STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2063

State of Minnesota,
Respondent,

vs.

Edward Gary Kowalzyk,
Appellant.

Filed October 21, 2019
Affirmed
Larkin, Judge

Traverse County District Court
File No. 78-CR-17-260

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

Matthew P. Franzese, Traverse County Attorney, Wheaton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

LARKIN, Judge

Appellant challenges his convictions of second-degree driving while impaired (DWI), driving after cancellation, and possession of an open bottle in a motor vehicle,

arguing that the district court plainly erred by allowing the state to impeach him with statements he made regarding his breath test in a prior DWI investigation. We affirm.

FACTS

After learning that appellant Edward Gary Kowalzyk's license to drive was cancelled as inimical to public safety, Traverse County Sheriff's Deputy Darrell Thompson stopped the car Kowalzyk was driving. Deputy Thompson suspected that Kowalzyk was intoxicated, arrested him for DWI, and transported him to the county jail. There, Deputy Thompson read Kowalzyk Minnesota's implied-consent advisory and asked him to submit to a breath test. Kowalzyk told Deputy Thompson that he would not submit to the test. The state charged Kowalzyk with second-degree DWI (test refusal), third-degree DWI, driving after cancellation, and possession of an open bottle while in a motor vehicle.[1]

Before trial, Kowalzyk stipulated that his driver's license was cancelled based on a prior DWI offense. The district court noted that Kowalzyk made recorded comments in response to the implied-consent advisory in this case, in which he told Deputy Thompson that he would not take a test because law enforcement manipulated the breath test in his prior DWI and the results of that test were inaccurate. The district court stated that Kowalzyk's recorded comments regarding his prior breath test would not be admissible at trial, "unless it comes up in some other way." The district court indicated that it might allow the state to impeach Kowalzyk with the excluded comments if he "were to testify to some other reason [he] refused."

[1] The state dismissed the third-degree DWI charge before trial.

The case was tried to a jury. At trial, Kowalzyk testified about his physical condition and the pain that he experienced on the day of his arrest. Kowalzyk testified that when he got out of his car during the traffic stop, he was "hurting." He explained that he knew he could not do the field sobriety tests because "with [his] skull fracture [his] balance isn't very good" and he could not "hop on one leg" because his "hip is shot." Kowalzyk further testified that he did not know what test Deputy Thompson wanted, but he knew that he could not "blow into things without hurting" and that he was "hurting so bad [that] all [he] wanted to do was lay down."

In response to that testimony, the state moved to impeach Kowalzyk with his previously excluded comments, arguing that his testimony had opened the door to impeachment. The district court ruled that the state could ask Kowalzyk about his reasons for refusing the test. The state asked Kowalzyk whether he told Deputy Thompson that he did not want to take the test because the last breath test he took "was a set-up job." Kowalzyk did not object to that line of questioning. The district court later explained that it had allowed the state to impeach Kowalzyk with the excluded comments because the court "felt the door had been opened" to that line of questioning.

The jury found Kowalzyk guilty, and the district court entered judgments of conviction. Kowalzyk appeals.

D E C I S I O N

"The credibility of a witness may be attacked by any party, including the party calling the witness." Minn. R. Evid. 607. A party may impeach a witness by cross-examination with a prior inconsistent statement. Minn. R. Evid. 613(a). "It is well

established that proper impeachment evidence includes prior inconsistent statements." *State v. Knaffla*, 243 N.W.2d 737, 740 (Minn. 1976).

Kowalzyk did not object to the admission of his comments for impeachment, but he contends that the admission was improper. This court reviews such an alleged, unobjected-to error under the plain-error standard. Minn. R. Crim. P. 31.02. The plain-error standard requires the challenging party to show: (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Error is plain when it "is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). If the first three parts of the plain-error test are satisfied, this court determines whether it is necessary to address the error to ensure the fairness and integrity of the judicial proceedings. *State v. Kuhlmann*, 806 N.W.2d 844, 852-53 (Minn. 2011). If any part of the plain-error test is not satisfied, this court need not consider the others. *Webster*, 894 N.W.2d at 786.

Kowalzyk argues that the admission of his comments for impeachment was erroneous for two reasons: he did not open the door with his trial testimony and the comments were irrelevant and overly prejudicial. We address each argument in turn.

Opening the Door

Opening the door occurs when one party, by introducing certain material, creates a right in the opposing party to respond with otherwise inadmissible material. *State v. Guzman*, 892 N.W.2d 801, 814 (Minn. 2017). "The opening-the-door doctrine is essentially one of fairness and common sense, based on the proposition that one party

should not have an unfair advantage and that the factfinder should not be presented with a misleading or distorted representation of reality." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (quotation omitted).

In explaining its allowance of the challenged comments, the district court stated, "I did feel it was fair" and "I felt the door had been opened." The district court explained that "[Kowalzyk] was saying to [the] jury that he was in pain. And he just couldn't do anything because he was in pain and that's why he didn't take [the test]. And he had said a different thing at the time" of the implied-consent advisory.

Kowalzyk asserts that the district court erred, arguing:

> The prosecutor claimed [he] opened the door when he testified that he could not blow without hurting. This comment did not open the door to impeachment with his statements that the prior breath test was a "set-up." The gist of [his] excluded statements was that he would not take the test because he did not agree with how his prior breath test was conducted. When the court originally excluded these statements, the court said impeachment with the statements might be possible if [he] testified he refused because of a different reason. [He] did not provide a different reason for refusing the breath test in his testimony. [He] explained his medical problems and the pain he suffered because of them. He was not testifying that he refused the breath test because of pain. He testified that the pain was so bad that he did not understand what was going on and he did not understand what test the deputy offered.

Kowalzyk concludes that because he "did not offer an alternative explanation for his refusal, he did not open the door" and that, therefore, "[i]t was error for the court to permit impeachment with evidence of his prior breath test."

We are not persuaded that Kowalzyk did not offer an alternative explanation for his test refusal. He most certainly did. On direct examination, Kowalzyk testified about his

physical condition on the day of his arrest, the pain he was feeling that day, and the pain he was feeling during the advisory. Kowalzyk told the jury that he "didn't know what test [the officer] wanted," that he "can't blow into things without hurting," and that he was "just hoping [that he] could lay down because [it] was so painful."

The implication of Kowalzyk's testimony is obvious: he refused the test because he did not understand what was going on because he was in pain. Indeed, Kowalzyk's appellate brief refers to his "defense that he did not understand what was going on because he was in pain." Because Kowalzyk testified about his reason for refusing the test, the district court correctly concluded that he opened the door to impeachment evidence regarding his earlier inconsistent comments regarding his reason for refusal. Not allowing the state to impeach Kowalzyk under those circumstances would have given Kowalzyk an unfair advantage and presented the jury with a distorted representation of reality. Thus, the district court's allowance of the impeachment was not error, much less plain error.

Relevance and Prejudice

Evidence is not admissible unless it is relevant, that is, it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401, 402. A district court may exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. Evidence is unfairly prejudicial

when it persuades by illegitimate means. *State v. Kendell*, 723 N.W.2d 597, 609 (Minn. 2006).

Kowalzyk argues that the district court plainly erred because the challenged comments were irrelevant and overly prejudicial. As to relevance, Kowalzyk argues that:

> It was error to allow the introduction of the excluded statements because they were not relevant to the determination of any issue at trial. The state's purported purpose in impeaching [him] with the statements was to show he provided a different reason for refusing the test. The crime of refusal, however, does not require the state to prove the defendant's reason for refusing. It is enough that the defendant refused a chemical test after being read the implied consent advisory. Because the statements had no bearing on an element of the crime, they were not relevant and should not have been admitted.

(Citations omitted.)

Published caselaw has not squarely addressed whether a reasonable-refusal defense is available in a criminal-refusal case. *See State v. Johnson*, 672 N.W.2d 235, 242-43 (Minn. App. 2003) (holding narrowly that an instruction on reasonable refusal was not an abuse of discretion), *review denied* (Minn. Mar. 16, 2004); *State v. Olmscheid*, 492 N.W.2d 263, 266 n.2 (Minn. App. 1992) (declining to decide whether or how reasonable refusal applies in criminal test-refusal cases). Unlike the implied-consent statute, the criminal test-refusal statute under which Kowalzyk was convicted does not set forth a reasonable-refusal defense. *Compare* Minn. Stat. § 169A.53, subd. 3(c) (Supp. 2017) (implied-consent statute), *with* Minn. Stat. § 169A.20, subd. 2(1) (Supp. 2017) (criminal test-refusal statute).

Because the availability of a reasonable-refusal defense in a criminal-refusal case is undecided, the relevance of Kowalzyk's reasons for refusing is debatable.[2] Thus, we cannot say that the district court clearly or obviously erred by admitting Kowalzyk's prior comments for impeachment purposes. But even if the comments were irrelevant, Kowalzyk's testimony opened the door to the impeachment.

Lastly, Kowalzyk's complaint that the comments were overly prejudicial is not compelling given his failure to object when the district court allowed the comments to be used for impeachment. And we discern no unfair prejudice here. The state's cross-examination regarding Kowalzyk's earlier inconsistent comments about the reasons for his refusal did not persuade by illegitimate means. *See Knaffla*, 243 N.W.2d at 740 (stating that proper impeachment evidence includes prior inconsistent statements). Thus, we are not persuaded that the district court clearly or obviously erred by failing to conclude—sua sponte—that the challenged statements were overly prejudicial.

Once again, Kowalzyk has failed to establish error that is plain. Because Kowalzyk has failed to satisfy the requirements of the plain-error test, he is not entitled to relief. *See Webster*, 894 N.W.2d at 786 (stating that if any part of the plain-error test is not met, appellate courts need not consider the others). We therefore affirm.

Affirmed.

[2] Kowalzyk's relevancy argument begs the question: Why was his direct testimony regarding his physical condition and pain during the implied-consent advisory—which clearly presented a reason for refusing—relevant?