STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0851

State of Minnesota,
Respondent,

vs.

Dalmar Hassan Dhimbil,
Appellant.

Filed May 1, 2017
Affirmed
Reilly, Judge

Ramsey County District Court
File No. 62-CR-15-4204

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

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, Joshua L. Weichsel (certified student attorney), St. Paul, Minnesota (for respondent)

Hillary B. Parsons, Caplan & Tamburino Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Ross, Judge; and Kalitowski, 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

REILLY, Judge

Appellant challenges his impaired-driving and test-refusal felony convictions on the grounds that (1) the test-refusal statute is unconstitutional, (2) the evidence produced at trial was insufficient to support the verdict, (3) the test-refusal jury instructions were plainly erroneous, and (4) the state committed misconduct during cross-examination. We affirm.

D E C I S I O N

I. Minnesota's test-refusal statute survives appellant's constitutional challenge.

Appellant raises a substantive due-process challenge to Minnesota's test-refusal statute. The United States and Minnesota Constitutions guarantee that no individual shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. Minnesota law criminalizes an individual's refusal to submit to a chemical breath test when an officer has probable cause to believe that a person is driving, operating, or physically controlling a motor vehicle while impaired, and the officer reads the individual the implied-consent advisory. *See* Minn. Stat. §§ 169A.20, subd. 2, .51, subd. 1 (2016). In *State v. Bernard*, the Minnesota Supreme Court ruled that the test-refusal statute does not offend substantive due process. 859 N.W.2d 762, 773-74 (Minn. 2015), *aff'd sub nom. Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). Appellant concedes that the *Bernard* holding forecloses his present constitutional challenge; he is therefore not entitled to reversal of his convictions on constitutional grounds.

II. The evidence presented at trial was sufficient to prove beyond a reasonable doubt that appellant was guilty of impaired driving and test refusal.

A. Standard of Review

Appellant challenges the sufficiency of the evidence. An appellate court examining the sufficiency of the evidence "carefully examine[s] the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015), *cert. denied*, 136 S. Ct. 509 (2015). "We view the evidence presented in the light most favorable to the verdict, and assume that the [jury] disbelieved any evidence that conflicted with the verdict." *Id.*

B. Impaired-driving conviction

To establish that appellant is guilty of impaired driving, the state must prove beyond a reasonable doubt that appellant drove, operated, or was in physical possession of a car while impaired. Minn. Stat. § 169A.20, subd. 1(1) (2016). A person is impaired if the person consumed "enough alcohol so that the [person's] ability or capacity to drive was impaired in some way or to some degree" and, as a result, "does not possess that clearness of intellect and control . . . that [the person] otherwise would have." *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012).

The state produced evidence of the following at trial: On June 7, 2015, at approximately 2:30 a.m., appellant and two other individuals were traveling westbound on Highway 94 in a silver Toyota Camry registered to appellant. A witness, J.R., saw

appellant's car "[d]riving out of control," making "very sporadic turns," driving at excessive speeds, and making "quick lane changes . . . even into almost the ditch." J.R. called 911 to report the incident. While on the phone with the 911 dispatcher, J.R. saw appellant's car "spin out, potentially even hit the . . . median barrier, and spin and go into the ditch." J.R. saw appellant exit from the driver's side of the car, while the two passengers exited from the passenger's side. Minnesota State Patrol Trooper Jim Swanson responded to the emergency call and, upon arriving at the scene, saw appellant's car in the ditch and the car's three occupants standing on the side of the road.

Swanson noticed that appellant was leaning heavily on the two other individuals for support and smelled of alcohol. One of the passengers told the officer that appellant had been driving the car. Swanson asked the three men if they were wearing seat belts, and asked to see their shoulders to check for seat-belt marks. Appellant had marks on his upper left chest and shoulder, indicating that he was seated in the front driver's side of the car. Swanson then conducted field sobriety tests, which appellant failed, and administered a preliminary breath test, which revealed an alcohol concentration of 0.256. Based upon his training and experience, Swanson concluded that appellant was driving while impaired. *See State v. Smith*, 814 N.W.2d 346, 352 (Minn. 2012) (recognizing that police officers may rely on their training and experience to determine whether a particular factor supports a reasonable suspicion of criminal activity). Appellant does not dispute that he was under the influence of alcohol at the time of the incident. The evidence in the record sufficiently proves beyond a reasonable doubt that appellant was driving while impaired.

C. Test-refusal conviction

Appellant also argues that the evidence is insufficient to sustain his conviction of test refusal. Our standard of review varies depending on whether the elements of the offense were proved by circumstantial evidence or by direct evidence. *Loving v. State*, ___ N.W.2d ___, ___, 2017 WL 1104913, at *2 (Minn. 2017) (articulating the separate standards of review). Where the defendant does not expressly refuse a breath test, the state must prove test refusal by relying on circumstantial evidence. *See State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). But in this case, because direct evidence support's appellant's conviction, we must conduct "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light most favorable to the verdict, were sufficient" to sustain the verdict. *Loving*, 2017 WL 1104913, at *3. The record conclusively shows that the police officer testified that appellant smelled of alcohol and then led him through a series of field sobriety tests, which appellant failed. A passenger in appellant's car also informed the officer that appellant had been driving the car. The officer administered a preliminary breath test, which registered an alcohol concentration of 0.256. The officer arrested appellant on suspicion of impaired driving and transported him to the Ramsey County Law Enforcement Center. The officer read appellant the implied-consent advisory and asked appellant to take a breath test. Appellant refused. Direct evidence sufficiently establishes appellant's guilt beyond a reasonable doubt.

III. The jury instructions were not plainly erroneous.

The district court is afforded "considerable latitude" when selecting language in jury instructions and when "determining the propriety of a specific instruction." *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). We review a district court's decision to give a particular jury instruction for an abuse of discretion, *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011), and we review the jury instructions as a whole to determine if they accurately state the law in a manner that is understandable to the jury, *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014).

Appellant did not object to the jury instructions at trial and we therefore review for plain error. *See State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015) (articulating that we review unobjected-to jury instructions for plain error). An appellate court may review unobjected-to jury instructions under a plain-error analysis if the defendant establishes that (1) there was an error, (2) it was plain, and (3) the plain error affected his substantial rights. *State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015). If all three prongs are satisfied, we may address the error to ensure fairness and the integrity of the judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant's argument fails under a plain-error analysis. The state charged appellant with test refusal under Minn. Stat. § 169A.20, subd. 2. The district court instructed the jury on the elements of the crime, including that (1) the police officer had probable cause to believe the defendant drove, operated, or was in physical control of a car while under the influence of alcohol, (2) the PBT indicated an alcohol concentration of 0.08 or more, (3) the officer read appellant the implied-consent advisory, (4) the officer requested that

appellant submit to a chemical breath test, (5) appellant refused to submit to a chemical breath test, and (6) the act took place in Minnesota. These jury instructions accurately state the law. *See* Minn. Stat. §§ 169A.20, subd. 2 ("It is a crime for any person to refuse to submit to a chemical test of the person's . . . breath . . . under section 169A.51."), .51, subd. 1(b)(1) ("[A] test may be required . . . when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle . . . and . . . the person has been lawfully placed under arrest for [impaired driving.]"); *see also* 10 *Minnesota Practice*, CRIMJIG 29.22 (articulating elements of test refusal) (2016). We therefore conclude that no error occurred.

Because appellant has not met his burden of establishing that an error occurred, we need not consider whether the error was plain, or whether appellant's substantial rights were affected. *See Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011) ("[I]f we find that any one of the requirements [under the plain-error test] is not satisfied, we need not address any of the others.").

IV. The state did not commit misconduct during cross-examination.

During cross-examination, the prosecutor asked appellant if the state's witnesses were lying when they identified appellant as the driver. The following exchange occurred:

> THE PROSECUTOR: Sir, you told [the officer] that there was a fourth person who was driving the car, correct?
>
> THE DEFENDANT: I never did.
>
> THE PROSECUTOR: So, sir, your testimony here today is that [the officer] lied to us yesterday when he was here in the courtroom?

> THE DEFENDANT: He did.
>
> . . . .
>
> THE PROSECUTOR: Sir, you're claiming before this jury that everything that your friend Hassan Osman said yesterday in front of this jury was a lie? Yes or no?
>
> . . . .
>
> THE DEFENDANT: Yes, he did. He lied.

Appellant argues that the prosecutor's inquiry constitutes impermissible "were they lying" questions. Appellant did not raise this objection at trial and we review unobjected-to prosecutorial misconduct allegations under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Appellant bears the burden of proving that there was an error and that it was plain. *Id.* If appellant demonstrates plain error, the burden shifts to the state to prove the error did not affect his substantial rights. *Id*. If all three prongs of the modified plain-error test are satisfied, we may correct the plain error "only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotations omitted).

We determine that the prosecutor did not commit prosecutorial misconduct. "Were they lying" questions generally "have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). But Minnesota has not adopted a "blanket rule of law" prohibiting such questions because "[s]ituations may arise where 'were they lying' questions may have a probative value in clarifying a particular line of testimony, in

evaluating the credibility of a witness claiming that everyone but the witness lied or [where] the witness flatly denies the occurrence of events." *Id*. "[S]uch questions are permitted when the defendant [places] the issue of the credibility of the state's witnesses in central focus." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (quoting *Pilot*, 595 N.W.2d at 517); *see also State v. Leutschaft*, 759 N.W.2d 414, 422 (Minn. App. 2009) (noting that the "central focus" test applies when the defense expressly accuses opposing witnesses of fabrications or falsehoods).

We determine that the prosecutor's questions were not improper because appellant placed witness credibility squarely in issue. Appellant testified during cross-examination that the state's witnesses were lying. The defense counsel asserted, in both his opening statement and closing argument, that testimony from the state's witnesses was "coerced." Defense counsel argued in his opening statement that:

> Our one thing that we basically disagree with the State on is, [the] claim [from the state's witnesses] that [appellant] was driving his car. And, basically, anybody who says -- comes in here and testifies that [appellant] was driving his car either was coerced into doing it . . . or [was] not in a position to see what they [may] claim that they saw.

And during closing argument, defense counsel again asserted that Osman's statement that appellant was driving was a "coerced statement." The credibility of the state's witnesses was a "central focus" of the trial and the prosecutor's line of questioning assisted the jury in evaluating the credibility of those witnesses. *See Morton*, 701 N.W.2d at 233 (noting that "were they lying" questions are permissible and may assist the jury in weighing a defendant's own veracity when the defendant places the credibility of the state's witnesses

in central focus); *see also* 10 *Minnesota Practice*, CRIMJIG 3.12 (2016) ("[j]jurors are the sole judges of whether a witness is to be believed and of the weight to be given a witness's testimony.").

Because we conclude that an error did not occur, there can be no finding that the error was plain. *See Pilot*, 595 N.W.2d at 518 ("Failure to meet the first prong of our plain error analysis requiring proof of 'error,' obviates the need to address the remaining plain error factors.").

Even assuming plain error, appellant is not entitled to relief because his substantial rights were not violated. *See State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (determining that, even if plain error occurred, relief was not warranted because the defendant's substantial rights were not violated). An error is prejudicial if there is a reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the outcome of the case. *Griller*, 583 N.W.2d at 741. If an appellate court concludes that "the jury would have reached the same verdict even if the state had not asked [defendant] . . . 'were they lying' questions," then the state has satisfied the third prong. *Morton*, 701 N.W.2d at 235-36. In this case, appellant does not dispute that he had been drinking, he failed the field sobriety tests, and the PBT registered an alcohol concentration well-above the legal limit. Witnesses placed appellant in the driver's seat of the car, and seat-belt marks on appellant's left shoulder substantiate that testimony. The officer had reason to believe that appellant was driving while impaired and read him the implied-consent advisory. Appellant refused to submit to a chemical breath test. There is no reasonable likelihood that the jury would have reached a different verdict if the

prosecutor had refrained from asking appellant if the state's witnesses were lying about him being the driver and, therefore, appellant's substantial rights were not affected.

Accordingly, we determine that the record fails to disclose any plain error affecting appellant's substantial rights and we affirm his conviction.

Affirmed.