STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2187

State of Minnesota,
Respondent,

vs.

Warren Dennis Skinaway,
Appellant.

Filed December 24, 2012
Affirmed
Rodenberg, Judge

Mille Lacs County District Court
File No. 48CR10763

Lori Swanson, Attorney General, Michael T. Everson, Assistant Attorney General, St. Paul, Minnesota; and

Janice Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

On appeal from his conviction of first-degree driving while impaired, first-degree test refusal, and violation of a restricted driver's license, Warren Dennis Skinaway argues

that: (1) the district court erred in refusing to redact from the law enforcement recording that was played for the jury appellant's statement that he had twelve prior DWI convictions; (2) the prosecutor committed prejudicial misconduct by disparaging the defense during closing argument when she told the jury that the defense attorney's job was to "poke holes" in the state's case, "distract" the jurors, and "create a perception" that the state had not proven its case; and (3) the court abused its discretion or plainly erred when it misstated the law on probable cause during its instructions on the elements of the test refusal charge. We affirm.

FACTS

On April 3, 2010, police officer Brett Haskin, driving an unmarked squad car, noticed that appellant drove away from a gas station and left a gas can behind, coming close to striking the can with his vehicle as he drove away. Officer Haskin followed appellant and attempted to draw appellant's attention to his apparent oversight by various means, including activating his emergency lights and siren. These efforts to attract appellant's attention were unsuccessful. Officer Haskin therefore followed appellant and radioed Officer Kintop for assistance. Officer Haskin observed that appellant obeyed all speed limits and traffic signs but that his car crossed the centerline and the fog line several times. Officer Kintop also observed appellant weaving. He also used his squad car's emergency lights and siren in an effort to attract appellant's attention. Despite the police officers' efforts, appellant did not pull over or even seem to notice that he was being followed until he pulled into a parking lot five to seven miles from the gas station. Upon approaching appellant after he had stopped, Officers Haskin and Kintop noticed

that appellant's speech was slurred, he seemed sluggish, his eyes were bloodshot, and he smelled of alcohol. Appellant admitted to having had one alcoholic drink. He refused to participate in field sobriety tests, but agreed to take a preliminary breath test (PBT), which indicated a .199 blood alcohol content. After placing appellant under arrest, Officer Kintop read the Minnesota implied consent advisory form twice to ensure that appellant had heard it and could indicate understanding it. Appellant affirmed that he understood the advisory and declined to answer any further questions.

Appellant was charged by complaint on April 5, 2010, and as amended on February 8, 2011, with one count of first-degree driving while impaired, in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .24 (Supp. 2009), one count of first-degree test refusal, in violation of Minn. Stat. § 169A.20, subd. 2 (Supp. 2009), and one count of violation of a restricted driver's license, in violation of Minn. Stat. § 171.09, subd. 1(d)(1) (2008).

Prior to trial, when asked by the trial judge, appellant stipulated to his restricted driver's license status, as well as his knowledge of the restricted status. However, with his attorney present, appellant elected not to stipulate to his prior impaired driving convictions, saying, "I want the jury to hear 'em."

Alleging unfair prejudice and a lack of probative value, appellant moved to redact a portion of the squad-car recording in which appellant stated that he had twelve prior alcohol-related driving offenses. The state maintained that the exchange was admissible, and that redacting the recordings would be technically difficult. The district court denied the request for redaction, noting that appellant did not stipulate to the fact of his prior

convictions, making proof of those convictions an issue at trial. The court did not expressly address appellant's objection that the prejudicial effect of the statement outweighed its probative value.

Very early into the state's final argument, the prosecutor told the jury that

> [t]he Defense attorney's job is to poke holes in the State's case. He may take a small detail and try to make it seem huge to try to distract you from the overwhelming evidence that points to his client's guilt. His job is to create a perception that the State hasn't proven its case and hasn't met its burden, and it'll try to do that by focusing on things that maybe weren't done in the case or observations that weren't made by the officers.

The prosecutor continued by telling the jury that the anticipated defense arguments "are to distract you from what the officers did see," emphasizing that "these arguments would only be meant to distract your attention away from those observations that the officer did made [sic]." Defense counsel did not object to the prosecution's arguments or address them in appellant's closing argument.

Appellant requested a modified jury instruction on the test refusal count. Appellant sought an instruction on lawful arrest advising the jury than an arrest is lawful when the officer "has a reasonable belief that a person is in violation" rather than when an officer "has reason to believe a crime has been committed." The trial court denied appellant's request. The court instructed the jury by including a reference to and definition of probable cause in both the first and second elements of the refusal count.[1]

[1] The transcript reveals the following instructions to the jury:

The jury found appellant guilty on all counts. The trial court denied appellant's motion for a downward dispositional departure and sentenced him to the presumptive term of 60 months in prison.

D E C I S I O N

I. Motion to Redact

Appellant first argues that the district court abused its discretion when it refused to redact from the implied consent advisory recording played at trial appellant's statement concerning his twelve prior alcohol-related driving convictions. We disagree.

In general, "[e]videntiary rulings rest within the sound discretion of the [district court] and will not be reversed absent a clear abuse of discretion. On appeal, the

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> First one is Refusal to Submit to Testing, Lawful Arrest. Statutes of Minnesota provide that whoever refuses to submit a chemical test of the person's blood, breath, or urine under the implied consent law is guilty of a crime. There are six elements to the crime of Refusal to Submit to Testing. These six elements are:
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> First, a peace officer had probable cause to believe that defendant drove or operated a motor vehicle while under the influence of alcohol. Probable cause means the officer, based upon his observations, information, experience and training, can testify to the objective facts and circumstances—circumstances in his particular situation that gave the pe-ah [sic], gave the officer cause to stop the defendant's motor vehicle and the further objective observations led him to believe the defendant was driving or operating a motor vehicle while under the influence of alcohol.
>
> Second, the peace officer placed the defendant under lawful arrest for driving while impaired. An arrest is lawful when the officer has probable cause to believe the defendant is in violation of the law prior to the arrest. Probable cause means that the officer, based upon his observation, information, experience and training can testify to the objective facts and circumstances in the particular situation that gave that officer cause to stop the defendant's motor vehicle and the further objective observations that led him to believe that the defendant was driving or operating a motor vehicle while under the influence of alcohol.

appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Evidentiary errors warrant reversal if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (quotation omitted).

Evidence must be relevant to be admissible. Minn. R. Evid. 402. To sustain a conviction for first-degree driving while impaired and first-degree test refusal, the state must prove that (1) the offense occurred within ten years of the first of three or more qualified prior impaired-driving incidents; or (2) the defendant had a prior felony DWI conviction. Minn. Stat. § 169A.24, subd. 1 (2008). "[T]he prior conviction is an element which the state must prove at trial and which defendant has a right to have a jury decide." *State v. Berkelman*, 355 N.W.2d 394, 396 (Minn. 1984).

A defendant's references to prior crimes or prior imprisonment are generally inadmissible. *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009) (citing *State v. Hjerstrom*, 287 N.W.2d 625, 627 (Minn. 1979), and *State v. Haglund*, 267 N.W.2d 503, 505–06 (Minn. 1978)). Because evidence of a prior DWI has obvious potential for unfair prejudice, a defendant is generally entitled to stipulate to the prior-conviction element of first-degree DWI, thereby removing the issue from the jury's consideration. *Berkelman*, 355 N.W.2d at 396–97.

Here, after being informed of the effect of stipulating to the fact of his prior convictions, appellant declined to so stipulate. He stated that he wanted the jury to hear the evidence, unequivocally expressing that he wished to exercise his right to hold the

state to its burden of proof on all elements of the impaired-driving charges. The district court concluded that appellant's recorded admission of twelve prior alcohol-related driving convictions was relevant evidence tending to prove an essential element of the state's case. However, the district court did not expressly engage in a rule 403 analysis of the recorded admission's prejudicial effect. *See* Minn. R. Evid. 403.

We begin by analyzing the probative value of the disputed evidence. Evidence is relevant and has probative value when it advances the inquiry to some degree. *State v. Carlson*, 268 N.W.2d 553, 559 (Minn. 1978). A fact is relevant if, when taken alone or in connection with other facts, it warrants a jury in drawing a logical inference assisting, even though remotely, the determination of the issue in question. *State v. Schultz*, 691 N.W.2d 474, 478 (Minn. 2005) (citing *State v. Upson*, 162 Minn. 9, 12–13, 201 N.W. 913, 914 (1925); *State v. Lee*, 282 N.W.2d 896, 901 (Minn. 1979) ("Any evidence that logically tends to prove or disprove a material fact in issue is relevant.")). The weight to be given to relevant evidence is for the jury to determine. *Upson*, 162 Minn. at 12–13, 201 N.W. at 914. Appellant's recorded statement that he had twelve prior alcohol-related driving convictions is probative of a material fact and relevant to the existence of aggravating factors required to be proven by the state.

We next turn to the rule 403 analysis, which was not expressly conducted on the record by the district court. Other strong evidence proved appellant's guilt independent of his recorded admission. The state produced certified copies of appellant's record proving the existence of sufficient prior qualifying convictions within the ten years prior to this incident to satisfy the requirements of Minn. Stat. § 169A.24, subd. 1(1). The state

focused its argument on the subject of the prior convictions on this documentary evidence and not on appellant's admission. Evidence of appellant's prior conviction was already before the jury by virtue of appellant's trial strategy. Therefore, and in the context of appellant's decision to hold the state to its burden of proof on all issues including his prior convictions, any prejudicial effect of his recorded statement did not substantially outweigh its probative value.

II. Prosecutorial Misconduct

Appellant next argues that the prosecutor committed misconduct in closing arguments by repeatedly disparaging the defense. Although we find that the prosecutor's conduct was improper, we disagree that the prosecutor's misconduct warrants reversal.

A conviction will be reversed for prosecutorial misconduct only if, "when considered in light of the whole trial, [the misconduct] impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). If no objection was made to the alleged misconduct at trial, the review is conducted under a modified plain–error standard. *See State v. Ramey*, 721 N.W.2d 294, 299–300, 302 (Minn. 2006) (announcing the applicable standard of review).

Under the plain-error standard, the appellant has the burden of demonstrating that there is "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). However, in cases where the prosecutor's conduct is being reviewed for plain error, the appellant only bears the burden of showing that plain error occurred. *Ramey*, 721 N.W.2d at 302. The state bears the burden of showing that the error did not affect the appellant's substantial rights. *Id.*

"An error is 'plain' if it is clear or obvious," such as in cases where the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008). 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. Vance*, 734 N.W.2d 650, 656 (Minn. 2007), *overruled in part on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012).

When the misconduct is alleged to have occurred during a closing argument, this court must consider any offending statements in the context of the argument as a whole, and avoid lending undue prominence to an isolated remark. *Jones*, 753 N.W.2d at 691.

It is inappropriate for a prosecutor, in closing arguments, to "invite[] the jurors to speculate with respect to the motivation behind defendant's decision to try the case as she did." *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997) (quoting *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994)). However, "the state is not required to make a colorless argument and has a right to present all . . . proper inferences to be drawn from the evidence." *State v. Bolstad*, 686 N.W.2d 531, 544 (Minn. 2004). Furthermore, prosecutors are not expected to be perfect, and "[u]nartful statements inevitably occur in the midst of a heated and impassioned closing argument." *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

Here, the first few transcript pages of the prosecutor's closing argument contain the following argument to the jury:

> The Defense attorney's job is to poke holes in the State's case. He may take a small detail and try to make it seem huge to try to distract you from the overwhelming evidence that

> points to his client's guilt. His job is to create a perception that the State hasn't proven its case and hasn't met its burden, and it'll try to do that by focusing on things that maybe weren't done in the case or observations that weren't made by the officers.

In a later attempt to preempt the defense attorney's presumptive arguments, the prosecutor argued, "well, gosh, the defendant's ability to drive was not actually influenced by alcohol." The prosecutor went on to argue that "those [defense] arguments are . . . to distract you from what the officers did see," later concluding, "[s]o these arguments would only be meant to distract your attention away from those observations that the officer did made [sic]."

The prosecutor's argument here was improper. A prosecutor has special responsibilities as a representative of the people, and "must avoid inflaming the jury's passions and prejudices" against defendants. *State v. Bailey*, 677 N.W.2d 380, 404 (Minn. 2004). The supreme court has repeatedly warned prosecutors that it is improper to disparage the defense in closing arguments, or to suggest that a defense offered is some sort of standard defense used by defendants "when nothing else will work." *Griese*, 565 N.W.2d at 427 (quoting *Williams*, 525 N.W.2d at 549).

Here, the prosecutor characterized appellant's defense strategy as "pok[ing] holes" and "distract[ing]" the jury. *Williams* found that type of argument improper when it invites "the jurors to speculate with respect to the motivation behind defendant's decision to try the case as she did." 524 N.W.2d at 549. Although the prosecutor also addressed the merits of the state's evidence, she prominently and at length referenced the efforts of appellant's counsel as having a "job" to "poke holes," "distract," and "create a

perception" concerning the state's case. The prosecutor was "fully free to specifically argue that there was no merit to the defense . . . but she was not free to belittle the defense . . . in the abstract or . . . to suggest that the defendant raised it because that was the only defense that might work." *Id.* at 549 (quotations omitted).

Next, we consider whether the prosecutor's misconduct affected appellant's substantial rights. *See Ramey*, 721 N.W.2d at 302; *Griller*, 583 N.W.2d at 740.

The state's evidence in this case was extremely strong. The state presented the arresting officers' testimony regarding appellant's driving and impairment. They testified that appellant continued to drive despite the officers' use of lights and siren to pull him over for several miles. Appellant admitted to the officers that he had consumed alcohol. He refused field sobriety testing, and declined to provide a breath sample after being read the implied-consent advisory. The prosecutor's statements, although improper, did not impair appellant's right to a fair trial. *See State v. Johnson*, 616 N.W.2d 720, 727–28 (Minn. 2000) (noting that we will reverse only if the error impaired the defendant's right to a fair trial). In context, there is no reasonable likelihood that the misconduct here had any significant effect on the verdict. *See Ramey*, 721 N.W.2d at 302 (citing *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005)).

Although portions of the prosecutor's summation amounted to misconduct, given the overwhelming evidence of appellant's guilt presented at trial, the error did not have a significant prejudicial effect on the verdict.

III. Jury Instructions

Finally, appellant argues that the trial court erred by misstating the law on probable cause in its jury instructions regarding the test refusal charge. Because there was no objection to the district court's instruction, we review this issue under the plain-error standard. *See State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Under the plain-error test, an appellant must show (1) an error, (2) that is plain, and (3) that affects substantial rights. *Griller*, 583 N.W.2d at 740. If these three prongs are satisfied, we will address the error only if it seriously affects the fairness and integrity of judicial proceedings. *Id.*

Minn. Stat. § 169A.20, subd. 2, makes it a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (2008). Section 169A.51, in turn, allows an officer to request that a person submit to a chemical test when the officer "has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle" while impaired. Minn. Stat. § 169A.51, subd. 1(b); *see also State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) (citing Minn. Stat. § 169A.51, subd. 1(b)).

In *Koppi*, the supreme court examined the former pattern jury instruction on "probable cause" under the 2008 version of CRIMJIG 29.28. *See* 798 N.W.2d at 363–64; *see also* 10A *Minnesota Practice*, CRIMJIG 29.28 (Supp. 2009). That instruction provided: "Probable cause means that the officer can explain the reason the officer believes it was more likely than not that the defendant drove, operated or was in physical control of a motor vehicle while under the influence of alcohol." 798 N.W.2d at 363.

The supreme court in *Koppi* held that the instruction was defective for three reasons: (1) it did not require the officer to recite actual observations and circumstances supporting a finding of probable cause; (2) it failed to include the requirement that the jury evaluate the totality of the circumstances from the viewpoint of a reasonable officer; and (3) it erroneously defined probable cause with reference to a "more likely than not" standard in conflict with case law defining probable cause as depending upon the totality of the circumstances. *Id.* at 363–64.

The probable cause instruction given in this case differed from that given in *Koppi*, but appellant argues that it was similarly flawed. The district court here instructed the jury that "probable cause" means that

> [t]he officer, based upon his observation, information, experience, and training, can testify to the objective facts and circumstances in the particular situation that gave that officer cause to stop the defendant's motor vehicle and the further objective observations that led him to believe that the defendant was driving or operating a motor vehicle while under the influence of alcohol.

Appellant argues that the court failed to instruct the jury to evaluate the objective facts from the viewpoint of a reasonable officer, as opposed to the viewpoint of the testifying officer, and that it thus suffers from the second *Koppi* defect noted above. Appellant also argues that, while the district court here did not use the "more likely than not" language, which the supreme court disapproved of in *Koppi*, the instruction as given failed to articulate any quantifiable standard for probable cause. *See id.* at 364 (noting probable cause requires that, under the totality of the circumstances, "a person of ordinary care and

prudence would entertain an honest and strong suspicion that a crime has been committed" (quotation omitted)).

As respondent notes, the instruction given here follows the definition of probable cause found in the current CRIMJIG 29.28, which is based on this court's decision in *State v. Koppi*, 779 N.W.2d 562, 566–68 (Minn. App. 2010), *rev'd on other grounds*, 798 N.W.2d 358. The instruction directs the jury to consider the officer's recitation of actual observations and circumstances supporting probable cause and requires the jury to evaluate those circumstances from the viewpoint of a reasonable officer. *See* 10A *Minnesota Practice* CRIMJIG 29.28 (Supp. 2010). And the instruction does not include the "more likely than not" language found to be a misstatement of law in the supreme court's decision in *Koppi*. *See id.*

Considered in its entirety, the instruction given here was not plainly erroneous. The instruction properly directed the jury's attention to the objective facts and circumstances in determining probable cause. There was no plain error.[2]

IV. Pro se Brief

In his pro se supplemental brief, appellant argues that a conviction from 2000 was improperly used to enhance the charges or the sentence in this case. The 2000 conviction was not one of the qualified prior driving incidents enumerated in the complaint. It was not used to calculate appellant's criminal history score. Thus, there is no arguable basis

[2] *See State v. Schmuhl*, No. A11-566, 2012 WL 1813278, at *6 (Minn. App. May 21, 2012) (concluding that an instruction almost identical to the one given here was not erroneous under *Koppi*), *review denied* (Minn. Aug. 7, 2012). Although not precedential, the *Schmuhl* analysis is persuasive. *See* Minn. Stat. § 480A.08, subd. 3 (2012); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

for this court to entertain a collateral attack on the 2000 conviction in these proceedings. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (noting that arguments in a pro se brief not supported by material in the record cannot be considered on appeal).

Affirmed.