STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0221

State of Minnesota,
Respondent,

vs.

Timothy J. Otis,
Appellant.

Filed December 28, 2020
Affirmed
Worke, Judge

Meeker County District Court
File No. 47-CR-18-1240

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

Brandi L. Schiefelbein, Meeker County Attorney, John P. Fitzgerald, Assistant County Attorney, Litchfield, Minnesota (for respondent)

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

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

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

WORKE, Judge

Appellant argues that the district court erred in its chemical-test-refusal jury instruction. Appellant also makes several pro se arguments. We affirm.

FACTS

Appellant Timothy J. Otis went to trial on three charges: fleeing a peace officer in a motor vehicle, refusing to submit to a chemical test, and possessing marijuana in a motor vehicle.

A deputy testified that on December 25, 2018, he responded to a driver complaint of a red pickup truck traveling at high speeds. The deputy saw the vehicle traveling about 90 miles per hour and activated his emergency lights. The truck did not stop. After a chase, the truck got stuck in a ravine. The deputy broke the window on the driver's side door after the driver refused to get out of his car. The driver eventually exited the passenger's side of the vehicle, and the deputy apprehended him. The deputy identified Otis as the driver through documents found in Otis's wallet. The deputy testified that Otis's "behavior was incredibly erratic. His skin was flushed. He's disoriented in terms of knowing who I was." The deputy did not conduct field sobriety tests out of medical concerns with Otis and because Otis was a flight risk.

Otis lost consciousness in the back of the squad car, and the deputy revived him with a sternum rub. Officers searched the truck and found a jar containing 12 grams of marijuana. When paramedics arrived, they determined that Otis should be brought to the hospital. The deputy brought Otis to the hospital.

The deputy then obtained a search warrant for "A Blood or Urine sample." The deputy served Otis with the search warrant and explained that Otis could refuse, but refusing would constitute a separate crime. He explained this at least ten times. Otis first admitted to being on Percocet and stated that he consented to a breathalyzer or urine test.

When the deputy returned with a urine sample cup, Otis refused to take the test. The deputy tried to obtain a sample of blood or urine for 15 minutes before he labeled it as a test refusal.

The state charged Otis with three counts, including one count for refusing to submit to a chemical test. The case proceeded to a jury trial. During trial, the district court conferred with the parties to finalize the jury instructions. When discussing the instruction for refusal to submit to a chemical test, Otis's attorney stated, "We are gonna want, ah, the language of 'and' instead of 'or' between blood or urine. I think the refusal is gonna have to be both or in other words 'and or.'" The state agreed with the change and stated, "I think that if it was just left at 'and' it would be confusing that he would have to provide two, so the 'and or' I think would be sufficient." Otis's attorney responded, "Yeah, I agree with that. So, it would read 'a person's blood and or urine'?" Otis's co-counsel added, "As long as it's clear in the definition section . . . that he'd have to refuse both in order to violate. As long as that part's clear to the jury." The district court concluded the discussion by reading the full element and asking if it was acceptable. Otis's attorney responded, "Yes – yes. Blood and or urine." Otis's attorney then confirmed that the "and or" language is used in the definition of the crime along with the third and fourth elements.

The jury instructions defined "refusal to submit to a chemical test" as "whoever refuses to submit to a chemical test of the person's blood and or urine as required by a search warrant under the implied consent law is guilty of a crime." The "and or" language was used again in the elements of the crime: "Third, the defendant was informed that refusal to submit to blood and or urine test is a crime. Fourth, the defendant was requested

by a peace officer to submit to a chemical test of the defendant's blood and or urine as required by a search warrant."

The jury found Otis guilty as charged. The district court sentenced Otis to 12 months and one day for fleeing a peace officer and 365 days in jail for test refusal. Otis received credit for time served, and the remainder of his sentences were stayed for three years. This appeal followed.

D E C I S I O N

Jury instruction

Otis argues that the district court erred by using the "and or" language in the jury instruction for the charge of refusal to submit to a chemical test when the statute requires a defendant to refuse both tests. We must first determine the appropriate standard of review.

"Under the invited error doctrine, a party cannot assert on appeal an error that he invited or that could have been prevented at the district court." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). Otis requested the district court to change the jury instruction from "or" to "and or." While the invited error doctrine appears invoked, it was not argued by the state. But a defendant also generally forfeits the right to challenge jury instructions on appeal by failing to object at trial. *State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015). We may analyze unobjected-to jury instructions under the plain-error standard. Minn. R. Crim. P. 31.02; *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015).

Otis believes that the plain-error analysis does not apply because he brought to the district court's attention "the necessity of an instruction that aligned with the statute." Otis

is referring to his co-counsel's statement that, "As long as it's clear in the definition section . . . that he'd have to refuse both in order to violate. As long as that part's clear to the jury." But Otis never objected to the "and or" language—in fact, his counsel first suggested and then approved the language. We therefore apply the plain-error analysis because Otis did not object to the jury instruction at trial.

In a plain-error analysis, appellate courts review the jury instruction to determine whether (1) there was error, (2) the error was plain, and (3) the error affected the appellant's substantial rights. *State v. Kelley*, 855 N.W.2d 269, 273-74 (Minn. 2014). If an appellant meets these requirements, appellate courts "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 274 (quotations omitted). An appellant fails to demonstrate plain error when any of the requirements are not met. *See State v. Webster*, 894 N.W.2d 782, 786 (Minn. 2017).

Here, we analyze whether Otis's substantial rights were violated. "With respect to the substantial-rights requirement, [the appellant] bears the burden of establishing that there is a reasonable likelihood that the absence of the [alleged] error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). Appellate courts look at all relevant factors, including: "(1) whether [the appellant] contested the omitted elements at trial and submitted evidence to support a contrary finding; (2) whether the [s]tate presented overwhelming evidence to prove those elements; and (3) whether the jury's verdict nonetheless encompassed a finding on those elements notwithstanding their omission from the jury instructions." *State v. Peltier*, 874 N.W.2d 792, 800 (Minn. 2016).

Otis has not met his burden. The deputy obtained a search warrant for Otis's blood or urine. The deputy explained that Otis could refuse but it would constitute a separate crime. After Otis changed his mind about the urine test, the deputy testified that he tried for 15 minutes to get either a blood or urine sample from Otis. Otis did not provide any evidence contrary to the deputy's testimony. The record shows that Otis refused both tests. Otis's substantial rights were not violated; thus, he fails to show plain error.

Pro se arguments

Otis raises three pro se arguments. He first argues that the district court erred by not admitting into evidence his two clean urinalysis (UA) results that he took at the jail later on the night of the incident. The jury convicted Otis for fleeing a peace officer, refusing to submit to a chemical test, and possessing marijuana. None of these offenses relate to a UA taken hours after the offense and after Otis refused to comply with the search warrant.

Otis also argues, "I offered a urine sample at the hospital/I stated I was afraid of needles. The policeman . . . said no to me giving a [UA] at [the] hospital. So at county jail 20 min[utes] later I offered a [UA] they took a UA." This court does not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We do not consider Otis's argument because he did not make it to the district court.

Otis next argues that he tried to mail letters to his attorney and the district court, but Meeker County failed to send them until after the trial. This argument is unrelated to Otis's convictions and not within the scope of our review.

Finally, Otis argues that a detective engaged in illegal questioning for several reasons, but foremost because she made him believe that she worked for parole and probation. Otis does not allege a violation or present any legal argument. This court does not consider pro se claims that are unsupported by legal argument or citations to legal authority. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). His pro se arguments are without merit.

Affirmed.