STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2259

State of Minnesota,
Respondent,

vs.

Nathan Lee Adams,
Appellant.

Filed December 24, 2012
Affirmed
Peterson, Judge

Stearns County District Court
File No. 73-CR-09-10339

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

Matthew Allen Staehling, St. Cloud City Attorney, Hao Q. Nguyen, Assistant City Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Crippen, Judge.*

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

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

PETERSON, Judge

In this appeal from convictions of second-degree driving after license revocation and refusal to submit to chemical testing, appellant argues that (1) he had a physical injury that prevented him from providing a breath sample for chemical testing, and, therefore, the evidence was insufficient to show that he refused to submit to testing; and (2) the prosecutor engaged in reversible misconduct by asking "were they lying" questions during cross-examination. We affirm.

FACTS

After a license-plate search showed that appellant Nathan Lee Adams's driver's license was revoked, St. Cloud Police Officer Adam Meierding stopped appellant's vehicle upon observing that the driver matched appellant's description. When Meierding noticed a strong odor of alcohol, he asked appellant to participate in field sobriety tests and a preliminary breath test. Appellant failed the tests, and he was arrested on suspicion of driving while impaired. He was taken to the Stearns County Jail, where he was asked to submit to a breath test.

According to Meierding's trial testimony, appellant's first attempt to take a breath test resulted in a "deficient sample" reading, which Meierding interpreted to mean that appellant had not blown sufficient air into the machine for an accurate reading. As Meierding stood right next to appellant, he saw that appellant "had somewhat of a seal; however, he was trying to leak some air out of the sides" of the machine. Meierding conducted a second test, and as he held the tube into which appellant was supposed to

blow, he "could feel air coming on [his] hand" because appellant did not make a tight seal on the tube with his mouth. Meierding concluded that appellant "was trying to manipulate the machine" and not provide a sample. Meierding testified that he instructed appellant "numerous times" to make a tight seal and blow harder, but, after the second attempt, appellant "gave up and said he didn't want to try anymore and that he was done trying to take the test."

Meierding testified that he did not "recall" that appellant said "anything to [him about] why he wasn't able to give a sample" or "in terms of having any injuries." Meierding also responded in the negative when asked, "[A]t any point did [appellant] tell you that his mouth hurt, that he couldn't perform the test?" Meierding further stated that appellant "[g]ave [him] no indication that he wouldn't be able to blow into a tube."

Appellant also testified at trial. He stated that, eight days before the traffic stop, he had suffered an injury to his mouth and eye during an altercation with another inmate at the Benton County Jail. According to appellant, he told Meierding about his mouth injury and showed it to him. He also stated that he never refused to take the breath test and denied that there was any air seepage during the test. Appellant also said that Meierding construed his ineffectual attempt to blow into the breathalyzer as test refusal, stating, "He stopped the test, I never stopped."

The following exchange occurred when the prosecutor cross-examined appellant:

> Prosecutor: . . . You told the officer – you testified today that your injury was obvious?
> Appellant: It was.
> Prosecutor: Okay. But the officer testified that it wasn't?

> Appellant: You heard him say that [on a recording of the stop played for the jury].
> Prosecutor: Is that correct?
> Appellant: You heard him say that.
> Prosecutor: Okay. So I want to know and the jury would like to know, who is lying?
> Appellant: Why would somebody lie? Why would somebody come here and lie?
> Prosecutor: Okay.
> Appellant: You got a lot of important people here. You are wasting people's time here. Why would somebody come here and lie?

The jury found appellant not guilty of driving while impaired and guilty of second-degree driving after license revocation and refusal to submit to chemical testing. Appellant seeks review of his convictions of second-degree driving after license revocation and refusal to submit to chemical testing.

D E C I S I O N

I.

An appellate court's review of a sufficiency-of-evidence claim is "well-settled." *State v. Franks*, 765 N.W.2d 68, 72 (Minn. 2009). "[R]eview is limited to ascertaining whether under the evidence contained in the record the jury could reasonably find the accused guilty of the offense charged." *Id.* at 73 (quotation omitted). In conducting such review, the appellate court may not reweigh the evidence. *Id.* Rather, the appellate court "will view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted). An appellate court defers to the jury's evaluation of the evidence and assumes that the jury found the state's witnesses

credible and "disbelieved contrary evidence." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003).

Subject to provisions in the civil implied-consent statute and the criminal driving-while-impaired statute, a Minnesota driver consents "to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol." Minn. Stat. § 169A.51, subd. 1(a) (2008). It is a crime for a person "to refuse to submit to a chemical test of the person's blood, breath, or urine." Minn. Stat. § 169A.20, subd. 2 (2008). A reasonable refusal to submit to a chemical test is an affirmative defense provided by statute in implied-consent proceedings. Minn. Stat. § 169A.53, subd. 3(c) (2008). While this defense is not specifically recognized by statute in criminal proceedings, it has been recognized by implication in case law. *See, e.g., State v. Johnson*, 672 N.W.2d 235, 242 (Minn. App. 2003) (stating that a district court instruction in criminal test-refusal case "was a substantially correct statement of the law" when it informed the jury that a defendant who reasonably refused to submit to testing could not be found guilty), *review denied* (Minn. Mar. 16, 2004).

Citing *Burke v. Comm'r of Pub. Safety*, 381 N.W.2d 903 (Minn. App. 1986), appellant argues that he provided sufficient evidence to demonstrate that he reasonably refused a breath test because he had a mouth injury that prevented him from adequately performing the test. In *Burke*, this court affirmed a district court decision to rescind a license revocation under the implied-consent law, based on a factual finding that a driver's failure to provide a sufficient breath sample was due to the driver's heart condition. 381 N.W.2d at 904-05. While the record in *Burke* also included evidence that

the driver did not make a genuine effort to provide a breath sample, this court upheld the district court's decision because "[t]he record . . . contains sufficient evidence to support the [district] court's contrary factual finding." *Id.*

Unlike *Burke*, the jury's verdict demonstrates that the jury rejected appellant's testimony that his refusal to submit to chemical testing was due to a physical condition. And the verdict is supported by evidence that the affirmative defense of reasonable test refusal did not apply to appellant. Meierding testified that he offered appellant "numerous" opportunities to provide a valid breath sample but appellant attempted to "manipulate" the machine by leaking air out of the sides of his mouth. Meierding also testified that appellant did not claim that he was not able to provide a proper sample and gave no indication that he was not able to blow into a tube. The evidence was sufficient to support the jury verdict on appellant's test-refusal offense.

II.

Appellant argues that the prosecutor committed reversible error by asking appellant "were they lying" questions during cross-examination. Appellant did not object to the question that he argues was error. "[A]n unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). "For unobjected-to prosecutorial misconduct, we apply a modified plain error test." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). Under this test, appellant must establish that the alleged prosecutorial misconduct constitutes error and that the error was plain. *Id.* at 393. Error is plain if it "contravenes case law, a rule, or a

standard of conduct." *Ramey*, 721 N.W.2d at 302. The burden then shifts to the state to show that the error did not affect appellant's substantial rights. *Id.*

"Generally, questions designed to elicit testimony from one witness about the credibility of another have no probative value and are considered improper and argumentative." *State v. Simion*, 745 N.W.2d 830, 843 (Minn. 2008) (citing *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (labeling "were they lying questions" as generally improper)); *see also State v. Dobbins*, 725 N.W.2d 492, 511 (Minn. 2006) ("We have held that, as a general rule, 'Are they lying?' type questions are inappropriate."). But the prosecutor may ask "were they lying" questions "'when the defendant [holds] the issue of the credibility of the state's witnesses in central focus.'" *Simion*, 745 N.W.2d at 843 (alteration in original) (quoting *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005)) (other quotation omitted); *see also Dobbins*, 725 N.W.2d at 511 (permitting the state to ask "were they lying" questions "only if the defendant holds the issue of the credibility of the state's witnesses in central focus" (quotation omitted)). "In this regard, it is not enough that the defendant's testimony contradicted the witnesses' testimony." *Dobbins*, 725 N.W.2d at 511.

The trial transcript demonstrates that Meierding's testimony and appellant's testimony were contradictory on key points. Meierding testified that he did not observe that appellant had any injury that prevented him from participating in chemical testing, that appellant did not inform him about any physical limitations, and that appellant emphatically refused to test, despite being offered "numerous" opportunities to do so. In contrast, appellant testified that he told Meierding about his mouth injury, showed the

injury to him, and stated that the injury prevented him from providing a proper sample, but Meierding offered him only two opportunities to test and construed his behavior as a refusal to test.

By itself, this contradictory testimony is not enough to hold Meierding's credibility in central focus. But the trial transcript shows that, in addition to directly contradicting Meierding's testimony, appellant also testified that he is "constantly stopped" by St. Cloud police and that the "only place" his vehicle has "been stopped is in St. Cloud or Benton County." Furthermore, appellant's counsel closely questioned Meierding about why he did not hand-carry a tape recorder from the police interview room to the room where the Intoxilyzer was located, suggesting that "that way there is no independent record . . . to refute what somebody claims was said or wasn't said during that critical part of the process." These statements, which were made before appellant was asked who is lying, held the issue of Meierding's credibility in central focus. And, during closing argument, defense counsel demonstrated how appellant's theory of the case depended upon discrediting Meierding by offering point-by-point challenges to Meierding's testimony, suggesting that Meierding had made some "erroneous assumptions"; emphasizing discrepancies between Meierding's testimony and a videotape of the stop, which defense counsel argued may have involved "jumping to some conclusions" that were not "objectively supported by the evidence"; and stating that "maybe [Meierding] took a shortcut" by failing to offer appellant a blood test rather than a breath test because he wanted to leave work on time. Also, defense counsel admitted

during closing argument that he was "a little hard on . . . Meierding" during cross-examination.

Because all of these statements at trial tended to show that the central focus of appellant's defense was to undermine Meierding's credibility, appellant has not established that allowing the prosecutor to ask appellant "were they lying" questions was plain error. And, because appellant has not established that the alleged prosecutorial misconduct constitutes plain error, we need not consider whether the alleged misconduct affected appellant's substantial rights.

Affirmed.