
Respondent,

vs.

Brian Andy Simon,
Appellant.

**Filed September 19, 2022
Affirmed
Smith, Tracy M., Judge**

Beltrami County District Court
File No. 04-CR-18-3522

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

David Hanson, Beltrami County Attorney, Ashley A. Nelson, Assistant County Attorney,
Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge;
and Smith, John, Judge.*

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

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this appeal from the final judgments of conviction for six counts of possessing child pornography and the order denying his postconviction petition, appellant Brian Andy Simon argues that (1) the district court erred by denying his motion to suppress evidence obtained following warranted searches of his cellphone and data from an application on his cellphone and (2) his convictions must be reversed because the district court constructively amended the complaint by finding him guilty of offenses on dates that differed from the allegations in the complaint. We affirm.

FACTS

This case began with an investigation into an August 26, 2018, mobile-home fire in Beltrami County. Two days after the fire, Beltrami County Sheriff's Investigators Bill Thompson and Danelle Haugen reviewed surveillance footage from a nearby business, which showed a man with light-colored hair leaving the scene of the fire on a red four-wheeler. Thompson and Haugen then canvassed nearby residences, stopping at a residence that had an apparently matching four-wheeler in its driveway.

The officers spoke with the resident, who turned out to be Simon's father. Simon's father said that Simon used the four-wheeler and that Simon lived in a camper at the end of the driveway. The officers went to the camper and spoke with Simon. He said that his friend Ashley Benson, who was renting the property where the fire occurred and was set to purchase it, had hired him to clean up the yard over the weekend, but he denied being at the site the day of the fire. When informed of the surveillance-video footage, Simon

admitted he had ridden to the property on the day of the fire to check on it. Simon told the officers that he and Benson had communicated about cleaning the property via cellphone. The officers asked for Simon's phone number, which he gave, and the officers then seized Simon's cellphone.

The next day, while law enforcement had Simon's cellphone, then-Sergeant Jarrett Walton noticed that the cell phone was displaying a start-up screen, indicating that the cell phone had been remotely reset to its factory settings, deleting all content from the phone.

That same day, Crime Analyst Heather Ebbighausen made a preservation request to Verizon to preserve data associated with Simon's cellphone number. On September 6, 2018, Investigator Haugen applied for and obtained a search warrant for Verizon's cellphone records associated with Simon's phone number. Pursuant to that search warrant, Haugen received records from Verizon that included incriminating text messages between Simon and Benson suggesting that Simon had burned the mobile home at Benson's request:

Ashley 0045 HRS "Hey are you awake"
Ashley 0047 HRS "Go take care of that please"
Ashley 0048 HRS "And I have a few 100 dollars for you to do so"
Brian 0951 HRS "I was laid out hard lol, just got up, I would have tho"
Brian 1004 HRS "I'll go light it up right now"
Brian 1029 HRS "I'm pretty sure ur place is on fire, u might want to check that out"
Ashley 1049 HRS "k"
Ashley 1050 HRS "Awesome good now I don't have to worry about it"
Brian 1050 HRS "This is between you and me"
Brian 1050 HRS "That's it"
Ashley 1051 HRS "yep"
Ashley 1115 HRS "You are the bomb Brian"

On September 19, following review of those text messages, law enforcement arrested Simon and again seized his cellphone, which had been returned to him in the interim. In a statement from Simon at the jail, Simon acknowledged starting the fire but claimed that it was an accident. He said that he had poured gasoline on a bees' nest suspended from piping affixed to the trailer and that the trailer had started on fire.

On September 25, 2018, Haugen applied for and obtained a warrant to search Simon's phone and the data stored on the phone. The September 25 warrant application requested and the warrant granted:

Permission to access data and content stored on the phone from 08/20/18 through present which is pertaining to the burning of a mobile home on 08/26/18, to include but not limited to: text messages, call logs, communication applications, contact lists, deleted data, photographs and videos, web searches, location services, emails, and social media applications.

Permission to access data and content from applications or programs installed on the phone, pertaining to the burning of a mobile home on 08/26/18, to include but not limited to: text messages, call logs, contact lists, deleted data, photographs and videos, web searches, location services, and emails.

Permission to photograph the cellular phone[.]

Permission to use Cellebrite or other specialized equipment to download the data from the cellular device, and to store the data on an external storage device.

To support the request, Haugen wrote:

Your Affiant knows through training and experience that individuals whom conspire to commit criminal activity often use their phones as part of their criminal activities These communications may occur through phone calls, text messages and interactions through social media applications Your

Affiant knows that individuals involved in criminal activity often take photographs and videos during the course of the incident and may send these items to others in which [sic] they are conspiring with, as proof that an event has occurred or that they possess a certain item.

After obtaining the warrant, Walton conducted a forensic download of the cellphone's data using Cellebrite, a forensic search tool. While reviewing the downloaded data, Haugen discovered videos that had been created on August 26, 2018, the day of the fire. The videos were taken by a passenger in a pickup truck, which appears to be Simon's father's truck, near the fire scene. In one video, the truck is traveling toward the scene of the fire. Smoke is visible in the background and two males can be heard saying:

First Male: "Who was going to burn it?"

Second Male: "I don't know."

First Male: "You don't know, the f--- you don't know"

One of the men then laughs. In a second video, the passenger records the fire scene while the pickup drives by and flames and a firetruck are visible. These videos were located on the Google Drive "Cloud" account associated with the phone; that account was bdorgen@gmail.com.

Following the discovery of those videos, on September 26, 2018, Haugen applied for and the district court issued a warrant to obtain from Google and to search the Google Drive "Cloud" account for bdorgen@gmail.com. The warrant authorized search of the following:

Data and stored content; to include but not limited to, subscriber information, web albums, Google Chrome Sync, Google profile, text messages, call logs, contact lists, photographs, videos, audio files, web history, location services, and any incoming/outgoing emails and/or

communications, associated with the listed accounts for the time period of 08/20/2018 to present.

Google Account:

Name: Brian Simon

Email: bdorgen@gmail.com

Phone number: 218-261-0338

On October 11, 2018, Google responded to the September 26 warrant by providing a link. Ebbighausen opened that link and saw that it was a .zip file, which requires the user to unzip the file before any of its contents are available. Ebbighausen unzipped and opened the file. Upon opening the file, Ebbighausen observed that there were many folders, some of them labeled with dates. She also saw that there were many individual files, including images, outside of the folders. Many of those images had random numbers as their file name, and Ebbighausen was unsure if any were dated. Ebbighausen believed Google had sent “everything associated” with the account. She did not open the folders, but she reviewed the individual files by setting the image size to “larger thumbnails to view, so [she] could scroll quickly and see if there was anything related to the fire or anything like that, gas cans type of thing.” While scrolling, Ebbighausen saw images that she suspected could be child pornography. She then asked Walton, who had been trained in the identification of child pornography, to review the images.

Walton confirmed that the images were child pornography, and Ebbighausen and Walton stopped their search and requested a new warrant to authorize a search of all the data provided by Google for child pornography. Walton testified that they stopped their

search and requested this warrant because they “just wanted to make sure that we did not cross any boundaries and go beyond the scope of our search.” Following the approval of that warrant, Walton reviewed the entirety of the Google data and located over 80 images of child pornography.

Respondent State of Minnesota charged Simon with six counts of possession of pornographic work involving minors in violation of Minn. Stat. § 617.247, subd. 4 (2016). Simon moved to suppress evidence on various grounds. Following an omnibus hearing, the district court denied the motion and concluded, relevant here, that the September 25 warrant to search Simon’s cellphone was not overbroad and that officers had not exceeded the scope of the September 26 warrant to Google. Simon waived his right to a jury trial and agreed to a stipulated-evidence bench trial under Minn. R. Crim. P. 26.01, subd. 3. The district court found Simon guilty on all counts.

Simon appealed his convictions. This court stayed the appeal to permit Simon to pursue postconviction relief in the district court. In his postconviction petition, Simon argued, in part, that the district court had constructively amended the complaint and that, as a result, certain of Simon’s convictions were barred by the statute of limitations and certain of his convictions lacked sufficient evidence of venue. He requested reversal of his convictions or a new trial. The district court denied the petition for postconviction relief in its entirety. We then dissolved the stay and reinstated Simon’s appeal.

DECISION

Simon argues that all of his convictions must be reversed because the district court should have suppressed the images that were discovered on his Google Drive account. He

also argues some of his convictions must be reversed and the remaining counts remanded for a new trial because the district court constructively amended the complaint. We address each argument in turn.

I. The district court properly denied Simon’s motion to suppress evidence.

Simon contends that his convictions must be reversed because they depend on evidence that was seized in violation of the U.S. and Minnesota Constitutions.¹ He makes two arguments: first, that the September 25 search warrant for the contents of his cellphone was unconstitutionally overbroad; and, second, that officers exceeded the authorized scope of the warranted search of data from Simon’s Google Drive account. When reviewing a pretrial order denying a motion to suppress evidence, we review the district court’s factual findings for clear error and its legal conclusions de novo. *See State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011).

A. The September 25 warrant was not overbroad.

We begin with Simon’s overbreadth challenge to the September 25 warrant authorizing a search of his cellphone.² Relevant here, the September 25 warrant authorized

¹ Simon argues that the images of child pornography he was convicted of possessing are fruit of the poisonous tree because their discovery directly or indirectly resulted from unconstitutional searches. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Jordan*, 742 N.W.2d 149, 157 (Minn. 2007).

² As a threshold matter, the state argues, citing Minn. R. Crim. P. 10.01, subd. 2, that the district court should not have considered Simon’s overbreadth argument regarding the September 25 warrant because Simon did not properly raise that argument in his motion to suppress. But Simon briefed the argument in his memorandum supporting the motion to suppress and the district court addressed it. We therefore address the argument here.

a search of the cellphone for (1) “data and content stored on the phone from 8/20/18 through present which is pertaining to the burning of mobile home on 8/26/18, to include but not limited to: text messages, call logs, communication applications, contact lists, deleted data, photographs and videos” and (2) “data and content from applications or programs installed on the phone, pertaining to the burning of a mobile home on 8/26/18, to include but not limited to: text messages, call logs, contact lists, deleted data, photographs and videos.”

When reviewing a decision to issue a search warrant, our review is limited to whether the judge issuing the warrant had a “substantial basis” for concluding that probable cause existed to authorize the warrant. *See State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). We conduct that review with “great deference” to the issuing court. *See id.*

Generally, police must obtain a warrant before they can search a cellphone. *Riley v. California*, 573 U.S. 373, 403 (2014). Under the Fourth Amendment to the United States Constitution, a warrant must be based on probable cause, supported by an affidavit. U.S. Const. amend. IV; *accord* Minn. Const. art. I, § 10. In addition, the warrant must particularly describe the place to be searched and the persons or things to be seized. Simon challenges the warrant on both probable-cause and particularity grounds.

1. Probable Cause

We begin with Simon’s probable-cause argument. Probable cause to support a search warrant exists if the judge issuing the warrant determines that “there is a fair probability that contraband or evidence of a crime will be found . . . at the specific site to be searched.” *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014) (quotation omitted).

“A sufficient ‘nexus’ must be established between the evidence sought and the place to be searched.” *Id.* “A nexus may be inferred from the totality of the circumstances.” *Id.* In making a totality-of-the-circumstances determination, the issuing judge (and this court on our substantial-basis review) considers the “type of crime, the nature of the items sought, the extent of the defendant’s opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items.” *Id.* at 623.

Simon concedes that “[t]here was probable cause to search application data through Simon’s phone that were sent *to or from Benson*, such as text messages, emails, voice messages, photo messages, or video messages sent via applications like Facebook, Gmail, Twitter, or Snapchat.” But, he argues, “there was not probable cause to generally search photos and videos through applications on Simon’s phone, like those stored on the Google Drive account.” In other words, Simon agrees that *communications* in Simon’s cellphone applications were appropriately subject to a search warrant but not *photos or videos* stored in his Google Drive application. Google Drive is where law enforcement discovered the incriminating videos of the fire scene taken from inside Simon’s father’s pickup.

We disagree that the necessary nexus was lacking. *See id.* at 622. The affidavit supporting the warrant application established the connection between Simon and Benson, Simon’s presence at the scene of the fire, the incriminating messages between Simon and Benson concerning the fire, and Simon’s changing story with respect to the suspected arson. The affidavit also explained that, based on the affiant’s knowledge and experience, “individuals involved in criminal activity often take photographs and videos during the course of the incident and may send these items to others in which [sic] they are conspiring

with, as proof that an event has occurred or that they possess a certain item.” In addition, the affidavit explained that, when law enforcement first took the cellphone from Simon, the phone was reset to factory settings, deleting all content, and that, when the cellphone was thereafter returned to Simon, he denied resetting it. The affidavit also explained that “reviewing the data on [a person’s cellphone] can provide an accurate timeline on an individual’s actions” and “corroborate an individual’s story, or show inaccuracies which tend to indicate an individual is being deceitful.”

Based on the totality of the circumstances, including the type of suspected crime (conspiracy to commit arson) and the nature of the items sought (communications and photographic and video evidence related to the fire on cellphone applications), and affording appropriate deference to the judge issuing the search warrant, we conclude that a substantial basis exists for the determination of probable cause to search for photos and videos on the phone, including in the Google Drive application. *See Rochefort*, 631 N.W.2d at 804; *Yarbrough*, 841 N.W.2d at 623. The fact that Simon’s phone was remotely reset provided further reason for the issuing court to believe that incriminating information would be found on the phone.

We are not persuaded otherwise by Simon’s arguments. Simon contends that the warrant was based on a “generalized assertion that people sometimes leave photo or video evidence available through their phones” and that such an assertion is not sufficiently case-specific to support a search of his phone. He points to *State v. Botelho*, in which this court concluded that statements in the warrant application regarding the propensity of drug dealers to carry weapons was not sufficiently particularized to support reasonable suspicion

of a threat to officer safety or a threat of destruction of evidence in the context of an unannounced, or “no-knock,” warrant. 638 N.W.2d 770, 779-81 (Minn. App. 2002). In *Botelho*, we noted that the warrant application did not allege that the appellant or the visitors to appellant’s residence were drug dealers or, more specifically, armed drug dealers. *Id.* at 779. But, here, the affidavit supporting issuance of the warrant included texts and other evidence showing that Simon had conspired with Benson to commit arson. Thus, the affidavit’s statement that co-conspirators often record themselves committing a crime as proof that they performed the act was related to the particular facts and people in this case. It was not just a statement about the practices of criminals generally, as in *Botelho*.

Nor are we persuaded that probable cause to search Simon’s phone applications for photos and videos was absent based on the reasoning from caselaw that Simon cites from other jurisdictions. Simon relies particularly on *United States v. Morales*, 77 M.J. 567 (A. Ct. Crim. App. 2017). That case involved a sexual assault investigation, and the military appellate court concluded that a warrant authorizing a broad search of the defendant’s cellphone, including a search for any depictions of the reporting party, was without substantial basis. 77 M.J. at 574. The court concluded that “[i]t would be an inferential fallacy to assume without evidence that someone committing sexual assault would also photograph evidence of the crime on their phone.” *Id.* But, again, the present case is different because, here, evidence existed of a conspiracy to commit arson between two persons communicating via cellphones and photographic proof of having committed the crime may reasonably be expected among the co-conspirators.

2. Particularity

We turn to Simon’s particularity challenge. The particularity requirement “ensures that the search will be carefully tailored to its justifications.” *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). “[W]hen 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. Fawcett*, 884 N.W.2d 380, 387 (Minn. 2016) (quotation omitted). This determination is one of “practical accuracy” rather than “technical nicety.” *State v. Miller*, 666 N.W.2d 703, 713 (Minn. 2003) (quotation omitted).

Simon argues that, even if there was probable cause to search any stored photos or videos, the warrant was overbroad because, he claims, the provision authorizing searching for data through the phone’s applications and programs permitted law enforcement to search “*all* application ‘data and content’ available through Simon’s phone” with no meaningful limits, including temporal limits. He asserts that law enforcement instead could have narrowed the warrant by working in steps—first identifying the applications on the phone and the portions thereof most likely to contain relevant evidence and then seeking follow-up warrants specifying the portions to be searched. He also contends that the warrant could have been narrowed to authorize a search only for application data that was (1) transmitted between Simon and Benson from August 20, 2018, to the date of the warrant and (2) contains information about a suspected mobile-home arson that occurred on August 26, 2018. We are not persuaded that the warrant as written lacked sufficient particularity.

The warrant authorized a search for data “stored on the phone from 8/20/18 through present which is pertaining to the burning of mobile home on 8/26/18, to include but not limited to: text messages, call logs, communication applications, contact lists, deleted data, photographs and videos, web searches, location services, emails, and social media applications.” The warrant further authorized access to data “from applications or programs installed on the phone, pertaining to the burning of a mobile home on 8/26/18, to include but not limited to: text messages, call logs, contact lists, deleted data, photographs and videos, web searches, location services, and emails.”

Simon is correct that the clause authorizing that search of application data did not include a temporal limit in the same manner as the prior clause authorizing search of stored data, which established a specific date range. But even as to the application data, the warrant retained a subject-matter limitation which included a temporal reference: officers were required to limit their search to data and content “pertaining to the burning of a mobile home on 08/26/18.” And, in context, the warrant as a whole provided reasonable temporal boundaries for the search. The warrant limited the search both temporally and by subject-matter, and it identified the type of information sought (*e.g.*, communications, deleted data, and photographs or videos).

We are not persuaded by Simon’s argument that officers were required to tailor the search in a more stepwise manner. As discussed above, the warrant was based on the evidence that Simon had used the phone to communicate with Benson apparently about the suspected arson, that co-conspirators in crime often create photographic evidence of the crime, and that the contents of Simon’s phone had been remotely deleted. Thus, the

affidavit supporting the warrant provided probable cause to believe that communications and photographic or video evidence may be found on the phone—either stored on the phone or through its applications—and serial warrants were not constitutionally compelled. For the same reason, we disagree that the particularity requirement demanded that the warrant be limited to communications with Benson.

The out-of-state caselaw relied on by Simon does not persuade us otherwise. In *Burns v. United States*, the D.C. Court of Appeals reversed a conviction for first-degree murder, holding that the appellant’s Fourth Amendment rights were violated when police “sought search warrants that authorized an unlimited review of the contents of his cell phones for ‘any evidence’ of murder even though the warrants were supported by affidavits that established probable cause for only three narrow and discrete items of data.” 235 A.3d 758, 767 (D.C. 2020). In *Buckham v. State*, the Delaware Supreme Court reversed a trial court’s upholding of a warrant that authorized a search of “any and all” stored data on the appellant’s cellphone for any evidence linking him to a shooting because the warrant “did not limit the search . . . to any relevant time frame,” authorized the search of “any data” on the phone, and “expressly authorized the search of materials there was no probable cause to search.” 185 A.3d 1, 15, 19 (Del. 2018). In *Morales*, the U.S. Army Court of Criminal Appeals held that it was unreasonable for law enforcement to search the entire contents of the appellant’s cellphone, despite a warrant, and that the search should have been limited to just text messages. 77 M.J. at 570, 574-76. And in *United States v. Chavez*, the warrant sought all the appellant’s Facebook data and did not include a temporal limit. 423 F. Supp.

3d 194, 206-07 (W.D.N.C. 2019) (quoting *United States v. Blake*, 868 F.3d 960, 966 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1580 (2018)).³

This case is different. In the circumstances here, the warrant sufficiently identified the places to be searched and the items to be seized. It described what law enforcement could look for in the phone applications and placed practical temporal limits around the search. We therefore reject Simon’s argument that the September 25 warrant was not sufficiently particular.

B. Officers did not exceed the scope of the September 26 warrant.

We turn next to Simon’s contention that officers exceeded the scope of the September 26 warrant when they reviewed the data supplied by Google. Simon argues that Google’s response to the warrant contained data from outside the warrant’s authorized timeframe and that officers should have ceased their search when they realized that Google had sent more data than was permitted by the warrant.

³ Simon also cites to our unpublished decision in *State v. Cagle*, No. A17-0834, 2018 WL 2090526 (Minn. App. May 7, 2018). Our nonprecedential decisions are not binding authority. Minn. R. Civ. App. P. 136.01, subd. 1(c). In *Cagle*, the appellant was the boyfriend of the mother of a child who was found dead and law enforcement obtained a warrant to search the appellant’s phone for “Cellular Telephone Data.” 2018 WL 2090526, at *1. The search revealed child pornography. *Id.* at *2. We reversed the appellant’s subsequent child-pornography conviction on the grounds that (1) the search-warrant application did not establish a sufficient nexus between the suspected crime of child abuse or neglect and the appellant’s cellphone data and (2) the warrant was insufficiently particular. *Id.* at *3-6. Importantly, we concluded that the district court’s determination that the warrant had a temporal limit of two days to be clearly erroneous because the warrant specified no temporal limitation. *Id.* at *6. Moreover, as we observed, the warrant also contained no subject-matter limitation. *Id.* We held that the lack of a temporal or subject-matter limit made the warrant insufficiently particular. *Id.* Here, in contrast, the September 25 warrant provided both a subject-matter and temporal limit.

“A search that exceeds the scope of a warrant is unconstitutional.” *State v. Molnau*, 904 N.W.2d 449, 452 (Minn. 2017) (citing *Horton v. California*, 496 U.S. 128, 140 (1990)). Whether a search occurred outside the scope of a warrant depends on whether law enforcement reasonably executed the search under the totality of the circumstances. *See id.*

Crime Analyst Ebbighausen testified that, when she looked at the dates on folders submitted by Google, she immediately believed that Google had sent data “well in excess” of that authorized by the warrant. Simon argues that Ebbighausen should have stopped her search and contacted Google to send a correct batch of data and that Ebbighausen furthered the intrusive search by turning on a “thumbnail” view to quickly scroll through the images that were outside of the folders.

The state responds that Ebbighausen’s belief that Google had sent more data than that authorized by the warrant was only her opinion and, as such, did not definitively establish that Google in fact sent data that was outside the warrant’s scope. The state also points to Walton’s testimony that a folder labeled with a particular date could have been labeled as such by a user, regardless of when it was created.

The district court did not determine whether Google in fact produced information outside of the timeframe of the warrant. But the state’s arguments have some merit—the fact that a folder was labeled with a date does not mean the folder or its contents were created on that date. But, even if Google sent data that was outside the temporal limits of the warrant, Ebbighausen and Walton still acted reasonably in their execution of the warrant. At the start of the search, officers would reasonably believe that Google had complied with the terms specified in the warrant. And Ebbighausen continued to act

reasonably once she thought that it possible—based on folder dates—that Google might have sent more data than the warrant authorized. Upon seeing the dates on the folders, Ebbighausen did not open the folders. Instead, she scrolled through the individual images that were outside of the folders, scanning for information connected to the suspected arson. After incidentally discovering child pornography among the images, Ebbighausen and Walton stopped their search and were careful to obtain an additional warrant before continuing. We conclude that, based on the totality of the circumstances, law enforcement acted reasonably while executing the September 26 warrant and the search did not exceed the scope of that warrant. *See Molnau*, 904 N.W.2d at 452.

II. The district court did not constructively amend the complaint.

Simon next argues that the district court improperly denied his petition for postconviction relief, in which he argued that the district court constructively amended the complaint by changing the dates of the charged offenses and that, due to that constructive amendment, (1) Counts I through III occurred outside the statute of limitations, (2) the evidence was insufficient on Counts I through V to prove that Simon was in Beltrami County on the dates of the offenses, and (3) his substantial rights were prejudiced for all counts because he was deprived of a fair opportunity to contest venue.

We review the denial of a petition for postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A postconviction court abuses its discretion “when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual

findings.” *Id.* (quotation omitted). We review legal issues de novo and review factual issues for clear error. *See id.*

Minnesota Rule of Criminal Procedure 17.05 governs the formal amendment of complaints. When a complaint is not formally amended but a defendant is confronted with a different or additional charge after trial starts, the complaint is considered constructively amended. *See State v. Guerra*, 562 N.W.2d 10, 12-13 (Minn. App. 1997). An amendment charges a different offense if it affects an “essential element” of the charged offense. *Id.* at 13 (quoting *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982)). Whether a complaint has been constructively amended is a question of law which we review de novo. *See id.*

Simon’s argument relies on his assertion that the district court—in its findings of fact, conclusions of law, and order finding him guilty—found that Simon possessed pornography on dates different from the date alleged in the amended complaint. The amended complaint alleged that, “on or about October 16, 2018”—the date that Walton obtained and executed a search warrant to search the Google data for child pornography—Simon possessed six screenshots containing child pornography. In its conclusions of law, the district court stated, “Defendant’s acts took place on the following dates,” and then listed, for each screenshot, the date that “[d]efendant captured and possessed” the screenshot. Those dates range from July 19, 2015, through May 14, 2018. By identifying those dates, Simon argues, the district court constructively amended the complaint, leading to the arguments identified above.

We disagree that the district court constructively amended the complaint. Based on the stipulated facts and evidence, the district court made the following factual findings.

Simon was the owner of the Google Drive account, which was associated with his cellphone. Google responded to a search warrant for the data on that account, and law enforcement obtained an additional warrant on October 16, 2018, to search the Google data for child pornography. On October 17, 2018, Walton wrote a report describing the images that he found. In total, he located 81 images of child pornography. Simon “captured and possessed all 81 images described” in a stipulated exhibit. Based on the information in that exhibit, “[Simon] possessed more than six images of different child victims captured on different dates that meet the definition of child pornography.” All of those pornographic images “existed on the Google Drive account found on [Simon’s] cell phone and associated with [his] email account.” The district court also concluded that “[Simon] possessed on his personal Google Drive cloud storage account at least six pornographic works.” While it is true that the district court identified the dates of capture of each of the six images at issue, it also found that Simon possessed those images on or about the date of the search of his Google Drive account on October 16, 2018. The district court therefore did not constructively amend the complaint.

Because we reject Simon’s premise that the district court constructively amended the complaint, we need not address his arguments regarding the statute of limitations, venue, and the alleged prejudice to his defense, all of which rely on that premise. The district court properly denied Simon’s petition for postconviction relief.

Affirmed.