STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0899

State of Minnesota,
Respondent,

vs.

Dustin Carl Moen,
Appellant.

Filed April 14, 2014
Affirmed in part, reversed in part and remanded
Randall, Judge[*]

Nicollet County District Court
File No. 52-CR-12-304

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

James W. Brandt, St. Peter City Attorney, Stefanie L. Menning, Assistant City Attorney, St. Peter, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, Inga K. Nelson (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Randall, 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

RANDALL, Judge

Appellant challenges his conviction of second-degree refusal to submit to chemical testing, arguing that (1) there is insufficient evidence that he refused testing, (2) the jury instructions on two elements of the test-refusal charge were plainly erroneous, (3) the test-refusal statute is unconstitutional, and (4) the record does not contain a valid stipulation to an aggravating factor, as required to sustain his second-degree conviction. There is sufficient evidence of refusal, and the jury instructions did not impair appellant's substantial rights. The test-refusal statute, on these facts, is constitutional. We affirm in part. Because the record does not contain a valid stipulation as to the aggravating factor required for a second-degree conviction, we reverse and remand for entry of a third-degree conviction.

FACTS

Shortly before midnight on July 22, 2012, St. Peter Police received a report that a shirtless man was knocking on doors and asking for a funnel for gas. Officer Thomas Winsell responded to the report and encountered appellant Dustin Moen, who explained that his vehicle had run out of gas and he needed a funnel to put gas in it. Officer Winsell observed that Moen appeared intoxicated and asked Moen if he had been driving the vehicle when it ran out of gas; Moen replied that he had. Officer Winsell also asked him if he had been drinking that evening. Moen initially denied having anything to drink, but when Officer Winsell said he could smell alcohol on him, Moen admitted that he had been drinking. Moen claimed that he had been drinking approximately four hours prior.

Officer Winsell asked Moen to perform field sobriety tests; he agreed but failed all three. Officer Winsell informed Moen he was under arrest for driving while impaired and instructed him to put his hands behind his back. Moen physically resisted, fighting against Officer Winsell and another officer as they "took him to the ground," tased him twice, and employed knee strikes against the back of his body. After the second tasing, Moen permitted the officers to handcuff him.

Officer Winsell transported Moen to jail and read him the implied-consent advisory. Moen declined to contact an attorney but verbally agreed to take a breath test. Officer Winsell explained that the DataMaster machine they would use requires two breath samples of "very deep lung air." The machine has a screen that shows a bar graph that increases as it receives the air sample and reaches the end of the bar graph when it accepts the sample. If it does not register an adequate sample within three minutes, it ends the session and indicates it as a deficient sample. For the first session, Moen blew "really hard," then stopped short, and repeated blowing and stopping. After approximately 95 seconds, Moen provided an adequate sample. Officer Winsell then gave Moen two three-minute sessions to provide a second sample. Moen again started and stopped, stating that he "didn't have a big lung capacity, and that he was trying," but Officer Winsell observed that Moen was watching the bar graph as it registered the sample and would stop blowing just short of a full sample. After the machine ended the third session without an adequate sample, Officer Winsell deemed it a refusal.

Moen was charged with second- and third-degree test refusal, third- and fourth-degree driving while impaired (DWI), and obstructing legal process. At trial, Moen

testified that he was intoxicated on the night of July 22 but had not been driving in that state. He testified that his vehicle ran out of gas in the late afternoon, he went to a nearby bar and drank beer for approximately five hours, then decided to put gas in his vehicle so that it would be ready the next day when he needed to go to work. He testified that when the officers confronted him as he was looking for a funnel, he was surprised to be arrested for DWI and requested a blood test, which Officer Winsell refused. He also testified that he tried but was unable to give two adequate breath samples.

The jury acquitted Moen of DWI but found him guilty of test refusal and obstructing legal process.[1] The district court convicted Moen of second-degree test refusal and obstructing legal process, sentenced him to 365 days in jail (265 days stayed), and placed him on probation. This appeal follows.

D E C I S I O N

I.

We first address Moen's argument that there is insufficient evidence that he refused chemical testing. A conviction of test refusal requires proof of actual unwillingness to submit to testing, which may be shown by circumstantial evidence. *State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). When reviewing the sufficiency of circumstantial evidence indicating refusal, we first identify the circumstances proved, deferring to the fact-finder and viewing the evidence in the light most favorable to the conviction. *Id.* at 102. We presume the jury

[1] The jury was instructed only on the three substantive offenses; it did not decide the presence of aggravating factors.

believed the state's witnesses and disbelieved any contrary evidence. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). We then independently examine the reasonableness of all inferences that might be drawn from the circumstances proved. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). Circumstantial evidence must exclude "any reasonable inference other than guilt." *Id.* "However, possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (quotation omitted).

Viewed in the light most favorable to the verdict, the evidence establishes that Moen was substantially intoxicated and violently resisted being arrested for DWI. He received an implied-consent advisory informing him that refusal to submit to testing is a crime and agreed to a breath test. Officer Winsell was trained in using the DataMaster machine and explained the machine to Moen, including the need for two breath samples and that a steady stream of air would yield an adequate sample. Moen was able to perform the test successfully one time. Moen then spent a total of six minutes pretending to blow into the machine, starting and stopping, watching the machine register his breath, and repeatedly stopping just short of providing a full second sample.

Moen argues that the evidence also supports the inference that he tried but was physically unable to provide a sufficient breath sample, pointing to the altercation at the time of his arrest, his offer to take a blood test, and Officer Winsell's limited experience using the DataMaster machine. This inference is not reasonable in light of all the circumstances, particularly Officer Winsell's description of Moen's obstructive conduct

during the testing process. A reasonable inference from all the circumstances is that Moen was unwilling to submit to chemical testing. Sufficient evidence supports Moen's test-refusal conviction.

II.

Moen also challenges the district court's jury instructions on test refusal. Because he did not object to the instructions at trial, we review for plain error. *See State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013). In applying the plain-error analysis, we will reverse only if the district court (1) committed an error; (2) that was plain; (3) that affected the defendant's substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). Because jury instructions must define the crime charged and explain the elements of the offense, *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001), failure to properly instruct the jury on all elements of the offense charged is plain error, *State v. Gunderson*, 812 N.W.2d 156, 161 (Minn. App. 2012). Plainly erroneous jury instructions warrant reversal only if the error demonstrably affected the defendant's substantial rights. *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013). An error affects substantial rights if "there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Milton*, 821 N.W.2d 789, 809 (Minn. 2012) (quotations omitted).

Moen argues that the district court's instructions to the jury on test refusal are plainly erroneous because they stated a subjective standard for probable cause and lawful arrest, rather than the proper objective standard required under *State v. Koppi*, 798 N.W.2d 358 (Minn. 2011).

Probable cause

A test-refusal conviction requires proof beyond a reasonable doubt "that an officer had probable cause to believe the person was driving, operating, or in physical control of a motor vehicle while impaired." *Id.* at 362 (quotation omitted). The probable-cause standard involves an objective determination of reasonableness based on the totality of the facts and circumstances. *Id.* at 363-64. The actual officer's observations and insights form the relevant circumstances. *Id.* at 363. But ultimately "what matters is whether there was objective probable cause." *Id.* at 363-64 (quotation omitted).

Here, the district court instructed the jury that the elements of test refusal include that

> a peace officer had probable cause to believe the defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. Probable cause means that it is more likely than not that the defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol.

This instruction comports with *Koppi*. The instruction properly defines the relevant circumstances in terms of Officer Winsell's interactions with Moen but requires an objective, independent determination as to whether those circumstances establish probable cause. It does not permit a finding of probable cause based merely on Officer Winsell's belief that there was probable cause. *Cf. id.* at 363 (explaining that "it is not sufficient that the officer can simply 'explain the reason' why he or she believed there was probable cause to request a chemical test from a suspect"). And while the instruction erroneously imposes a "more likely than not" standard, when probable cause "requir[es]

only an 'honest and strong suspicion' of criminal activity," *see id.*, this error *over*states the probable cause standard, which weighs in Moen's favor and does not require reversal. On this record, we conclude Moen's plain-error challenge to the district court's probable-cause instruction is not persuasive.

Lawful arrest

Lawful arrest also is an element of test refusal on which the jury must be instructed. *State v. Oullette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007); *see* Minn. Stat. § 169A.51, subd. 1(b)(1) (2010) (requiring lawful arrest before officer may request chemical test). Since the lawful-arrest element is essentially a restatement of the probable-cause element, *Oullette*, 740 N.W.2d at 360, the district court must instruct the jury to determine lawful arrest on the same objective basis articulated in *Koppi* for probable cause.

Here, the district court instructed the jury that a conviction of test-refusal requires proof that "the peace officer placed the defendant under lawful arrest for driving while impaired," explaining that "[a]n arrest is lawful when the officer has reason to believe that a person is in violation of the law and the officer can explain the reason." Moen contends that this instruction erroneously articulated lawful arrest in a subjective manner. The instruction does contain subjective language similar to the instruction held erroneous in *Koppi*. 798 N.W.2d at 363 (reviewing instruction that there is probable cause if "the officer can explain the reason the officer believes" there was probable cause). But unlike the instruction in *Koppi*, the instruction given here also asks for a determination that the officer "ha[d] reason to believe" that the defendant was in violation of the law. Because

this requires an objective determination, it would not be satisfied by testimony that the officer had a "gut feeling that the defendant was driving while impaired." *Cf. id.*

The district court's separate proper instruction on probable cause elicited the requisite finding that there was proof beyond a reasonable doubt that Officer Winsell had probable cause to believe that Moen drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. On this record, we conclude that Moen's plain-error challenge to the district court's lawful-arrest instruction fails.

III.

For the first time on appeal, Moen argues that the test-refusal statute is unconstitutional because it requires a driver to surrender the constitutional right to withhold consent to a search as a condition of driving. We generally will not consider constitutional challenges raised for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We will deviate from this rule only when "the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Id.* Moen contends that the interests of justice warrant consideration of his constitutional challenge because "the basis for the challenge did not exist at the time of trial." We disagree. The test-refusal statute has repeatedly been challenged as imposing unconstitutional conditions on the driving privilege. *See, e.g.*, *State v. Netland*, 762 N.W.2d 202, 211-14 (Minn. 2009) (rejecting unconstitutional-conditions argument), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *see also State v. Wiseman*, 816 N.W.2d 689 (2012) (following *Netland*), *review denied* (Minn. Sept. 25, 2012), *cert. denied* 133 S. Ct. 1585 (2013). Moen was aware of the basis for his

challenge at the time of his trial. He simply declined to assert the challenge because he believed it would have been "futile" after *Netland* and *Wiseman*. On this record, we conclude the interests of justice do not warrant consideration of Moen's challenge to the test-refusal statute.

IV.

Finally, Moen argues that the district court improperly convicted him of second-degree test refusal because the jury did not determine and he did not validly stipulate to the existence of an aggravating factor. A conviction of second-degree test refusal requires proof of an "aggravating factor," Minn. Stat. § 169A.25, subd. 1(b) (2010), which includes an impaired-driving conviction or license revocation within the previous ten years, Minn. Stat. § 169A.03, subds. 3, 22 (2010). A defendant has a right to a jury trial on the aggravating factor but may stipulate to its existence and remove the issue from the jury. *State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011). Such a stipulation requires an express, personal jury-trial waiver. *Id.* at 849-50.

The complaint charging Moen with second-degree test refusal alleges that Moen has two prior DWI convictions and related losses of license, one in early 2004 and one in early 2009. But the record does not include a written stipulation or an oral stipulation on the record, or a waiver of Moen's right to a jury trial on the aggravating factor, either before or during trial. The state did not present evidence of any alleged aggravating factors at trial. And the jury was not instructed to and did not decide the presence of an aggravating factor.

At a hearing approximately two months after trial, the district court inquired about the multiple levels of test refusal charged in the complaint, noting that the jury form had not indicated multiple counts of test refusal. The prosecutor stated that Moen had stipulated "to priors." The district court responded that it did "not believe that he did." Approximately one month later, Moen gave a sworn statement indicating that "prior to the start of the jury trial . . . , we had agreed to stipulate that there were prior convictions." Moen further agreed that the purpose of the stipulation was "to simplify the trial" and that he had "two prior convictions within a ten-year period." The district court thereafter convicted Moen of second-degree test refusal.

The state contends that Moen's posttrial statements indicate that he actually submitted a waiver and stipulation before trial and points out that he did not object to the procedure of making a record of them after trial. We are not persuaded.

First, Moen's statements after trial, which are the only evidence of a stipulation, do not prove that Moen previously submitted a bona fide stipulation. They indicate only that he "agreed to stipulate that there were prior convictions," without addressing when he made that agreement, with whom, or whether that agreement was ever presented to the district court. The district court's statements after trial strongly and fairly suggest that it was never presented a stipulation during trial. Importantly, it made no findings to the contrary after receiving Moen's posttrial statement.

Second, even if Moen admitted that he stipulated to a prior conviction during trial, that posttrial record does not remedy the omission. Unlike in many cases in which a defendant stipulates to an element of an offense but the district court fails to secure a

valid jury-trial waiver, *see, e.g.*, *id.* at 852, this case involves a complete failure to establish a record as to an element of an offense. The state bears the burden of proving every element of an offense. *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 2313 (1995). And failure to present a necessary element to the jury generally requires reversal. *See id.* at 509, 522-53, 115 S. Ct. at 2313, 2320; *State v. Clark*, 755 N.W.2d 241, 256 (Minn. 2008). Consequently, the state must bear the burden of making a record as to any stipulations. Its failure to satisfy that burden results in reversal. To hold otherwise, or even hold a defendant's failure to object to such an omission against him, would be tantamount to improperly shifting the burden of proof.

On this record, we reverse Moen's second-degree conviction and remand for the district court to enter a conviction on the lesser-included third-degree offense. *See State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (stating that a finding of guilt with respect to lesser-included offenses generally "remains intact and the district court retains jurisdiction to formally convict and sentence the defendant for such crimes").

Affirmed in part, reversed in part, and remanded.