STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0562

State of Minnesota,
Respondent,

vs.

Thomas Lenard Hunter,
Appellant.

Filed January 31, 2022
Affirmed
Smith, John, Judge[*]

Beltrami County District Court
File No. 04-CR-20-520

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

David L. Hanson, Beltrami County Attorney, Wesley J. Van Ert, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Segal, Chief Judge; and Smith, John, Judge.

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

NONPRECEDENTIAL OPINION

SMITH, JOHN, Judge

We affirm appellant's convictions for fleeing a peace officer in a motor vehicle, driving while impaired (DWI)—test refusal, and fourth-degree assault of a peace officer because the district court's findings support its restrictions on the public's in-person access to appellant's trial; the evidence supports appellant's DWI conviction; the district court did not plainly err in instructing the jury on the DWI charge; and the district court did not abuse its discretion by allowing the state to amend the complaint prior to trial.

FACTS

The state charged appellant Thomas Lenard Hunter with one count of fleeing a peace officer in a motor vehicle, one count of DWI—test refusal, and one count of fourth-degree assault—physical assault. According to the complaint, an officer tried to stop Hunter's vehicle for speeding, but Hunter continued driving. Hunter eventually stopped in a parking lot. The officer observed indicia of intoxication and later read Hunter the breath-test advisory, but Hunter refused to answer any questions; spewed profanities at the officer; kicked a trash can, which struck the officer in the leg; and spat at the officer.

The matter proceeded to a jury trial. Prior to the start of jury selection, the state requested leave to amend the complaint to add a felony count of assault involving the transfer of bodily fluids. The defense objected, arguing that the new charge was "a surprise and prejudicial." The district court allowed the state to amend the complaint, noting that the facts underlying the new charge were in the complaint. The state added a count of fourth-degree assault of a peace officer—transfer of bodily fluids.

The record indicates that the district court limited the public's access to the courtroom during jury selection and trial because of social-distancing concerns stemming from the COVID-19 pandemic. The district court broadcast jury selection over Zoom "to keep an open courtroom" and broadcast the evidentiary portion of the trial to a separate courtroom via ITV because the jury's presence resulted in insufficient "space to have additional people observing." Hunter did not object to these restrictions on in-person observation of the proceedings.

The only witness to testify at trial was the officer who initiated the stop of Hunter's vehicle and processed his DWI. The jury found Hunter guilty of fleeing a peace officer in a motor vehicle, DWI—test refusal, and fourth-degree assault—transfer of bodily fluids. The jury found Hunter not guilty of fourth-degree assault—physical assault. The district court imposed stayed sentences on the three convictions.

DECISION

I.

Hunter argues that the COVID-19 pandemic did not provide adequate grounds to close the courtroom to in-person observation by the public and that the failure to allow in-person observation resulted in a structural error requiring reversal.

"Both the Sixth Amendment to the United States Constitution and Article I, Section 6, of the Minnesota Constitution provide that the accused shall enjoy the right to a public trial." *State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012) (quotation omitted). The right to a public trial applies to all phases of the trial, including jury voir dire. *Id.* at 617. A

denial of the right to a public trial constitutes a structural error, which is not subject to harmless-error review. *Id.* at 616.

The right to a public trial is not absolute and may be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (quotation omitted). Under the factors established in *Waller*, criminal proceedings may be closed to the public if (1) the party seeking the closure advances an overriding interest that is likely to be prejudiced; (2) the closure is no broader than necessary to protect that interest; (3) the court considers reasonable alternatives to the closure; and (4) the court makes findings adequate to support the closure. *Id.* at 48; *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007). We review de novo the constitutional issue of whether the right to a public trial has been violated. *Mahkuk*, 736 N.W.2d at 684.

The state argues that no closure occurred because the public could see and hear the proceedings remotely.[1] "Not all courtroom restrictions implicate a defendant's right to a public trial." *Brown*, 815 N.W.2d at 617. To determine whether a "true closure" occurred, we consider the extent to which the public was excluded from the proceedings. *See State v. Petersen*, 933 N.W.2d 545, 551 (Minn. App. 2019) (listing factors for determining whether a closure occurred).

[1] Of note, some federal courts have differentiated between full and partial closures of a courtroom. *See Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (stating that if a partial closure occurs, the court need not satisfy the *Waller* test, but must simply put forth a substantial reason for the closure). However, the supreme court, in *Mahkuk*, declined to adopt a lesser standard for partial closures. 736 N.W.2d at 685.

Here, even assuming a "true closure" occurred, the district court's findings adequately support that closure. Because Hunter did not object to the district court's public-access limitation, the district court did not expressly reference *Waller*, but it explained its reasoning, both on the record and in the jury instructions, for limiting in-person observation of the proceedings. *See Mahkuk*, 736 N.W.2d at 684-85 (conducting de novo review of the record to determine if the *Waller* standard had been met).

As to the first *Waller* factor, the record shows that the district court limited the public's in-person access because of a lack of physical space to maintain social distancing during the COVID-19 pandemic. The district court explained that jury trials had been postponed in Minnesota to slow the spread of COVID-19 and had restarted with "precautions for the safety of our citizen jurors, the safety of our staff and the safety of our justice partners." The district court noted that the courthouse had been marked with yellow tape to ensure six feet of social distancing. In seeking to maintain social distancing, the district court acted upon an overriding interest, public safety, which would have likely been prejudiced by unfettered public access to the courtroom. As stated by the Supreme Court, "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

Regarding the second *Waller* factor, the record shows that the district court attempted to keep the closure as limited as possible. It noted the importance of maintaining an "open courtroom" and allowed the public to view the proceedings remotely. The district court took "special care" in balancing the interests at play. *See Waller*, 467 U.S. at 45.

Hunter did not object to the restriction on in-person observation of the proceedings, and he fails to advance any reasonable alternative to the district court's actions.

On the third *Waller* factor, the record shows that the district court considered the possibility of keeping the courtroom open. It intended to allow the public into the courtroom during the evidentiary portion of the trial, but it ultimately allowed only remote observation because the presence of the jury resulted in insufficient "space to have additional people observing."

Lastly, as discussed, the district court made adequate findings to support the closure. The COVID-19 pandemic provided sufficient grounds to limit in-person observation of Hunter's trial.

II.

Hunter argues that the evidence was insufficient to support his DWI conviction because the officer never asked him to submit to a test, and therefore he "never refused to take a test."

When evaluating the sufficiency of the evidence, we carefully examine the record "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. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). If the state relied 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). Before determining whether a circumstantial-evidence standard applies in this case, we

first examine the statutes under which Hunter was convicted to determine if his conviction was permitted under these circumstances. We review issues of statutory interpretation de novo. *Roberts v. State*, 945 N.W.2d 850, 853 (Minn. 2020).

Hunter was convicted of violating Minn. Stat. § 169A.26, subd. 1(b) (2018), which makes it a crime for a person to violate Minn. Stat. § 169A.20, subd. 2 (2018). Section 169A.20, subdivision 2, in turn, makes it a crime "for any person to refuse to submit to a chemical test . . . of the person's breath," when such a test is lawfully directed. As stated in *State v. Bernard*, Minnesota's test-refusal statute "makes it a crime for a driver to refuse a request to take a chemical test to detect the presence of alcohol if certain conditions are met." 859 N.W.2d 762, 764 (Minn. 2015). One of those prerequisite conditions is the breath-test advisory; prior to any breath test, the driver must be given an advisory and told that he is required to test under Minnesota law, he has a limited right to consult with an attorney before deciding whether to test, and refusal to submit to a breath test is a crime. Minn. Stat. § 169A.51, subd. 2 (2018); *see State v. Ouellette*, 740 N.W.2d 355, 357 (Minn. App. 2007) (holding that the advisory is an element of the crime), *rev. denied* (Minn. Dec. 19, 2007).

We disagree with Hunter's assertion that he was never offered a test. The officer told Hunter that Minnesota law *required* him to take a test and that if he unreasonably delayed the process, such a delay would be deemed a refusal. And, in convicting Hunter of DWI—test refusal, the jury found that the officer requested a breath test from Hunter. Additionally, caselaw shows that Hunter could be convicted for test refusal if he frustrated the advisory process, regardless of whether a test was expressly offered. *See Busch v.*

Comm'r of Pub. Safety, 614 N.W.2d 256, 259 (Minn. App. 2000) (holding that if a driver frustrates the implied-consent procedure, the driver is deemed by his behavior to have refused to submit to a test).

In *State v. Collins*, we considered a driver's disruptive behavior in the context of a test-refusal conviction. 655 N.W.2d 652, 656 (Minn. App. 2003), *rev. denied* (Minn. Mar. 26, 2003). A police officer tried to read the advisory to the driver but was "unable to do so because [she] began screaming, swearing, making accusations of rape, and insisting that she would not listen." *Id.* at 658. The driver appealed her test-refusal conviction, arguing that her limited right to counsel had been violated. *Id.* at 654. We affirmed her conviction, concluding that even though the advisory was not read, the driver had "completely frustrated the implied consent procedure," which amounted to refusal to test. *Id.* at 658. "If the conduct of any driver does frustrate the process, it will amount to refusal to test." *Id.*

Additionally, Hunter's conviction did not require that he verbally refuse testing. The test-refusal statute does not require a "verbal refusal." *State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011). "[R]efusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver's words and actions in light of the totality of the circumstances." *Id.* at 102.

Having determined that the law supports Hunter's conviction, we next address whether the circumstantial-evidence standard is applicable. In this case, the jury was asked to find whether Hunter refused testing by acting in a manner that frustrated the process.

Such a finding required the jury to draw inferences from Hunter's conduct. *Id.* at 101-02 (holding that a test-refusal conviction may be premised on "actual unwillingness to participate in the testing process, as determined from the driver's words and actions in light of the totality of the circumstances"). We therefore apply the two-step circumstantial-evidence standard of review.

First, we determine the circumstances proved, disregarding evidence that is inconsistent with the verdict. *Harris*, 895 N.W.2d at 600-01. 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).

The relevant circumstances proved are as follows. The breath-test advisory process lasted approximately 20 minutes. The officer read Hunter the breath-test advisory and told him that Minnesota law required him to take a test to determine if he was under the influence of alcohol, refusal to take a breath test was a crime, he had the right to consult with an attorney before deciding whether to test, and a telephone and directories would be made available if he wished to speak with an attorney. The officer informed Hunter, "if you are unable to contact an attorney, you must make the decision on your own . . . within a reasonable period of time." The officer further stated, "if the test is unreasonably delayed, or if you refuse to make a decision, you will be considered to have refused the test." The officer asked Hunter, "do you understand what I just explained?" Hunter refused to acknowledge his understanding of the advisory.

The officer ultimately read Hunter the advisory ten times. Hunter continually refused to acknowledge an understanding of the advisory and responded to the officer with belligerent, assaultive, and offensive conduct. For example, Hunter responded by saying, "bro I am not answering sh--." The officer told Hunter that he was "unreasonably delaying this test," to which Hunter said, "I don't give a f--- bro." Hunter yelled at the officer and swore in his face. Hunter told the officer to "suck [his] di-- b----," and "suck off [his] di-- bro." Hunter spoke over the officer, interrupted him, spat in his direction, and said, "end of discussion . . . we have nothing to talk about brother." Hunter also kicked a garbage can at the officer and called him a "b----."

On the tenth reading, the officer told Hunter, "This is the last time I am going to read it for you." Hunter spoke over the officer, stating, "don't even waste your breath." Hunter said, "I am done." The officer then told Hunter, "you are now being charged with DWI test refusal." The officer explained that he was charging Hunter with test refusal because "he was unreasonably delaying the test."

These circumstances are consistent with a conclusion that Hunter refused to test by frustrating the process and inconsistent with any rational hypothesis other than guilt.

III.

Hunter challenges the district court's DWI jury instructions, arguing that they lacked a "mens rea element," that is, an intent to frustrate the testing process, as outlined in *Ferrier*.

The state asked for additional language to inform the jury that a driver refuses to test if he frustrates the testing process. The defense objected to the additional language

and requested the standard jury instruction, though the defense conceded that if the district court provided the additional language, the proposed language was "fine." The district court granted the state's request and instructed the jury on the DWI elements, in relevant part, as follows:

> And fifth, the defendant refused to submit to the test. The implied consent law imposes on the driver a requirement to act in a manner so as to not frustrate the testing process. If the conduct of any driver does frustrate the process, it will amount to a refusal to test.

Hunter argues that the jury should have been instructed "that they had to find [he] intended to refuse the test by his conduct."

"A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *State v. White*, 684 N.W.2d 500, 508 (Minn. 2004). "Nevertheless, a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id.* While Hunter objected to any deviation from the standard jury instruction, he did not request a mens rea component and conceded that the proposed additional language was appropriate. We therefore review the instruction given for plain error. *See* Minn. R. Crim. P. 26.03, subd. 19(4)(b) (providing that a party objecting to jury instructions must state specific grounds for objection).

Under plain-error review, we analyze "whether the jury instructions contained an (1) error (2) that was plain and (3) that affected the defendant's substantial rights." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). If these three prongs are met, "we then decide whether we must address the error to ensure fairness and the integrity of the judicial

proceedings." *Id.* (quotation omitted). We review the jury instructions in their entirety to determine whether they fairly and adequately explained the law of the case. *Id.* "Additionally, while it is well settled that jury instructions must define the crime charged and explain the elements of that crime to the jury, we nevertheless give district courts broad discretion and considerable latitude in choosing the language of jury instructions." *Id.* (quotations and citations omitted). "Absent an abuse of that discretion, we will not reverse a district court's decision on jury instructions." *Id.*

As previously stated, a driver may refuse testing by frustrating the advisory process. *Busch*, 614 N.W.2d at 259. Indeed, Hunter concedes that "if a driver's actions frustrate the testing process, the driver's conduct can amount to a test refusal." However, Hunter cites *Ferrier* for the proposition that the district court needed to require the jury to find that his acts were volitional and done with an actual unwillingness to submit to testing.

In *Ferrier*, the driver argued that the evidence was insufficient to convict her of test refusal because she did not refuse testing, she simply failed to produce a urine sample. 792 N.W.2d at 100. This court held that refusal requires "a volitional act," and "[a]ctual unwillingness to submit to testing must be proved." *Id.* at 101. This is because "the statute does not criminalize inability to perform the steps necessary for testing." *Id.*

In this case, we cannot say that the district court plainly erred by failing to require a finding of a volitional act as part of the DWI instruction. This case is clearly distinguishable from *Ferrier.* The record here is replete with volitional acts and statements, which clearly showed that Hunter intentionally hindered the advisory process. "A party is entitled to a specific jury instruction if evidence exists at trial to support the instruction."

State v. Yang, 774 N.W.2d 539, 559 (Minn. 2009). Nothing in the record suggests that Hunter's acts and statements were accidental or involuntary. Indeed, the jury convicted Hunter of assaulting the officer by spitting at him. That conviction required a finding that Hunter "intentionally threw or otherwise transferred bodily fluids" at the officer.

Even accepting that a plain error occurred, Hunter has failed to establish that his substantial rights were affected. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (stating that the defendant bears the burden on the substantial-rights prong). Given Hunter's statements to the officer indicating that he was refusing to comply with the advisory process, it is not reasonably likely that the verdict would have been different had the instruction on volitional acts been given.

IV.

Hunter argues that the district court erred in granting the state leave to amend the complaint prior to trial to add a felony charge of assault involving the transfer of bodily fluids. The state made its motion to amend after the district court pointed out a potential charging discrepancy in the following exchange:

> COURT: And so one thing that I wanted to note, as we're talking about the assault on a peace officer, did I get that right? It's physically assaults, because I assumed that based on the gross misdemeanor charge, that's what it was.
> PROSECUTOR: No, Your Honor, I think this was a bodily fluid.
> COURT: Isn't that a felony?
> DEFENSE COUNSEL: It was not a bodily fluid.
> PROSECUTOR: Was it not? Oh.
> COURT: The [complaint] talks about spitting in the direction, but it does not match the charge because the charge is a gross misdemeanor, whereas a bodily fluid transmission is a felony. So that's why I wanted to make sure I had it right.

Under Minn. R. Crim. P. 3.04, subd. 2, a district court is "relatively free" to permit the state to amend a complaint prior to trial, "provided the [district] court allows continuances where needed." *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). Rule 3.04, subdivision 2, states in part:

> Pre-trial proceedings may be continued to permit a new complaint to be filed and a new warrant or summons issued if the prosecutor promptly moves for a continuance on the ground that:
>
> (a) the initial complaint does not properly name or describe the defendant or the offense charged; or
>
> (b) the evidence presented establishes probable cause to believe that the defendant has committed a different offense from that charged in the complaint, and the prosecutor intends to charge the defendant with that offense.

"The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004). A district court abuses its discretion when its "decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

Neither party requested a continuance. The district court heard arguments from both parties and ultimately granted the state leave to amend because jeopardy had not attached and the facts supporting the charge (spitting toward the officer) were in the complaint. The district court did not abuse its discretion by permitting amendment of the complaint because the initial complaint did not properly describe the offense that the state intended to charge, assault via the transfer of bodily fluids.

Hunter argues that the defense was surprised by the amendment and "had to adjust its trial strategy just before the jury was brought in." But Hunter's argument is unpersuasive because the defense never requested a continuance. Additionally, the trial was not complicated, it involved a single state's witness, and there was a holiday between jury selection and the start of trial, so the defense had an entire day after jury selection to alter its trial strategy before the evidentiary portion of the trial.

Hunter argues that the state failed to "promptly move[] for a continuance" under rule 3.04. But the state implicitly did so by requesting amendment of the complaint. Neither party expressly requested a continuance, and continuances are not always "needed." *See Bluhm*, 460 N.W.2d at 24. The state's failure to expressly request a continuance did not render the district court's determination erroneous.

Hunter also argues that the district court first pointed out the charging mistake and therefore the state should not have been granted permission to amend the complaint. But Hunter fails to point to any caselaw to directly support this argument. Hunter likens this case to *State v. Schlienz*, in which a district court judge engaged in ex parte communication with the prosecutor. 774 N.W.2d 361, 362-63 (Minn. 2009). But no ex parte communication occurred in this case, the district court's statements were made in open court. Moreover, the district court did not instruct the prosecutor on how to proceed, but merely pointed out a discrepancy in the complaint. Again, district courts are given broad

discretion when it comes to permitting amendment of a complaint. *Baxter*, 686 N.W.2d at 850. The district court did not abuse its discretion by pointing out the potential charging error and permitting the state to amend the complaint prior to trial.

Affirmed.