STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1639

State of Minnesota,
Respondent,

vs.

Neil Ray Lystad,
Appellant

Filed August 28, 2017
Affirmed
Worke, Judge

Lake of the Woods County District Court
File No. 39-CR-14-213

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

James C. Austad, Lake of the Woods County Attorney, Baudette, Minnesota (for respondent)

Alan B. Fish, Dennis H. Ingold, Roseau, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

WORKE, Judge

Appellant challenges the sufficiency of the evidence for his test-refusal and driving-while-impaired (DWI) convictions, arguing that the state failed to prove that he drove, operated, or was in physical control of a motor vehicle. We affirm.

FACTS

On September 20, 2014, Deputy Ben Duick received a tip of a possible drunk driver with North Dakota license plates near Williams, Minnesota. The tipster identified R.W. as the driver. Deputy Duick and Deputy Brad Abbey headed towards Williams. Based on the tip, they expected R.W. and his wife A.W. to be driving to the home of appellant Neil Ray Lystad.

At approximately 11:32 p.m., the officers observed a pickup truck with one taillight on pulled over on the side of the road. It had Minnesota license plates. The officers pulled behind the vehicle. The officers observed that the vehicle's drive shaft had fallen on the ground underneath the vehicle. It appeared that the vehicle had recently pulled over because there were fresh tire tracks on the grass.

Both deputies approached the pickup. A person identified as Lystad was in the driver's seat, and A.W. was in the passenger's seat. The keys were in the ignition and the headlights were on. The deputies smelled alcohol and noticed that Lystad's speech was slurred. Lystad got out of the vehicle. He had poor balance and fell over not long after exiting. Lystad admitted that he was too intoxicated to drive. He also said, "I pulled over." Lystad twice refused to take a field sobriety test or a preliminary breath test (PBT). He was arrested for DWI.

Following the arrest, the officers transported Lystad to the Sheriff's Office for booking. On the way, they took A.W. to Lystad's residence where she and R.W. were staying. On the drive to his residence, Lystad made several unsolicited statements. He said that they took the truck out "for a whip around the block." He also said, "[W]e were

buzzed up." When the deputies dropped A.W. off at Lystad's, there was a car parked on the property with North Dakota license plates. They matched the license plate the tipster gave Deputy Duick. A.W. told the officers that R.W. was not with her and Lystad in Williams.

After the deputies dropped A.W. off, Lystad continued to make unsolicited statements. He asked, "If I blew over a 0.20 is that a double?" He asked the same question about other levels of blood alcohol content. When he was told that there is no such thing as a double DWI, he said, "[Y]es there is."

When they arrived, Deputy Abbey read Lystad the implied-consent advisory. With the deputy's assistance, Lystad tried to contact an attorney. When he was unsuccessful, Lystad argued with the deputy. The deputy told Lystad that if he did not continue to attempt to contact an attorney, his attorney time would end and he would be considered to have refused the test. Lystad grabbed the implied-consent form out of the officer's hands and tore it up.

Lystad was charged with second-degree test refusal, in violation of Minn. Stat. §§ 169A.20, subd. 2, .25, subd. 2 (2014), and second-degree DWI, in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .25, subd. 2 (2014). He moved to dismiss the charges for lack of probable cause. The district court denied the motion.

The matter proceeded to trial. A video from the squad car was played for the jury and Deputy Duick and Deputy Abbey testified on behalf of the state. Both deputies testified that you cannot drive a vehicle without a drive shaft unless the vehicle has four-wheel drive.

Lystad testified in his own defense. He said that R.W. was doing repair work on Lystad's pickup. R.W. finished working on the truck, and R.W., A.W., and Lystad drove it to a bar in Williams. When they left the bar, R.W. was driving, A.W. was sitting on the passenger side, and Lystad was sitting in the middle between R.W. and A.W.

On the drive home, they heard noises coming from underneath the truck. They pulled over and discovered the issue with the drive shaft. Lystad testified that the pickup had four-wheel drive. He indicated that, despite the broken drive shaft, the vehicle could have been driven. The drive shaft, however, would have dragged on the pavement. They were trying to figure out how they were going to get home when they saw headlights. R.W., who was on probation, said, "There's the cops," and then got out of the car and ran.

The jury found Lystad guilty of both offenses. The district court sentenced Lystad on the test-refusal count to 365 days in jail, stayed 275 of those days, and placed Lystad on probation for four years. This appeal followed.

D E C I S I O N

Lystad challenges the sufficiency of the evidence for his test-refusal and second-degree DWI convictions. We first address the second-degree DWI conviction.

Second-degree DWI

To convict Lystad of this offense, the state had to prove beyond a reasonable doubt that he drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1). Lystad concedes that he was intoxicated and does not challenge the jury's determination that he was under the influence

of alcohol. Lystad argues only that the state failed to prove beyond a reasonable doubt that he drove, operated, or was in physical control of the pickup.[1]

Lystad claims that the heightened circumstantial-evidence standard applies. While Lystad admitted driving the vehicle and there is other direct evidence that Lystad was at least in physical control of the truck, we apply the more exacting circumstantial-evidence standard because Lystad's claim fails under either standard. *See State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013) (declining to resolve a dispute over whether the direct- or circumstantial-evidence standard applied because "even under the more favorable [circumstantial-evidence] standard proposed by [defendant], the record contains sufficient evidence to support the jury's verdict").

When reviewing the sufficiency of the evidence, this court views "the evidence in the light most favorable to the verdict and assume[s] that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008) (quotation omitted). "The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense." *Id*. (quotation omitted).

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[1] Lystad also argues that "[b]ecause the deputies did not have probable cause to arrest [him] for a [DWI] offense," his second-degree DWI conviction must be reversed. But while Lystad challenged probable cause for the second-degree DWI charge in district court, Lystad did not challenge probable cause for the arrest. We generally do not consider matters not argued in district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Moreover, even if we considered this argument, as discussed below, the officers did have probable cause to arrest Lystad.

When a conviction is based on circumstantial evidence, we use a two-step process to assess the sufficiency of the evidence to sustain the conviction. *Silvernail*, 831 N.W.2d at 598. First, we identify the circumstances proved. *Id.* Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt," giving no deference to the factfinder's choice among reasonable inferences. *Id.* at 599 (quotations omitted). "To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

The following circumstances were proved at trial: (1) When police encountered the pickup, Lystad was in the driver's seat, the keys were in the ignition, and the vehicle's headlights and taillight were on; (2) the vehicle had Minnesota license plates and belonged to Lystad; (3) it looked like the vehicle had recently pulled over because there were fresh tire tracks in the grass; (4) Lystad told the officers that he "pulled over"; (5) Lystad admitted that he was too intoxicated to drive; (6) the pickup's drive shaft had partially fallen off; (7) the pickup has four-wheel drive and could have been driven, but the drive shaft would have dragged on the ground; (8) A.W. told police that R.W. was at Lystad's and did not go to the bar with her and Lystad; (9) there was a vehicle at Lystad's home with North Dakota license plates that matched those described by the tipster who contacted Deputy Duick; (10) Lystad told police that they took the pickup out "for a whip around the block" and were "buzzed up"; and (11) Lystad asked the officers about the possibility that he would be charged with a "double" DWI.

The above circumstances are consistent with the hypothesis that Lystad drove the vehicle to the side of the road. Lystad argues that the circumstances are also consistent with his testimony that R.W. drove the truck and ran when he saw police approaching. But this hypothesis is contradicted by the evidence: Lystad was sitting in the driver's seat, police did not see anyone running from the vehicle, A.W. told police that R.W. was not with her and Lystad that evening, the vehicle that the citizen tipster had seen R.W. driving earlier in the day appears to have been at Lystad's residence when police dropped A.W. off, and Lystad admitted to police that he had pulled the truck over. Lystad's testimony that R.W. was driving is also inconsistent with the verdict, and we "assume that the factfinder disbelieved any testimony conflicting with th[e] verdict." *Holliday*, 745 N.W.2d at 562. Lystad's version of events is not a reasonable explanation of the evidence, and "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." *Taylor*, 650 N.W.2d at 206 (quotation omitted). The only rational explanation of the evidence is that Lystad drove the pickup to the side of the road.

Even if the state had failed to prove that Lystad drove the pickup, the state proved beyond a reasonable doubt that Lystad was in "physical control" of the pickup. *See* Minn. Stat. § 169A.20, subd. 1 (2014). "[A] person is in physical control of a vehicle if he has the means to initiate any movement of that vehicle, and he is in close proximity to the operating controls of the vehicle." *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). "[P]hysical control should be given the broadest possible effect" and "is meant to cover situations when an intoxicated person is found in a parked vehicle under circumstances in

which the [vehicle], without too much difficulty, might again be started and become a source of danger to the operator, to others, or to property." *Id.* (quotations omitted).

Lystad argues that he was not in physical control of the pickup because the broken drive shaft made it inoperable. But both deputies testified that the vehicle could have been driven if it had four-wheel drive, and Lystad testified that the vehicle had four-wheel drive. Lystad also indicated that, although the drive shaft would have dragged on the ground, the vehicle could have been driven. Lystad was sitting in the driver's seat and had the key in the ignition. The circumstances proved establish that he was in close proximity to the controls of the vehicle and had the means to move the vehicle and make it a danger to himself and others. The circumstances proved are inconsistent with any rational hypothesis that Lystad did not have physical control of the vehicle.

The evidence was sufficient to convict Lystad of second-degree DWI because it established that Lystad drove and was in physical control of the pickup while under the influence of alcohol.

Test refusal

To convict Lystad of test-refusal, the state had to prove, among other things, that, at the time of arrest, police had probable cause that he drove, operated, or had physical control of the vehicle while impaired.[2] *See* Minn. Stat. §§ 169A.51, .52 (2014); *see also* Minn.

[2] Lystad also challenges the district court's denial of his motion to dismiss the test-refusal charge for lack of probable cause. Once a defendant has been found guilty beyond a reasonable doubt, a probable-cause challenge becomes irrelevant because the standard of proof beyond a reasonable doubt "is much higher than probable cause." *State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995); *State v. Olhausen*, 669 N.W.2d 385, 389 (Minn. App. 2003) ("A claim that the [district] court erred

Stat. § 169A.20, subd. 2 (incorporating §§ 169A.51 and .52); *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007) (holding that prerequisites for testing under § 169A.51 are elements of criminal test refusal), *review denied* (Minn. Dec. 19, 2007). Probable cause to arrest for DWI exists if the circumstances at the time of arrest reasonably warrant a prudent, cautious officer to believe the person was driving while under the influence of alcohol. *Reeves v. Comm'r of Pub. Safety*, 751 N.W.2d 117, 120 (Minn. App. 2008).

Lystad argues that the state failed to "establish the required temporal connection between [his] intoxication and any alleged operation of a motor vehicle." *See Dietrich v. Comm'r of Pub. Safety*, 363 N.W.2d 801, 803 (Minn. App. 1985) (concluding that probable cause did not exist where record established that defendant drove and was later found intoxicated but not that he drove while intoxicated). He points out that the deputies "did not observe [him] drive the motor vehicle." But "[a]n officer is not required to see the person actually driving in order to have probable cause to believe that the person was driving a motor vehicle while under the influence." *Johnson v. Comm'r of Pub. Safety*, 394 N.W.2d 614, 615 (Minn. App. 1986). Where the officers do not witness the person driving, probable cause may be shown by circumstantial evidence that the defendant drove the vehicle to its resting place. *State v. Starfield*, 481 N.W.2d 834, 838 (Minn. 1992).

Applying the same circumstantial evidence test used above, at the time of arrest, the officers had the following information: (1) Lystad was found in the driver's seat with the

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in failing to dismiss a complaint for lack of probable cause made after there has been a trial and a conviction is construed as a claim that the evidence was insufficient to convict."), *rev'd on other grounds* 681 N.W.2d 21 (Minn. 2004). Accordingly, we review Lystad's test-refusal conviction only for sufficiency of the evidence.

keys in the ignition and the headlights and taillight on; (2) there were fresh tire tracks in the grass indicating that the vehicle had recently pulled over; (3) Lystad told the officers that he "pulled over"; and (4) Lystad admitted that he was too intoxicated to drive. Under these facts, there is no rational theory of the evidence under which a prudent, cautious officer would not be warranted in believing that Lystad had driven the pickup to the side of the road while impaired.

The evidence was sufficient to convict Lystad of test refusal because it established that, at the time of arrest, the officers had probable cause that Lystad drove the pickup while under the influence of alcohol.[3]

Affirmed.

[3] Lystad does not argue that the evidence is insufficient to establish any other element of test refusal beyond a reasonable doubt.