STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0855

State of Minnesota,
Respondent,

vs.

Olusegun Adebayo Osunlana,
Appellant.

Filed December 27, 2021
Affirmed
Rodenberg, Judge[*]

Ramsey County District Court
File No. 62SU-CR-19-2964

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

Martin H.R. Norder, Kelly & Lemmons, P.A., St. Paul, Minnesota (for respondent)

Karen Venice Bryan, KB Law PLLC, Minnetonka, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Gaïtas , Judge; and Rodenberg, Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Appellant Olusegun Adebayo Osunlana was arrested and charged with second-degree refusal to submit to a chemical test and third-degree driving while impaired. A jury found appellant guilty of both offenses. Appellant appeals, arguing that the evidence is insufficient to prove either offense beyond reasonable doubt. We affirm.

FACTS

Appellant was driving to a friend's house when a police officer saw him drift over the centerline several times. The officer stopped appellant at about 1:00 a.m., according to the timestamp on the officer's body-worn camera. Appellant told the officer that he had not been drinking alcohol that evening. But the officer smelled alcohol wafting from the car and observed that appellant had red, bloodshot, and watery eyes. He asked appellant to perform three field sobriety tests: the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test.

During the horizontal gaze nystagmus test, the officer observed "a lack of smooth pursuit in both of [appellant's] eyes, as well as an onset of nystagmus prior to 45 degrees." When appellant performed the walk-and-turn test, he completed zero heel-to-toe steps, turned improperly, and took ten steps instead of the nine as directed. On his first attempt of the one-leg stand test, appellant could only lift his foot off the ground for three seconds despite being instructed to do so for 30 seconds. On his next attempt, appellant lifted his foot and immediately lost his balance. On his final attempt, appellant kept his foot in the air for 12 seconds but failed to count out loud as he had been instructed.

The officer administered a preliminary breath test (PBT). The screen displaying the results of the PBT is partially obstructed in the body-camera recording, but the officer told appellant that his alcohol concentration was 0.14. Appellant asked the officer to see the results as displayed on the machine. Consistent with his preferred practice, the officer did not let appellant see the machine. At trial, when the body-camera recording was paused at the moment the machine was displaying the results, the officer said that he could read the tops of the numbers, and they were either 0.11 or 0.14.

The officer arrested appellant and transported him to the police station. He read appellant the implied-consent advisory. The officer informed appellant that he needed to supply a breath sample for alcohol-concentration testing, that refusing to take the test was a crime, and that unreasonably delaying or refusing to decide would amount to refusing to take the test. Appellant testified at trial that he understood that refusing to decide whether to take the test would equate to refusing the test. He did not provide a sample. Appellant testified that he did not take the test because he did not trust the officer after the officer declined to show him the results of the PBT. He asked the officer if someone else could administer the test. The officer did not grant appellant's request. Appellant then refused to answer when the officer asked appellant if he was ready to take the test.

At trial, appellant disputed the officer's testimony and the body-camera recording. He said that on the night of his arrest, he got off work, went home, and had one bottle of beer around 9:00 p.m. About two-and-a-half hours later a friend called him and asked for assistance with a computer problem. Appellant therefore disputed that the stop occurred at 1:00 a.m., claiming it happened over an hour earlier. Appellant asserted that the officer was

lying about the results of the PBT. After watching the body-camera recording, he declared that he did not stumble during the one-leg stand test and that he did "everything [the officer] asked me to do." The jury found appellant guilty of both offenses.

This appeal followed.

DECISION

Appellant challenges his convictions for second-degree refusal to submit to a chemical test and third-degree driving while impaired, contending that the evidence is insufficient to prove either charge beyond reasonable doubt.[1]

Direct or circumstantial evidence may be used to prove an offense beyond reasonable doubt. "Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation and alteration omitted). Circumstantial evidence is "evidence from which the fact[-]finder can infer whether the facts in dispute existed or did not exist." *Id.* (quotation omitted). We use different standards

[1] Appellant also argues that the district court failed to "afford [him] the presumption of innocence and the benefit of all reasonable inferences." But he does not argue that the district court's jury instructions were incomplete, inappropriate, insufficient, or unclear. The district court instructed the jury that, "The defendant is presumed innocent of the charges made. This presumption remains with the defendant unless and until the defendant has been proved guilty beyond a reasonable doubt." Appellant testified at trial and, by the verdicts it returned, the jury rejected that testimony beyond reasonable doubt. The essence of appellant's argument on this issue is that the jury ought to have weighed the evidence differently than it did. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief will not be considered on appeal unless prejudicial error is obvious on mere inspection." *Louden v. Louden*, 22 N.W.2d 164, 166 (Minn. 1946). We therefore do not further consider appellant's argument, which amounts to mere disagreement with the trial's outcome.

of review for the different types of evidence to determine whether "the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation and citations omitted).

When a conviction is based on direct evidence, we comprehensively review the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). We assume the jury believed the state's witnesses and disbelieved evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

We apply the circumstantial-evidence standard of review when proof of an element depends on circumstantial evidence. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). This requires a two-step analysis. First, we identify the circumstances proved by the state. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). In doing so, we construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the state's witnesses and disbelieved the defense's witnesses. *Id.* at 599. Second, we determine whether the circumstances proved are consistent only with guilt and inconsistent with any rational hypothesis except that of guilt. *Id.*

Here, we conclude that the direct evidence produced at trial sufficiently supports the jury's conclusions that appellant is guilty of both offenses. Alternatively, and even if we apply the circumstantial-evidence standard, the evidence is sufficient.

I. Sufficient evidence supports appellant's conviction for second-degree driving while impaired for refusing to submit to a chemical test.

Appellant argues that the state presented insufficient evidence to support his conviction for refusing to submit to a chemical test. To convict someone for second-degree test refusal, the state must prove five elements. *See* Minn. Stat. §§ 169A.20, subd. 2 (2018) (criminalizing refusing to submit to a test), .51, subd 1(a), 1(b)(2), (4) (2018) (dictating procedural requirements for administering chemical tests). Appellant's argument that the evidence is insufficient relates only to the element that requires proof that appellant refused to submit to the test. A person does not need to expressly refuse a test to be convicted; instead, "any indication of actual unwillingness to participate in the testing process, as determined from the driver's words and actions" constitutes refusing the test. *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011).

Appellant argues that the only evidence presented by the state was circumstantial evidence. We disagree. The record contains direct evidence that appellant refused to submit to the chemical test. Appellant testified that he knew that refusing to decide whether to take the test would amount to refusing to take the test. The officer asked him six times whether he would take the test. Appellant remained silent, asking only that a different operator administer the test. He continued his refusal after being told that his request for a different operator was denied. No inference is needed to determine that appellant refused the test. Based on this evidence, the jury reasonably concluded beyond a reasonable doubt that appellant refused the test.

Even if we consider the evidence of refusal to be circumstantial—which we do not—the evidence would still be sufficient to support the jury's verdict on the refusal count. No reasonable inference can be drawn from the circumstances proved that is inconsistent with appellant refusing to take the test.

After arriving at the police station, the officer read appellant the breath-test advisory. He told appellant that refusing to decide would be considered a refusal to take the test. Appellant asked the officer whether he could have someone else administer the test and the officer refused the request. Appellant argued with the officer about being unable to see the results of his PBT. The officer asked appellant whether he would take the test six times, and eventually, appellant refused to answer the question. Even if this evidence of repeatedly declining to answer is considered to be circumstantial evidence, the only reasonable inference that can be drawn from the evidence consistent with the jury's verdict is that appellant refused to submit to the test.

II. Sufficient evidence supports appellant's conviction for third-degree driving while impaired.

Appellant also argues that the state presented insufficient evidence to support his conviction for third-degree driving while impaired. The state needed to prove beyond a reasonable doubt: (1) that the defendant drove a vehicle, and (2) while the defendant was driving, he was under the influence of alcohol. *See* Minn. Stat. 169A.20, subd. 1(1) (2018). Appellant's specific challenge on appeal is that there is insufficient evidence that he was under the influence of alcohol.

A person is under the influence of alcohol when he does not "possess that clearness of intellect and control" he otherwise would have. *State v. Graham*, 222 N.W. 909, 911 (Minn. 1929).

Here again, direct evidence supports appellant's conviction. The officer testified that appellant crossed the centerline multiple times while driving. The smell of alcohol was wafting from appellant's vehicle and appellant's eyes were bloodshot and watery. Appellant seems to have been confused about what time it was when he was stopped. The body-camera recording showed appellant failing the walk-and-turn test and the one-leg stand test. The officer testified that the horizontal gaze nystagmus test showed indications that appellant was impaired.

Based upon his experience and training, the police officer opined that appellant was under the influence of alcohol. That opinion testimony is direct evidence. The officer further testified that the PBT results revealed alcohol in appellant's system. The PBT result of either .11 or .14 is direct evidence of appellant's alcohol concentration. No inference is required. *See State v. Brazil,* 906 N.W.2d 274, 278-79 (Minn. App. 2017) (holding that the DataMaster breath test is direct evidence of a test subject's alcohol concentration), *rev. denied* (Minn. Mar. 20, 2018)[2]. The confluence of opinion testimony and evidence of the

[2] Although this case involves a PBT, and *Brazil* involved a DataMaster, the evidence of the PBT measurement of appellant's alcohol concentration was admitted into evidence at trial, appellant did not object when it was admitted, and appellant makes no argument on appeal that the PBT result was admitted in error. In fact, appellant argued at trial and argues on appeal that the evidence includes a PBT result that exonerates him. But the jury necessarily rejected that argument in arriving at the verdicts it did.

measurement of alcohol concentration received in evidence (the admission of which is not challenged on appeal) is sufficient direct evidence to support the jury's verdict.

As above, even if we were to regard this opinion evidence and PBT result as circumstantial evidence, we can see no reasonable inference from what the state proved at trial that is inconsistent with the conclusion that appellant was under the influence of alcohol.

Reviewing the record in the light most favorable to the conviction, and assuming the jury believed the state's witnesses and disbelieved evidence to the contrary, the following was proved at trial. Appellant drifted over the centerline several times while driving and was confused about what time it was when he was stopped. During the stop, the officer smelled alcohol coming from the car and noticed that appellant's eyes were red, bloodshot, and watery. Three different field sobriety tests showed signs of alcohol impairment. Appellant's horizontal gaze nystagmus test showed a lack of smooth pursuit in both eyes, and nystagmus before 45 degrees. Appellant took the incorrect number of steps, turned incorrectly, and failed to take even one heel-to-toe step during the walk-and-turn test. When he did the one-leg stand test, he quickly failed three times, stumbling in one attempt. The PBT measured appellant's alcohol concentration at above 0.08.

These circumstances are consistent only with the jury's conclusion that appellant was under the influence of alcohol. The PBT confirms that appellant had consumed alcohol to the point of having an alcohol concentration over 0.08. The field sobriety tests show the influence of that alcohol on appellant's ability to control his own body. And his drifting over the centerline demonstrates that appellant's lack of control affected his driving. The

circumstances are consistent only with appellant having been under the influence of alcohol.

In his testimony, appellant hypothesized that the officer lied to him about the results of the PBT. Appellant also claimed that he completed everything he was asked to do in the sobriety tests. But this testimony was obviously rejected by the jury. It cannot properly be considered in a circumstantial-evidence analysis. *Porte*, 832 N.W.2d at 309.

Appellant argues that his circumstances are like those in *City of Eagan v. Elmourabit*, 373 N.W.2d 290 (Minn. 1985), where the supreme court held that there was insufficient evidence to uphold a conviction for driving while impaired. *Id.* at 294. But the circumstances here are not like those in *Elmourabit*. There, the defendant passed his field sobriety tests, performing normally. *Id.* at 291. The defendant there never took a PBT, or a chemical test of any kind. *Id.* The sequence of events in *Elmourabit* did not provide prolonged access to or an opportunity for the defendant to consume alcohol. *Id.* 293. Most crucially, there existed circumstances in *Elmourabit* that were reasonably consistent with non-guilt. The defendant there had an undiagnosed medical condition. Not long after he was taken to the police station, the defendant fell to the floor, moaning and requesting a doctor. *Id.* at 291. While paramedics could not definitively say that the defendant was having a heart attack, they could not definitively say he wasn't experiencing some amount of pain. *Id.* at 293. The circumstances were therefore consistent with a rational hypothesis that medical conditions were causing the circumstances proved by the state. There is no

such evidence here, and this case is not a close one. The jury's verdict is amply supported by the record.

Affirmed.