No. 18-6715

In the
SUPREME COURT OF THE UNITED STATES

Cortney John Edstrom, *Petitioner,*

v.

State of Minnesota, *Respondent.*

Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CATHRYN MIDDLEBROOK
Chief Appellate Public Defender
(Counsel of record)

STAN KEILLOR
Special Assistant State Public Defender

Office of the Minnesota Appellate Public Defender
540 Fairview Avenue North, Suite 300
St. Paul, Minnesota 55104
(651) 201-6700
Email: Cathryn.Middlebrook@pubdef.state.mn.us

ATTORNEYS FOR PETITIONER

Petitioner offers this Reply Brief in response to the respondent State of Minnesota's Brief in Opposition to the Petition for Writ of Certiorari. Respondent filed its Brief on January 18, 2019. Petitioner files this Reply Brief pursuant to Sup. Ct. R. 15.

Respondent argues that this Court lacks jurisdiction because the August 15, 2018 decision of the Minnesota Supreme Court is not a "final judgment" within the meaning of U.S.C. § 1257(a). Respondent offers an entirely mechanical application of the "final judgment" rule, one that would serve only to extend Petitioner's incarceration pending this Court's review. Petitioner offers the following response to these "new points raised in the brief in opposition." Sup. Ct. R. 15.6.

Procedural posture

On December 10, 2018, this Court requested that the respondent State of Minnesota file a response to Petitioner's Petition for Writ of Certiorari and provided that the Respondent's Brief in Opposition should be filed by January 9, 2019. On December 12, 2018, Respondent filed a Motion to Extend the time to file its Brief in Opposition until February 22, 2018, and on December 14, 2018, this Court granted that motion.

Despite the extension, Respondent filed its Brief in Opposition on January 18, 2019, over three weeks before the extension deadline it sought. Meanwhile, on January 14, 2019, the Minnesota Court of Appeals issued an unpublished opinion rejecting Petitioner's arguments as to the three remanded non-federal issues and affirming Petitioner's conviction. *See* Jan. 14, 2019 Slip opinion (attached).

A criminal defendant has 30 days to file a Petition for Further Review of a Minnesota Court of Appeals decision to the Minnesota Supreme Court. Minn. R. Crim. P. 29.04, subd. 2. This time may be extended for up to 30 days for good cause. *Id.*[1]

Petitioner has decided not to file a Petition for Further Review in the Minnesota Supreme Court. Petitioner's remanded non-federal issues, and their treatment by the Minnesota Court of Appeals, fall outside the categories of cases qualifying for further review by the Minnesota Supreme Court. *See* Minn. R. Crim. P. 29.04, subd. 4 (listing, inter alia, decisions presenting an important question, conflicting with supreme court precedent, departing so far from the "usual course of justice" as to call for exercise of the supreme court's supervisory powers, or calling for supreme court review to "develop, clarify, or harmonize" the law). And even in those categories, review is rarely granted.[2]

The Minnesota Court of Appeals' decision summarily disposed of Petitioner's argument for in camera review of the informant's identity, which sought an *extension* of existing law, based in part on a "'harmless-error' type argument." *See* Jan. 14, 2019 Slip op., at 5. The court found an erroneous hearsay ruling to be harmless error, *id.* at 10, and the unobjected-to receipt of arguably cumulative SWAT-team evidence to have been prompted by defense counsel himself. *Id.* at 11-13. None of these arguments, whose

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[1] The jurisdictional issue in this Court has thrust front-and-center the decision whether to seek further review in the Minnesota Supreme Court, and Petitioner cannot imagine making a showing of good cause for delay. There are no medical or other personal reasons at this time to support such a request.

[2]The Minnesota Supreme Court grants review only rarely, so rarely that it in some recent years 95 to 97% of all cases had their final disposition in the Minnesota Court of Appeals. Hon. Harriet Lansing, "25 Years of Doing Minnesota Justice, Keynote Address at William Mitchell College of Law Symposium: Doing Minnesota Justice," 35 Wm. Mitch. Law Rev. 1244, 1257 (2009).

merits were highly dependent on the unique trial events in this case and - as to harmless error - the strength of the State's evidence, provide any plausible grounds for further review under the factors governing review listed in the Minnesota Rules of Criminal Procedure. *See* Minn. R. Crim. P. 29.04, subd. 4. Upon being advised of these considerations by counsel, Petitioner has decided not to pursue a Petition for Further Review in the Minnesota Supreme Court.[3]

Because Petitioner will not be filing a Petition for Further Review on the remanded – and now decided – non-federal issues, the Minnesota Supreme Court's decision on the Fourth Amendment issue is unquestionably a "final judgment." This fact alone distinguishes *Johnson v. California*, 541 U.S. 428, 124 S. Ct. 1833 (2004), on which the State principally relies. And it renders unnecessary any discussion of the four categories of cases set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029 (1975), in which finality has been found despite there being "further proceedings in the lower state courts to come." *Id.* at 477, 95 S. Ct. at 1037.

The State might argue that this Court should disregard Petitioner's avowed waiver of any Petition for Further Review as premature and somehow inconclusive. This Court's rules, however, require that this Reply Brief be filed before the February 13, 2019 deadline for filing such a petition. *See* Sup. Ct. R. 15.5 (providing 14-day period for Reply Brief). This Court can assess the finality of the Minnesota Supreme Court's August 15, 2018 decision as of the passing of that deadline rather than as of the date of

[3] Petitioner is willing to file a notarized affidavit to this effect, which prison visiting schedules and the availability of notary services there did not permit for purposes of this Reply Brief.

filing of this Reply Brief.[4] But because Petitioner must make a showing on the jurisdictional issue now, Petitioner will also address the *Cox Broadcasting* categories.

Cox Broadcasting Category One

Petitioner has shown above that there are no "further proceedings in the lower state courts to come," *Cox Broadcasting Corp.*, 420 U.S. at 477, 95 S. Ct. at 1037. Nevertheless, even disregarding Petitioner's avowed waiver of a Petition for Further Review, the theoretical "further proceedings" to come do not, under *Cox Broadcasting*, defeat the finality of the Minnesota Supreme Court's Fourth Amendment ruling.

This case falls within the first category of cases outlined in *Cox Broadcasting*, those in which "the Court has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts," *id.* This Court described that category as consisting of:

> [T]hose cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive *or the outcome of further proceedings preordained.*

Id. at 478, 95 S. Ct. at 1038 (emphasis added). Here, the rejection of any Petition for Further Review on the nonfederal issues is nearly certain. And, in the highly unlikely event such a petition were granted and the even unlikelier event Petitioner prevailed on

[4] The State, by filing its Opposition weeks before the briefing extension granted to it ended, has prevented Petitioner from letting expire the 30-day period for filing a Petition for Further Review in the Minnesota Supreme Court and thereby settling for all practical purposes the finality question.

those issues in the Minnesota Supreme Court, the Fourth Amendment issue would be conclusive of trial court proceedings, and the trial outcome "preordained."

Minnesota courts long ago recognized that pretrial rulings on drug-suppression issues are often conclusive and, therefore, developed a procedure – later incorporated in the Minnesota Rules of Criminal Procedure - by which the defendant can obtain appellate review of the suppression issue without submitting to a trial. *See State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980)(rejecting conditional guilty plea but allowing defendant to stipulate to state's case in order to have pretrial appeal of suppression ruling); Minn. R. Crim. P. 26.01, subd. 4 (providing for defense to stipulate to state's evidence "[w]hen the parties agree that the court's ruling on a specified pretrial issue will be dispositive of the case" or make a "contested trial unnecessary"). This procedure is often used in drug-possession prosecutions, in which the search-and-seizure issue is frequently dispositive of the case. *See State v. Verschelde*, 595 N.W.2d 192, 194-95 (Minn. 1999) (approving use of *Lothenbach* procedure in drug-possession case).

Although Petitioner did not stipulate to the facts in this case, the State possessed strong evidence of constructive drug possession:

> When the police executed the search warrant, Edstrom was in the apartment. Police found several firearms, ammunition, scales with methamphetamine residue, marijuana, and approximately 226 grams of methamphetamine. They also found many personal items that belonged to Edstrom.

State v. Edstrom, 916 N.W.2d 512, 515 (Minn. 2018). That is particularly the case as "[a] person may constructively possess contraband jointly with another person." *State v.*

Lee, 683 N.W.2d 309, 316 n.7 (Minn. 2004). A full recitation of the State's evidence would further demonstrate the extreme difficulty of any defense in a retrial.

This case is similar to *Mills v. Alabama*, 384 U.S. 214, 86 S. Ct. 1434 (1966), in the degree to which the outcome of any further state-court proceedings is preordained. In *Mills*, the defendant newspaper editor admitted writing the election-day editorial alleged to have violated the criminal statute. *Id.* at 217, 86 S. Ct. at 1436. The Alabama Supreme Court upheld that statute against First Amendment challenge and remanded to the trial court "for further proceedings not inconsistent with its opinion (which would include a trial)." *Id.*. This Court, concluding that there was a "final judgment" providing it jurisdiction despite the remand, acknowledged that

> the decision of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did and he therefore has no defense in the Alabama trial court. Thus, if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably toward a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions, whereupon the case could once more wend its weary way back to us as a judgment unquestionably final and appealable.

Id.

The execution of the search warrant here caught Petitioner in the highly incriminating situation of being the only resident present in an apartment strewn with methamphetamine and drug paraphernalia. Being caught red-handed, Petitioner is in a situation similar to the defendant in *Mills* who had fully admitted to the *actus reus*. Even

in the highly unlikely event that Petitioner obtained a new trial – far more unlikely than in *Mills* – such a trial would similarly be "no more than a few formal gestures leading inexorably toward a conviction." *Id.*

Distinguishing *Johnson v. California*

The State argues that the jurisdictional issue in this case is governed by *Johnson v. California*, 541 U.S. 428, 124 S. Ct. 1833 (2004). In *Johnson*, this Court dismissed for want of jurisdiction an appeal in which certiorari had been granted on a federal *Batson* claim decided by the California Supreme Court in a decision remanding for further proceedings "separate evidentiary and prosecutorial misconduct claims." *Id.* at 429, 124 S. Ct. at 1834. The California Court of Appeal had not yet acted on the remand. *See id.* at 430-31, 124 S. Ct. at 1835 ("In the event that the California Court of Appeal on remand affirms the judgment of conviction"). This Court noted that if the California Court of Appeal ended up affirming the conviction, "petitioner could once more seek review of his *Batson* claim in the Supreme Court of California – albeit unsuccessfully – and then seek certiorari on that claim from this Court." *Id.* at 431, 124 S. Ct. at 1835.

Here, Petitioner's conviction has already been affirmed on remand by Minnesota's intermediate appellate court. Petitioner has decided not to seek any further review in the Minnesota Supreme Court of the rulings on the remanded non-federal issues. Thus, *Johnson* is distinguishable on at least two grounds.[5] Moreover, as discussed above, "the

[5]In *Johnson*, this Court also noted that the full opinion of the California Court of Appeal was only belatedly filed, and that the parties had not fulfilled their duty to advise the Court of any jurisdictional issues. 541 U.S. at 431-32. Although the procedural flaws in *Johnson* might not have flagged jurisdictional problems, neither of the problems is present here.

outcome of [any possible] future proceedings [is] preordained," *Cox Broadcasting Corp.*, 429 U.S. at 478, 95 S. Ct. at 1038. And it would be a waste of judicial resources to require Petitioner to raise the Fourth Amendment issue a second time in the Minnesota Supreme Court, where that court's first opinion on the issue would stand as law of the case. *See generally State v. Ferguson*, 729 N.W.2d 604, 612 (Minn. App. 2007) (applying law-of-the-case doctrine in criminal case).

Cox Broadcasting Category Four

Even if this Court were to find that the outcome of any further proceedings in state court is not "preordained," there is an argument to be made that the fourth *Cox Broadcasting* category of "final judgments" applies. That category covers:

> [T]hose situations where the federal claim has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . ., *if a refusal immediately to review the state court decision might seriously erode federal policy* . . . .

Id. at 482, 95 S. Ct. at 1040 (emphasis added).

If, contrary to all indications, it is assumed that Petitioner "might prevail on the merits on nonfederal grounds," it remains that a reversal by this Court of the Minnesota Supreme Court's holding on the Fourth Amendment issue would be "preclusive of any further litigation" by suppressing all evidence seized pursuant to the search warrant, resulting in a failure of proof at trial. And delay in review of the Fourth Amendment issue would "seriously erode federal policy" by prolonging Petitioner's post-sentence

incarceration without this Court's final settlement of the Fourth Amendment issue. *See generally Arizona v. Evans*, 514 U.S. 1, 9, 115 S. Ct. 1185, 1190 (1995) (affirming this Court's "authority as final arbiter of the United States Constitution"); *Flynt v. Ohio*, 451 U.S. 619, 620, 101 S. Ct. 1958, 1959 (1981) ("Applied in the context of a criminal prosecution, finality is normally determined by the imposition of sentence.").

This Court has acted to avoid erosions of federal policy in civil cases implicating the preemptive effect of the Federal Arbitration Act and the exclusivity of National Labor Relations Board jurisdiction. *Southland Corp. v. Keating*, 465 U.S. 1, 6-7, 104 S. Ct. 852, 856 (1984) (Federal Arbitration Act); *Construction Laborers v. Curry*, 371 U.S. 542, 550, 83 S. Ct. 531, 537 (1963) (NLRB). Federal policy should particularly disfavor unnecessary delay in this Court's review of state-court Fourth Amendment rulings affecting personal freedom from government searches, especially when, as the State concedes here, there are splits of authority in the federal circuit courts and the state courts of last resort.

CONCLUSION

The Minnesota Supreme Court's decision on the Fourth Amendment issue is a "final judgment" within the meaning of 18 U.S.C. § 1257 because Petitioner is foregoing a Petition for Further Review of the Court of Appeals' decision on the remanded non-federal issues. Thus, there are no "further proceedings in the lower state courts to come." And even absent Petitioner's declared waiver of his right to petition for further review, there would be no significant possibility of the Minnesota Supreme Court's granting such a petition so as to initiate "further proceedings." Finally, because the outcome of any such proceedings would be "preordained," this Court should find it has jurisdiction under *Cox Broadcasting* even if the "final judgment" rule is not technically satisfied.

For the foregoing reasons, this Court should assert jurisdiction over Petitioner's Petition for a Writ of Certiorari.

Dated: January 28, 2019

Respectfully submitted,

Cathryn Middlebrook

CATHRYN MIDDLEBROOK
Chief Appellate Public Defender
Office of the Minnesota
Appellate Public Defender

STAN KEILLOR
Spec. Ass't State Pub. Defender
540 Fairview Avenue North
Suite 300
St. Paul, MN 55104

ATTORNEYS FOR PETITIONER

APPENDIX

PAGE

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1382

State of Minnesota,
Respondent,

vs.

Cortney John Edstrom,
Appellant.

Filed January 14, 2019
Affirmed
Klaphake, Judge*

Hennepin County District Court
File No. 27-CR-15-28931

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Stan Keillor, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Reilly, Judge; and Klaphake, Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

This case was remanded by the Minnesota Supreme Court to consider issues that were raised but not decided when this court reversed Edstrom's convictions. *State v. Edstrom*, 916 N.W.2d 512, 524 n.12 (Minn. 2018), *pet. for cert. filed* (U.S. Nov. 13, 2018). We reinstated the appeal and gave the parties an opportunity to file supplemental briefs updating their research on the remaining claims. Edstrom argues that the district court (1) abused its discretion by denying his request for in camera review of the confidential informant's identity, (2) abused its discretion in excluding his witness's testimony as inadmissible hearsay, and (3) plainly erred by admitting prejudicial evidence of the SWAT team's involvement in executing the search warrant. We affirm.

DECISION

I. The district court did not abuse its discretion by denying Edstrom's request for in camera review of the identity of the confidential informant.

Edstrom was convicted of first-degree controlled-substance crime (possession of methamphetamine) and possession of a firearm by an ineligible person after a jury trial. Methamphetamine and multiple firearms were seized during a warranted search of S.G.'s Brooklyn Park apartment where Edstrom occasionally stayed. *State v. Edstrom*, 901 N.W.2d 455, 458 (Minn. App. 2017), *rev'd*, 916 N.W.2d 512 (Minn. 2018). Reasonable suspicion for the dog sniff of the apartment door and probable cause for the search warrant were based, in part, on information provided by a confidential informant (CI). *Id.*

Edstrom filed a motion to disclose the identity of the CI or for the district court to conduct in camera review of the CI's identity. The district court concluded that the disclosure of the CI's identity was not required because the CI was not a material witness and only provided information for the search. Edstrom contends that the identity of the CI was important because of the "possibility" that the CI resided at or frequented the apartment and may also have been guilty of possessing the methamphetamine and firearms found in the apartment.

The appellate courts review a district court's order denying disclosure of a confidential informant's identity for an abuse of discretion. *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008). The supreme court has recognized that the state has a common law privilege to withhold the identity of a confidential informant. *See id.* But the privilege is not unlimited, and "gives way" when the disclosure is relevant and helpful to the defense. *Id.* The defendant bears the burden of establishing the need for disclosure, and the supreme court has articulated four factors for the district court to consider in determining whether to order disclosure of the CI's identity: "(1) whether the informant was a material witness; (2) whether the informer's testimony will be material to the issue of guilt; (3) whether testimony of officers is suspect; and (4) whether the informant's testimony might disclose entrapment." *Id.* (quotation omitted). These factors are not exclusive, but are "to be used to inform a district court's analysis, which remains a balancing test between the defendant's right to prepare a defense and the public's interest in effective law enforcement." *Id.* "The central focus of this inquiry is whether disclosure is necessary to a fair determination of the defendant's guilt." *Id.* at 90-91 (quotation

omitted). "If the defendant fails to meet this burden [to disclose the CI's identity] but is able to establish a basis for inquiry by the court, then the court should hold an in camera hearing to consider affidavits or to interview the informant in person." *State v. Ford*, 322 N.W.2d 611, 614 (Minn. 1982).

The district court found that the first factor, the materiality of the CI as a witness, was not satisfied because Edstrom was not charged with any crime related to his dealings with the CI, such as a controlled purchase, and the CI only provided information to police who used it to conduct "an independent investigation." The court also found that the CI's testimony was not material to the issue of guilt because there is no indication that the CI had information that would have been helpful to Edstrom "in overcoming" the charges of possession of methamphetamine and possession of a firearm because there was no controlled buy and the CI was not a witness to the charged crimes. The district court also found that there was nothing in the record to suggest that law enforcement testimony was suspect or that the CI's "testimony might disclose entrapment" because entrapment was not an issue in the case.

With respect to Edstrom's alternative request for in camera review, the district court recognized that the defendant bears a lesser burden but still must make a plausible showing that the information sought would be material and favorable to the defense. The district court determined that Edstrom's motion "lacks the necessary showing" because he articulated no basis for inquiry, "other than his hope that the CI has more information than the description in the search warrant."

"When the informant is merely a tipster who conveys information and is not an active participant in or witness to the offense, disclosure is not required." *State v. Marshall*, 411 N.W.2d 276, 280 (Minn. App. 1987), *review denied* (Minn. Oct. 26, 1987). In this case, the information the CI supplied was used to establish reasonable suspicion for the dog sniff outside the apartment and in the warrant application for probable cause for the search warrant. *See Edstrom*, 916 N.W.2d at 523 (stating Edstrom concedes and the supreme court agrees that police had reasonable, articulable suspicion of criminal activity to conduct the narcotics-dog sniff). Because the CI was merely a tipster, the district court properly concluded that the CI was not a material witness.

Moreover, the state correctly contends that the district court did not err because of "the overwhelming evidence" that appellant possessed the methamphetamine and firearms based on the quantity of methamphetamine found in the bedroom, his presence in the bedroom at the time the search warrant was executed, and his attempted flight from the bedroom. Although Edstrom disputes the state's "harmless-error" type argument, the supreme court in *Ford* relied on evidence "the state used to convict the defendant," which "overwhelmingly established the elements of the offense," in determining that Ford "failed to make a sufficient showing of the need for disclosure of the informant's identity or an in camera hearing on the issue." 322 N.W.2d at 614. The supreme court relied on this trial testimony to conclude that it was speculation that one of the witnesses was the CI who framed the defendant "when considered in the context of the overwhelming evidence presented by the state" showing he "was an active and willing participant" in the crime. *Id.*

Edstrom's convictions are based on the evidence seized in the execution of the search warrant.[1] The trial evidence, including the location of the methamphetamine in the bedroom Edstrom used and his presence and attempted flight from the bedroom when the police executed the warrant, supports the reasonable inference that he constructively possessed the methamphetamine. *See State v. Bias*, 419 NW.2d 480, 485 (Minn. 1988) ("[E]vidence of flight suggests consciousness of guilt."); *State v. Dickey*, 827 N.W.2d 792, 796 (Minn. App. 2013) (listing facts that have been found to satisfy constructive possession). Even if other people, including the CI, possessed the methamphetamine, that evidence would not tend to demonstrate that Edstrom was not guilty because a person may constructively possess contraband jointly with another person. *State v. Lee*, 683 N.W.2d 309, 316 n.7 (Minn. 2004) (noting that a person may constructively possess contraband jointly with another person). Because the evidence supports Edstrom's conviction, regardless of any information supplied by the CI, the district court did not abuse its discretion in declining to disclose the CI's identity or conduct an in camera review.

II. Even if the district court abused its discretion by excluding S.G.'s testimony as to what her boyfriend A.R. told her while police searched the apartment, the exclusion of the evidence did not affect the verdict.

Edstrom argues that the district court abused its discretion when it sustained the prosecutor's hearsay objection to his counsel's efforts on redirect to elicit from his witness

[1] The jury was instructed on constructive possession, which allows for a finding of guilt even if the methamphetamine was in a place to which others had access, "where the inference is strong that the defendant at one time physically possessed the [item] and did not abandon his possessory interest in the [item] but rather continued to exercise dominion and control over it up to the time of the arrest." *See State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975).

S.G., the apartment lessee, what A.R., her abusive boyfriend who is also on the lease, told her to do while they were sitting next to each other on a couch during the search. Appellate courts generally defer to a district court's evidentiary rulings and will not reverse unless the district court clearly abused its discretion. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, the defendant bears the burden of proving that the district court abused its discretion in admitting evidence and that the defendant was prejudiced by the erroneous admission of evidence. *See State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994). But where the district court's evidentiary ruling results in the erroneous exclusion of defense evidence in violation of the defendant's constitutional rights, the verdict must be reversed if "there is a reasonable possibility that the verdict might have been different if the evidence had been admitted." *State v. Graham*, 764 N.W.2d 340, 351 (Minn. 2009) (quotation omitted). "In other words, the reviewing court must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (footnote omitted).

Hearsay is defined as a statement, other than one made by the declarant while testifying at trial, that is offered in evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is generally inadmissible. Minn. R. Evid. 802. But where an out-of-court statement is offered to impeach a witness, rather than for the truth of the matter asserted, it does not fall within the scope of the hearsay rule. *See State v. Carillo*, 623 N.W.2d 922, 928 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

Edstrom contends that a statement advising a witness what he/she should do is not hearsay because it is not offered to prove the truth of the matter asserted and does not "state or imply any factual assertion." The state contends that, because Edstrom did not make an offer of proof and the objection was sustained after an unrecorded bench conference, it is impossible for this court to review the district court's decision. Alternatively, the state contends that any error was harmless because Edstrom's defense was not prejudiced because S.G. was able to explain why her prior statement was untruthful. Because an offer of proof is unnecessary if "the substance of the evidence" is "apparent from the context within which the questions were asked," Minn. R. Evid. 103(a)(2), it is necessary to examine the record to determine whether Edstrom should have made an offer of proof.

On direct examination by defense counsel, S.G. testified that Edstrom only occasionally stayed at her apartment and that the apartment was a "flophouse" with as many as ten different people staying there from time to time and using the same bedroom Edstrom used. During the state's cross-examination, the prosecutor asked S.G. to confirm details of her prior statement in which she told police that Edstrom lived with her, that he stayed in the northwest bedroom, and that he cleaned her handgun. S.G. explained she was not truthful in her prior police statement because she was worried about going to jail, and was "listening to my ex who is not a bright person." S.G. explained that she had time to speak to A.R. because "they put us right next to each other on the couch" and "[h]e had like whispered some stuff in my ear trying to tell me and I just kind of went along with it."

The hearsay objection occurred on redirect when Edstrom's counsel asked S.G., "What exactly did [A.R.] say to you?" The state objected as hearsay, and, after a sidebar

that was not placed on the record, the district court sustained the objection. Defense counsel continued, asking S.G. why she was untruthful in her prior statement to police, and S.G. explained that she "was going along with what [A.R.] told [her]." In rebuttal, the state called the sergeant involved in executing the search warrant who testified that an officer was on the scene to make sure people were not talking. In surrebuttal, S.G. testified that no one told them not to talk to each other. Defense counsel asked S.G. what she and A.R. were talking about, the state objected, and the district court sustained the objection. Later, S.G. said that, at the time she made the prior statement to police, she was concerned about incriminating herself and "wanted to do whatever [she] could to go along with what I was told to say by [A.R.]." During cross-examination, the prosecutor asked why S.G. didn't want to incriminate herself, and she explained that she knew what the police found, she didn't want to get blamed for it, and "[A.R.] was sitting there telling me on the couch when he got there that, you know, we'll just say it was his." S.G. explained that she said what she did about Edstrom "because [A.R.] told me to."

Based on this context, an offer of proof was unnecessary because the substance of the excluded testimony is clear from the context—that A.R. told her to tell police that it was Edstrom. The context also shows that A.R.'s out-of-court statements were offered for impeachment purposes to explain why S.G.'s prior statement was not truthful. Because A.R.'s out-of-court statements were not offered to prove the truth of the matter asserted, but to explain S.G.'s prior inconsistent statement, the district court abused its discretion in excluding them. *See Carillo*, 623 N.W.2d at 928-29 (concluding out-of-court statement

regarding a payoff in exchange for revised testimony was offered for impeachment to show veracity or bias of a witness and not to prove the truth of the matter asserted).

Nonetheless, Edstrom cannot show that he was prejudiced by the district court's ruling. As demonstrated above, the record includes other testimony from S.G. in which she was allowed to explain, without objection, that she lied to police because of what A.R. told her to do. And in closing argument, defense counsel was able to point out the inconsistencies between S.G.'s statement to police on the day of the incident and her trial testimony and explain that the difference was because her abusive ex-boyfriend told her what to say. Additionally, the state produced substantial evidence showing that Edstrom was in constructive possession of the methamphetamine found and in possession of at least one of the four firearms, as observed by the sniper who saw a male possess and throw a firearm from the bedroom window. The failure of the district court to admit A.R.'s out-of-court statements was, therefore, harmless beyond a reasonable doubt. *See Carillo*, 623 N.W.2d at 929.

III. The district court did not plainly err in admitting evidence of the SWAT team's involvement in the search.

Edstrom argues that the district court committed plain error by allowing the prosecutor to repeatedly emphasize the role of the SWAT team in executing the search warrant. There was no objection to the testimony at trial, so the plain-error standard applies. Edstrom must show: "(1) error, (2) that was plain, and (3) that affected the defendant's substantial rights." *State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014) (quotation omitted). "If these three prongs are met, the appellate court then assesses

whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Edstrom relies on Minn. R. Evid. 403 and *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002), as authority for why this evidence was not admissible. According to rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In *Strommen*, the supreme court concluded that it was plain error for the district court to admit an accomplice's testimony that she committed the robbery out of fear because Strommen had previously kicked in doors and killed someone during a fight. 648 N.W.2d at 686-87. The supreme court concluded it was plain error to admit this evidence because it was irrelevant and it was more prejudicial than probative because it portrayed Strommen as a person of bad character whom the jury would be motivated to punish where Strommen had not put his character in issue. *Id.* at 687. The supreme court also concluded that it was plain error for the arresting officer to testify that he knew Strommen by name from "prior contacts and incidents," which was unnecessary because Strommen's identity was not an issue in the case. *Id.* at 687-88.

Edstrom contends that the SWAT-team evidence was plain error because, like *Strommen*, it suggested that police had knowledge of his criminal record from prior contacts. The state contends that the evidence was not unfairly prejudicial, and that it was defense counsel who elicited the additional information "to portray the execution of the

warrant as somehow extreme or severe." The state's argument is persuasive, based on the limited, factual nature of the officer's testimony and defense counsel's closing argument.

During the state's case-in-chief, the officers involved in executing the search warrant testified about the manner in which the search warrant was executed. The search warrant authorized a nighttime, no-knock warrant and included officers from the drug task force and the SWAT team. The SWAT team used a large ram to "breach" the entry, and entered the apartment after an officer delivered a "shotgun flash bang," which is a round fired from a 12-gauge shotgun that is designed to cause a bright flash and loud bang as a distraction. The drug task force maintained a perimeter to ensure that no one fled from the residence while the SWAT team entered the apartment. A sniper trained in surveillance was responsible for observing the building and maintaining radio communication with the officers executing the warrant. During cross-examination, defense counsel elicited that 12 SWAT officers were involved in executing the search warrant, six drug task force officers were involved in maintaining the perimeter, a marked squad car was somewhere in the area, the SWAT officers had their weapons drawn, and it was a forced entry. On redirect, the prosecutor asked if a SWAT team is always used to execute a warrant, and the officer responded, "No." The prosecutor then asked if it was "necessary in this instance," and the officer said, "Yes," without elaboration.

The prosecuting attorney only referenced the SWAT team once in closing argument. In the defense closing argument, counsel relied on testimony about the SWAT team "busting in your door, guns drawn, screaming, yelling" to apparently explain why Edstrom

barricaded himself in the bedroom and attempted to flee out the window: because he was startled and "fearful."

Unlike the facts in *Strommen*, the officers in this case did not testify that they knew Edstrom from prior contacts or incidents. Instead, the officers merely explained how the warrant was executed and that a SWAT team was involved in executing it. Only after Edstrom's attorney elicited more details in cross-examination did the prosecutor elicit that it is not typical to use a SWAT team to execute a search warrant. *See State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012) (stating that invited errors are reviewed for plain error). But even then, the officer did not say that a SWAT team was used *because* of prior police contact with Edstrom. Based on this record, Edstrom has not demonstrated that it was plain error for the district court to permit the state to introduce the evidence concerning the manner in which the search warrant was executed.

Finally, although not raised as a separate issue, to the extent Edstrom is arguing that the cumulative effect of the trial errors deprived him of a fair trial, Edstrom's cumulative-effect argument fails because he has only established one error—the exclusion of A.R.'s out-of-court statements. *See State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) ("Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury.") (quotations omitted).

Affirmed.