This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0849

State of Minnesota,
Respondent,

vs.

Theresa Kay Anderson-Chapman,
Appellant.

Filed June 10, 2013
Affirmed
Cleary, Judge

Ramsey County District Court
File No. 62SU-CR-11-1722

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

Thomas R. Hughes, Hughes & Costello, St. Paul, Minnesota (for respondent)

John L. Fossum, Fossum Law Office, LLC, Northfield, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Huspeni, Judge.*

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

CLEARY, Judge

Appellant challenges her conviction of refusal to submit to chemical testing in violation of Minn. Stat. § 169A.20, subd. 2 (2010), arguing that the district court

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

committed plain error when it improperly instructed the jury, that she received ineffective assistance of counsel, and that the district court erred by denying a hearing on her petition for postconviction relief.[1] We affirm.

FACTS

Around 8:45 p.m. on May 14, 2011, a New Brighton police officer was parked in a lot parallel to 7th Street in New Brighton. The officer observed a vehicle traveling westbound on 7th Street that he believed was going faster than the posted 30-mile-per-hour limit. He began to follow the vehicle and observed that both of the vehicle's left tires were entirely across the center lane divider. Using a radar unit, the officer determined that the vehicle was traveling 38 miles per hour. The officer followed the car along 7th Street and noticed that the vehicle continued to drive with its left tires over the center divider for approximately six blocks. The vehicle then made a left turn onto Inca Lane. The officer followed the vehicle, activated his emergency lights, and stopped the vehicle.

The officer identified the driver of the vehicle as appellant Theresa Anderson-Chapman. During his initial conversation with appellant, the officer observed that she

[1] At oral argument, appellant raised an issue regarding the constitutionality of Minnesota's test-refusal statute, as it relates to a recent decision by the United States Supreme Court in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). This issue was not considered by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts "generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure"). Appellant also provided a citation to supplemental authority after oral argument, pursuant to Minn. R. Civ. App. 128.05. Because rule 128.05 does not permit a party to raise an issue that was not previously raised and because the issues briefed here do not present a constitutional challenge to the test-refusal statute, we decline to rule on that issue. *State v. Tracy*, 667 N.W.2d 141, 145 (Minn. App. 2003).

appeared very jittery, paranoid, antsy, and "more nervous than an average person typically would be." He asked appellant to take a preliminary breath test (PBT) and she agreed. Before administering the test, he looked in appellant's mouth to make sure there were no foreign objects in it and noticed that she had heat bumps on the back of her tongue consistent with drug use. The result of the PBT was zero, indicating that appellant did not have any alcohol in her system.

The officer administered three different field sobriety tests: the horizontal gaze nystagmus (HGN), the walk-and-turn test, and the leg-stand test. Based on those tests and the officer's other observations, he determined that appellant was under the influence of a drug and arrested her. After transporting appellant back to the police department, the officer read her the implied-consent advisory and gave her time to contact an attorney. The officer then asked appellant to take a blood test, which she refused, or to take a urine test, which she also refused. Following her refusal, appellant was charged with second-degree test refusal and third-degree driving under the influence of a controlled substance.

At trial, the officer testified regarding the observations he made about appellant when he stopped her vehicle. He testified that he had "multiple trainings and instruction in field sobriety and to DWI detection, and also had lots of experience in processing DWIs." He also explained that he was a "drug recognition evaluator" (DRE) and that he recently completed a drug recognition course.

The officer noted that the purpose of administering the HGN was to observe any involuntary jerking of the eyes, and that he did not observe this in appellant. He did observe that appellant was swaying during the test and that she was unable to keep her

head still. He testified that he had to remind her "multiple times" to keep her head still. The officer noted that "[s]omebody who is not under the influence should be able to follow the instructions like keeping their head still." He also testified that appellant failed the walk-and-turn test and the leg-stand test. Finally, he stated that as appellant exited her vehicle, he observed that the zipper on her pants was down and that her general appearance was disheveled.

Appellant also testified at trial, denying that she had crossed the center line on 7th Street. She explained that she had a pinched nerve in her neck and that the injury made her head shake "a little bit." She also testified that she fidgets when she is nervous. Appellant stated that she did not have any trouble getting out of her car the night of May 14 and that she does not have any balance problems. She explained that she was nervous during the sobriety tests because there were several police officers searching her vehicle. Finally, appellant testified that she refused the chemical test because she "didn't really trust this police officer. I really wanted to get away from him. And then I didn't see any reason. I - - I'd already did everything he wanted, and there was no reason for him to even have arrested me."

The court instructed the jury about the elements of the charges against appellant. The court noted that one of the elements of refusal to submit to a chemical test of an individual's blood, breath, or urine is that the police officer needs probable cause to believe the individual was driving a motor vehicle while under the influence of a controlled substance. The court explained that "probable cause" means that:

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

The jury found appellant not guilty of driving under the influence of a controlled substance and guilty of refusal to submit to chemical testing.

Appellant filed an appeal with this court and then moved to stay that appeal so she could file a postconviction petition with the district court. This court granted the stay. Appellant filed a petition for postconviction relief with the district court, arguing that she received ineffective assistance of counsel and requesting an evidentiary hearing. The district court denied her petition. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court erred when it instructed the jury regarding probable cause. Appellant did not object to the instruction at trial, so we review the instruction for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Griller*, 583 N.W.2d at 740. An error is plain if it is clear or obvious; "[u]sually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome

of the case." *Griller*, 583 N.W.2d at 741. If all three prongs of the test are met, we then determine whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740.

In a very similar case, the Minnesota Supreme Court determined whether the jury instruction regarding probable cause was erroneous. *State v. Koppi*, 798 N.W.2d 358 (Minn. 2011). The court noted that "the threshold question is whether probable cause is a subjective or objective inquiry." *Id.* at 362. The supreme court determined that it is an objective inquiry, but one that "incorporates the individual characteristics and intuitions of the officer to some extent." *Id.* at 362–63. The supreme court held that one reason the probable-cause instruction was flawed was because "it fail[ed] to include the requirement that the jury evaluate the totality of the circumstances from the viewpoint of a reasonable police officer." *Id.* at 363. Following *Koppi*, the model jury instruction regarding probable cause was amended to its current form, which reads:

> "Probable cause" means that the officer testified to the objective facts and circumstances that led the officer to have an honest and strong suspicion that the defendant was driving, operating, or in physical control of a motor vehicle while under the influence of [a controlled substance.] You must evaluate the totality of those circumstances from the viewpoint of a reasonable officer, considering the arresting officer's observations, experience, and training.

10A *Minnesota Practice*, CRIMJIG 29.28 (Supp. 2012).

Appellant first argues that the jury instruction regarding probable cause used here was erroneous because it failed to instruct the jury regarding the "reasonable officer"

viewpoint. The instruction here was error, and because the instruction contravenes case law, the error was plain.

Appellant bears the burden of persuasion on the third prong and must demonstrate that the error was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741.[2] The Minnesota Supreme Court has defined plain error as prejudicial if "there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted).

The officer testified to several objective facts and circumstances that he observed when he stopped appellant. Appellant was jittery and very antsy. She appeared disheveled and her zipper was down. She was unable to follow instructions on the HGN test and failed the walk-and-turn and one-leg-stand tests. If the jury had been instructed to "evaluate the totality of those circumstances from the viewpoint of a reasonable officer, considering the arresting officer's observations, experience, and training," they would likely have come to the same conclusion—that the officer had probable cause to suspect appellant was driving under the influence. CRIMJIG 29.28. There is not a reasonable likelihood that the giving of the complete instruction would have had a significant effect on the verdict.

II.

Appellant next argues that she received ineffective assistance of counsel during her trial because her counsel did not challenge the officer's "extensive" testimony

[2] Both appellant and the state discuss a "harmless error" analysis, similar to the one used in *Koppi*. Because appellant failed to object to this instruction at trial, we evaluate it using the plain-error standard rather than the harmless-error standard.

regarding his DRE training, because her counsel did not hire an expert to testify at trial, and because her counsel did not play the tape recording of the officer reading the implied-consent advisory to appellant.

"A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo." *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). "An ineffective assistance of counsel claim is an alleged violation of the right to reasonably effective assistance of counsel" guaranteed by the United States and Minnesota Constitutions. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003); *see also* U.S. Const. amend. VI; Minn. Const. art. I, § 6.

The reviewing court analyzes ineffective-assistance-of-counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Rhodes*, 657 N.W.2d at 842. An appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). "We need not address both the performance and prejudice prongs if one is determinative." *Patterson v. State*, 670 N.W.2d 439, 442 (Minn. 2003).

"An attorney's performance is substandard when the attorney does not exercise 'the customary skills and diligence that a reasonably competent attorney would [exercise] under the circumstances.'" *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quoting

State v. Doppler, 590 N.W.2d 627, 633 (Minn. 1999)) (alteration in original). "Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts." *Leake*, 737 N.W.2d at 536. A defendant has the burden of proof to rebut the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007).

Appellant contends that her sole defense at trial was that the officer did not have probable cause to demand a chemical test and that the only evidence the state relied on to establish that he did have probable cause was the officer's DRE training. She also argues that "[c]ourts in other jurisdictions have found counsel ineffective for not effectively cross-examining or impeaching witnesses."

The Minnesota Supreme Court and this court have repeatedly held that trial preparation, choosing a defense to present, determining whether to call an expert witness, determining what objections to make, and determining how to cross-examine witnesses are matters of trial strategy that will not be second-guessed by a reviewing court. *See Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010) (holding that counsel's decision about whether to call an expert witness was a matter of trial strategy); *State v. Vick*, 632 N.W.2d 676, 688–89 (Minn. 2001) (holding that failure to vigorously cross-examine a witness and failure to object to an opinion involving vouching testimony were matters of trial strategy and were not reviewed for competency); *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) ("What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed

later for competence."); *State v. Lahue*, 585 N.W.2d 785, 789–90 (Minn. 1998) (holding that "[p]articular deference is given to the decisions of counsel regarding trial strategy" and that "[w]hich witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel") (quotation omitted).

Appellant claims that the officer testified "extensively" about his training as a DRE. This mischaracterizes the officer's testimony; he only mentions his DRE training a handful of times during 72 pages of testimony. He testified that he based his suspicions of impaired driving on appellant's driving conduct, her nervous behavior after the stop, her failure to adequately perform three standard field sobriety tests, her disheveled appearance, and the heat bumps on her tongue. In this case, where evidence consists of appellant's word against the officer's, it is entirely likely that appellant's counsel did not want to give the officer an opportunity to strengthen his testimony by explaining the extensive drug-recognition training he completed. Contrary to appellant's assertions, her trial counsel did present a defense; he emphasized that she voluntarily took the PBT, that she did not have any problems with her balance, that she was able to follow directions, and that no evidence of a controlled substance was found in her vehicle. We will not second-guess the strategy on appeal, and appellant has failed to prove that her trial counsel's representation otherwise "fell below an objective standard of reasonableness." *Gates*, 398 N.W.2d at 561 (quotation omitted). Because the performance prong is determinative here, we do not address the prejudice prong. *See Patterson*, 670 N.W.2d at 442.

III.

Appellant also argues that the district court erred by denying her postconviction petition without holding an evidentiary hearing. We review the denial of a request for an evidentiary hearing for an abuse of discretion. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). The district court "may dismiss a petition for postconviction relief without conducting an evidentiary hearing if the petition, files, and record conclusively show that the petitioner is entitled to no relief." *Zenanko v. State*, 587 N.W.2d 642, 644 (Minn. 1998) (quotation omitted); *see also* Minn. Stat. § 590.04, subd. 1 (2010). To be entitled to an evidentiary hearing on an ineffective-assistance-of-counsel claim, a petitioner must allege facts which, if proved, "would affirmatively show that [petitioner's] attorney's representation fell below an objective standard of reasonableness, and that but for the errors, the result would have been different." *Wilson v. State*, 582 N.W.2d 882, 885 (Minn. 1998). "[W]e resolve any doubts about whether an evidentiary hearing is required in favor of the petitioner." *Patterson*, 670 N.W.2d at 441.

The petition, files, and record conclusively show that appellant was not entitled to relief on her ineffective-assistance-of-counsel claim. The district court did not abuse its discretion by denying her claim without holding an evidentiary hearing.

Affirmed.