STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0975

State of Minnesota,
Respondent,

vs.

Richard Lor Xiong,
Appellant.

Filed April 8, 2013
Affirmed
Kirk, Judge

Ramsey County District Court
File No. 62-CR-11-8807

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kirk, Judge; and Klaphake, 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

KIRK, Judge

On appeal from his conviction of possession of a firearm by an ineligible person, appellant argues that: (1) the district court erred by denying his motion to suppress evidence; (2) the prosecutor committed misconduct in her closing argument; and (3) the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

FACTS

At approximately 11:45 a.m. on October 30, 2011, Mounds View Police Officer Keith Demarest was patrolling the parking lot of an apartment complex that generates a high number of calls for police assistance, when he noticed a red Nissan Altima parked in a parking spot. Officer Demarest had recovered two stolen midsized vehicles from the parking lot the previous day, and the Altima was parked in the same parking spot in which one of the stolen vehicles had been parked. Officer Demarest noticed that a male, who was later identified as appellant Richard Lor Xiong, was reclined in the vehicle's driver's seat and appeared to be sleeping or relaxing.

Due to a slow computer system, Officer Demarest was unable to determine whether the vehicle was stolen by running the license plates. He asked the dispatcher to run the license plates, and the dispatcher reported that the vehicle had not been reported stolen. However, based on his training and experience, Officer Demarest believed that the vehicle was "fresh stolen," meaning that the vehicle had been recently stolen but the owner had not yet reported it stolen.

Officer Demarest approached the vehicle and knocked on the window to get appellant's attention. The vehicle was not running and Officer Demarest was unable to see if the keys were in the ignition. Appellant sat up quickly, looked around, saw Officer Demarest, opened the door, and exited the vehicle. Officer Demarest noticed that appellant was looking over the officer's shoulders toward the tree line and not making eye contact with him. Because Officer Demarest determined that appellant's behavior indicated that he intended to run away, he asked appellant to sit back down in the vehicle. Appellant sat down in the driver's seat as two additional police officers arrived.

When appellant was seated in the vehicle, Officer Demarest began asking him questions about the vehicle and what he was doing. Appellant appeared fidgety and uncomfortable, looked around the interior of the vehicle, made furtive movements, and gave several different answers to Officer Demarest's questions. Approximately two minutes after Officer Demarest began questioning appellant, an officer who was standing on the passenger side of the vehicle yelled that a bullet was in plain view in the vehicle. Officer Demarest asked appellant to exit the vehicle. Once appellant stood up, Officer Demarest conducted a pat-down search to check for weapons, told him that he was not under arrest, and placed him in a squad car. He did not handcuff appellant.

Meanwhile, the other officer searched the vehicle and found a .380-caliber semiautomatic pistol in a Dremel drill case on the floorboard of the rear passenger seat. Because of the degree to which the driver's seat was reclined, the gun was within appellant's reach when he was lying in the driver's seat. The gun was loaded, a live round was in the chamber, and a full magazine was next to the gun. The police later

determined that the bullet that was found in the vehicle's back seat was associated with a high-powered M16 or M4 rifle.

After the gun was discovered, Officer Demarest asked appellant if he had any convictions. Appellant stated that he had a felony drug conviction, which Officer Demarest knew was an offense that renders an individual ineligible to possess a firearm. After the dispatcher confirmed that appellant had been convicted of a felony, Officer Demarest placed appellant under arrest and transported him to the police station.

The state charged appellant with possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2010). Appellant moved to suppress the gun and the statements he made to the officers, arguing that he was seized without reasonable or articulable suspicion or probable cause. After a hearing, the district court denied appellant's motion to suppress.

The district court held a jury trial in January 2012, and the jury found appellant guilty. Appellant subsequently moved for a downward dispositional departure or a downward durational departure. The district court denied the motion and sentenced appellant to the presumptive sentence of 60 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not err by denying appellant's motion to suppress.

Appellant does not challenge the validity of Officer Demarest's initial contact with him while he was in his parked vehicle. Instead, appellant argues Officer Demarest improperly seized him by ordering him to reenter his vehicle without reasonable suspicion of criminal activity. The state concedes that appellant was seized when he was

ordered to reenter his vehicle, but argues that the seizure was based on specific, articulable facts from which Officer Demarest drew reasonable inferences.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). "[W]hen the facts are not in dispute, a reviewing court must determine whether a police officer's actions constitute a seizure and if the officer articulated an adequate basis for the seizure." *Harris*, 590 N.W.2d at 98.

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Consistent with the Fourth Amendment to the United States Constitution, a police officer may "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted); *see also Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968). A police officer's reasonable, articulable suspicion must be based on specific facts, and the officer must have a particularized and objective basis for suspecting the detained person of criminal activity. *State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011). This standard is not high, but the police officer making the stop must be able to articulate more than a hunch. *Timberlake*, 744 N.W.2d at 393. This court considers the

totality of the circumstances when determining whether a stop is justified. *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001).

Appellant contends that his behavior after exiting the vehicle was not suspicious. After Officer Demarest knocked on appellant's window, appellant immediately exited the car, looked towards the tree line, and avoided making eye contact with him, which Officer Demarest believed to be indicative of his intention to flee. *See Richardson*, 622 N.W.2d at 825 (stating that police officers may rely on "inferences and deductions that would be beyond the competence of an untrained person"). In addition, Officer Demarest testified that he approached the parked vehicle in which appellant was reclining for several reasons, including that: two stolen vehicles were recovered from the same parking lot the previous day, and one vehicle had been parked in the same parking space; the vehicle was very similar to the stolen midsized vehicles that had been recovered the day before; he saw appellant reclined in the driver's seat; and he suspected that the vehicle was "fresh stolen." Considering the totality of the circumstances, Officer Demarest had a reasonable, articulable suspicion, based on specific facts, that appellant was engaged in criminal activity that justified an investigative stop.

Appellant argues that Officer Demarest's fear that he would flee was unsupported because: (1) acting fidgety and distracted is normal behavior for an individual who is confronted by a police officer; and (2) appellant was in a better position to flee when he was sitting in the car. However, Officer Demarest testified that, in his experience, people who choose to flee during a traffic stop behave similarly to the way he observed appellant behave, and that drivers who have been stopped for a traffic violation typically make eye

contact. Officer Demarest's testimony establishes that the behavior appellant exhibited was not normal behavior for an individual who is questioned by police. In addition, Officer Demarest testified that the vehicle was not running when he approached it. Under the circumstances, it was reasonable for Officer Demarest to determine that appellant intended to flee by foot.

Appellant argues that this case is similar to *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004), and *State v. Robb*, 605 N.W.2d 96 (Minn. 2000). However, both cases are distinguishable. Unlike the police officer in *Askerooth*, Officer Demarest had a reasonable suspicion that appellant was engaged in serious criminal activity—the theft of the vehicle—and he ordered appellant to sit down in his own vehicle, not to exit his vehicle and sit in a squad car. While the supreme court acknowledged that it is very intrusive for an officer to remove an individual from his own car and place him in the back of a locked squad car, the same level of intrusiveness is not present when a police officer merely asks an individual to remain seated in his own vehicle. *See Askerooth*, 681 N.W.2d at 366. In *Robb*, the supreme court concluded that the following facts did not support an inference of dangerousness: the police officers had an arrest warrant for Robb; it was late at night and getting dark; the setting was deserted; Robb's behavior changed when the officers told him about the search of his vehicle; and Robb's friend was present. 605 N.W.2d at 103. As a result, the supreme court held that a search of Robb's vehicle was not a valid search incident to arrest. *Id.* Here, in contrast, Officer Demarest conducted an investigatory stop, not a search, of appellant based on several circumstances, including his nervousness.

Appellant next contends that the concept of a "fresh stolen" vehicle does not justify a *Terry* stop because it would give police the discretion to stop any car at any time. However, Officer Demarest's suspicion that the vehicle was fresh stolen was just one factor among several that contributed to his reasonable suspicion that appellant was engaged in criminal activity. And although Officer Demarest's computer check of the vehicle's license plates did not reveal that the vehicle had been reported stolen, that fact did not add to, or detract from, his reasonable suspicion that the vehicle was stolen. *See State v. Britton*, 604 N.W.2d 84, 88 (Minn. 2000) ("[U]nder the circumstances of this case, the computer check would not necessarily have detracted from any reasonable suspicion that the Cutlass was stolen, although it obviously did not add to it either.").

In the alternative, appellant argues that he was unlawfully arrested when Officer Demarest placed him in the back of his squad car. "The scope of a *Terry* investigation must be limited to that which occasioned the stop, to the limited search for weapons, and to the investigation of only those additional offenses for which the officer develops a reasonable, articulable suspicion within the time necessary to resolve the originally-suspected offense." *Diede*, 795 N.W.2d at 845 (quotation omitted). Evidence that is discovered as the result of a reasonable expansion is admissible. *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012).

Here, the scope of the stop expanded when one of the police officers noticed a bullet in plain view in the back seat of appellant's vehicle while Officer Demarest was questioning appellant, who was sitting in the vehicle. As a result, Officer Demarest asked appellant to exit the car, patted him down, told him he was not under arrest, and

placed him in the back seat of the police car while the officers conducted a search of his vehicle. The police officers' confinement of appellant in the back seat of the squad car during the search was justified because it was reasonably related to officer safety. *See Askerooth*, 681 N.W.2d at 369-70 (stating that the state may justify confining a driver stopped for a minor traffic violation in a squad car "if it is reasonably related to the initial lawful basis for the stop, reasonably related to the investigation of an offense lawfully discovered or suspected during the stop, or a threat to officer safety"). Accordingly, the district court did not err by denying appellant's motion to suppress.

II. The prosecutor did not commit misconduct in her closing argument.

Appellant argues that the prosecutor committed prosecutorial misconduct by inflaming the passions of the jury during her closing argument. Because appellant did not object to the alleged prosecutorial error at trial, this court's review is for plain error. *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011). Under that analysis, this court will reverse if there is: (1) error; (2) that is plain; and (3) affects the defendant's substantial rights. *Id.* When applying the plain-error analysis to claims of prosecutorial misconduct, this court uses a modified test that places the burden of persuasion on the state to demonstrate that the alleged misconduct did not affect the defendant's substantial rights. *Id.* This court will "reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006).

Prosecutors are obligated to ensure that a defendant receives a fair trial and "may not seek a conviction at any price." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

In presenting a closing argument, a prosecutor "may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence," but "may not speculate without a factual basis." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009). Prosecutors may not make arguments "that are designed to inflame the passions and prejudices of the jury." *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009). This court reviews the prosecutor's "closing argument as a whole and does not focus on selective phrases or remarks." *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2002).

During her closing argument, the prosecutor stated: "And when you think about why Officer Demarest wears 40 pounds of body armor when he's on duty, could it be that sometimes the wrong people have guns? Could it be that sometimes those folks may not be afraid to use them?" The prosecutor further stated that "when the police found that loose bullet in the car [appellant] was in . . . this great big long round, they have a duty to investigate. They can't just ignore that." Appellant argues that the prosecutor improperly insinuated that appellant could have shot and killed the police officers and that, in doing so, the prosecutor relied on a fact that was not in evidence—that Officer Demarest was wearing 40 pounds of body armor.

Reading the prosecutor's closing argument as a whole, her statements were not improper. The purpose of the prosecutor's statement was not to inflame the passions of the jury but rather to explain how the officers found the gun. Although appellant was not initially investigated for having a gun, the presence of the bullet in the vehicle raised officer safety concerns that were not present at the beginning of the stop because it indicated the possible presence of a gun in the vehicle. As a result, the police officers

searched appellant's car for a gun. In addition, the prosecutor's reference to Officer Demarest's "40 pounds of body armor" was not improper. Officer Demarest testified that he wears "40 pounds of equipment," and the prosecutor's statement was a reasonable inference based on his testimony.

Appellant argues that the prosecutor further inflamed the passions of the jury by discussing the dangerousness of the gun in her closing statement. But the gun was central to the prosecutor's case. The prosecutor focused on a description of the gun and the DNA evidence that was found on the gun. She did not overemphasize the dangerousness of the gun; in fact, she only used the word "dangerous" once. The prosecutor's argument was based on the evidence and inferences drawn from the evidence, and was not inflammatory. The prosecutor did not commit misconduct in her closing argument.

III. The district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure.

A district court must impose the presumptive sentence provided by the sentencing guidelines unless the case involves "identifiable, substantial, and compelling circumstances" that warrant a departure. Minn. Sent. Guidelines II.D (2010). Substantial and compelling circumstances include "circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The decision whether to depart from the guidelines is within the district court's discretion and this court will not reverse absent an abuse of that discretion. *State v. Schmit*, 601 N.W.2d 896, 898 (Minn. 1999). Only a "rare case" warrants reversal of the district court's decision not to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Although the district court is required to give reasons for its decision to depart from the guidelines, no explanation is required when it considers reasons for a departure but imposes a presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). This court "may not interfere with the [district] court's exercise of discretion, as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination." *Id.* at 80-81. But where compelling circumstances for departure exist, the district court must deliberately consider those circumstances before imposing the presumptive sentence. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984).

In determining whether to depart from a presumptive sentence, a district court may consider the individual's amenability to probation. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). In doing so, the district court may consider factors such as "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But "the mere fact that a mitigating factor is present in a particular case does not obligate the court to place defendant on probation or impose a shorter term than the presumptive term." *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted).

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure because it erroneously stated that appellant's DNA was found on the gun. He contends that the BCA experts testified that appellant

could not be excluded as having contributed to the DNA on the gun, not that his DNA actually *was* found on the gun.

Shortly before it imposed the presumptive sentence at the sentencing hearing, the district court noted that the jury found that appellant was in constructive possession of the gun, and that the gun had his DNA on it. The district court concluded by denying appellant's motion to depart because it did not "find that [appellant presented] a compelling reason to" depart from the guidelines. The district court further told appellant that he did "have a lot of positives . . . The upside is that your dad owns the mechanic shop. And so to the extent that you get your GED, that it seems like you will have an opportunity when you get out that a lot of people don't have."

The statement to which appellant objects was the district court's observation about the jury's verdict, not the district court's reason for denying appellant's motion. Reading the district court's statement in its entirety, it is clear that the district court carefully considered all of the information that was presented to it before deciding to deny appellant's motion. The district court noted that appellant had positive aspects of his life, particularly the possibility of employment at his father's business, but concluded that appellant had not presented a compelling reason to depart from the guidelines. The district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure and imposing the presumptive sentence.

Affirmed.