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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1397

State of Minnesota,
Respondent,

vs.

Edward Gary Kowalzyk,
Appellant.

Filed August 5, 2019
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Stevens County District Court
File No. 75-CR-17-221

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Aaron K. Jordan, Stevens County Attorney, Elisabeth M. Kirchner, Assistant County Attorney, Morris, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant challenges his two convictions of driving while impaired (DWI), arguing that the evidence is insufficient to support the convictions. Because the evidence is

sufficient to support appellant's convictions, we affirm in part. However, because the district court improperly convicted appellant of two DWI counts for a single behavioral incident, we reverse in part and remand for the district court to vacate one of appellant's DWI convictions and leave the finding of guilt in place.

FACTS

On May 9, 2017, at about 7:30 p.m., dispatch received a citizen report that a green Ford Ranger pickup truck was swerving "all over the road" and had parked at a liquor store parking lot in Stevens County. Deputy Curfman drove to the liquor store but did not see the truck until he checked a nearby alley, where the truck was parked and unoccupied behind a bar. Curfman ran the license plate on the truck, which showed that the registration was "almost a year" expired. Curfman also learned that the truck was registered to appellant Edward Gary Kowalzyk, who had a restricted license that prohibited him from consuming alcohol.

Curfman waited in his marked squad car nearby. Eventually, Curfman saw the truck driving south in the alley. The truck was moving slowly, about 10 to 15 miles per hour, and Curfman observed no swerving. Curfman followed the truck for "approximately a minute," and then activated his emergency lights to initiate a traffic stop at 8:30 p.m. As he approached, Curfman noticed that the truck had "current tabs" on the license plate. The driver identified himself as Kowalzyk, and was the only occupant of the truck. Curfman told Kowalzyk that the truck registration was expired.

As they tried "to figure out the situation with his tabs," Curfman "observed an odor of alcoholic beverage" inside the vehicle and that Kowalzyk's eyes were "glossy."

Curfman asked Kowalzyk if he had been drinking, and Kowalzyk responded that he had "a couple of drinks." Curfman also asked about Kowalzyk's restricted license, and Kowalzyk acknowledged that he was not allowed to consume alcohol. Dispatch informed Curfman that the tab number was registered to a different vehicle, which Kowalzyk said also belonged to him. Kowalzyk said that he might have mixed up the tabs.

Curfman asked Kowalzyk to step out of the truck to perform two field sobriety tests, which he failed, in part, because he did not follow Curfman's instructions. Kowalzyk told Curfman before he took the tests that he had a "bad back" and had stomach surgeries. Curfman placed Kowalzyk under arrest "for suspicion of driving while intoxicated." After the arrest, Curfman observed that Kowalzyk's eyes were bloodshot and watery.

After waiting for about 25 minutes for a tow truck, Curfman drove Kowalzyk to a nearby law-enforcement office to administer a breath test. Kowalzyk provided a breath sample, but it came back as deficient because "there wasn't enough [air]flow to get an accurate result." Kowalzyk told Curfman that he had three drinks and that he had a cold.

Curfman then secured a search warrant to obtain Kowalzyk's blood and drove him to a medical center. The blood draw occurred at 11:04 p.m. on May 9—about two and a half hours after the stop. Curfman sent the blood to the Minnesota Bureau of Criminal Apprehension (BCA) for analysis.

In July 2017, the state charged Kowalzyk with the following counts: fourth-degree DWI (driving a motor vehicle under the influence of alcohol) under Minn. Stat. § 169A.20, subd. 1(1) (2016), fourth-degree DWI (driving a motor vehicle with an alcohol

concentration of 0.08 or more) under Minn. Stat. § 169A.20, subd. 1(5) (2016),[1] violation of limited driver's license conditions under Minn. Stat. § 171.30, subd. 4 (2016), and unlawful use of a certificate/tab under Minn. Stat. § 168.36, subd. 2 (2016).[2]

At trial, three witnesses testified for the state—Curfman, a forensic scientist from the BCA who analyzed Kowalzyk's blood sample, and the medical lab technician who drew Kowalzyk's blood. The defense called no witnesses and Kowalzyk chose not to testify. The state's witnesses testified to the above facts.

The forensic scientist testified that she used "retrograde extrapolation" to calculate Kowalzyk's approximate alcohol concentration earlier in the evening of May 9, 2017. The forensic scientist reported that Kowalzyk's alcohol concentration was 0.10 at the time of the draw. She assumed that drinking ceased at 8:30 p.m.—the time of the traffic stop. Finally, she estimated that Kowalzyk's alcohol concentration was between 0.10 and 0.12 at 10:00 p.m.

The jury returned a verdict of guilty on all four counts and the district court entered judgments of conviction of all four counts. The court did not impose a sentence for count two because it is a "different version[]" of count one, but noted that Kowalzyk will "still have a conviction there." For count one, the district court imposed a stayed sentence of

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[1] This opinion refers to a DWI charge under Minn. Stat. § 169A.20, subd. 1(1), as "driving a motor vehicle under the influence of alcohol" and a DWI charge under Minn. Stat. § 169A.20, subd. 1(5), as "driving a motor vehicle with an alcohol concentration of 0.08 or more."

[2] The state also charged Kowalzyk with having no proof of insurance pursuant to Minn. Stat. § 169.791, subd. 2(a) (2016). The state later dismissed this count of the complaint.

90 days for one year. Kowalzyk appeals, challenging his judgments of conviction for counts one and two.

D E C I S I O N

I. There is sufficient evidence to support Kowalzyk's conviction of fourth-degree driving a motor vehicle under the influence of alcohol.

Kowalzyk contends that the "only evidence" that he drove while under the influence of alcohol was "circumstantial evidence prone to reasonable alternate explanations." Kowalzyk argues that his age and physical ailments provide a "reasonable alternate explanation" for his "poor performance in physical sobriety tests," and that his alcohol concentration "taken over two and a half hours after driving" was "insufficient to demonstrate impairment while driving." The state agrees that "this is a circumstantial case," but argues that the evidence is sufficient for Kowalzyk's conviction.[3]

When appellate courts review a sufficiency-of-the-evidence challenge, we conduct "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. Porte*, 832 N.W.2d 303, 307 (Minn. App. 2013) (quotation omitted). But we apply a heightened two-step test when addressing a sufficiency-of-the-evidence claim based on circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 598 (Minn.

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[3] The state also notes that there is direct evidence that supports the conviction, such as Curfman's testimony that he saw Kowalzyk's "glossy eyes," smelled the odor of alcohol emanating from Kowalzyk, and Kowalzyk's admission that he had a couple of drinks. Because direct evidence of Kowalzyk's guilt is "not alone sufficient to sustain the verdict," we apply the circumstantial evidence standard of review. *See Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

2017). In the first step, we defer to the jury's acceptance of the state's evidence and "disregard evidence that is inconsistent with the jury's verdict," which results in a "subset of facts that constitute the circumstances proved." *Id.* at 600-01 (quotation omitted). We do not "re-weigh th[e] evidence" when reviewing the circumstances proved, and we defer to the jury's credibility findings. *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010); *see also Harris*, 895 N.W.2d at 600 ("[T]he first step . . . requires an appellate court to winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury's verdict . . . .")

In the second step, we determine whether a reasonable inference of guilt can be drawn from the circumstances proved and "whether a reasonable inference inconsistent with guilt can be drawn from the circumstances proved." *Harris*, 895 N.W.2d at 600. At this stage, we give "no deference to the jury's choice between reasonable inferences." *Id.* at 601. "Where the jury has rejected conflicting facts and circumstances, we do not draw competing inferences from those facts on appeal." *Stein*, 776 N.W.2d at 715. If this court determines that "any rational hypothesis except that of guilt" exists, it must reverse the conviction. *Id.* A "reasonable inference" cannot be based on "mere conjecture." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012).

At trial, the state had to prove that Kowalzyk was driving a motor vehicle "under the influence of alcohol." Minn. Stat. § 169A.20, subd. 1(1). Kowalzyk does not dispute that he was driving just before his arrest—a fact that was proven by direct evidence because Curfman saw Kowalzyk driving. Therefore, the only element challenged for sufficiency is whether Kowalzyk was under the influence of alcohol at the time he was driving.

To establish whether a driver was under the influence of alcohol, no specific alcohol concentration is required. *Compare id.*, *with* Minn. Stat. § 169A.20, subd. 1(5) (requiring an alcohol concentration of 0.08 or more for a conviction). Instead, the state must prove that Kowalzyk "had drunk enough alcohol so that [his] ability or capacity to drive was impaired in some way or to some degree." *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992). The state can prove the under-the-influence-of-alcohol element by "showing the amount of liquor consumed (either by witnesses or chemical tests), or by evidence of outward manifestations of intoxication, or by a combination of both methods." *State v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985); *see also State v. Ards*, 816 N.W.2d 679, 686-87 (Minn. App. 2012) (providing that an "alcohol concentration over the legal limit" is a factor to consider under subdivision 1(1)). Outward manifestations may include an odor of alcohol, glassy and bloodshot eyes, poor balance, and slurred speech. *State v. Teske*, 390 N.W.2d 388, 390-91 (Minn. App. 1986).

We first identify the circumstances proved. On May 9, 2017, at about 7:30 p.m., dispatch received a citizen complaint that a green Ford Ranger pickup truck was swerving on the road and that the truck was parked at a liquor store parking lot. Curfman located the truck parked in an alley and determined it was registered to Kowalzyk. Shortly after, Curfman saw the truck driving slowly in the alley and observed no swerving. After following the truck for about a minute, Curfman initiated a traffic stop at 8:30 p.m. After the stop, Kowalzyk did not consume any alcohol. Kowalzyk initially told Curfman that he had "a couple of drinks," and later stated that he had "three." Curfman smelled an odor of alcohol when he first talked to Kowalzyk and observed that Kowalzyk had "glossy,"

"bloodshot," and "watery" eyes. Kowalzyk failed two field sobriety tests and was unable to provide a sufficient breath sample. Curfman obtained a search warrant to draw Kowalzyk's blood, which was executed at 11:04 p.m. The BCA determined that Kowalzyk's alcohol concentration was 0.10 at 11:04 p.m. and, by extrapolation, that his alcohol concentration was between 0.10 and 0.12 at 10:00 p.m.

Based on our review of the circumstances proved, we conclude that the jury reasonably inferred that Kowalzyk was driving under the influence of alcohol because Curfman observed "outward manifestations of intoxication," Kowalzyk admitted that he consumed alcohol, and Kowalzyk's alcohol concentration was between 0.10 and 0.12 approximately one hour and a half after he stopped driving, even though he consumed no alcohol during this period. *See Elmourabit*, 373 N.W.2d at 293; *Ards*, 816 N.W.2d at 686-87.

Kowalzyk argues that the circumstances proved support two rational hypotheses inconsistent with guilt. First, Kowalzyk argues that his age, his "health issues," and his "physical difficulty with the breath test" provide an alternative rational hypothesis for his failure of the field sobriety tests. Kowalzyk claims his bad back and stomach surgeries affected his performance that night, and that a cold made it difficult for him to do the breath test.[4] But the jury heard Curfman repeat Kowalzyk's statements to him that these ailments affected his behavior. We cannot reweigh the evidence and draw an alternative hypothesis

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[4] In his brief to this court, Kowalzyk also states that he used hearing devices during trial. However, at trial, the jury did not hear any evidence about Kowalzyk's hearing or how it affected his ability to follow instructions. Consequently, it is not a circumstance proved at trial.

from evidence that the jury rejected. *See Stein*, 776 N.W.2d at 714-15. Even if we were to conclude that Kowalzyk's physical ailments explain his failure of the field sobriety tests, this theory is inconsistent with the other circumstances proved, including Kowalzyk's statement that he had three drinks, the odor of alcohol on Kowalzyk, and Kowalzyk's "glossy," "bloodshot," and "watery" eyes. Kowalzyk's physical ailments also do not explain why his alcohol concentration was between 0.10 and 0.12 at 10:00 p.m.

Second, Kowalzyk appears to argue that he could have drank heavily just before he was stopped by Curfman, therefore, at the time of driving, he would not have had "significant alcohol in his system at 8:30 p.m." "In DWI cases, there is always some lag time between arrest and testing." *State v. Larson*, 429 N.W.2d 674, 676 (Minn. App. 1988) *review denied* (Minn. Nov. 8, 1988). "Even where the lag time is only a few minutes, the jury necessarily must make some conclusions as to the level of intoxication of the accused at the time of driving or control." *Id.* at 676-77.

Here, the circumstances proved include that Kowalzyk consumed no alcohol after the traffic stop. Kowalzyk's attorney cross-examined the BCA forensic scientist about the extrapolation being "just an estimate," to which she agreed and explained that is why the BCA provides a range value. But the circumstances proved also include that Kowalzyk swerved while driving around 7:30 p.m. and that Kowalzyk failed field sobriety tests shortly after 8:30 p.m. Curfman observed outward manifestations of intoxication on Kowalzyk's person—the odor of alcohol and glossy, bloodshot, and watery eyes. The circumstances proved also include that Kowalzyk admitted to having consumed three drinks before his arrest. Kowalzyk's alternative theory of heavy drinking just before he

was stopped by Curfman is inconsistent with the circumstances proved and, therefore, is not a reasonable hypothesis inconsistent with guilt. *Harris*, 895 N.W.2d at 600.

Because the evidence supported the reasonable inference that Kowalzyk was driving a motor vehicle under the influence of alcohol, and because Kowalzyk does not present a reasonable alternative hypothesis other than guilt, we conclude that the circumstantial evidence is sufficient to support Kowalzyk's conviction of driving a motor vehicle under the influence of alcohol.[5]

II. There was sufficient evidence to support Kowalzyk's conviction of driving a motor vehicle with an alcohol concentration of 0.08 or more.

In Minnesota, it is a crime for any person to drive when "the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more." Minn. Stat. § 169A.20, subd. 1(5). Kowalzyk does not dispute the BCA's determination that his alcohol concentration was over the legal limit at 10:00 p.m., or one-and-a-half hours after

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[5] We note that our decision in this appeal is consistent with other sufficiency-of-the-evidence cases involving Minn. Stat. § 169A.20, subd. 1(1). In a case with "unique facts and circumstances" that had "little precedential value," the supreme court set aside a conviction of driving under the influence of alcohol as a "rare exception." *Elmourabit*, 373 N.W.2d at 293-94. In *Elmourabit*, there was affirmative evidence of a medical issue that affected the defendant's behavior, the defendant's alcohol concentration was never measured, and video evidence showed that the defendant performed field sobriety tests "normally." *Id.* at 290-92. Cases since *Elmourabit* have established that it was a "rare exception." *See Ards*, 816 N.W.2d at 681-87 (upholding conviction for driving under the influence of alcohol when defendant failed a field sobriety test, had an alcohol concentration above the legal limit, and admitted to consuming five alcoholic drinks); *State v. Mohomoud*, 788 N.W.2d 152, 156-59 (Minn. App. 2010) (upholding conviction for driving under the influence of alcohol when a defendant failed field sobriety tests, had an alcohol concentration above the legal limit, and admitted to consuming four alcoholic drinks).

he was driving. Kowalzyk argues, however, that under the plain language of Minn. Stat. § 169A.20, subd. 1(5), the measurement has to be taken within two hours or evidence must establish alcohol concentration at the time of driving. Kowalzyk appears to argue that "retrograde extrapolation" is sufficient to support a conviction only if it establishes alcohol concentration at the actual time of driving (here, 8:30 p.m.). Because the state did not offer this evidence, Kowalzyk asserts that the state's evidence is insufficient to support a conviction on count two.

In *State v. Banken*, we considered whether a breath test taken more than two hours after a car accident, which registered as 0.17, could be used to show that the defendant's alcohol concentration was above 0.10 one hour and fifty-nine minutes after driving. 690 N.W.2d 367, 369 (Minn. App. 2004), *review denied* (Minn. Mar. 29 2005). The question was whether retrograde analysis could establish an alcohol concentration above 0.10 "as measured within two hours of the time of driving." *Id.*

We determined that section 169A.20, subd. 1(5) was ambiguous because "measured" could indicate either the actual "act of measuring" or the "quantity determined" as accurate at "a point in time within the two-hour limit." *Id*. at 370. This court looked to Minn. Stat. § 169A.45, subd. 4, for guidance, because it provides that DWI evidence in section 169A.20, "includ[es] tests obtained more than two hours after the alleged violation." *Id.* at 371. We held that "the implication of section 169A.45 is that any accurate proof that the driver's alcohol concentration was above the legal limit within two hours of driving, including a test taken more than two hours after driving, can be used as evidence for Minn. Stat. § 169A.20, sub. 1(5)." *Id.* at 372.

Kowalzyk acknowledges that *Banken* is directly on point but argues that it was wrongly decided. But this court "is bound by supreme court precedent and the published opinions of the court of appeals." *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). Published opinions of the court of appeals establish precedent unless the supreme court grants review and decides differently. *See State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998) ("This court's decisions do not have precedential effect until the deadline for granting review has expired."), *review denied* (Minn. July 16, 1998). In *Banken*, the supreme court denied review and *Banken* is binding precedent.

Kowalzyk does not otherwise challenge the BCA's determination that his alcohol concentration was over the legal limit one-and-a-half hours after driving. Thus, we conclude that there is sufficient evidence supporting Kowalzyk's conviction under Minn. Stat. § 169A.20, subd. 1(5).

III. Remand is necessary to vacate one of Kowalzyk's convictions.

Kowalzyk does not challenge his two separate DWI convictions on the basis that they arose from a single behavioral incident.[6] "Generally, we consider an argument not raised in the parties' briefs to be forfeited." *State v. Vasko*, 889 N.W.2d 551, 555-56 (Minn. 2017). But "it is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's . . . failure to specify issues or

[6] Kowalzyk also did not raise this issue at his sentencing hearing. But "[a] defendant does not waive relief from multiple sentences or convictions arising from the same behavioral incident by failing to raise the issues at the time of sentencing." *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992).

to cite relevant authorities." *Id.* (quotations omitted). We may consider an issue on appeal, even when it is not raised in or supported by appellant's brief, if the "prejudicial error is obvious on mere inspection." *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015).

Under Minn. Stat. § 609.04, subd. 1 (2016), "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be any of the following: (1) A lesser degree of the same crime; or . . . (4) A crime necessarily proved if the crime charged were proved." We have held that section 609.04 forbids "multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *Clark*, 486 N.W.2d at 170 (quoting *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985)).

We conclude that Kowalzyk's two convictions were for an act committed during a single behavioral incident. In *State v. Clark*, this court stated that driving under the influence of alcohol and driving with an alcohol concentration over the legal limit "do not necessarily rest upon the same proof and are not lesser-included offenses of each other," but instructed that caselaw "[n]onetheless . . . forbids" multiple convictions under the same statute for the acts committed during a single behavioral incident. 486 N.W.2d at 170-71. We held it was plain error for the district court to convict the defendant both of driving while under the influence of alcohol *and* driving with an alcohol concentration over the legal limit because the defendant's dual DWI convictions stemmed from the same series of acts. *Id.* at 171. This court determined that "[o]ne of the convictions must be vacated," and then vacated one conviction. *Id.*

When a defendant is convicted under different sections of the same criminal statute for a single criminal act, "the proper procedure to be followed by the trial court . . . is for the court to adjudicate formally and impose sentence on one count only." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). But the finding of guilt should be left in place so it can later be formally adjudicated if "the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s)." *Id.*

Accordingly, we reverse and remand for the district court to vacate one of Kowalzyk's convictions as required by Minn. Stat. § 609.04, subd. 1, but to leave both findings of guilt in place.

Affirmed in part, reversed in part, and remanded.