STATE OF MINNESOTA
IN COURT OF APPEALS
A10-791

State of Minnesota,
Respondent,

vs.

Puiassance Jhovar Andersen,
Appellant.

Filed March 29, 2011
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR099165

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

Michael O. Freeman, Hennepin County Attorney, Hilary L. Caligiuri, Paul R. Scoggin, Assistant County Attorneys, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

STONEBURNER, Judge

Appellant challenges his convictions of felon in possession of a firearm and controlled-substance crime, arguing that the district court erred in denying his motion to

suppress evidence of a firearm with an obliterated serial number and marijuana found in a warrantless search of appellant's residence by his parole officer. Appellant also challenges the jury instruction for the charge of possession of a firearm with obliterated serial number and asserts that the prosecutor committed prejudicial misconduct in closing argument. Because (1) the search of appellant's residence was reasonable under the totality of the circumstances; (2) the prosecutor's statements did not constitute error; and (3) appellant's challenge to the jury instruction for a crime for which he was not sentenced is without merit, we affirm.

FACTS

Appellant Puiassance Jhovar Andersen, at all relevant times, was on intensive-supervised release from the Minnesota Commissioner of Corrections. Andersen's release was conditioned, in relevant part, on remaining law abiding, not using drugs or alcohol, and consenting to "unannounced visits and/or searches of his . . . person, vehicles or premises by the agent or designee."

Andersen was supervised by corrections agent Daniel Larson, who has supervised Andersen since 2005. Andersen has a history of possessing and using controlled substances and possessing items associated with the distribution of controlled substances while on supervised release.

After Andersen produced six diluted urine tests, Larson suspected that Andersen was again using drugs.[1] Larson obtained a department-of-corrections warrant for Andersen's arrest. Andersen was arrested when he reported for a urine test. Larson searched Andersen's car and found multiple cell phones, which, in Larson's experience, is often an indication of illegal activity.

Larson, with assistance, then searched Andersen's residence. The search revealed a 9-millimeter handgun with holes drilled into the grip, obliterating the serial numbers; several bags of marijuana; a scale; and plastic bags. The handgun was in a sock in Andersen's gym bag. Andersen was charged with (1) felon in possession of a firearm; (2) possession of a firearm with an obliterated serial number; and (3) fifth-degree controlled-substance possession. The district court denied appellant's motion to suppress the evidence obtained during the search, and the case proceeded to trial.

At trial, Andersen admitted that he was selling marijuana and that he knew that there was a gun in a sock in his gym bag. He testified, for the first time at trial, that the gun must have been left by one of two tenants who had left Andersen's residence for Texas just hours before the search. Andersen testified that he had asked his wife to take the gun away because he knew he could not possess a gun and because he was afraid of guns.

[1] According to the testing laboratory, diluted urine test samples are considered to be positive for controlled substances because they indicate a purposeful attempt to mask use of controlled substances.

In closing argument, the prosecutor stated several times, without objection, that Andersen had "lost" the presumption of innocence due to the evidence produced by the state. The jury found Andersen guilty of all three charges.

At sentencing, the judge imposed a sentence of 60 months for felon in possession of a firearm and a concurrent 21 months for the controlled-substance crime, noting that the charge of possessing a firearm with an obliterated serial number was part of the same behavioral incident as the felon-in-possession-of-a-firearm charge.

In this appeal, Andersen (1) challenges the denial of his motion to suppress; (2) asserts that the jury was improperly instructed on the charge of possessing a firearm with an obliterated serial number; and (3) asserts that the prosecutor's statements that Andersen had lost the presumption of innocence constituted misconduct, warranting a new trial.

D E C I S I O N

I. The search of Andersen's residence was not unreasonable.

A reviewing court examines a district court's ruling on the constitutionality of searches and seizures de novo. *State v. Wiegand*, 645 N.W.2d 125, 129 (Minn. 2002). "[A]n appellate court will not reverse the district court's factual findings unless the findings are clearly erroneous or contrary to law." *Id.*

Warrantless residential searches and seizures are presumptively unreasonable under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980). But the Supreme Court has held that the special circumstances attendant to a state's probation system justify a departure from the typical probable-cause and warrant

requirements and that the reasonableness of such a search is determined by examining the totality of the circumstances, balancing the individual's right to privacy against the promotion of legitimate government interests. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 119–22, 122 S. Ct. 587, 591–92 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 873–75, 107 S. Ct. 3164, 3168–69 (1987) (holding that reasonable suspicion of criminal activity makes a warrantless search of a probationer's residence reasonable when legitimate government interests outweigh the probationer's already diminished expectation of privacy).

In *State v. Anderson*, 733 N.W.2d 128, 137–40 (Minn. 2007), the Minnesota Supreme Court adopted the totality-of-circumstances approach enunciated in *Knights*, and similarly concluded that, given the government's interest in probation, when a probationer has agreed to conditions that diminish privacy expectations, "the Fourth Amendment require[s] no more than reasonable suspicion to conduct a search of [probationer's] residence."

The case before us involves a parolee rather than a probationer, but the parties agree that the analysis of the reasonableness of the search is the same. The totality of circumstances, in this case, include Andersen's status as a parolee, his consent to search conditions that diminished his expectation of privacy, and the state's interest in supervising his conditional release. The issue is whether Larson had reasonable suspicion that Andersen was engaged in prohibited conduct. Andersen argues that he did not. We disagree.

"Reasonable suspicion requires a sufficiently high probability that criminal conduct is occurring to make the intrusion on [a parolee's] privacy interest reasonable." *Anderson*, 733 N.W.2d at 138 (quotation omitted). Reasonable suspicion is more than a hunch and requires a particularized and objective basis. *Id.*

In this case, Larson's knowledge of Andersen's history of using and possessing controlled substances while on parole, coupled with six diluted urine tests, made it reasonable for Larson to suspect that Andersen was again unlawfully involved with controlled substances in violation of the conditions of his release. Discovery of the multiple cell phones in Andersen's car increased Larson's level of suspicion, creating reasonable suspicion that Andersen was engaging in prohibited conduct. The district court did not err in denying Andersen's motion to suppress evidence obtained from the searches.

II. Andersen was not prejudiced by the allegedly defective jury instruction.

When an appellant does not object to a jury instruction during trial, an appellate court will only reverse if the allegedly deficient instructions were misleading or confusing on fundamental points of law. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). Minn. R. Crim. P. 31.02 allows consideration of plain errors not objected to at trial if the appellant demonstrates that (1) the district court's ruling was error; (2) that the error was plain, and (3) that the error affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The third prong is satisfied when the error is prejudicial and affects the outcome of the case. *Id.* at 741. Here, the outcome of the case was not affected by any alleged error because Andersen was not formally

adjudicated on the related count. Andersen's sentence was not affected by the instruction and he has not demonstrated that he was prejudiced by the instruction. We find Andersen's challenge to the jury instruction to be without merit.

III. The prosecutor's statements in closing argument did not constitute plain error.

In closing argument, the prosecutor made four references to Andersen having "lost the presumption of innocence." Andersen asserts that the statements impermissibly shifted the burden of proof. *See State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) (stating that "[p]rosecutors improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence"). Misstating the burden of proof is improper and is prosecutorial misconduct. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). Because Andersen did not object to the statements at trial, this court examines the alleged misconduct under a modified plain-error standard of review that first requires that Andersen prove error that was plain. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Error is plain "if the error contravenes case law, a rule, or a standard of conduct." *Id.*

To determine whether a prosecutor's statements constitute error, we "look at 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. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010) (quotation omitted). In a case involving a similar challenge to a prosecutor's final argument, the supreme court found that, read in context, the challenged statement appeared to be argument that the state had produced sufficient evidence of guilt

to overcome the presumption of innocence, rather than argument that the defendant was not entitled to the presumption in the absence of proof beyond a reasonable doubt. *State v. Young*, 710 N.W.2d 272, 280–81 (Minn. 2006) (holding that prosecutor's statement that the defendant was "no longer an innocent man" because evidence presented by the state proved guilt beyond a reasonable doubt, was not a misstatement of the law and did not constitute error).

Similarly, in this case, each statement challenged by Andersen asserts that Andersen had lost the presumption of innocence "based on the evidence" or "as a result of the evidence" or because "all those items prove [guilt] beyond a reasonable doubt." The prosecutor stated the beyond-a-reasonable-doubt standard several times and also remarked several times to the jury that, initially, "the defendant is presumed innocent." As in *Young*, the prosecutor's reference to loss of the presumption was merely argument that the prosecution had met its burden to prove guilt beyond a reasonable doubt that did not shift the burden of proof. The prosecutor did not misstate the law. Because Andersen has not shown that the prosecutor's statements constituted error, his challenge to the statements is without merit.

IV. Andersen's pro se supplemental brief does not raise any meritorious argument.

In a pro se supplemental brief, Andersen argues, without citation to authority, that cases permitting warrantless searches of probationers/parolees were decided erroneously, and that his consent to submit to "unannounced" searches pertains only to the "knock and announce" requirement in executing a warrant. We find no merit in these arguments.

Affirmed.