

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY RODRIGO RAMIREZ,

Defendant-Appellant.

UNPUBLISHED

January 31, 2013

No. 306316

Saginaw Circuit Court

LC No. 10-034769-FH

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of possession of a short-barreled rifle, MCL 750.224b, and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to serve concurrent terms of five years' probation for the possession of a short-barreled rifle and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was alleged to have confronted a woman while he possessed a .22-caliber, sawed-off rifle. The woman testified that she heard defendant yelling at her from an apartment window as she, her two daughters, and a niece were entering her vehicle. She testified that defendant then exited the apartment building and confronted her with what appeared to be a long gun under his shorts, although she never saw the actual gun. However, the woman's niece testified that she saw a long black gun with a brown handle at defendant's right side. The woman informed a nearby police officer of the incident, and as the officer approached the venue, he saw defendant driving a white van. By the time the officer turned his vehicle around, defendant had already pulled the van over and was exiting the vehicle as the officer approached. The officer patted defendant down and did not find a weapon on his person, but the officer found ammunition in defendant's shoe. Shortly after, the officer received a call from dispatch informing him that a witness had seen someone throw a gun under a car adjacent to the van. The officer looked under the car and found the sawed-off rifle.

Defendant argues on appeal that his trial counsel was ineffective in failing to move to suppress the firearm on three bases and failing to object to certain comments made by the prosecutor in closing argument. We review these claims for errors apparent on the record because defendant failed to preserve them for appellate review. *People v Unger (On Remand)*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This right to counsel encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To prove defendant received ineffective assistance of counsel, he must show: (1) "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness," and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). There is a presumption of effective assistance of counsel and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

First, defendant argues that the police officer did not have reasonable suspicion to perform a *Terry* stop. We disagree. Both the United States and Michigan Constitutions protect individuals from unreasonable searches and seizures. US Const, Am IV; US Const, Am XIV; Const 1963, art 1, § 11; *People v Slaughter*, 489 Mich 302, 310-311; 803 NW2d 171 (2011). "The lawfulness of a search or seizure depends on its reasonableness," and a warrantless search is unreasonable unless both probable cause and an exception to the warrant requirement exist. *People v Snider*, 239 Mich App 393, 406-407; 608 NW2d 502 (2000). "The exclusionary rule, modified by several exceptions, generally bars the introduction into evidence of materials seized and observations made during an unconstitutional search." *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003).

A police officer who has reasonable suspicion that criminal activity may be taking place may stop and briefly detain a person for investigation. *People v Oliver*, 464 Mich 184, 193; 627 NW2d 297 (2001). A brief investigatory stop may be necessitated for personal safety and a legitimate concern to investigate possible criminal behavior. *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Wallin*, 172 Mich App 748, 750; 432 NW2d 427 (1988). "An investigatory *Terry* stop constitutes a seizure and requires specific and articulable facts sufficient to give rise to a reasonable suspicion that the person detained has committed or is committing a crime." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998).

To evaluate whether an officer had reasonable suspicion to make an investigatory stop, the totality of the circumstances is considered on a case-by-case basis. *People v Horton*, 283 Mich App 105, 109; 767 NW2d 672 (2009). "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), cert den *Champion v Michigan*, 519 US 1081 (1997). Overly technical reviews of the police officer's assessment are unwarranted, and "[d]eference should be given to the police officer's experience and the known patterns of certain types of lawbreakers." *People v Rizzo*, 243 Mich App 151, 156; 622 NW2d 319 (2000). A reasonable suspicion "must be based on commonsense judgments and inferences about human behavior." *Illinois v Wardlow*, 528 US 119, 119-120; 120 S Ct 673; 145 L Ed 2d 570 (2000).

The officer who spoke with defendant and performed the pat down had a reasonable suspicion that defendant possessed a weapon. A woman who knew defendant told the officer that she had a confrontation with defendant when he was across the street from her apartment a short time prior. The woman believed defendant had a gun because he was moving what she

took to be a gun under his shorts as he confronted her. The woman's niece also testified to seeing defendant in possession of a gun. The woman gave the officer a description of defendant. The officer testified that when he saw defendant, he noted that he matched the description given by the woman. Thus, the officer possessed information of "specific and articulable facts demonstrating a reasonable suspicion" that defendant had committed or was committing a crime, which allowed him to briefly detain defendant for an investigatory *Terry* stop. *Shankle*, 227 Mich App at 693.

Second, defendant argues that it was unclear when he was arrested and that the record does not support a finding of probable cause necessary to arrest defendant at the time he was stopped. We disagree. A brief detention does not violate the Fourth Amendment where, as here, the officer has a reasonably articulable suspicion that criminal activity was occurring. *Horton*, 283 Mich App at 109. Where "an investigative stop of an automobile is proper, the officer is 'permitted to briefly detain the vehicle and make reasonable inquiries aimed at confirming or dispelling his suspicions.'" *Rizzo*, 243 Mich App at 156, quoting *People v Yeoman*, 218 Mich App 406, 411; 554 NW2d 577 (1996). The temporary seizure of a driver during an investigative stop remains reasonable for the duration of the stop, which is usually terminated when the officer has no further need to control the scene and communicates that the driver is free to leave. *People v Corr*, 287 Mich App 499, 507; 788 NW2d 860 (2010).

The officer sat defendant in the back seat of his police car while the officer investigated. The officer acknowledged that defendant was not under arrest as he sat in the back seat of the police car. During the investigative stop, the officer received a call from dispatch informing him that a witness saw a man exit the van and throw a gun under the car next to it. The officer found a sawed-off rifle under the car next to the passenger side of the van. Only then did the officer arrest defendant, and had probable cause to do so. "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Champion*, 452 Mich at 115. The information the officer received from the woman and the witness, coupled with the finding of the gun, provided the officer with the knowledge that defendant had committed a crime, which is all that was required for probable cause to arrest defendant.

Third, defendant argues that he may have been seized prior to the gun being thrown under an adjacent vehicle, giving rise to a reasonable expectation of privacy that defendant had in the place the gun was found. We disagree. When analyzing whether a search violated a defendant's Fourth Amendment rights, the main focus is "whether defendant had a legitimate expectation of privacy in the place searched." *People v Wagner*, 114 Mich App 541, 547; 320 NW2d 251 (1982). This is determined by considering the totality of the circumstances. *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998).

The officer retrieved the gun from under someone else's car in a parking lot of someone else's residence. Clearly, defendant did not have a legitimate expectation of privacy in that place. See *Shankle*, 227 Mich App at 693-694. In addition, it is reasonable to conclude that the gun was thrown under the adjacent car before the officer arrived because he did not see the gun thrown under the car as he approached the van defendant was driving. Therefore, the gun was

abandoned property and not the product of an illegal search or seizure. See *People v Sanders*, 193 Mich App 128, 129; 483 NW2d 439 (1992).

In sum, we find no error in the three bases defendant asserts entitled him to suppression of the firearm. Accordingly, because bringing a motion to suppress the firearm would have been futile, counsel did not fail to provide effective assistance of counsel. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Finally, defendant argues that defense counsel was ineffective in failing to object to remarks made by the prosecutor during closing argument. We disagree. “Given that a prosecutor’s role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). “Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor’s remarks in context.” *Id.* at 64.

Defendant states that the following closing remarks of the prosecutor were improper:

And finally—and I’ll be short—what did Bobby Pasanen say? He didn’t say anything, did he? Did he testify? We don’t know if there is a Bobby Pasanen. We don’t know if there isn’t. We don’t know what he did, what he didn’t do, what he said, what he didn’t say, what he thought, what he was wearing, what he ate. We don’t know because the first time we hear of him is today, and you certainly haven’t heard from him. The value of Bobby Pasanen is zero.

Defendant argues that this remark was intended to persuade the jury that defendant’s brother made up the testimony on the day of trial that Bobby Pasanen possessed and hid the short-barreled rifle.

“Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial.” *Unger (On Remand)*, 278 Mich App at 236. Although prosecutors may not make statements of fact that are not supported by the evidence, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den *Michigan v Caruso*, 513 US 1121 (1995), they can “argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case,” *Unger (On Remand)*, 278 Mich App at 236. In addition, “[a] prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.” *Dobek*, 274 Mich App at 64.

Defendant told the arresting officer that a man named Bobby was one of the passengers in the vehicle with him, and he told a police detective who interviewed him that Bobby possessed the gun. However, the arresting officer was not given any information about Bobby beyond his first name, and the detective stated that he could not locate Bobby because defendant did not provide a last name, address, or phone number. Moreover, Bobby did not present himself to police. Therefore, it is reasonable to conclude that the prosecutor’s statement that the trial was the first time Bobby Pasanen was mentioned was not a mischaracterization of the evidence. Rather it is a reasonable inference from the evidence presented at trial, given that the police were

not provided with any details about Bobby, his name was not mentioned until the testimony of defendant's brother, and he was not called as witness.

Further, defendant's theory was that Bobby Pasanen was the person that possessed the short-barreled rifle. "When a defendant advances a theory, the prosecutor may argue the inferences flowing from that theory." *People v Fyda*, 288 Mich App 446, 462; 793 NW2d 712 (2010). The prosecutor's remarks question the veracity of defendant's explanation by pointing out that there was not a sufficient identification available before trial to consider Pasanen's involvement. The prosecutor's characterization was a proper response to defendant's theory. Because there was no prosecutorial misconduct, there was no basis for defense counsel to object. Therefore, defense counsel was not ineffective for failing to make a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan