STATE OF MINNESOTA
IN COURT OF APPEALS
A11-835

State of Minnesota,
Respondent,

vs.

Toraus Marquis Eason,
Appellant.

Filed June 25, 2012
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-10-18513

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

Appellant challenges his prohibited-person-in-possession conviction, arguing that (1) the district court erred in refusing to suppress the gun because the state failed to prove

that the tip was reliable; (2) the district court erroneously denied his request for in camera review of the arresting officers' non-public files; (3) the prosecutor committed misconduct by arguing that appellant is the type of person who carries a gun and that, in order to acquit, the jury would have to find that the officers lied; and (4) the district court erred in allowing the deliberating jury to retire without appellant's consent. We affirm.

D E C I S I O N

Suppression of evidence

A jury found appellant Toraus Marquis Eason guilty of being a prohibited person in possession of a firearm. Officers stopped appellant based on a citizen tip. Appellant first argues that the district court should have suppressed the handgun found on his person because the state failed to establish that the tip was reliable. "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).

Appellant argues that the district court erred in determining that the stop and search were reasonable. Unreasonable searches and seizures are prohibited under the United States and Minnesota Constitutions. U.S. Const. amend. IV; Minn. Const. art. I, § 10. An officer may conduct a limited warrantless investigative stop, otherwise known as a *Terry* stop, if he has a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). To meet the reasonable suspicion standard, the officer must show that the stop "was based upon 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant

that intrusion.'" *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). We determine whether the police had a reasonable basis to justify the stop by looking at the totality of the circumstances. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

Here, arresting officers relied on information the dispatcher received from a 911 caller.[1] Under the collective-knowledge doctrine, all information known to the police, including the dispatcher, is imputed to the arresting officer. *See Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). This court presumes that tips from private citizens are reliable. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). This is especially true when citizens provide "information about their identity so that the police can locate them if necessary." *Id.* at 183.

The officers testified that they received a call from dispatch that a black male wearing a red baseball cap, a black top, and grey pants had a gun and that shots were fired. The man was reported walking northbound on the east side of a particular street. Officers responded to that location and observed a man who matched the description. The officers stopped the man and observed a gun handle sticking out of his pocket. The caller's citizen status supports his reliability. *See State v. McGrath*, 706 N.W.2d 532, 540

[1] As the district court noted in its order denying appellant's motion to suppress, the record is not developed regarding whether the 911 caller was actually anonymous. While the arresting officers did not talk to the 911 caller, the record indicates that other officers responded to the location where the shots were fired and spoke with an identified male who made the shots-fired report. *See Groe*, 615 N.W.2d at 840 (stating that all information known to the police is imputed to the arresting officer).

(Minn. App. 2005) (stating that a concerned citizen who provides information in his capacity as a witness to a crime is presumptively reliable), *review denied* (Minn. Feb. 22, 2006). Additionally, the citizen's tip was corroborated when officers observed a male in clothing that matched the suspect's clothing walking in the area reported. The citizen's tip was further corroborated by the Shot Spotter being activated indicating that a shot had been fired in the area reported. Further, the citizen presumably provided identifying information, because he testified at appellant's trial. Therefore, the stop in this case is supported by the presumed reliability of the citizen as well as the officers' independent corroboration of the substance of the information. The district court did not err in refusing to suppress the handgun.

In camera review

Appellant next argues that the district court abused its discretion in denying his request that the court conduct an in camera review of the arresting officers' non-public information. A district court has considerable discretion in granting or denying evidentiary discovery requests, and its decision will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

In requesting in camera review, there must be "at least some plausible showing that the information sought would be material and favorable to [a] defense." *State v. Burrell*, 697 N.W.2d 579, 605 (Minn. 2005) (quotation omitted). It must be shown that the sought-after information "could be related to the defense" and that the documents to be reviewed were "reasonably likely to contain" such information. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (denying in camera review because defendant provided "no

theories on how the [confidential] file could be related to the defense or why the file was reasonably likely to contain information related to the case").

Appellant sought production of the Internal Affairs and Civilian Review Authority files of the arresting officers, requesting that the district court conduct an in camera review to determine whether disclosure was required. The district court denied appellant's motion, concluding that appellant's broad assertion that "the files likely contain impeachment evidence" failed to make a plausible showing that the information was material or favorable to his defenses. Appellant's attorney received public information regarding the officers. The non-public information appellant sought would have to support one of his defenses, which were "voluntary intoxication, lack of intent, lack of knowledge, mistake of fact, mistake of law, due process, and not guilty." Appellant failed to show a connection between impeachment evidence and these defenses. Appellant's assertion that the files *may* contain impeachment evidence is too speculative; thus, the district court did not abuse its discretion in denying appellant's request for an in camera review of the files.

Prosecutorial misconduct

Appellant next argues that the prosecutor committed misconduct in closing argument. This court considers closing arguments in their entirety in determining whether prosecutorial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). We review prosecutorial-misconduct claims using a two-tier approach. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)). If the misconduct is serious, it will be considered

harmless beyond a reasonable doubt only if the verdict was surely unattributable to the misconduct. *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). For less-serious misconduct, the error is harmless if the misconduct did not likely play a substantial part in influencing the jury to convict. *Id.* This court will generally reverse only if the misconduct, "considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Appellant testified that he does not need to carry a gun because he does not "have any enemies." Appellant also testified that he was shot once before and that he did not want to be shot again. In closing argument, the prosecutor asked the jury: "Does a man who has suffered a prior gunshot wound carry a firearm for self-defense? Sure." Appellant argues that this attacked his character and insinuated that he is the type of person with a propensity to commit the charged crime. But the prosecutor's argument was not improper. Appellant stated that he had no enemies and admitted that he had been shot previously. Stating that appellant may carry a gun for self-defense does not attack his character nor does it insinuate that he committed this particular crime—the evidence that he was previously shot shows that he was a victim. It is not an attack on his character to state that appellant, once a victim, may take defensive precautions.

The prosecutor also argued that in order to acquit appellant, the jury would have to believe that "officers came in here and lied" and that officers "plant guns on people." We liken the prosecutor's comments to "were-they-lying" questions, which are generally impermissible. *See State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005) (holding that were-they-lying questions improperly "creat[e] the impression that the jury must

conclude that [the state's] witnesses were lying in order to acquit"). The concern with a prosecutor asking were-they-lying questions is that the prosecutor inappropriately attempts to limit the jury's assessment of witness credibility and thereby distorts the state's burden of proof. *See State v. Leutschaft*, 759 N.W.2d 414, 422 (Minn. App. 2009) (stating that were-they-lying questions create unfairness by suggesting that when it comes to credibility there are only two choices: truthfulness versus lying), *review denied* (Minn. Mar. 17, 2009); *see also United States v. Reed*, 724 F.2d 677, 681 (8th Cir. 1984) (stating that this form of argument is improper because it distorts the burden of proof).

While the argument here was improper, appellant fails to show prejudice. We consider the argument as a whole; the statement constituted a small portion of the entire closing argument. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (stating that we do not look at selective remarks that may be given undue prominence); *see also State v. Boitnott*, 443 N.W.2d 527, 534 (Minn. 1989) (stating that even if an argument is in some respects improper, it is normally regarded as harmless error unless the misconduct played a substantial part in influencing the jury to convict). This misconduct was harmless because it is unlikely that it played a substantial part in influencing the jury to convict appellant. The officers testified that they stopped appellant and found a gun on him. And the citizen informant testified regarding what he reported when he called 911; thus, the state's evidence was strong.

Jury

Finally, appellant argues that he is entitled to a new trial because the district court allowed the jury to separate and retire without his consent. Under Minn. R. Crim. P.

26.03, subd. 5(3), the court may allow the jurors to separate overnight during deliberations with the consent of the defendant.

During jury deliberations, the district court responded to jury questions. The jury returned to its deliberations that afternoon, and rendered a guilty verdict the next morning. Appellant moved for a new trial, arguing that the district court failed to obtain appellant's consent before allowing the jury to go home after responding to its questions. The transcript does not indicate what occurred immediately after the jury questions were addressed and the jury returned to deliberations. But the district court made an after-the-fact record. The district court stated that the last jury question was timed at 3:35 p.m. and it took some time to gather the parties. The district court then stated that after the court and the parties discussed the responses to the jury, the parties were informed that the jury was most likely going home because it was nearly 4:30 p.m. and that they would resume deliberations at 9:00 a.m. The district court stated that appellant's attorney was aware that the jurors were going to separate and did not comment or object.

Appellant concedes that he did not object, but he claims that failing to object is not the same as consenting. Even if appellant is correct and the court improperly failed to secure his consent, separation of the jury during deliberations in violation of rule 26.03 is not presumptively prejudicial. *State v. Sanders*, 376 N.W.2d 196, 206 (Minn. 1985). Appellant argues that there could have been improper influences because the jury returned the next morning and were quick to deliver a verdict. He claims that his girlfriend saw two jurors outside of the courtroom at 4:30 p.m. and asked what was going on. They told her that they had been released for the night. It is unclear how this was

prejudicial. Thus, appellant fails to offer evidence of improper influence or jury tampering, as is required to find prejudice. *See id*. (stating prejudice will be presumed upon showing of improper influence or jury tampering). Appellant is not entitled to a new trial.

Affirmed.