STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1486

State of Minnesota,
Respondent,

vs.

Jason Owen Nelson,
Appellant.

Filed September 17, 2018
Affirmed
Reyes, Judge

Kandiyohi County District Court
File No. 34-CR-17-222

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

Thomas M. Anderson, Willmar City Prosecutor, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Florey, Judge.

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

REYES, Judge

On appeal from his conviction of refusing to submit to a chemical test, appellant argues that insufficient evidence supports the jury's guilty verdict. We affirm.

FACTS

In the early morning of March 10, 2017, a peace officer on routine patrol saw a car idling at a gas-station parking lot, ran its license plate, and discovered that the license plate was revoked, and the registered owner of the vehicle had a revoked driver status. When the driver came back to the car and drove away, the officer followed him and further observed the vehicle's broken taillights and the driver swerving within his lane of travel. The officer initiated a traffic stop, approached the vehicle, and identified the driver as appellant Jason Owen Nelson. The officer noticed that appellant's eyes were bloodshot and watery and smelled the odor of an alcoholic beverage coming from appellant's breath. Appellant initially denied consuming alcohol but later stated that he had had two beers.

The officer asked appellant to step out of the vehicle, checked appellant's eyes for horizontal-gaze nystagmus, and observed signs of impairment. The officer then conducted a preliminary breath test (PBT) on appellant, who registered an alcohol concentration of 0.14. The officer arrested appellant for driving while impaired (DWI).

The officer took appellant to the police station and read the implied-consent advisory to appellant at 4:22 a.m. When appellant indicated that he did not understand the advisory, the officer read it again. The officer then asked whether appellant would like to speak to an attorney before deciding to take a breath test. Appellant said he wanted to contact his own attorney, and the officer gave appellant's phone back. During the phone call, appellant's attorney asked the officer about appellant's PBT result, but the officer declined to provide it as a matter of standard practice. Appellant ended the call after a few minutes, and the officer asked him whether he wanted to contact another attorney, to which

appellant answered affirmatively. The officer provided appellant with several phonebooks, but appellant made no attempt to contact an attorney. The officer advised him a few more times to contact an attorney, but appellant did not do so. The officer ended appellant's phone time at about 4:45 a.m. and asked him if he would take the breath test. According to the officer, appellant stated that he "would not without his attorney present." The officer told appellant that he had to make the decision on his own, but appellant reiterated his prior response. The officer told appellant that he would consider appellant's response as refusing the test and wrote, "[h]e wants his attorney, even though he already spoke to his attorney" on the implied-consent advisory form as the reason for refusal.

Respondent State of Minnesota charged appellant with one count of refusing to submit to chemical testing under Minn. Stat. § 169A.20, subd. 2 (2016), along with several other counts. After the trial, the jury found appellant guilty of refusing to submit to chemical testing, but acquitted him of the other charges. This appeal follows.

D E C I S I O N

Appellant argues that the evidence was insufficient to support the jury's guilty verdict because he was exercising his right to have a reasonable opportunity to obtain legal advice rather than refusing the test, and therefore did not demonstrate an "actual unwillingness" to submit to a chemical test. We are not persuaded.

When considering a claim of insufficient evidence, this court conducts "a painstaking 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 a verdict of guilty. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We

must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Nelson*, 812 N.W.2d 184, 187 (Minn. App. 2012) (quotation omitted). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A police officer may require a person to take a chemical test under Minn. Stat. § 169A.51, subd. 1(b) (2016), if the officer has probable cause to believe that a person is driving while impaired and that person has been lawfully placed under arrest for violation of the DWI law.[1] Under Minn. Stat. § 169A.20, subd. 2, "[i]t is a crime for any person to refuse to submit to a chemical test of the person's . . . breath . . . under section 169A.51." "[R]efusal to submit to chemical testing includes any indication of *actual unwillingness* to participate in the testing process, as determined from the driver's words and actions in light of the totality of the circumstances." *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010) (emphasis added), *review denied* (Minn. Mar. 15, 2011). Whether a driver refused to submit to chemical testing is a question of fact, which we review under the clearly erroneous standard. *Lynch v. Comm'r of Pub. Safety*, 498 N.W.2d 37, 38-39 (Minn. App. 1993).

[1] Appellant stipulated that he had been lawfully arrested for DWI two times in the past.

Appellant told the officer that "he would not [take the test] without his attorney present." Appellant's statement is direct evidence indicating his refusal to take the test and is sufficient evidence supporting the jury's guilty verdict.[2]

Appellant argues that his statement is insufficient to support the jury's guilty verdict because his statement indicated that he was exercising his right to have a reasonable opportunity to obtain legal advice, which includes having an attorney present during the test. Appellant's argument is unavailing. A driver has a state constitutional right, "upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). However, such right is "limited" in DWI cases, and may be vindicated when a police officer provides the driver with "a telephone and a reasonable amount of time to contact and speak with an attorney." *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). In *Sturgeon v. Comm'r. of Pub. Safety*, we held that this right does not include having counsel "present during the test itself, even though counsel was already present at the station before the test was administered and no delay would result," as long as the driver is allowed to use a phone

[2] Appellant contends that the circumstantial-evidence standard should apply because he "did not verbally refuse the test." We disagree. Appellant's response was a verbal refusal and direct evidence. *See Bernhardt*, 684 N.W.2d at 477 n.11 (direct evidence is "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." (quotation omitted)). As stated *infra*, because appellant's statement is sufficient evidence to support the jury's guilty verdict, we decline to apply the circumstantial-evidence standard. *See State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015) (declining to apply the circumstantial-evidence standard of review because direct evidence sufficiently supported the guilty verdict).

and have a private conversation with his attorney. 350 N.W.2d 487, 489 (Minn. App. 1984). Here, appellant spoke with an attorney over the phone, had access to a phone and phonebooks, and was even given the opportunity to contact another attorney. Therefore, appellant's right to have a reasonable opportunity to obtain legal advice was vindicated, and that right does not include having an attorney present during the test.

Appellant further challenges the vindication of his right to a reasonable opportunity to obtain legal advice, arguing that he did not have a reasonable amount of time to contact and speak with an attorney. However, "[a] reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell v. Comm'r. of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008). In considering the reasonableness of the time given to a driver to contact an attorney, we balance the driver's effort to diligently exercise his right to counsel within the given time and the officer's effort in vindicating the right to counsel. *Id.* (quotation omitted). In *Mell*, we held that the three minutes the appellant was given was a reasonable amount of time because he did not make an effort to contact an attorney, walked away from the phone, and nodded when asked whether he was done. *Id.* Appellant here was given approximately 25 minutes, during which he actually spoke with an attorney and was given the opportunity to contact another attorney. On balance, appellant had a reasonable amount of time.

Finally, appellant argues that he did not have a reasonable opportunity to obtain legal advice because the officer refused to provide the attorney with appellant's PBT results. *Hartung v. Comm'r. of Pub. Safety* clearly provides that the right to counsel is not violated when an officer refuses to provide the exact PBT result, as long as the driver's

limited right to counsel is vindicated, as it was here. 634 N.W.2d 735, 738-39 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

Because appellant did not have a right to have his attorney present during the test, and because his right to have a reasonable opportunity to obtain legal advice was fully vindicated, his verbal refusal to submit to the test without his attorney present was sufficient to allow the jurors to find that he refused to submit to chemical testing and reach the guilty verdict.

Affirmed.