STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1129

State of Minnesota,
Respondent,

vs.

John Edward Juneau,
Appellant.

Filed June 27, 2022
Affirmed
Johnson, Judge

Anoka County District Court
File No. 02-CR-17-2371

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

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

An Anoka County jury found John Edward Juneau guilty of a third-degree controlled substance crime based on evidence that he possessed methamphetamine in his vehicle. We conclude that the district court did not err by denying Juneau's motion to

suppress the evidence of the methamphetamine. We also conclude that the prosecutor did not engage in misconduct during closing argument. And we further conclude that the district court did not err by denying Juneau's motion for a downward durational departure from the presumptive sentencing range. Therefore, we affirm.

FACTS

Juneau's conviction arises from a police officer's stop of his vehicle and subsequent discovery of methamphetamine during a search of the vehicle. On April 11, 2017, at approximately 1:30 a.m., Sergeant Blair of the Coon Rapids Police Department responded to a report that an unknown person was running through the backyards of local residences. After concluding his investigation into that report, Sergeant Blair saw an SUV drive slowly past a particular home. Sergeant Blair became suspicious because he recently had spent a considerable amount of time investigating that home for narcotics-related activity. Sergeant Blair checked the registration of the SUV. His squad-car computer indicated that the vehicle's owner was not a resident of Coon Rapids and also indicated (incorrectly) that the vehicle's registration had expired.

Sergeant Blair followed the SUV. As he did so, he noticed that the driver was speeding up, as if to increase the space between the SUV and the squad car. Sergeant Blair eventually caught up to the SUV and stopped it for an equipment violation. The driver of the SUV came to a rolling stop. Sergeant Blair shined a spotlight through the SUV's rear window and saw the driver make furtive movements toward the center console. Sergeant Blair approached the vehicle and ordered the driver to exit the vehicle. After his third or fourth command, the driver complied. Sergeant Blair immediately recognized Juneau

based on past interactions. Juneau told Sergeant Blair that he had been in the area visiting a friend. Sergeant Blair did not believe Juneau and ordered a drug-detection dog to sniff the SUV. The dog reacted positively to the presence of narcotics. Sergeant Blair searched the vehicle and found two small baggies containing a substance that later was determined to be methamphetamine.

The state charged Juneau with one count of third-degree possession of a controlled substance, in violation of Minn. Stat. § 152.023, subd. 2(a)(1) (2016). In July 2017, Juneau moved to suppress the evidence seized during the search of his vehicle. In November 2017, the district court held an evidentiary hearing at which Sergeant Blair and Juneau testified. In August 2018, the district court filed an order denying Juneau's motion. The district court determined that the dog sniff of Juneau's vehicle was justified by a reasonable suspicion of drug-related activity and that Sergeant Blair's search of Juneau's vehicle was supported by probable cause.

The case was tried to a jury over two days in August 2019. The state called two witnesses: Sergeant Blair and a forensic scientist who had tested and weighed the substance found in Juneau's vehicle. Juneau called one witness, J.I., who testified that he—not Juneau—was responsible for the methamphetamine found in Juneau's vehicle. Juneau did not testify.

The jury found Juneau guilty. At sentencing, Juneau moved for a downward durational departure from the presumptive guidelines range. The district court denied Juneau's motion and imposed a sentence of 49 months of imprisonment. Juneau appeals.

DECISION

I. Motion to Suppress

Juneau first argues that, for two reasons, the district court erred by denying his motion to suppress evidence. First, Juneau contends that the dog sniff of his vehicle was not supported by a reasonable suspicion of criminal activity. Second, he contends that, even if there was reasonable suspicion for a dog sniff, the dog sniff is invalid because the dog alerted to the presence of narcotics only after entering the vehicle, which he contends is a search that was not supported by probable cause.[1] This court applies a clear-error standard of review to a district court's findings of fact concerning an investigatory stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). If the relevant facts are undisputed, this court applies a *de novo* standard of review to a district court's ruling that an investigatory stop is valid. *State v. Yang*, 774 N.W.2d 539, 551 (Minn. 2009).

A. Dog Sniff

Juneau first contends that the dog sniff of his vehicle was not supported by a reasonable suspicion of criminal activity.

The United States Constitution and the Minnesota Constitution guarantee the right of the people to be secure against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Under the Fourth Amendment to the United States

[1]In his principal brief, Juneau also argued that probable cause is lacking because the state did not introduce evidence of the drug-sniffing dog's reliability. *See Florida v. Harris*, 568 U.S. 237, 246-48 (2013). Juneau did not make such an argument to the district court, and the issue was not considered by the district court. In his reply brief, Juneau admitted that additional fact-finding is necessary on that issue. At oral argument, Juneau expressly waived the argument. Thus, we need not consider it.

Constitution, the use of a drug-sniffing dog is not a "search" and, thus, does not require probable cause. *Illinois v. Caballes*, 543 U.S. 405, 408-10 (2005). Under the Minnesota Constitution, a law-enforcement officer may not use a drug-sniffing dog on a motor vehicle that is stopped for a routine equipment violation unless the officer has a reasonable, articulable suspicion of drug-related criminal activity. *State v. Wiegand*, 645 N.W.2d 125, 135, 137 (Minn. 2002). The reasonable-suspicion standard is satisfied if "an officer observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). The reasonable-suspicion standard is not high, but the suspicion must be more than a "mere hunch" and must be based on "specific and articulable facts." *State v. Taylor*, 965 N.W.2d 747, 751-52, 758 (Minn. 2021) (quotation omitted). A court must consider the totality of the circumstances in determining whether reasonable suspicion exists. *Id.* at 752.

In this case, the district court concluded that Sergeant Blair's expansion of the investigatory stop with a dog sniff was justified by a reasonable, articulable suspicion of drug-related activity. The district court determined that three facts provided the requisite reasonable suspicion: (1) Juneau had been in a high-crime area, (2) he had come to a "rolling" stop, and (3) he had made "furtive movements" towards the center console after stopping.

Juneau contends that the first fact on which the district court relied—that he had been in a high-crime area—is clearly erroneous because Sergeant Blair testified that the area in which Juneau was arrested is a "relatively quiet neighborhood." But Sergeant Blair

also testified that, in the months preceding Juneau's arrest, he had spent "endless hours" conducting narcotics-related surveillance at the home past which Juneau was driving slowly. Sergeant Blair also testified that he had been involved in narcotics-related arrests in the area and was aware of additional criminal incidents occurring in that area. Thus, the district court's finding that Juneau had been in a high-crime area is not clearly erroneous.

Juneau also contends that the district court's three findings do not indicate *drug*-related activity so as to justify a dog sniff. *See Wiegand*, 645 N.W.2d at 137. In evaluating an officer's assertion of a reasonable, articulable suspicion, courts must be "deferential to police officer training and experience and recognize that a trained officer can properly act on suspicion that would elude an untrained eye." *Britton*, 604 N.W.2d at 88-89; *Taylor*, 965 N.W.2d at 752. Sergeant Blair testified that, in his experience, a rolling stop is "very typical" in narcotics-related cases. Sergeant Blair also testified that if a car's occupant makes movements toward the center console, the person may be trying to hide something. Sergeant Blair's testimony, which is based on his training and experience, specifically connects his observations of Juneau's behavior to drug-related activity. In this way, this case is similar to *State v. Lugo*, 887 N.W.2d 476 (Minn. 2016), in which the appellant was seen leaving a drug house, took an unusually long time to stop, and had recently been arrested for a drug crime. *Id.* at 487. Accordingly, the district court in this case did not err by concluding that Sergeant Blair had "specific and articulable facts" of drug-related activity that are sufficient to satisfy the reasonable-suspicion standard for a dog sniff.

B. Search of Vehicle

Juneau also contends that, even if the use of a drug-sniffing dog was justified, the dog sniff is invalid because the dog alerted to the presence of narcotics only after entering the vehicle, which, Juneau asserts, must be deemed a search that is not supported by probable cause.

Juneau did not make this argument to the district court. He is making the argument for the first time on appeal. In his reply brief, he urges the court to consider the argument based on an exception to the general rule that an argument is forfeited if it was not presented to the district court. He relies primarily on *Watson v. United Services Automobile Association*, 566 N.W.2d 683 (Minn. 1997), which sets forth a four-factor test for determining whether an exception applies. *Id.* at 688. The state urges the court to follow *State v. Sorenson*, 441 N.W.2d 455 (Minn. 1989), in which the supreme court declined to consider an argument for suppression based on the Minnesota Constitution because that theory had not been presented to the district court. *Id.* at 457.

We believe that the applicable law is found in *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3 (Minn. 1965), in which the supreme court stated:

> If the defendant, having been advised before trial that evidence obtained as the result of search and seizure will be offered against him . . . , and having been told that he may have a test of the admissibility of this evidence upon constitutional grounds before the trial, fails or refuses to request such a hearing, any objection which he may otherwise make based upon this ground may be deemed waived.

Id. at 14; *see also State v. Merrill*, 274 N.W.2d 99, 109 (Minn. 1978) (refusing to consider argument concerning search of apartment because appellant did not raise that issue at

omnibus hearing or trial). This rule applies with special force if the state did not have an opportunity to present relevant evidence on the issue at the omnibus hearing. *State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996). In this case, the record of the omnibus hearing[2] does not contain evidence with respect to whether the dog actually entered Juneau's vehicle, how the dog might have entered, and when the dog might have entered relative to when the dog alerted to methamphetamine. Accordingly, we will not consider Juneau's second argument.

Thus, the district court did not err by denying Juneau's motion to suppress evidence.

II. Prosecutorial Misconduct

Juneau next argues that he is entitled to a new trial on the ground that the prosecutor engaged in two types of misconduct.

The right to due process of law includes the right to a fair trial. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted). Consequently, prosecutorial misconduct may result in the denial of the right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

[2]Both parties cite to a video-recording of the dog sniff. But the video-recording was not admitted into evidence at the omnibus hearing. The district court instructed the state to submit the video-recording after the omnibus hearing, but it appears that the state did not do so. Juneau has not argued to this court that the district court erred by not ensuring that the video-recording was made part of the record of the omnibus hearing. Thus, we do not consider the video-recording, which later was introduced at trial, to be part of the evidentiary record of the omnibus hearing.

The parties agree that Juneau did not object at trial to the prosecutorial conduct that he challenges on appeal. Accordingly, we apply the modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, an appellant initially must establish that there is prosecutorial misconduct and that it is plain. *Ramey*, 721 N.W.2d at 302. If the appellant establishes plain misconduct, the burden shifts to the state to show that the plain misconduct did not affect the appellant's substantial rights, *i.e.*, "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). "If these three prongs are satisfied, the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

A. Alleged Personal Opinion on Credibility

Juneau first contends that the prosecutor engaged in misconduct during closing argument by making the following two statements with respect to Juneau's defense witness, J.I.: "[Y]ou have a story that is fanciful, told by someone who is not credible. . . . What is not speculative is that [J.I.] was not telling you the truth." Juneau contends that these statements constitute impermissible commentary on the credibility of a witness.

It is inappropriate for a prosecutor to give his or her own opinion about the credibility of a witness in closing argument. *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). "However, the state is free to argue that particular witnesses were or were not credible." *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007). In this case, the prosecutor did not offer his *personal* opinion about J.I.'s credibility. Instead, the prosecutor identified

inconsistencies in J.I.'s testimony and, based on that evidence, urged the jury to draw an inference that J.I. was not credible. A prosecutor is permitted "to present to the jury all legitimate arguments on the evidence" and "to present all proper inferences to be drawn therefrom." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996); *see also State v. Rucker*, 752 N.W.2d 538, 552-53 (Minn. App. 2008), *rev. denied* (Minn. Sept. 23, 2008). The prosecutor did not commit misconduct by arguing to the jury about the credibility of a witness.

B. "We" Statements

Juneau also contends that the prosecutor engaged in misconduct during his closing argument by repeatedly using the word "we" to align himself with the jury.

Juneau identifies five statements of the prosecutor during closing argument that he believes constitute misconduct:

> And then at some point there was a conversation, we're led to believe, about seeing some girls later, strippers, somewhere in Coon Rapids for a party. . . .
>
> So we're led to believe that [J.I.] saw law enforcement, got spooked, and actually got out of the car right where the officers were in the area responding to a call. . . .
>
> So we're to believe that that's what [J.I.] did the next day. . . .
>
> We don't know why [J.I.] would step forward. . . .
>
> We are supposed to believe, based on the testimony of [J.I.], that the alternative theory here is that [J.I.] had somehow put his bag with the methamphetamine into the center console and, for whatever odd reason, the defendant had placed his bag either in the passenger's side seat or behind [J.I.]."

Juneau relies on *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006), in which the supreme court stated that "a prosecutor is not a member of the jury, so to use 'we' and 'us' is inappropriate and may be an effort to appeal to the jury's passions." *Id*. at 790. Likewise, a prosecutor may not "describe herself and the jury as a group of which the defendant is not a part." *Id.* Juneau contends that by using these "we" statements, in conjunction with statements about what "to believe," the prosecutor aligned himself with the jury but not his sole witness, J.I. *See id.* at 790. In response, the state cites *Nunn v. State*, 753 N.W.2d 657 (Minn. 2008), in which the supreme court concluded that a prosecutor did not engage in misconduct by using the word "we" when summarizing the evidence that had been presented at trial. *Id*. at 663. The supreme court reasoned that a "we" statement "does not necessarily exclude the defendant because the 'we' could reasonably be interpreted . . . to refer to everybody who was in court when the evidence was presented." *Id.*

The state is correct that the circumstances of this case are like those in *Nunn* and unlike those in *Mayhorn*. As in *Nunn*, the prosecutor was summarizing evidence presented to the jury and all other persons in the courtroom, including Juneau, during J.I.'s testimony. *See id.* This case is very different from *Mayhorn*, in which the prosecutor used the word "we" in the context of what the supreme court described as a possible "attempt[] to highlight cultural differences between the predominantly white jury and the [African American] defendant." *See* 720 N.W.2d at 789. In this case, the prosecutor did not commit misconduct by sometimes using the word "we."

Thus, Juneau is not entitled to a new trial on the ground of prosecutorial misconduct.

III. Downward Durational Departure

Juneau last argues that the district court erred by denying his motion for a downward durational departure from the presumptive sentencing range.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2016). For any particular offense, the presumptive sentence is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines 1.B.13 (2016); *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court shall utilize the presumptive sentencing range provided in the sentencing guidelines "unless there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2016). For purposes of a request for a downward durational departure,"[s]ubstantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotations omitted).

In reviewing a decision on a motion to depart from the applicable sentencing range, this court applies an abuse-of-discretion standard of review. *Soto*, 855 N.W.2d at 307-08. A district court "has broad discretion to depart" from the sentencing guidelines "only if aggravating or mitigating circumstances are present." *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989) (emphasis omitted). But "if aggravating or mitigating circumstances are not present, the trial court has no discretion to depart." *Id.* One way in which a district court may abuse its discretion is by basing its decision "on an erroneous view of the law." *Soto*,

855 N.W.2d at 308 n.1 (quotation omitted). Whether an aggravating or mitigating circumstance is present is, in essence, a question of law. *See Best*, 449 N.W.2d at 427. "[T]o the extent a decision to depart turns on a question of law, reviewing the decision for an abuse of discretion . . . calls for resolving the legal question de novo." *Soto*, 855 N.W.2d at 308 n.1; *accord State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008); *State v. Dentz*, 919 N.W.2d 97, 101 (Minn. App. 2018); *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010); *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *rev. denied* (Minn. Aug. 26, 2009).

In this case, the district court acknowledged the standard for a downward durational departure but rejected Juneau's arguments. Juneau contends that, for two reasons, his offense was significantly less serious than a typical third-degree possession offense.

First, Juneau contends that a downward departure is warranted on the ground that he possessed an amount of methamphetamine that is only slightly (0.3 grams) above the minimum 10-gram amount required for a third-degree methamphetamine possession offense. The amount of methamphetamine that Juneau possessed is within the weight range identified by the legislature. *See* Minn. Stat. § 152.023, subd. 2(a)(1). It is questionable whether possession of such an amount could be deemed "significantly . . . less serious than that typically involved in the commission of the crime in question." *See Hicks*, 864 N.W.2d at 157 (quotation omitted). Even if that were so, reversal is not required because the district court determined that the evidence in this case does not warrant a departure. The district court expressly stated, "There was nothing extraordinary in the testimony of this case that would indicate that the possession in this situation . . . was less

onerous than somebody else in a similar offense . . . of third degree possession of a controlled substance." The district court did not abuse its discretion in making that determination.

Second, Juneau contends that the jury may have found him "not wholly responsible" for possession of the methamphetamine if it relied on the jury instruction concerning joint possession. Juneau does not cite any caselaw for the proposition that joint possession of a controlled substance is "significantly . . . less serious than that typically involved in the commission of the crime in question." *See id*. Also, we do not know whether the jury believed J.I.'s testimony that the methamphetamine belonged to him, not to Juneau. In any event, the district court described Juneau's offense as "a very straightforward case of third degree possession of a controlled substance." The district court did not abuse its discretion in rejecting Juneau's argument concerning mitigation due to joint possession.

Juneau also argues, in the alternative, that the district court erred by not exercising discretion when ruling on his motion for a downward durational departure. A district court is not required to state reasons for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). The transcript shows that the district court considered both of Juneau's arguments for departure and rejected them. It appears that the district court did not fail to exercise discretion when it imposed its sentence on Juneau.

Thus, the district court did not err by denying Juneau's motion for a downward durational departure.

Affirmed.