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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1684**

State of Minnesota,
Respondent,

vs.

Scott Richard Lind,
Appellant.

**Filed July 27, 2020
Affirmed
Larkin, Judge**

Kandiyohi County District Court
File No. 34-CR-19-319

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

Shane D. Baker, Kandiyohi County Attorney, Aaron P. Welch, Assistant County Attorney,
Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and
Schellhas, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of driving while impaired (DWI), arguing that the evidence was insufficient to sustain the conviction because the state's expert made inaccurate assumptions and used general alcohol-elimination rates when using retrograde extrapolation to estimate appellant's alcohol concentration. We affirm.

FACTS

On April 2, 2019, around 7:10 a.m., a state trooper stopped a vehicle because the registered owner's license was revoked and he observed the vehicle travel on the fog line. The trooper identified appellant Scott Richard Lind as the driver. The trooper smelled alcohol and saw that Lind had bloodshot, watery eyes. When asked, Lind said that he last drank alcohol at 1:00 a.m.

Following field sobriety tests, the trooper arrested Lind for DWI. Lind agreed to take a breath test, but the breath-test machine was unable to register an accurate reading. The trooper obtained a search warrant, transported Lind to a hospital, and acquired a blood sample from him at 11:09 a.m.

The state charged Lind with three criminal counts: (1) gross-misdemeanor DWI—driving under the influence of alcohol, (2) gross-misdemeanor DWI—alcohol concentration of 0.08 or more, and (3) misdemeanor driving after revocation. The case was tried to a jury.

The state called a forensic scientist from the Bureau of Criminal Apprehension to testify as an expert witness at trial. The forensic scientist testified that she analyzed Lind's

blood sample and determined that it had an ethyl-alcohol concentration of “0.065, plus or minus .004 grams per 100 milliliters of blood with a 99.73 percent level of confidence.” She explained that a method known as retrograde extrapolation allows for the calculation of alcohol concentration at a time prior to a blood test. The person making the calculation uses “a range of elimination rates or the rate at which the alcohol gets taken out of the body that would encompass a majority of the population.” These elimination rates “are based on peer-reviewed literature” and account for numerous variables, such as gender, food in the stomach, the type and quantity of alcohol consumed, the rate of drinking, and the person’s experience with drinking.

The forensic scientist testified that she relied on information in police reports indicating that Lind had stopped drinking at 1:00 a.m. She used Lind’s ethyl-alcohol value and the elimination rates to “extrapolate[] that alcohol concentration back in time.” She testified that Lind’s “concentration of ethyl alcohol would have been approximately .10 to .16 grams per 100 milliliters of blood at 7:10 a.m. on April 2, 2019.”

Lind testified that he consumed alcohol on April 2 at “one o’clock,” before he went to bed and that he also consumed approximately one-and-one-half drinks between 5:00 a.m. and 6:30 a.m., shortly before driving. He testified that he lied to the trooper when he claimed that he last consumed alcohol at 1:00 a.m.

The jury found Lind guilty on counts two and three and not guilty on count one, DWI—driving under the influence of alcohol. This appeal followed.

DECISION

Lind contends that the evidence was insufficient to sustain his conviction of DWI—alcohol concentration of 0.08 or more. In considering Lind’s challenge to the sufficiency of the evidence, we carefully analyze the record to determine whether the evidence, viewed in a light most favorable to the conviction, was sufficient to permit the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We “assume that the jury believed the state’s witnesses and disbelieved contrary evidence.” *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We defer to the jury’s credibility determinations and will not reweigh the evidence on appeal. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009); *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). We will not disturb a guilty verdict if the jury, acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could reasonably have concluded that the state proved the defendant’s guilt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

When the state relies on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review. *See State v. Harris*, 895 N.W.2d 592, 601-03 (Minn. 2017) (applying circumstantial-evidence standard to individual element of criminal offense that was proved by circumstantial evidence). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* at 599 (quotations omitted). In contrast, direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotations omitted).

Lind asserts that the heightened circumstantial-evidence standard of review is applicable. We question the applicability of that standard here, but we apply it for two reasons. First, the state does not dispute its application. Second, the evidence is sufficient to sustain Lind’s conviction under that heightened standard.

Under the circumstantial-evidence standard, we use a two-step process. *Id.* at 601. First, we determine the circumstances proved and “disregard evidence that is inconsistent with the jury’s verdict.” *Id.* Next, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We do not defer to the jury’s choice between reasonable inferences. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). But we will reverse a conviction based on circumstantial evidence only if there is a reasonable inference other than guilt. *Loving*, 891 N.W.2d at 643.

Lind was convicted of violating Minn. Stat. § 169A.20, subd. 1(5) (2018), which criminalizes driving a motor vehicle with an alcohol concentration of 0.08 or more at the time of driving, “or as measured within two hours of the time” of driving. In *State v. Banken*, this court interpreted the “as measured within two hours” language as not requiring a test to be obtained within two hours of driving. 690 N.W.2d 367, 368-73 (Minn. App. 2004), *review denied* (Minn. Mar. 29, 2005). We held that a test acquired after those two hours could be used to prove “that a driver’s alcohol concentration exceeded the legal limit within two hours of driving.” *Id.* at 368.

Lind argues that the evidence was insufficient to convict him of DWI—alcohol concentration of 0.08 or more because the forensic scientist’s retrograde extrapolation

relied on inaccurate assumptions and used alcohol-elimination rates that apply to a majority of the population, but not necessarily to Lind.

The relevant circumstances proved are as follows: Lind stopped drinking at 1:00 a.m. on April 2, he drove a motor vehicle later that morning, the trooper stopped him at 7:10 a.m., his blood alcohol concentration was 0.065 at 11:09 a.m., and based on retrograde extrapolation, his alcohol concentration was estimated to be between 0.10 and 0.16 at 7:10 a.m. These circumstances are consistent with Lind's guilt.

We next consider whether the circumstances proved are inconsistent with any rational hypothesis other than guilt. *See Loving*, 891 N.W.2d at 643. "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). A defendant may not rely on mere conjecture or speculation, but must instead point to specific evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010); *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008).

Essentially, Lind's theory of innocence is that his alcohol concentration would have been below 0.08 had he been tested within two hours of driving. As support, he primarily challenges the credibility of the forensic scientist's expert testimony, which estimated Lind's alcohol concentration to be above the legal limit at the time of the stop. Lind argues that the forensic scientist's retrograde extrapolation was not credible because she relied on a police report indicating that he stopped drinking at 1:00 a.m. He relies on his testimony that he had additional drinks between 5:00 a.m. and 6:30 a.m., shortly before driving, and

asserts that his alcohol concentration was rising and that, therefore, the forensic scientist's calculations are inaccurate.

Evidence at trial supported the forensic scientist's assumption that Lind stopped drinking at 1:00 a.m. A squad-car video captured Lind's arrest and was admitted at trial. That video depicts Lee stating that his last drink was at 1:00 a.m. And during his testimony, Lee admitted telling the trooper that his last drink was at 1:00 a.m. Lind asks this court to accept as true his testimony that he had additional drinks after 1:00 a.m., but we must "disregard evidence that is inconsistent with the jury's verdict." *Harris*, 895 N.W.2d at 601. Moreover, the jury apparently rejected Lind's testimony in reaching its verdict, which is not surprising given his claim that he lied to the officer regarding the time of his last drink. We defer to the jury's apparent determination that Lind's testimony was not credible and that the forensic scientist's reliance on the police report did not undermine her expert opinion regarding Lind's alcohol concentration. *See Franks*, 765 N.W.2d at 73; *Watkins*, 650 N.W.2d at 741.

Lind also argues that the alcohol-elimination rates used by the forensic scientist are insufficient to prove guilt beyond a reasonable doubt because the rates apply to a "majority of the population," which might not necessarily include him. The forensic scientist acknowledged that some individuals do not fall within the range of alcohol-elimination rates that she used, but she testified that the range covered the "general population," was "based on peer-reviewed literature," and was "known to be a general consensus of the values that are accepted while performing retrograde extrapolation in the scientific community." She testified that she provided an "accurate estimate" of Lind's alcohol

concentration. Once again, the jury's verdict indicates that it found the forensic scientist's estimate credible, and we defer to that determination. *See Franks*, 765 N.W.2d at 73; *Watkins*, 650 N.W.2d at 741.

Lind argues that retrograde extrapolation "is not a scientific result" and that the forensic scientist's belief that her calculation was accurate was insufficient because she could not make a "guarantee." We have previously held that expert testimony on the use of retrograde extrapolation to determine alcohol concentration is admissible. *State v. Jensen*, 482 N.W.2d 238, 238-39 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). Lind suggests that the forensic scientist needed to guarantee her calculation, but a reasonable basis for the admission of expert testimony "exists where an expert's opinion is probably true; mathematical or absolute certainty is not required." *Id.* at 239. Likewise, proof beyond a reasonable doubt does not require mathematical certainty. *See State v. Smith*, 674 N.W.2d 398, 402-03 (Minn. 2004) (concluding that reasonable-doubt instruction that included statement that reasonable doubt does not require proof "to a mathematical certainty" was not plainly erroneous).

In sum, Lind's argument that we should invalidate the jury's verdict based on his challenges to the forensic scientist's credibility is unavailing. Lind's attorney challenged the forensic scientist's credibility at trial, questioning her regarding the assumptions underlying her estimation of Lind's alcohol concentration and about how errors in those assumptions could have caused the estimate to "be off." During closing argument, Lind's attorney argued that the forensic scientist's estimate was not reliable because Lind may still have been absorbing alcohol "given his testimony" that he had additional drinks before

driving and because Lind may not have fit within the range of alcohol-elimination rates used by the forensic scientist. The jury's verdict indicates it rejected Lind's challenges to the forensic scientist's credibility. We must defer to the jury's credibility determination, as well as its determination that the forensic scientist's testimony was sufficient to establish Lind's alcohol concentration. *See Franks*, 765 N.W.2d at 73; *Watkins*, 650 N.W.2d at 741.

Lastly, Lind argues that the jury's verdict of not guilty on the driving-under-the-influence charge "further bolsters the conclusion that his alcohol concentration was in all likelihood much lower than [the forensic scientist] estimated." We are not persuaded because driving under the influence is based on driving conduct, and not alcohol concentration levels. A person is "under the influence" when a person does not "possess that clearness of intellect and control of himself that he otherwise would have." *State v. Teske*, 390 N.W.2d 388, 390 (Minn. App. 1986) (quotation omitted). To prove a driving-under-the-influence charge, the state must show that the driver drank enough alcohol so that "the driver's 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). In contrast, a charge of DWI—alcohol concentration of 0.08 or more does not require proof that a driver was impaired. *See Minn. Stat. § 169A.20, subd. 1(5)*.

Because driving with an alcohol concentration above the legal limit and driving under the influence "do not necessarily rest upon the same proof," *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992), it is possible for a jury to return a guilty verdict for driving with an alcohol concentration above the legal limit but a not-guilty verdict for driving under the influence. Thus, the jury could have reasonably determined that there

was insufficient evidence that Lind's ability to drive was impaired even though there was sufficient evidence that his alcohol concentration was 0.08 or more within two hours of driving. This is particularly true given the limited evidence regarding Lind's driving conduct.

Because the jury, acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could reasonably have concluded that the state proved Lind's guilt, we do not disturb the verdict.

Affirmed.