STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1001

State of Minnesota,
Respondent,

vs.

Kevin Lee Black,
Appellant.

Filed June 30, 2014
Affirmed
Hooten, Judge

Ramsey County District Court
File No. 62-CR-10-10355

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)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Kevin Lee Black, Moose Lake, Minnesota (pro se appellant)

Considered and decided by Kirk, Presiding Judge; Hooten, Judge; and Willis, 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

HOOTEN, Judge

Appellant was convicted of a second-degree controlled-substance crime. He challenges the district court's denial of his motions (1) to suppress evidence found after an informant's tip led police to stop and search his vehicle; (2) for a judgment of acquittal based on the state's evidence concerning the nature of the substances found in his vehicle; and (3) for a mistrial based on the prosecutor's improper questions to appellant about incarceration. He also argues that the district court erred by declaring his first trial a mistrial without his consent and that he received ineffective assistance of counsel. We affirm.

FACTS

Police officers Michael Dunaski and Joshua Raichert worked together for St. Paul's Focusing Our Resources on Community Enforcement ("FORCE") Unit, which investigates citizen complaints about properties suspected of drug and other criminal activity. In November 2010, the unit targeted about 20 individuals suspected of dealing narcotics from an 11-unit apartment complex at 1891 7th Street in St. Paul. In the prior two years, there were about 150 calls for police services at the location. Officer Dunaski had executed four search warrants and arrested about 20 people with narcotics or guns there.

On November 4, 2010, Officer Dunaski had a telephone conversation with a confidential reliant informant (CRI). The CRI had previously assisted him with obtaining evidence that allowed him to secure eight or nine search warrants and about 30 arrests for

guns and drugs, leading to multiple charges against numerous individuals. According to Officers Dunaski and Raichert, the CRI consistently gave reliable information.

The CRI told Officer Dunaski that within the next hour appellant Kevin Black would be in a Chevy Blazer delivering crack cocaine near 7th and Hazel Streets, about 15 feet from the target apartment building. Officer Dunaski later testified that he did not get a description or license plate from the CRI because he could already recognize Black and knew Black's license-plate number. Black was one of the FORCE unit's target suspects. Officer Dunaski knew Black from a previous arrest for possession of crack cocaine, and his unit was familiar with Black's vehicles and the locations he frequented. Officer Dunaski suspected that Black was selling crack cocaine out of at least three apartments at 1891 7th Street. Officer Dunaski had previously received information from the CRI and another informant that Black hid his narcotics in his dashboard or around the center console of his vehicle.

Officers Dunaski and Raichert went to 7th and Hazel in a marked squad car immediately after receiving the CRI's tip. About an hour later, Officer Dunaski saw the Blazer referred to by the CRI. He recognized its license plate, color, and pinstripes and confirmed the license-plate number. The Blazer's rear window was broken out, and Officers Dunaski and Raichert could see only the driver.

Officer Dunaski positioned his squad car about 20 or 30 feet behind the Blazer and turned on his lights and siren. The Blazer did not stop immediately, despite what Officer Dunaski described as plenty of opportunity to do so. It continued eastbound on 7th, turned north onto Hazel and west into an alley, and stopped. Officer Dunaski stated that

he then saw the driver reach to his right in a "[v]ery abrupt, quick, furtive" manner. Officer Raichert said that he saw the driver "kind of leaning or moving towards the passenger compartment in the car to his right."

Officer Dunaski approached the driver, whom he then recognized as Black, and asked him to exit the vehicle. Officer Dunaski asked Black if he had anything illegal in the vehicle. Black said something like, "You think I'd go around in a vehicle like that, dirty? That window was busted out at my house today." Officer Dunaski took Black to the squad car, and Officer Raichert searched in the area of the vehicle where he saw Black reach. A removable cup holder was sitting on top of a hump over the vehicle's drive shaft. Officer Raichert lifted the cup holder and found bags "containing multiple pieces of crack cocaine."

Black was charged with a second-degree controlled-substance crime in violation of Minn. Stat. § 152.022, subd. 2(1) (2010). Black moved to suppress all evidence seized during the search of his vehicle. The district court denied the motion. Black's first trial ended in a mistrial. During the second trial, the state presented evidence concerning the substances in the bags found in the Blazer. A criminalist for the St. Paul Crime Lab testified that the bags weighed 6.07 grams, 0.54 grams, and 0.32 grams and that the substances inside were cocaine. A forensic scientist with the Minnesota Bureau of Criminal Apprehension also testified that the samples contained cocaine. After the state rested its case, Black moved for a judgment of acquittal. He argued in part that the state had failed to prove that the substances in the bags found in his vehicle were controlled substances. The district court denied the motion.

Black testified and admitted that he had been convicted of a controlled-substance crime in 2002. The following exchange occurred during the prosecutor's cross-examination:

> Q: As a result of your felony conviction, you lost your liberty for a piece—for a period of time, didn't you?
> A: Explain that, please.
> Q: You were in jail.
> A: Yes, I was.
> Q: And that is not something you ever want to go back to, right?
> A: Not necessarily.

Immediately after the exchange, defense counsel asked to approach the bench, and a discussion was held off the record. The district court then instructed the jury on the record, "Ladies and gentlemen, you'll disregard the last question and answer. Had it been objected to, I would have sustained the objection. The question was improper, and you should disregard both the question and answer." Black moved for a mistrial, and the district court denied the motion. After the jury found Black guilty, he moved for a new trial based on the questioning about his incarceration. The district court denied the motion. This appeal follows.

D E C I S I O N

I.

Black argues that the district court erred by denying his suppression motion. When reviewing pretrial orders on motions to suppress evidence, we examine the facts to determine whether the district court erred as a matter of law by failing to grant the

motion. *State v. Flowers*, 734 N.W.2d 239, 247 (Minn. 2007). Because the parties do not dispute the facts, our review is de novo. *See id.* at 248.

Both the United States and Minnesota Constitutions guarantee the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. For an investigatory traffic stop to be lawful, the police must have "a reasonable, articulable suspicion of criminal activity." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). This standard is not high, but it requires more than a hunch. *Id.* An informant's tip can satisfy the reasonable-suspicion standard if it "bear[s] indicia of reliability that make the alleged criminal conduct sufficiently likely." *Id.* at 393–94. There must be "some minimal information suggesting the informant is credible and obtained the information in a reliable way." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). Ultimately, whether the stop was lawful depends on the totality of the circumstances. *Jobe v. Comm'r of Pub. Safety*, 609 N.W.2d 919, 922 (Minn. App. 2000).

Black complains that the state provided no evidence concerning the source of the CRI's information and failed to establish that Officers Dunaski and Raichert verified the tip. To support his argument, Black relies on cases in which we considered whether informants' tips established probable cause. *See State v. Cook*, 610 N.W.2d 664, 667–68 (Minn. App. 2000), *review denied* (Minn. July 25, 2000); *State v. Ward*, 580 N.W.2d 67, 70–72 (Minn. App. 1998). But probable cause is a higher standard than reasonable suspicion. *Timberlake*, 744 N.W.2d at 393.

The information available to Officers Dunaski and Raichert when they stopped the Blazer established a reasonable suspicion of criminal activity. A CRI, who had

consistently provided credible information, told the officers that Black would be in a Blazer delivering crack cocaine to the apartments at 7th and Hazel in an hour. *See State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004) ("[A]n informant who has given reliable information in the past is likely also currently reliable . . . ."). Even before receiving the CRI's tip, the officers were familiar with Black, a target of their unit's investigation, and suspected that Black was dealing crack cocaine from the apartment complex, a "problem property" with a history of drug activity. They also knew that Black drove a Blazer. An hour or two after receiving the CRI's tip, the officers saw a Blazer in the area referred to by the CRI. They recognized its color and pinstripes and confirmed its license plate as Black's.

Black asserts that Officer Dunaski's prior knowledge of him did not provide an objective basis for the stop, even when combined with the CRI's tip. But Black fails to explain why the officers were required to rediscover what they already knew. The officers were entitled to rely on the information available to them. *See In re Welfare of G. (NMN) M.*, 542 N.W.2d 54, 57 (Minn. App. 1996) ("[T]he grounds for making the stop can be based on the collective knowledge of all investigating officers."), *aff'd*, 560 N.W.2d 687 (Minn. 1997). Their familiarity with Black, his vehicles, and the location, along with the CRI's tip, was more than enough to satisfy the "not high" standard of reasonable suspicion. There was no question as to the identity of the CRI, whom the officers had successfully relied on numerous times, and the officers had good reason to rely on the CRI's tip because it was consistent with their existing information on Black. *See G.M.*, 560 N.W.2d at 692 (holding that tip had sufficient indicia of reliability because

"there was both sufficient identification of the anonymous informant and a demonstrated basis for the informant's knowledge). The investigative stop of the Blazer was therefore lawful, and the district court did not err by denying Black's suppression motion.[1]

II.

Black argues next that the district court erred by denying his motion for an acquittal because the state failed to prove that the substances found in the Blazer contained six or more grams of cocaine. We review de novo a district court's ruling on a motion for acquittal. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). We must consider the state's evidence and determine "whether, after viewing the evidence and all resulting inferences in the light most favorable to the state, the evidence is sufficient to present a fact question for the jury." *Id.* (quotation omitted).

The state was required to prove that Black unlawfully possessed "one or more mixtures of a total weight of six grams or more containing cocaine." *See* Minn. Stat. § 152.022, subd. 2(1). It presented testimony from two witnesses who independently tested the bagged substances found in the Blazer. The witnesses stated that the substances contained cocaine and had a combined weight of more than six grams. Black argues, however, that their testing was unreliable. He criticizes the St. Paul Crime Lab's standards and testing methods and the criminalist's training. He acknowledges the

[1] The parties also argue about whether the stop was justified by the Blazer's broken rear window. Because the informant's tip led to a reasonable suspicion that the driver of the Blazer was engaged in criminal activity, the stop was justified on alternate grounds, and we need not consider this argument.

BCA's subsequent testing of the substances but states that the BCA's results are also "suspect because the forensic scientist performing the testing could not discount the possibility that the substance had been contaminated before being submitted to the BCA for testing."

Notably, Black contests the *sufficiency*, not the *admissibility*, of the evidence. Black's attorney thoroughly cross-examined the witnesses about issues with the St. Paul Crime Lab's methodology. Viewing the evidence and possible inferences in a light most favorable to the state, that questioning raised a fact issue for the jury to decide—exactly the circumstance in which a motion for acquittal should be denied. *See McCormick*, 835 N.W.2d at 506. The district court therefore did not err by denying Black's motion for an acquittal.

III.

Black also argues that the district court erred by denying his motion for a new trial based on the prosecutor's questions to him about imprisonment. We review a district court's denial of a motion for a mistrial for abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). The district court should deny a mistrial motion unless there is a reasonable probability that the outcome of the trial would be different had the event that prompted the motion not occurred. *Id.* References to a defendant's prior incarceration can be unfairly prejudicial. *Id.* "Where . . . a reference to a defendant's prior record is of a passing nature, or the evidence of guilt is overwhelming, a new trial is not warranted because it is extremely unlikely that the evidence in question played a

significant role in persuading the jury to convict." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quotation omitted).

The parties agree that it was improper for the prosecutor to ask Black whether he went to jail for a prior offense and whether he wanted to go back. But they dispute what impact the questioning had on the outcome of the trial. The district court concluded "that the verdict in this case was clearly not the product of the question at issue, nor can the question even reasonably be considered as a factor leading to Mr. Black's conviction." The court stated, "It is the evidence in the case, . . . not the passing question, about which the Court firmly instructed the jury, that led to Mr. Black's conviction."

Black argues that the district court was wrong because this was a close case, the curative instruction was insufficient, and the timing of the improper questions made them more impactful. He also insists that the questioning was not an accident, asserting that "the prosecutor obviously intended" the testimony to significantly affect the jury's decision. The state strongly rejects Black's contention that the prosecutor intentionally elicited the improper testimony and argues that the questioning did not affect the verdict.

Black's claim that the prosecutor purposefully asked about his incarceration to unfairly influence the jury is without support. The prosecutor stated that he felt the questions were proper. And he explained that he was attempting to illustrate Black's bias as a witness. Any claim of ill will is speculative.

The record supports the district court's conclusion that the improper questioning did not affect the trial's outcome. The jury already knew that Black had a prior felony conviction for a controlled-substance crime. The comments about incarceration were

brief, and the information was not referenced again during the trial. The district court issued a curative instruction right after the comments and another before deliberation. Curative instructions can offset the prejudice of improper references to a defendant's incarceration, and we presume juries follow those instructions. *Manthey*, 711 N.W.2d at 506. Black complains that the district court instructed the jury to disregard only the comments about whether he wanted to go back to prison, but we do not see a meaningful distinction.

Furthermore, the district court correctly found that the evidence of Black's guilt was strong. Black was spotted outside an apartment known for narcotics activity. He did not stop right away when the police signaled for him to pull over. Once he did, he quickly reached toward the area where the drugs were later found. He was the only one in the vehicle. When the officers found the cocaine, Black said, "That little bit of sh-t? People are shooting people around here and you're worried about that little bit—bit of stuff?" Also, in support of Black's defense, L.S., a friend of Black's and a recovering drug addict, testified that Black lent him the Blazer two or three times, including once in November 2010 while he was relapsing. But L.S. admitted that the Blazer's back window was not broken when he drove the vehicle. And he never stated that he brought drugs into the Blazer or that the drugs found in the Blazer were his.

Because there was strong evidence of Black's guilt, the improper questioning was brief, and the district court instructed the jury to disregard the comments, there is not a reasonable probability that the improper questioning affected the outcome of Black's

trial. The district court therefore did not abuse its discretion by denying Black's motion for a mistrial.

IV.

Black raises two additional issues in his pro se supplemental brief. First he argues that the district court erred by declaring his first trial a mistrial without his consent. This issue was not raised in the district court and is therefore beyond our scope of review. *See State v. Beane*, 840 N.W.2d 848, 854 (Minn. App. 2013) (declining to consider arguments not raised to and considered by the district court), *review denied* (Minn. Mar. 18, 2014). Furthermore, the record does not support Black's claim. The district court declared a mistrial because the first jury was accidently presented with inadmissible evidence that was prejudicial to both Black and the state. Black and his counsel discussed the issue off the record in a conference room during a 37-minute recess. When they returned, the defense attorney stated, "Mr. Black would like a mistrial," and the district court ordered a mistrial.

Black also argues that he received ineffective assistance of counsel. He initially contends that his attorney failed to remove jurors "related to the prosecution's team." Black asserts that one juror, a lawyer and the father of an executive assistant to the Ramsey County Attorney, unduly influenced the other jurors with his legal knowledge. He states that another juror, who knew the district court judge, should have been removed because of the "high potential for influence of other jurors and/or siding with [the lawyer juror]." These claims do not establish ineffective assistance. "Attorneys must make tactical decisions during jury selection, and a claim of ineffective assistance of counsel

cannot be established by merely complaining about counsel's failure to challenge certain jurors or his failure to make proper objections." *Tsipouras v. State*, 567 N.W.2d 271, 276 (Minn. App. 1997), *review denied* (Minn. Sept. 18, 1997) (quotation omitted). Further, Black fails to explain how objecting to these jurors would have affected the outcome of his case. He merely speculates that the two jurors could have influenced other jurors.

Black's second ineffective-assistance claim is that his counsel failed to call a drug expert, produce an affidavit from his former attorney, and visit the crime scene. This claim also fails. "What evidence to present and which witnesses to call at trial are tactical decisions properly left to the discretion of trial counsel." *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006); *see also Beane*, 840 N.W.2d at 855 ("Counsel's exercise of tactical judgment generally will not support an ineffective-assistance claim."). And Black does not explain what this evidence was or how it would have affected his case, let alone result in a different outcome.

Black's final argument is his counsel was ineffective for failing to challenge the legality of the search of the Blazer on the grounds that a police dog was not used and Officer Raichert had to lift the cup holder to find the drugs. But the vehicle search was not unlawful. As the district court stated, "The search was based on [Black's] actions at the time of the stop and upon timely, reliable, and largely corroborated information provided by the CRI and regarding the vehicle description, the identification of the driver, the location and the timing provided by the CRI." Officer Raichert had probable cause to search the Blazer and any containers found inside without a warrant. *See State v. Search*, 472 N.W.2d 850, 852 (Minn. 1991) ("Under the automobile exception to the

warrant requirement, police may search a vehicle without a warrant, including any closed containers within the vehicle, if they have probable cause to believe the search will result in a discovery of evidence or contraband."). Because this argument was meritless, Black's counsel was not ineffective for not raising it. *See State v. Dickerson*, 777 N.W.2d 529, 535 (Minn. App. 2010) ("An attorney's failure to raise meritless claims does not constitute deficient performance and cannot provide the basis for a claim of ineffective assistance."), *review denied* (Minn. Mar. 30, 2010).

Affirmed.