

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0444**

State of Minnesota,
Respondent,

vs.

Joshua John Keil,
Appellant.

**Filed March 21, 2022
Affirmed
Reilly, Judge**

Stearns County District Court
File No. 73-CR-19-8098

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

On appeal from his conviction of first-degree possession of a controlled substance, appellant argues that the district court (1) erred by denying his motion to suppress evidence seized during a search of his vehicle, and (2) violated his constitutional right to present a

complete defense by sustaining the state's objection to his testimony about his past injuries at trial. We affirm.

FACTS

In the evening of September 21, 2019, an officer of the Avon police department conducted a traffic stop and identified the driver as appellant Joshua John Keil. The officer approached the vehicle and observed that Keil had "sunken facial features" and "rapid movements," which the officer believed to be common with current or past substance use. The officer also observed that various parts of the vehicle's panels were pulled out or removed and that the radio was partially removed from the dashboard, which he thought could be signs of concealing controlled substances. The officer asked Keil to step out of the vehicle to question him about his use of alcohol and controlled substances. Keil complied and the officer noticed that Keil had "bloodshot or red eyes."

The officer questioned Keil about any drug use; Keil responded that he had used methamphetamine about a month earlier. The officer then asked Keil to perform field sobriety and drug recognition tests which included shining a light on Keil's pupils. Keil's pupils had a minimal reaction to the direct light, and he exhibited rapid eye flutter. The officer also took Keil's pulse which registered high at 130 beats per minute. The officer asked Keil to walk nine steps and balance on one leg. Keil informed the officer that he had a traumatic brain injury (TBI) which caused him to have balance issues. The officer asked Keil to "just do the best he could," but Keil could not complete the test.

The officer again asked about Keil's drug use and Keil admitted to using methamphetamine within the last 36 hours. Keil consented to a search of his person and

the officer found no drugs or drug paraphernalia on him. The officer then requested to search Keil's vehicle, but Keil denied consent. The officer called for backup and told Keil he would be running his dog trained in narcotics detection around the outside of the vehicle. When asked whether the dog would alert to the presence of drugs, Keil responded, "I hope not." The officer ran the dog around the exterior of the vehicle, and it alerted to the presence of narcotics. The officer searched the interior of the vehicle where the dog had alerted and found methamphetamine. Keil was arrested for possession of a controlled substance. While waiting for a tow truck to remove the vehicle from the highway ramp, the officer ran the dog around the vehicle once more, and the dog again alerted to the presence of drugs. The officer searched the vehicle a second time but found no additional controlled substances.

Keil moved to suppress the controlled-substance evidence. The district court held a contested omnibus hearing and the arresting officer testified about the search of Keil's vehicle and his dog's narcotics detection training. The officer testified that before stopping Keil, he had deployed the dog about five to ten times since becoming certified in narcotics detection in May 2019. When asked by counsel how many times the dog falsely alerted to the presence of narcotics, the officer testified: "None. I don't know. I mean, none that I'm aware of."

The district court denied Keil's motion to suppress evidence, finding that the arresting officer had reasonable suspicion to conduct a dog-sniff search of the vehicle and that the dog used was reliable.

The district court conducted a jury trial. Keil chose to testify in his own defense and his counsel asked him about his TBI in the following exchange:

Counsel: Okay. Mr. Keil, during your roadside testing, you advised [the arresting officer] that you had a traumatic brain injury, and that was going to affect how you did on those roadside tests. How did that happen?

Keil: I was in a motorcycle accident in April of 2015.

Counsel: And during this accident, did you suffer from any injuries?

Prosecutor: Objection. Relevance, Your Honor.

An off-the-record sidebar occurred on the objection and the district court sustained the state's objection. Keil then testified about his experience with homelessness. He testified that he had been staying with a friend in Fargo, North Dakota, and that the friend asked him to drive to Hastings, Minnesota, to "compensate him for sleeping on his couch." Keil testified that when he arrived in Hastings, "[a] gentleman approached the back of [his] truck, threw something in the back, waved to [him]; and then he left." He testified that he did not know what the item was. After the trial, the jury found Keil guilty as charged. This appeal follows.

DECISION

Keil challenges the district court's order denying his motion to suppress evidence. He also argues that the district court violated his constitutional right to present a complete defense when it prohibited him from testifying about the circumstances which caused him to sustain a TBI. We address each argument in turn.

I. The district court did not err in denying Keil’s motion to suppress evidence.

Keil first challenges the district court’s denial of his motion to suppress evidence. He argues that the evidence was discovered illegally because the officer lacked reasonable suspicion to conduct a dog-sniff search of his vehicle. He also contends that the drug detecting dog was unreliable and thus did not provide probable cause to search the vehicle.

The United States and Minnesota Constitutions prohibit “unreasonable searches and seizures.” U.S. Const. amend. IV; Minn. Const. art. I, § 10. Evidence obtained during an unconstitutional search or seizure must be suppressed. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). “When reviewing pretrial orders on motions to suppress evidence, [appellate courts] 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). We review the district court’s factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

A. Reasonable suspicion

Under the principles established by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer may “stop and temporarily seize a person to investigate that person for criminal wrongdoing if the officer reasonably suspects that person of criminal activity.” *Diede*, 795 N.W.2d at 842 (quotation omitted). “Reasonable suspicion must be based on specific, articulable facts that allow the officer to be able to articulate . . . that he or she had a particularized and objective basis for suspecting the seized person of criminal activity.” *Id.* at 842-43 (quotations omitted). These principles set out

in *Terry* apply to motor vehicle stops for minor traffic violations and the expansion of such stops to “conduct a narcotics-detection dog sniff around the exterior of a motor vehicle.” *State v. Wiegand*, 645 N.W.2d 125, 137 (Minn. 2002).

The reasonable-suspicion standard is met “when an officer observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). The standard is not high, but it requires more than an unparticularized hunch. *Id.* When determining whether an officer reasonably suspected criminal activity, courts consider the totality of the circumstances. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998).

Keil does not challenge the initial stop as unlawful but contends that police lacked reasonable suspicion to expand the scope of the initial stop to conduct a dog-sniff search of his vehicle. “[E]ach incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible.” *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quotations omitted). Under the Minnesota Constitution, an intrusion not strictly tied to the circumstances that made the initial stop permissible must be supported by “at least a reasonable suspicion of additional illegal activity.” *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

Here, the district court determined that the officer had reasonable, articulable suspicion of criminal activity to warrant the use of a narcotics detecting dog-sniff search around the vehicle based on the officer’s testimony about the following circumstances. The officer observed Keil’s sunken facial features and rapid jerky movements which he

testified could suggest the use of a controlled substance. The officer also observed that various parts of the vehicle's panels were removed from the dashboard and that the radio was partially protruding. From the officer's training and experience, he noted that the removal of panels could suggest the concealing and transporting of controlled substances. And the officer testified that Keil had bloodshot eyes, his pupils had a minimal reaction to light, his pulse rate was high, and he could not complete the field sobriety tests. Finally, Keil admitted to the officer that he used methamphetamine just 36 hours before the traffic stop.

Keil argues that some circumstances on which the state relies cannot establish reasonable suspicion of criminal activity. Citing *State v. Lugo*, he argues that the removal of panels in a vehicle does not suggest drug-related activity. 887 N.W.2d 476, 487 (Minn. 2016). In *Lugo*, the supreme court determined that the lack of any signs of drugs or drug trafficking in a car that appeared "lived-in" could not, alone, establish reasonable suspicion. *Id.* at 480, 487. While we agree that the missing panels in the vehicle would not independently establish reasonable suspicion, the missing panels were just one factor in the totality of the circumstances. And even if we subtract this factor from our analysis, the remaining circumstances adequately establish reasonable suspicion of criminal activity. *See id.* at 487 (determining that even without considering the removal of the vehicle's center console, the remaining facts established reasonable suspicion).

The totality of the circumstances show that Keil exhibited several signs of impairment, he failed routine field sobriety tests, his vehicle had missing and removed interior panels, and he admitted to using controlled substances just 36 hours earlier. Thus,

we conclude that the officer had reasonable, articulable suspicion to expand the scope of the traffic stop to conduct a dog-sniff search of Keil's vehicle.

B. Probable cause

Keil contends that, even if reasonable suspicion supported the expansion of the traffic stop, the search of the inside of his vehicle was unconstitutional. Generally, a search is unreasonable when it is conducted without a warrant issued upon probable cause. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). But the automobile exception to the warrant requirement allows the police to search a vehicle without a warrant when they have probable cause that the vehicle contains contraband. *Id.* “Probable cause exists when there are facts and circumstances sufficient to warrant a reasonably prudent person to believe that the vehicle contains contraband.” *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotation omitted).

The United States Supreme Court has held that a narcotics dog alert to the presence of controlled substances provides probable cause to search if the dog has successfully completed a certification or training program. *Florida v. Harris*, 568 U.S. 237, 246-47 (2013). Under the totality of the circumstances, the question is whether “all the facts surrounding a dog's alert” would make a reasonable person suspect evidence of a crime. *Id.* at 248. The totality of the circumstances includes the dog's training, certification, field history, and the circumstances of the sniff in question. *Id.* at 247.

Keil argues that the state did not establish probable cause to search his vehicle because the particular dog used in the search was unreliable and the finding that the dog had “zero false positives” was clearly erroneous. He asserts that the dog was only recently

certified before conducting the sniff of his vehicle and that the state failed to provide sufficient evidence or any detail of the dog's training. We disagree.

While the state did not offer into evidence any activity logs or training certifications detailing the dog's deployments, the officer testified in some depth about the dog's training, certification, and field history in the following testimony:

- Q: What does that certification process look like?
- A: I think it was about 13 weeks of training with me and my dog Monday through Friday working on—I have a dual purpose K9 partner so patrol aspect related to tracking and so on, and then narcotics.
- Q: So you said you're certified. Is your K9 certified as well?
- A: Yes. We are certified narcotics detection.
- Q: And what training did your dog have to go through to become certified?
- A: We do all that together. Going through narcotics detection training, I guess, training how to locate and indicate the presence of narcotics.
- Q: And to become certified, does a K9 have to pass certain tasks before it's given a certification?
- A: Yes. I'm certified by the NPCA, so certification includes indicating which rooms and/or vehicles that contain narcotics.

The officer also testified that he was trained to determine whether the dog alerted to false positives. The officer testified that the dogs learn to imprint on the specific odor of something, and "not just nothing." The officer testified that when the dog begins training there often is not a "change of behavior," but once trained, the dog will respond when it detects a specific odor. The officer testified that he had worked with his dog since May 2019, about four months before the stop, and he had deployed the dog on about five to ten stops.

In this case, Keil had a chance to cross-examine the officer about the dog's training and certifications and the opportunity to present his own witnesses in his defense. Thus, he had a chance to challenge the dog's reliability at the district court. Here, the dog made a positive alert to the bed of the truck where narcotics were found. Caselaw does not require a certain number of dog deployments in the field before a narcotics detecting dog can be considered reliable. And there are no circumstances surrounding the dog-sniff search here that suggest unreliability. Based on the totality of the circumstances, the dog-sniff search was reliable and therefore provided the officer with sufficient probable cause to search the vehicle.

For these reasons, we conclude that the district court did not err in denying Keil's motion to suppress evidence.¹

II. The district court did not err in its evidentiary decision.

Keil argues that he was denied his constitutional right to present a complete defense when the district court sustained an objection to his testimony about the circumstances surrounding his TBI.

Due process requires affording defendants a meaningful opportunity to present a complete defense. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. And defendants have a due process right to explain their conduct to a jury, even if their motive is not a valid

¹ Together with challenging Keil's arguments above, the state asserts that this court should affirm the district court's denial of Keil's suppression motion because the methamphetamine found in Keil's truck would have inevitably been discovered through lawful means. Because we determine that the district court did not err in denying the motion to suppress, we decline to address this issue.

defense. *State v. Thompson*, 617 N.W.2d 609, 612 (Minn. App. 2000). But the right to present a complete defense is not unlimited; a defendant must still comply with the rules of procedure and evidence. *State v. Wolf*, 605 N.W.2d 381, 384 (Minn. 2000). “Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). When the district court’s evidentiary ruling results in the erroneous exclusion of defense evidence in violation of the defendant’s constitutional rights, the verdict must be reversed unless the error was harmless beyond a reasonable doubt. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

Minnesota has a broad definition of relevant evidence. Minn. R. Evid. 401. But the district court has discretion to exclude otherwise relevant evidence when its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . waste of time[.]” Minn. R. Evid. 403. Keil chose to testify in his own defense and his counsel asked him about how he sustained a TBI. The state objected to the testimony on the grounds of relevance and an off-the-record sidebar occurred. The district court sustained the state’s objection and Keil then testified about his experience with homelessness and the reasons why he was traveling from the Twin Cities.

The state asserts that Keil’s due process argument is not properly before this court. We agree. To preserve an objection for appellate review following the district court’s exclusion of evidence, the party offering the evidence must ensure that “the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” Minn. R. Evid. 103(a)(2). Unless the substance of the

evidence is apparent from the context, or there is an offer of proof, “an appellate court cannot assess the significance of the excluded testimony.” *State v. Harris*, 713 N.W.2d 844, 848-849 (Minn. 2006).

In this case, Keil did not make an offer of proof on the record. And we cannot speculate about what the record *might* have shown if he had made the offer of proof because the substance of the testimony is not apparent from the context. *See State v. Lee*, 494 N.W.2d 475, 479 (Minn. 1992) (determining that the defendant did not preserve the claimed errors for review when he failed to make an offer of proof showing the nature of the evidence excluded). Thus, Keil’s failure to make an offer of proof prevents us from concluding that the district court erred.

Affirmed.