FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-0703

MICHAEL G. BRINEGAR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Bay County.
Brantley S. Clark, Jr., Judge.

October 13, 2021

PER CURIAM.

AFFIRMED.

RAY and WINOKUR, JJ., concur; MAKAR, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring.

Michael G. Brinegar disliked his neighbor so much that he admitted to firing multiple gunshots into his home across their adjoining field along West Linger Longer Road during a family gathering late one Saturday afternoon in rural Bay County, Florida ("yeah, I shot my .38, I shot it at that asshole"). The jury found him guilty of attempted second degree murder with a firearm, shooting into an occupied dwelling, and using a firearm while under the influence.

On appeal, an issue in dispute is whether the evidence could reasonably support the jury's finding that Brinegar was "under the influence" at the time of his shooting spree. In closing, the State summarized the evidence presented at trial that suggested Brinegar had been "under the influence" as follows:

> Investigator Roberts told you that the defendant smelled like alcohol. You saw photographs of alcohol bottles everywhere at the defendant's house. He had slurred speech, he had trouble standing, he was falling over, tripping over himself. That is impairment of normal faculties. The slurred speech, he couldn't speak normally, he couldn't stand and walk normally or stand or walk normally; that is being under the influence of alcohol to the extent that his normal faculties were impaired.

This evidence was based on police officers' observations of Brinegar and his home's interior and exterior within a few hours after the shooting had occurred. During this time, Brinegar was aggressive and had to be restrained, as one officer testified. ("When I was talking to him, he was highly intoxicated, he had slurred speech, he was stumbling into me as well as the other deputies, he was cursing, he smelled like he had been drinking all afternoon. He was just very, very, just disorderly, he would not -- he was just really mad."). The manner in which Brinegar shot his weapon was haphazard; he sporadically discharged his weapon sixteen to twenty-four times over a twenty-minute period, which resulted in an erratic shot pattern that struck the neighbor's home, shed, vehicle, and tree. The way in which Brinegar fired his gun, according to the State, "indicated he was under the influence while

using the firearm[,]" much "like a driver weaving in and out of their lane indicates being under the influence while operating a vehicle[.]"

No direct evidence pinpoints that Brinegar had imbibed before he began shooting, but circumstantial evidence strongly suggests that he had. *State v. Castillo*, 877 So. 2d 690, 693 (Fla. 2004) ("[I]t has long been established that circumstantial evidence is competent to establish the elements of a crime, including intent." (citing *Moorman v. State*, 25 So. 2d 563, 564 (Fla. 1946) ("It is too well settled to require citation of authorities that any material fact may be proved by circumstantial evidence, as well as by direct evidence."))). The observational evidence—that Brinegar had slurred speech, reeked of alcohol, was unable to walk or stand in a normal manner, and was found in a home strewn with empty and open liquor bottles—strongly suggests that Brinegar was "under the influence" just a few hours earlier. That's so even if his blood alcohol level may have been below that for impaired driving a few hours after the incident; he was in custody for much of that time, making it reasonable to infer that that his blood alcohol level may have been higher at the time of the shooting but had dissipated at the time of the test. *See also* § 790.157, Fla. Stat. (2021) (noting that statutory presumptions related to blood alcohol level "shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired"). Plus, an incentive exists for an intoxicated person to imbibe immediately *after* committing a criminal act to explain his condition ("I had to calm my nerves"), making circumstantial evidence all the more important.

In short, a jury could reasonably conclude that the evidentiary profile of Brinegar at the time of the shooting spree was not of a clear-minded and sober 66-year-old, but of a violent and aggressive drunkard on a bender; no precise definition exists of "under the influence," but the evidence reasonably suggests Brinegar met the statutory standard. *See* § 790.151(3), Fla. Stat. (2021) (It is unlawful "for any person who is under the influence of alcoholic beverages, . . . when affected to the extent that his or her normal faculties are impaired, to use a firearm in this state."). Affirmance

of all three convictions, including the use of firearm while under the influence, is warranted.

Jessica J. Yeary, Public Defender, Maria I. Suber, Assistant Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant; Michael G. Brinegar, pro se, Appellant.

Ashley Moody, Attorney General, and Michael L. Schaub, Assistant Attorney General, Tallahassee, for Appellee.