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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1298

State of Minnesota,
Respondent,

vs.

Fareez Ally,
Appellant.

Filed September 23, 2013
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19HA-CR-11-3251

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

Henry Schaeffer, III, Thomas M. Scott, Campbell Knutson P.A., Eagan, Minnesota (for respondent)

Coley J. Grostyan, Law Office of Coley J. Grostyan, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his convictions of driving while impaired (DWI) and test refusal, arguing that the evidence is not sufficient to support his convictions and that his right to counsel was not vindicated. We affirm.

FACTS

Respondent State of Minnesota charged appellant Fareez Ally with DWI, test refusal, failure to provide proof of insurance, failure to yield right of way to emergency vehicle, failure to illuminate license plates, and possession of a small amount of marijuana. The case was tried to a jury. The following evidence was presented at trial.

Lakeville Police Officer Adam Stier testified that on September 18, 2011, while on routine patrol, he noticed a vehicle that did not have its rear license plate illuminated. Stier followed the vehicle to confirm that the rear license-plate light was not functioning. He confirmed the license-plate light was off, followed the vehicle beyond a construction zone, and activated his emergency lights. Almost immediately after Stier activated his emergency lights, the vehicle swerved sharply to the right onto the shoulder of the road, veered back into the traffic lane, continued several blocks, and accelerated before finally pulling over.

Immediately after stopping, the driver of the vehicle—later identified as Ally—got out of the vehicle and walked toward Stier's squad car. Stier got out of his car and repeatedly told Ally to stop and to get back into his vehicle. Ally continued to walk

toward Stier until he was less than ten feet away. He then stopped, silently stood, and swayed from side to side.

Because Ally did not return to his vehicle, Stier decided to detain him as a safety precaution. When Stier approached Ally to handcuff him, Stier could smell "a very strong odor of an alcoholic beverage." After handcuffing him, Stier faced Ally and observed that he was still swaying, his eyes were bloodshot and watery, and his speech was slightly slurred. During the course of the encounter Ally continually interrupted, saying that Stier was violating his rights, oppressing him, and unlawfully detaining him.

Stier believed that Ally was intoxicated. He asked Ally to perform field sobriety tests and to take a preliminary breath test. Ally refused to submit to either form of testing. Stier arrested Ally, drove him to the police department, and read the implied-consent advisory to him.

After Stier read the implied-consent advisory, Ally told Stier, "I do not understand," but he declined to specify what he did not understand. Stier therefore read the entire advisory again. Ally again said he did not understand. Stier did not observe Ally to have any trouble understanding other statements he made, and he did not notice any language barrier. Stier concluded that Ally was saying that he did not understand "just to be difficult."

Next, Stier asked Ally if he wished to consult with an attorney. Ally replied: "I do not waive my right to counsel." Stier repeated the question several more times, hoping to get a yes or no answer. Each time, Ally replied, "I do not waive my right to counsel." Erring on the side of caution, Stier provided phone books to Ally along with a telephone

and told Ally that he had time to call an attorney. Ally did not make any effort to contact an attorney. Stier advised Ally several times that this was his opportunity to consult with an attorney. Ally said that he "was not going to contact an attorney who has taken an oath to the [s]tate because it is a conflict of interest" and that he "wasn't going to try" to contact an attorney because "he wasn't going to be able to get ahold of somebody during the middle of the night." Ally never used the phone to contact an attorney, and Stier moved on to the next topic.

Stier asked Ally if he would take a breath test. Ally responded: "I plead the fifth." Stier asked several more times, and Ally responded in the same manner each time. Stier finally told Ally that he would provide him the opportunity to take the breath test, unless he actively refused. Stier led Ally to the Intoxilyzer room, activated the machine, instructed Ally that the machine allotted a limited amount of time to provide a breath sample, and warned Ally that if he did not provide a sample within the allotted time, he would be charged with test refusal. Ally sat on a bench during the entire four-minute test cycle without making an effort to provide a breath sample. Stier told Ally that he would be charged with test refusal and led him to another room to complete the booking process.

The jury found Ally guilty of DWI, test refusal, and failure to illuminate license plates. Ally appeals his convictions of DWI and test refusal.

D E C I S I O N

I.

Ally argues that "the record lacks sufficient evidence to support the jury's finding that" Stier had probable cause to believe he was "driving while under the influence of alcohol, sufficient to require [him] to submit to a chemical test under Minn. Stat. § 169A.20, subd. 2 [(2010)]."

Under section 169A.20, subdivision 2, "[i]t is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." Minn. Stat. § 169A.20, subd. 2.

> The plain language of section 169A.20, subdivision 2 . . . incorporates the requirement from section 169A.51 that an officer may request that a person submit to a chemical test when the officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle while impaired.

State v. Koppi, 798 N.W.2d 358, 362 (Minn. 2011) (quotation omitted). "Refusing a chemical test is not a crime, therefore, unless it can be proven beyond a reasonable doubt that an officer had probable cause to believe the person was driving, operating, or in physical control of a motor vehicle while impaired." *Id.* (quotation omitted).

"Probable cause under section 169A.51, subdivision 1(b), exists whenever there are facts and circumstances known to the officer which would warrant a prudent man in believing that the individual was driving or was operating or was in physical control of a motor vehicle while impaired." *Id.* (quotation omitted). "The existence of probable

cause depends on the particular circumstances, conditioned by officers' own observations and information and guided by the whole of their police experience." *Id.* (quotation omitted). "[T]he probable cause standard asks whether the totality of the facts and circumstances known would lead a reasonable officer to entertain an honest and strong suspicion that the suspect has committed a crime." *Id.* at 363 (quotation omitted).

An appellate court assesses the sufficiency of the evidence supporting a conviction by determining whether the legitimate inferences drawn from the evidence on the record would permit a jury to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). This court's review is limited to a careful analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Ally's probable-cause argument lacks merit. Ally concedes that Stier testified that he observed the following regarding Ally: "(1) [a] strong odor of alcohol, (2) bloodshot and watery eyes, (3) slightly slurred speech, (4) motioning from side-to-side, and (5) [his] vehicle crossing over the fog line upon Stier's activation of his emergency lights." Stier

only needed one indication of intoxication to establish probable cause. *See State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004) (stating that "[a]n officer needs only one objective indication of intoxication to constitute probable cause to believe a person is under the influence," and that "[c]ommon indicia of intoxication include an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude" (quotation omitted)). There was more than enough evidence for the jury to reasonably conclude that the totality of the circumstances would lead a reasonable officer to entertain an honest and strong suspicion that Ally drove his vehicle while impaired. *See id.* (holding that a strong odor of alcohol, blood-shot watery eyes, and slurred speech provided probable cause to suspect the defendant was driving under the influence of alcohol).

II.

Ally next argues that he "was not afforded a reasonable opportunity to consult with counsel and gather his thoughts after being read the [i]mplied [c]onsent [a]dvisory." Under the Minnesota Constitution, an individual has "a limited right to consult an attorney before deciding whether or not to submit to chemical testing for blood alcohol." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 829 (Minn. 1991). But prior to trial, Ally appeared in court with counsel, acknowledged his right to a contested hearing on the right-to-counsel issue, and indicated that he waived the issue. On appeal, Ally attempts to circumvent his waiver by arguing that the denial of counsel renders his refusal reasonable, and therefore "the jury's guilty verdict cannot stand." But Ally did not present a reasonable-refusal defense or otherwise raise the issue during trial. "This court

generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We therefore do not consider Ally's right-to-counsel argument.

III.

Ally argues that "there is insufficient evidence to support the guilty verdict for driving while under the influence of alcohol."

"It is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . when . . . the person is under the influence of alcohol." Minn. Stat. § 169A.20, subd. 1 (2010). "A person is under the influence when a person does not possess that clearness of intellect and control of himself that he otherwise would have." *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012) (quotation omitted). "The state must show that the driver had drunk enough alcohol so that the driver's ability or capacity to drive was impaired in some way or to some degree." *Id.* (quotation omitted).

Ally argues that the evidence presented at trial "supports a rational hypothesis that [he] had consumed alcohol, but was not under the influence of alcohol" and that he "possessed the clearness of intellect and control of himself that an intoxicated person would not have." Because Ally contests the element of DWI pertaining to his state of mind at the time of the incident, we review his sufficiency-of-the-evidence claim under our standard of review for circumstantial evidence. *See State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) ("Because it is a state of mind, premeditation is generally proven through circumstantial evidence, and is often inferred from the totality of circumstances surrounding the killing." (quotation omitted)).

Appellate courts apply heightened scrutiny when reviewing verdicts based on circumstantial evidence. *Pratt*, 813 N.W.2d at 874. This heightened scrutiny requires that courts "consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Id*. (quotation omitted). "The circumstances proved must be consistent with a hypothesis that the defendant is guilty and must be inconsistent with any other rational hypothesis." *Id*. "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Id*. (quotation omitted). We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture; the state does not have the burden of removing all doubt, but of removing all reasonable doubt. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011).

We first identify the circumstances proved. *Id*. In doing so, we defer to the fact-finder's "acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Pratt*, 813 N.W.2d at 874 (quotations omitted). Second, we "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt." *Hanson*, 800 N.W.2d at 622 (quotation omitted). We "give no deference to the fact finder's choice between reasonable inferences." *Id*. (quotation omitted). We must consider "whether the circumstances proved are consistent with guilt and inconsistent, on the whole, with any reasonable

hypothesis of innocence." *State v. Hawes*, 801 N.W.2d 659, 669 (Minn. 2011) (emphasis omitted) (quotation omitted).

In this case, the circumstances proved are that Ally swerved sharply onto the shoulder of the road after Stier activated his emergency lights, he accelerated and traveled several blocks before pulling over, he emitted a strong odor of alcohol, he swayed from side to side while standing, his eyes were bloodshot and watery, his speech was slurred, he was uncooperative with Stier, he did not follow instructions, and he provided nonresponsive answers "just to be difficult."

Ally argues that a number of these circumstances do not necessarily prove intoxication. For example, he argues that Stier "acknowledged that he would be unable to determine how much alcohol someone has consumed based on the odor of alcohol on his or her breath"; that although his speech may have been slightly slurred, Stier "never had difficulty understanding [him]"; and that he did not swerve until Stier activated his emergency lights. But taken as a whole, the circumstances proved—specifically, the physical evidence of alcohol consumption and Ally's driving conduct and attitude—are consistent with a conclusion that Ally did not possess intellectual clarity or self control and inconsistent with any reasonable hypothesis that he was not under the influence of alcohol. *See id.* (stating that an appellate court "consider[s] whether the circumstances proved are consistent with guilt and inconsistent, *on the whole*, with any reasonable hypothesis of innocence" (quotation omitted)). Thus, the evidence was sufficient to support Ally's DWI conviction.

Affirmed.