STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0196

State of Minnesota,
Respondent,

vs.

Kendall Duane Perkins,
Appellant.

Filed December 26, 2017
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-16-8979

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

Susan L. Segal, Minneapolis City Attorney, Paula Kruchowski Barrette, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

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

REILLY, Judge

Appellant challenges his convictions of second-degree driving while impaired (DWI), arguing that the jury lacked sufficient evidence to sustain his convictions and that

the district court abused its discretion by denying his requested jury instruction explaining physical control and inoperable vehicles. We affirm.

D E C I S I O N

A jury found appellant Kendall Duane Perkins guilty of two counts of second-degree DWI and one count of careless driving. Appellant argues that the jury lacked sufficient evidence to convict him of two counts of second-degree DWI. Appellant also argues that the district court abused its discretion by not giving the jury an instruction regarding the circumstances that a jury may consider when determining whether a person was in physical control of a vehicle and whether a vehicle was inoperable.

I.

While considering a claim of insufficient evidence, this court's review is limited to a careful analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person is guilty of DWI if the person drives or is in physical control of a motor vehicle while the person is under the influence of alcohol or has an alcohol concentration of .08. Minn. Stat. § 169A.20, subd. 1(1), (5) (2014).

Appellant argues that there was insufficient evidence to show that he drove or was in physical control of a motor vehicle. Appellant argues that no one saw him driving at the time of the crash and that the vehicle was inoperable after the crash, so he could not be in "physical control." Appellant's arguments fail, because the evidence, when viewed in the light most favorable to the conviction, shows he was driving his vehicle while intoxicated.

In March 2016, appellant's vehicle crashed into a fence in a residential Minneapolis neighborhood. State witness D.M.L. heard the crash and, within moments of the crash, saw appellant in the driver's seat of the crashed vehicle. The car was stuck in the moist ground and appellant was revving the vehicle in an attempt to drive away. The vehicle had lost one of its wheels, but appellant's efforts were moving the vehicle a matter of inches back and forth. D.M.L. did not witness anyone else in the car. D.M.L. went out to the street to help appellant after seeing the vehicle begin to smoke. When D.M.L. got to the car, appellant was outside the driver's side door and was having trouble standing. Appellant told D.M.L. that he had a "dead leg," so she helped him across the street and later retrieved a chair from her apartment so that he could sit down.

Another of the state's witnesses, S.M., was playing with his child in his house when he heard the sound of a car crash. About 30 to 45 seconds later, he viewed the accident scene from his balcony and saw the vehicle stuck in the mud. S.M. saw the driver of the vehicle moving the car backward and forward by revving the engine. S.M. then heard the

engine blow out and saw billowing smoke. The driver was the only person S.M. could see in the car, and S.M. could not identify the driver with any certainty. S.M. then called the police. S.M. saw the driver step out from the car, and the driver seemed unstable on his feet. The driver was then assisted by a nearby neighbor.

Officer Guislain Muvundamina and his partner arrived on the scene first, where they found appellant seated in a chair near the accident. Appellant told Muvundamina that he had been driving from his girlfriend's house, a residence approximately two blocks away, and he did not remember how he arrived at the scene. While speaking with appellant, Muvundamina thought appellant was intoxicated, because appellant had bloodshot, watery eyes; slurred speech; and trouble walking. Muvundamina performed a nystagmus test on appellant and noticed signs of intoxication.

Assuming the jury believed the state's witnesses, appellant told an officer he was driving at the time of the accident, and D.M.L. saw appellant in the driver's seat immediately after the crash. *See Moore*, 438 N.W.2d at 108 (holding that, while reviewing a claim of insufficient evidence, the reviewing court presumes the jury believed the state's witnesses). Given this record and viewing the state's evidence in the light most favorable to the convictions, the evidence shows appellant was driving at the time of the crash. *See Webb*, 440 N.W.2d at 430 (holding that, while reviewing a claim of insufficient evidence, the reviewing court views the evidence in the light most favorable to the jury's verdict).

Appellant also argues that, because his convictions were based on circumstantial evidence, his convictions should be evaluated under a heightened standard. *See Bernhardt*, 684 N.W.2d at 477 (determining that a higher level of scrutiny is warranted when a

conviction is based on circumstantial evidence). We decline to apply this standard here, because appellant was convicted on direct evidence—Officer Muvundamina's testimony that appellant admitted to driving the vehicle. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (noting that the circumstantial-evidence standard does not apply when the state proves each of the disputed elements through witness testimony on personal observations, and the testimony allows a jury to convict without having to draw inferences).

The state's evidence shows appellant was driving at the time of the crash. Appellant did not dispute that he was under the influence of alcohol or that he did not have an alcohol concentration of more than .08 at the time of the crash. Therefore, we affirm the jury's verdict of two counts of DWI because it was based on sufficient evidence.

II.

Appellant argues the district court abused its discretion by declining to give the jury an instruction regarding the physical control of a vehicle and whether a vehicle was inoperable.

A district court has "considerable latitude" in the selection of language for the jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). "[Appellate courts] evaluate [an] erroneous omission of a jury instruction under a harmless error analysis." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). When faced with an erroneous refusal to give a particular jury instruction, the reviewing court must

"examine all relevant factors to determine whether, beyond a reasonable doubt, the error did not have a significant impact on the verdict." *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989). If the error might have prompted the jury to reach a harsher verdict than it might otherwise have reached, the defendant is entitled to a new trial. *Id.* The use of criminal jury instruction guides (CRIMJIGs) is favored, though not mandatory. *State v. Hughes*, 749 N.W.2d 307, 316 (Minn. 2008).

Appellant requested a jury instruction from *State v. Starfield*, which outlines circumstances a jury may consider when determining whether a person is in physical control of a vehicle and whether the vehicle is operable. 481 N.W.2d 834, 839 (Minn. 1992). The proposed instruction allows a jury to consider the following:

> [The] defendant's location in or by the vehicle, the location of the ignition keys, whether the defendant had been a passenger in the vehicle before it came to rest, who owned the vehicle, the extent to which the vehicle was inoperable, and whether the vehicle if inoperable might have been rendered operable so as to be a danger to persons or property.

Id. While *Starfield*'s endorsement of these instructions might encourage their use in physical-control cases, their exclusion in this case was not reversible error.

The judge's decision not to use the *Starfield* instructions was proper, because the standard CRIMJIGs accurately described the law of the case. *See Gatson*, 801 N.W.2d at 147. Here, the district court used instructions modeled after CRIMJIG 29.10, which is the standard instruction for DWI cases. 10A *Minnesota Practice*, CRIMJIG 29.10 (2015). The jury instructions given at trial for the "driving" and "physical control" elements are as follows:

> A person "drives" a motor vehicle when the person exercises physical control over the speed and direction of a motor vehicle while it is in motion. A person is in "physical control" of a motor vehicle when the person is present in the vehicle and is in a position to either direct the movement of the vehicle or keep the vehicle in restraint. It is not necessary for the engine to be running in order for the person to be in physical control of the motor vehicle.

These instructions adequately describe the criteria for determining both whether a person was driving a vehicle and whether a person was in physical control of a vehicle. The question of physical control was not of sole importance, because there was direct evidence in the record to show that appellant was actually driving. The district court was therefore correct not to include more specific instructions on physical control and new instructions on operability, because doing so would have improperly highlighted a specific issue to the detriment of other relevant issues. *See State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992) (recommending that district courts avoid giving instructions that point the jury toward particular evidentiary inferences). Indeed, the operability of a vehicle is only one factor to be considered among the totality of the circumstances and temporary inoperability does not preclude criminal liability on its own. *Starfield*, 841 N.W.2d at 838. If the only issue were physical control, it is possible that the *Starfield* instructions may have been more appropriate, but the evidence indicated that appellant was driving at the time of the crash. Appellant was observed in the driver's seat directly after the crash, and appellant told an arresting officer that he was driving. In light of the circumstances, the district court was correct in deciding not to give the *Starfield* instructions because such instructions might confuse the jury.

A judge has wide discretion to choose jury instructions, as long as they fairly and adequately state the law. *Gatson*, 801 N.W.2d at 147, *Flores*, 418 N.W.2d at 155. Here, the jury instructions fairly and adequately explained the law. The district court did not err by failing to include the instructions from *Starfield*, and the refusal to include them was unlikely to have resulted in a harsher verdict. *See Shoop*, 441 N.W.2d at 481.

Affirmed.