STATE OF MINNESOTA
IN COURT OF APPEALS
A09-865

State of Minnesota,
Respondent,

vs.

Jimmy Joseph Micius,
Appellant.

Filed June 29, 2010
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-K7-08-868

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Thomas Ragatz, Assistant County Attorney, Nathan T. Cariveau, Certified Student Attorney, St. Paul, Minnesota (for respondent)

Ira W. Whitlock, Whitlock Law Office, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

WORKE, Judge

Appellant challenges his ineligible-person-in-possession-of-a-firearm conviction, arguing that the officer did not have reasonable articulable suspicion to justify the stop

and search of appellant's vehicle and the prosecutor committed prejudicial misconduct during closing argument. We affirm.

D E C I S I O N

Stop and Search

Appellant Jimmy Joseph Micius was convicted by a jury of being an ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1 (2006).[1] Appellant argues that the district court erred in denying his motion to suppress the handgun found in his vehicle during a traffic stop, claiming that the officer did not have reasonable articulable suspicion to stop and search appellant's vehicle.

Traffic Stop

A stop is lawful under the Fourth Amendment if an officer can articulate a "particularized and objective basis for suspecting the particular persons stopped of criminal activity." *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985) (emphasis and quotation omitted). This court reviews de novo the district court's determination of whether there was reasonable suspicion of unlawful activity to justify a limited investigatory stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). In doing so, this court reviews the district court's findings of fact for clear error, gives due weight to inferences drawn from those facts by the district court, *State v. Lee*, 585 N.W.2d 378, 383 (Minn. 1998), and defers to the district court's assessment of witness credibility.

[1] Appellant is ineligible to possess a firearm due to an adjudication of delinquency for the offense of third-degree assault.

State v. Miller, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003).

"A brief investigatory stop requires only reasonable suspicion of criminal activity." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). The reasonable-suspicion standard is not high. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). But reasonable suspicion is more than merely a whim, caprice, or idle curiosity. *Pike*, 551 N.W.2d at 921. Articulable, objective facts that justify an investigatory stop are "facts that, by their nature, quality, repetition, or pattern become so unusual and suspicious that they support at least one inference of the possibility of criminal activity." *State v. Schrupp*, 625 N.W.2d 844, 847-48 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). The officer's suspicion may be based on the totality of the circumstances, including "the officer's general knowledge and experience, the officer's personal observations, information the officer has received from other sources, the nature of the offense suspected, the time, the location, and anything else that is relevant." *Applegate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987). "Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

The district court concluded that appellant failed to signal his movement, which is a traffic violation and enough for an officer to initiate a stop. Under Minn. Stat. § 169.19, subd. 4 (2006), "No person shall . . . turn a vehicle from a direct course or move right or left upon a highway . . . until . . . after giving an appropriate signal." *See State v. Jones*, 649 N.W.2d 481, 484 (Minn. App. 2002) (holding that "highway" includes a city street).

Here, an officer was on routine patrol on December 25, 2007, at approximately 1:00 a.m., in a marked squad car in a "very high-crime area." The officer was driving eastbound when his attention was drawn to a westbound-approaching vehicle. The driver of the westbound vehicle failed to signal as the vehicle pulled over to the curb. The officer continued past the vehicle and noticed that the driver slid down in an attempt to avoid detection. The officer made a U-turn in order to run the license-plate number; the officer discovered that the vehicle was a rental. According to the officer, criminals use rental vehicles because the vehicles do not register to them. The officer drove around the block, pulled up behind the vehicle, and turned on his vehicle's emergency lights to initiate a traffic stop for failure to signal change of course. Because appellant pulled over to the side of the road without signaling his movement, the corresponding investigation and detention of his vehicle was lawful, no matter how slight the traffic violation. *See George*, 557 N.W.2d at 578.

Search

Appellant argues that the officer impermissibly expanded the scope of the investigatory detention. "[T]he scope of the police investigation during a detention which follows a lawful stop must be strictly tied to and justified by the circumstances which rendered [the] initiation [of the investigation] permissible." *State v. Pleas*, 329 N.W.2d 329, 333 (Minn. 1983) (quotations omitted). A valid traffic stop may become invalid if it becomes "intolerable in its intensity or scope." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quotation omitted).

When the officer stopped behind the vehicle, he turned on his vehicle's spotlight and observed the driver bend forward. The driver's movement concerned the officer because he feared that the driver was "going to draw a weapon or attempt[] to conceal a weapon or [] narcotics" under the driver's seat. As the officer exited his squad, the driver exited his vehicle, which also concerned the officer because it is unusual for an individual to exit a vehicle during a traffic stop. The officer believed that the driver had leaned forward to retrieve a weapon and exited the vehicle because he was going to harm the officer or flee. In response, the officer drew his weapon and ordered the driver to get back inside his vehicle and the driver complied. When the officer reached the driver's door, the driver, again, attempted to exit the vehicle. The officer recognized the driver as appellant from previous contacts and knew that he belonged to a gang. The officer asked appellant to step out of the vehicle and escorted him to the squad car in order to separate him from the vehicle. The officer conducted a pat-search and did not find any weapons on appellant's person.

The district court found that the officer was justified in conducting a pat-search because it was 1:00 a.m. in a high-crime neighborhood, the officer had prior contacts with appellant and knew that he was a gang member, and appellant slouched down as if to hide, leaned forward and downward, and attempted to exit his vehicle on two occasions. The record supports the district court's findings. And the district court did not err in concluding that the officer was justified in conducting a search of appellant's person.

Appellant argues that the seizure of the weapon from the vehicle was illegal. The district court concluded that the plain-view exception to the warrant requirement applied. Under the plain-view exception, officers may "seize an item in plain view . . . if 1) police were lawfully in a position from which they viewed the object, 2) the object's incriminating character was immediately apparent, and 3) the officers had a lawful right of access to the object." *State v. Zimmer*, 642 N.W.2d 753, 755-56 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. June 26, 2002).

Here, the officer called for backup before he approached appellant's vehicle. When the officer was conducting the pat-search on appellant, appellant's mother yelled from the house in front of which appellant parked and walked toward the vehicle saying that it was her vehicle and she needed the keys. The officer instructed her to stay away from the vehicle, but she failed to comply. When the backup officer arrived, he heard the other officer yell at someone to not approach the vehicle. The backup officer observed a woman approaching the vehicle and told her to stop, but she failed to comply. He intercepted appellant's mother as she walked toward the driver's side of the vehicle and then approached the stopped vehicle. The driver's door was open. He stood outside the door, toward the front of the vehicle on the outer side of the open door and looked down and inside the vehicle using his flashlight and observed the grip of a handgun sticking out from underneath the driver's seat. The officers took photos of the handgun. The officers had to move the gun because they could not get good placement with the camera. For the purpose of the photos, the gun was pulled forward from its original spot and flipped over.

Neither officer went into the vehicle; the door was wide open. The backup officer was able to look into the vehicle and observe the grip of a firearm. Therefore, he was in a place where he had a lawful right to be, he was in a position where he was able to lawfully view the object, and the grip of the firearm handle immediately indicated its incriminating character. Thus, the plain-view exception applies, and the district court did not err in denying appellant's motion to suppress the handgun.

Finally, while appellant claims that the stop was pretextual, the first officer testified that he observed a traffic violation. Appellant presented no counter-evidence. Appellant instead challenges the officer's credibility, but this court defers to the district court's assessment of witness credibility. *Miller*, 659 N.W.2d at 279. And the district court found the officer to be credible.

Prosecutorial Misconduct

Appellant also argues that the prosecutor committed misconduct during closing argument. Appellant failed to object during trial; therefore, we review for plain error. *See* Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered by the court . . . on appeal even if it was not brought to the [district] court's attention."); *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).

"The plain error standard requires [appellant to] show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is "plain" if it is clear or obvious under current law. *Id.* at 688. A clear or obvious error "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. If appellant shows plain error, the state must prove that the error did not

affect appellant's substantial rights. *Id.* Only if the three plain-error requirements are satisfied will this court then consider whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Appellant argues that it was misconduct for the prosecutor to state that appellant told his mother that the police were behind him and that she needed to quickly get the gun from the vehicle before police found it. Appellant claims that he never made this statement. It is misconduct for a prosecutor to refer to facts outside of the evidence. *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998). But a prosecutor's argument may include reasonable inferences drawn from the evidence. *State v. Barnes*, 713 N.W.2d 325, 336 (Minn. 2006). Here, the prosecutor's argument was based on reasonable inferences that could be drawn from the evidence.

Appellant's mother testified that appellant called her from the vehicle and indicated that an officer was parked behind him. In closing argument, the prosecutor presented three possible theories: first, because it was a rental vehicle, someone left the gun in the vehicle; second, the police were framing appellant; or third, appellant put the gun there or knew it was there. The prosecutor examined the third theory, the state's theory, and explained constructive possession:

> Maybe [appellant] didn't put it there, but he knew it was there. He called his mom and told her, 'The police are here; you have to come get this gun.' He is exercising dominion and control over that firearm: 'Come get it so the police don't find it, quick.' That's dominion and control. That gun's about to be moved by someone else, jointly and exercising dominion and control, if that's the explanation.

> On the defendant's person, that's actual. Knowingly exercising dominion and control, that's constructive. Either one satisfies the elements of this offense.

Based on the state's theory of the case, it could be inferred that appellant told his mother to retrieve the gun from the vehicle. This is also possible based on the evidence that appellant's mother twice refused to comply with the officers' commands to stay away from the vehicle. Appellant's mother testified that she came out of her residence because she was concerned about her son, but her movement was toward the vehicle, not toward appellant, who was being placed in the backseat of the officer's squad car. It could be inferred that appellant's mother was aware that there was a gun in the vehicle because appellant called and told her. The prosecutor's argument was based on reasonable inferences that could be drawn from the evidence, and appellant fails to establish plain error.

Appellant also argues that the prosecutor misstated that appellant "abruptly" pulled over when he saw the officer because he merely pulled over in front of his home. The prosecutor stated: "Now, [the officer] sees this [vehicle] abruptly pull over to the curb without signaling as a marked police car is approaching." It is misconduct for a prosecutor to refer to facts outside of the record. *Patterson*, 577 N.W.2d at 497. But the officer testified that he saw a vehicle approaching him fail to signal as it pulled over to the curb. Thus, the prosecutor referred to facts in evidence. Although the officer did not state that appellant pulled over "abruptly," he did state that appellant failed to signal and that appellant slid down in his seat when the officer drove past. It could be inferred that

appellant's movement to the curb was abrupt because it was done without any indication of change of course and appellant attempted to hide from the officer as he drove by. Therefore, the prosecutor did not commit misconduct by referring to facts in evidence and drawing reasonable inferences from that evidence. *See Barnes*, 713 N.W.2d at 336.

Appellant argues that it was improper for the prosecutor to discuss the stipulation regarding appellant's ineligibility to possess firearms. The prosecutor stated: "We introduced a stipulation. It's a piece of evidence . . . just like any other evidence . . . . Both parties agree that on December 25, 2007, [appellant] could not legally possess[] firearms." The prosecutor did not state why appellant is ineligible to possess firearms, but referred to facts in evidence, which is proper to do in closing argument.

Additionally, appellant argues that the prosecutor improperly disparaged appellant and his mother. The prosecutor stated that appellant's mother's demeanor supported the theory that appellant put the gun in the vehicle or knew that it was there. The prosecutor argued that appellant's mother's concern was to get to the vehicle and that there was proof for that because appellant is "ineligible to possess firearms; there is no question about that." Again, the prosecutor was properly drawing inferences from the evidence.

Appellant also claims that the prosecutor disparaged him by stating: "Keep in mind this is a stolen firearm. Who would want to have a stolen firearm? Someone who can't go to the store and buy his own." The prosecutor did not state that appellant stole the firearm, but indicated that one who is ineligible to legally possess a firearm might only be able to possess a stolen firearm. Again, this is an inference that could be drawn from the evidence presented at trial that the gun was registered to a man who reported

that the gun had been stolen from his vehicle, and the gun did not belong to the two individuals who rented the vehicle before appellant's mother.

Finally, in determining whether a prosecutor's closing argument is improper, we look to the "closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). The prosecutor's closing argument was more than 14 transcribed pages. Looking at it as a whole argument, and because the prosecutor's closing argument need not be "colorless" and may include conclusions and inferences that are reasonably drawn from the facts in evidence, appellant fails to show plain error. *See State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993); *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980).

Affirmed.