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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-758

State of Minnesota,
Respondent,

vs.

Shirwa Mohamed Nur,
Appellant.

Filed November 14, 2011
Affirmed
Larkin, Judge

Lyon County District Court
File No. 42-CR-08-436

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

LARKIN, Judge

On remand from the supreme court, appellant challenges his conviction of first-degree driving while impaired, arguing that the district court's erroneous jury instruction

regarding the definition of probable cause necessitates reversal and a new trial. We affirm.

D E C I S I O N

This court previously affirmed appellant Shirwa Mohamed Nur's conviction of first-degree driving while impaired (DWI), refusal to submit to chemical testing, under Minn. Stat. § 169A.20, subd. 2 (2006). *State v. Nur*, No. A09-758 (Minn. App. March 18, 2010) (order op.), *vacated* (Minn. July 19, 2011) (order). Applying a plain-error standard of review, this court held that the district court's use of the pattern jury instruction, 10A *Minnesota Practice*, CRIMJIG 29.28 (Supp. 2009),[1] to define the probable-cause element of test refusal, was erroneous. *Id.* at 4. We nevertheless affirmed Nur's conviction because we concluded that the error was harmless beyond a reasonable doubt. *Id.* at 4-5. We relied on this court's decision in *State v. Koppi*, 779 N.W.2d 562, 568 (Minn. App. 2010), *rev'd*, 798 N.W.2d 358 (Minn. 2011), which held that the pattern jury instruction regarding test refusal did not accurately define probable cause because it implied that the jury's probable-cause determination could be based on an officer's subjective belief instead of an objective assessment. *Id.* at 2-3. The supreme court granted further review in *Koppi*. *State v. Koppi*, No. A09-136 (Minn. May 18, 2010) (order). The supreme court also granted further review in this case, but stayed all proceedings pending final disposition of *State v. Koppi*. *State v. Nur*, A09-758 (Minn. June 15, 2010) (order).

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[1] We recognize that the trial in the present case predated the release of the 2009 pocket part. However, the instruction given by the district court is identical to the pattern jury instruction contained in the 2009 pocket part.

The supreme court filed its decision in *State v. Koppi* on June 8, 2011. *State v. Koppi*, 798 N.W.2d 358 (Minn. 2011). In that case, the supreme court reversed and remanded for a new trial, holding that "the district court abused its discretion in instructing the jury on the probable cause element of test refusal in accordance with the language of CRIMJIG 29.28." *Id*. at 364. The supreme court reasoned that "because of the equivocal nature of the evidence presented at trial with respect to the probable cause element of test refusal and the seriousness of the errors in the jury instruction defining probable cause, we cannot say that the jury instruction was harmless beyond a reasonable doubt." *Id*. at 366. The supreme court subsequently lifted the stay in this case, vacated this court's decision, and remanded the case for "further proceedings consistent with *State v. Koppi*." *State v. Nur*, A09-758 (Minn. July 19, 2011) (order).

Consistent with *Koppi*, we previously concluded that the district court materially misstated the law when it used CRIMJIG 29.28 to instruct the jury. *Nur*, slip op. at 3-4. Also consistent with *Koppi*, we considered whether the instructional error was harmless beyond a reasonable doubt. *Id.* at 4-5. Because we ultimately concluded that the instructional error was harmless, our previous holding differs from the result in *Koppi*. *Id.* at 5. We therefore construe the supreme court's remand instructions as directing this court to reconsider our determination that the instructional error was harmless, using the analysis in *Koppi*.

Koppi states that in determining whether an erroneous probable-cause instruction is harmless beyond a reasonable doubt, "the question is whether the evidence points so overwhelmingly in favor of probable cause that we can say beyond a reasonable doubt

that the instructional error had no significant impact on the verdict." *Koppi*, 798 N.W.2d at 365. *Koppi* concluded the error in that case was not harmless because the evidence supporting probable cause was conflicting and the element of probable cause was "fervently disputed" at trial. *Id.* The arresting officer testified that Koppi "had bloodshot eyes, emitted a slight odor of alcohol, became upset, and was 'kind of swaying side to side a little bit' when walking." *Id.* But the officer admitted that "in 95% of arrests for driving while under the influence of alcohol, the suspect emits a moderate to strong odor of alcohol, rather than a slight odor." *Id.* The officer further admitted that "Koppi did not slur his speech at any time" and that "he did not observe Koppi's vehicle touch the center or fog lines prior to the stop." *Id.*

Unlike the evidentiary record in *Koppi*, the evidence of "probable cause to believe [that Nur] was driving, operating, or in physical control of a motor vehicle" while impaired is so overwhelming that we can say beyond a reasonable doubt that the instructional error had no significant impact on the verdict. *See* Minn. Stat. §§ 169A.51, subd. 1(b) (2006) (requiring probable cause before an officer may require a person to submit to a blood, breath, or urine test), .20, subd. 2 (incorporating the probable-cause requirement of section 169A.51 into the definition of the crime of test refusal).

First, the evidence overwhelmingly supports an objective belief that Nur was driving a motor vehicle. The arresting officers testified that they observed a white Blazer enter a parking lot at the police station and park approximately 50 feet away from the officers' vehicle. Officer Klenken recognized Nur, who was seated behind the wheel of

the vehicle. The officers saw Nur exit the driver's door, and the officers did not see any other person in the vehicle or in the parking lot.

Nur asserts that the evidence was conflicting regarding the quality of lighting in the parking lot and that the officers' ability to accurately identify Nur as the driver was therefore compromised. The record does not support this assertion. Officer Klenken testified that "[t]he parking lot's fairly well lit at night with the street lights and – and ah the light in the parking lot." Although defense counsel argued, in closing, that the lighting in the parking lot was poor, an attorney's statements and arguments at trial are not evidence. *See State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004). In sum, the record evidence regarding the lighting in the parking lot is not conflicting.

Nur also asserts that because the jury found him not guilty of DWI and driving after cancellation, "the jury must have found that the [s]tate failed to prove beyond a reasonable doubt that [he] was driving the Blazer." But the state did not have to prove, beyond a reasonable doubt, that Nur drove a motor vehicle while impaired to prove the test-refusal charge; the state merely had to establish that there was probable cause to believe that Nur drove while impaired. *See* Minn. Stat. §§ 169A.51, subd. 1(b) (stating that an officer must have "probable cause to believe" the person was driving while impaired before requiring the person to take a blood, breath, or urine test), .20, subd. 2 (defining the crime of test refusal and incorporating the probable-cause requirement found in section 169A.51, subdivision 1(b)). Probable cause is a much lower standard than proof beyond a reasonable doubt. Thus, the jury could have found that there was probable cause to believe that Nur drove a motor vehicle while impaired, even if proof

beyond a reasonable doubt were lacking. Moreover, as the state correctly observes, the jury could have acquitted Nur of DWI and driving after cancellation because the state failed to prove, beyond a reasonable doubt, that Nur was under the influence of alcohol and that he knew, or should have known, that his driver's license was cancelled. *See* Minn. Stat. §§ 169A.20, subd. 1 (setting forth the elements of a DWI offense), 171.24, subds. 3, 5 (setting forth the elements of driving after cancellation) (2006).

The evidence also overwhelming supports an objective belief that Nur was impaired. Nur exhibited several indicia of intoxication: he was unable to walk in a straight line, his eyes were bloodshot and watery, he emitted a strong odor of alcohol, and he slurred his speech. The supreme court in *Koppi* placed significance on testimony that 95% of drivers arrested for driving while under the influence of alcohol emit a "moderate to strong odor of alcohol, rather than a slight odor," as well as the fact that "Koppi did not slur his speech at any time." *Koppi*, 798 N.W.2d at 365. Nur's emission of a strong odor of alcohol and his slurred speech distinguishes this case from *Koppi*. Moreover, during the officers' questioning, Nur suggested that he had been drinking alcohol. Officer Klenken stated that he was concerned that Nur had been drinking and asked him whether he was "okay to drive"; Nur responded that he was not.

In sum, the officers' testimony regarding their observations of Nur and the white Blazer overwhelmingly supports an objective finding of probable cause to believe that Nur drove a motor vehicle while impaired. Thus, we can say, beyond a reasonable doubt,

that the instructional error had no significant impact on the verdict. And because the error was harmless, we affirm.

Affirmed.

Dated: ____________________________________

Judge Michelle A. Larkin