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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1395

State of Minnesota,
Respondent,

vs.

Corey Christopher Isaacson,
Appellant.

Filed September 3, 2013
Affirmed
Schellhas, Judge

Meeker County District Court
File No. 47-CR-11-727

Lori Swanson, Attorney General, Karen B. Andrews, Assistant Attorney General, St. Paul, Minnesota; and

Anthony Spector, Meeker County Attorney, Litchfield, Minnesota (for respondent)

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

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions of and sentences for driving while intoxicated and refusal to submit to chemical testing, arguing that (1) the district court

erroneously instructed the jury, (2) the evidence was insufficient to support his convictions, and (3) the district court abused its discretion in sentencing him. We affirm.

FACTS

In the early morning hours of August 14, 2011, while parked in his squad car in a lot near the intersection of County State Aid Highway 14 and Curran Street in Darwin, Meeker County Deputy Sheriff Jeffrey Pedersen observed a dark blue, two-door sports utility vehicle (SUV) traveling erratically. The SUV exited a driveway; rapidly accelerated; made a left turn; stopped suddenly at an intersection; quickly accelerated into a right turn, turning wide and into the oncoming-traffic lane; "overcorrected" into its own traffic lane; and again swerved into the oncoming-traffic lane before returning to its own traffic lane. At the time, the road surfaces were dry.

Deputy Pedersen believed that the driving he observed indicated that the SUV driver was either impaired or distracted. When Deputy Pedersen activated his emergency lights and began to follow the SUV, it accelerated and drove quickly through a horseshoe-shaped driveway, before it "slammed on its brakes" in front of a barricade in the driveway. The driver immediately exited the vehicle, leaving the engine running and the driver's door open, and walked towards Deputy Pedersen's squad car. Deputy Pedersen observed that the driver had difficulty maintaining his balance, and Deputy Pedersen approached him and saw an open can of beer on the console of the SUV. Deputy Pedersen asked the driver, later identified with a Tennessee I.D. as appellant Corey Isaacson, why he was trying to flee and why he was in a hurry, and Isaacson "shrugged his shoulders and said he was trying to get away." Deputy Pedersen noticed a

very strong odor of alcohol coming from Isaacson, that his eyes were bloodshot and watery, and that his speech was at times slurred. Based on his observations of Isaacson's driving and conduct, Deputy Pedersen believed that Isaacson was under the influence of alcohol.

Isaacson refused to perform the standardized field sobriety tests requested by Deputy Pedersen, so Deputy Pedersen arrested him on probable cause of driving while impaired (DWI) and transported him to the jail, where a corrections sergeant observed that Isaacson "went directly to the chairs"; laid "flat out"; "smelled of an alcoholic beverage"; was "very glassy eyed"; had "runny, runny eyes, teary, teary eyes"; "talked quietly"; and "mumbled." The corrections sergeant opined that Isaacson was under the influence of alcohol.

Deputy Pedersen repeatedly attempted to administer the implied-consent advisory. Isaacson refused to take the test, asking the deputy to take him to his jail cell, telling the deputy that he was "confused" about his right to call an attorney, and stating that he "studied law for years" and that the deputy could not question him without violating his *Miranda* rights. Isaacson told Deputy Pedersen that he had just driven from Baltimore and had no idea what Deputy Pedersen was talking about, he did not know how to call an attorney, he would not answer any of Deputy Pedersen's questions, and he wanted to go straight to his cell.

Respondent State of Minnesota charged Isaacson with (1) felony driving while impaired under Minn. Stat. § 169A.20, subd. 1(1) (2010); (2) felony refusal to submit to chemical testing under Minn. Stat. § 169A.20, subd. 2 (2010); (3) possession of an open

container while in a vehicle under Minn. Stat. § 169A.35, subd. 3 (2010); (4) driving after revocation of his driver's license under Minn. Stat. § 171.24, subd. 2 (2010); and (5) fleeing a peace officer in a motor vehicle under Minn. Stat. § 609.487, subd. 3 (2010). Isaacson filed numerous pro se motions with the district court, including, pertinent to this appeal, motions to suppress evidence of his test refusal. The district court held two omnibus hearings and issued a 30-page omnibus order and memorandum denying Isaacson's motions in their entirety. Before trial, the state dismissed the open-container charge, and the district court excluded Isaacson's evidence that his refusal to take the breath test resulted from his confusion. At the close of trial, the district court denied Isaacson's request for a reasonable-refusal jury instruction.

The jury found Isaacson guilty of all counts. The district court sentenced Isaacson to the presumptive sentence of 60 months' imprisonment for felony DWI with 270 days' jail credit; 72 months' imprisonment for DWI test refusal with 270 days' jail credit, to run concurrently with Isaacson's sentence for felony DWI; the presumptive sentence of 12 months and one day for fleeing a police officer, to run consecutively with Isaacson's sentence for DWI test refusal; and 90 days for driving after license revocation with 90 days' jail credit.

This appeal follows.

D E C I S I O N

Reasonable-Test-Refusal Jury Instruction

Isaacson argues that the district court erred by denying Isaacson's request for a jury instruction on the affirmative defense of reasonable test refusal because "when the

evidence is viewed most favorably to the defense, there was a factual basis for the instruction" and the "absence of such an instruction was prejudicial because if the instruction had been given the jury reasonably may have acquitted" Isaacson of the test-refusal charge. Isaacson's argument is unpersuasive.

We review jury instructions "in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Heiges*, 779 N.W.2d 904, 913 (Minn. App. 2010) (quotation omitted), *aff'd*, 806 N.W.2d 1 (Minn. 2011); *see State v. Holmberg*, 527 N.W.2d 100, 106 (Minn. App. 1995) ("An instruction need not be given if it is not warranted by either the facts or the relevant case law."), *review denied* (Minn. Mar. 21, 1995). "Determining whether a jury instruction should be given lies within the discretion of the district court and will not be reversed but for an abuse of that discretion." *State v. Hall*, 764 N.W.2d 837, 846 (Minn. 2009) (quotation omitted). A district court abuses its discretion if it "refuse[s] to give an instruction on the defendant's theory of the case if there is evidence to support it." *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006) (quotation omitted). "[I]n deciding whether a specific jury instruction should be given, a reviewing court must view the evidence in the light most favorable to the party requesting the instruction to determine whether the trial court abused its discretion." *Turnage v. State*, 708 N.W.2d 535, 545 (Minn. 2006).

We conclude that the district court did not err when it declined to instruct the jury on the reasonable-test-refusal defense. Generally, if a person refuses to permit a test, law enforcement may not administer the test. Minn. Stat. § 169A.52, subd. 1. In implied-consent cases, "[i]t is an affirmative defense for the petitioner to prove that, at the time of

the refusal, the petitioner's refusal to permit the test was based upon reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c) (2010). Here, the state charged Isaacson with test refusal under Minn. Stat. § 169A.20, subd. 2, which references the implied-consent statute by providing that: "[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)." But nothing in Minn. Stat. §§ 169A.20, subd. 2, 169A.51, or 169A.52, provides that the reasonable-test-refusal defense is applicable in *criminal* test-refusal cases. And none of the cases cited to by Isaacson supports his argument that the reasonable-refusal defense is available to a defendant facing a criminal test-refusal charge.

In *State v. Johnson*, on which Isaacson relies, this court rejected the appellant's argument that the "trial court erroneously instructed the jury regarding reasonable refusal to test," where the trial court instructed the jury on the reasonable-refusal affirmative defense but provided a potentially confusing example of what might constitute reasonable refusal. 672 N.W.2d 235, 241–43 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004). This court stated that the "district court's instruction was a substantially correct statement of the law," and concluded that the "instruction did not contain an error of fundamental law or controlling principle and that the district court did not abuse its discretion." *Id.* at 243. But, in *Johnson*, this court did not consider whether reasonable refusal is a defense available to a defendant in a criminal-test-refusal case. *Id.* at 241–43. Instead, this court considered the far narrower issue of whether the unchallenged,

reasonable-refusal jury instruction given by the district court created reversible error. *Id.* at 242–43. *Johnson* therefore is not relevant to the issue presented in this case.

In *State v. Ouellette*, 740 N.W.2d 355, 359 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007), and *State v. Olmscheid*, 492 N.W.2d 263, 265 (Minn. App. 1992), also cited by Isaacson, this court noted that the criminal-test-refusal statute explicitly incorporates aspects of the civil-implied-consent statute. *Ouellette*, 740 N.W.2d at 359; *Olmscheid*, 492 N.W.2d at 265. But as previously discussed, section 169A.20, subdivision 2, does not incorporate the portion of the civil-implied-consent statute containing the reasonable-refusal defense. Therefore, neither case is persuasive.

Because no case or statute provides that the reasonable-refusal defense is available to defendants facing a criminal test-refusal charge, we conclude that the district court's jury instructions fairly and adequately explained the law of the case and that the court did not abuse its discretion by declining to give the jury a reasonable-test-refusal instruction. *Holmberg*, 527 N.W.2d at 106 ("An instruction need not be given if it is not warranted by either the facts or the relevant case law."); *see State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) ("Jury instructions, reviewed in their entirety, must fairly and adequately explain the law of the case.").

Isaacson also argues that the district court abused its discretion by preventing him from questioning Deputy Pederson about facts that would support Isaacson's reasonable-refusal defense. "[A]bsent an abuse of discretion [an appellate court] will not overturn the district court's evidentiary rulings." *State v. Zornes*, 831 N.W.2d 609, 625 (Minn. 2013). "Due process requires that every criminal defendant be afforded a meaningful

opportunity to present a complete defense." *State v. Munt*, 831 N.W.2d 569, 583 (Minn. 2013) (quotations omitted). But the defendant is limited in this right in that the defendant "must comply with the procedural and evidentiary rules designed to ensure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* (quotations omitted). "A defendant has no constitutional right to present irrelevant evidence," and "[e]vidence that is not relevant is inadmissible." *State v. Woelfel*, 621 N.W.2d 767, 773 (Minn. App. 2001) (citing Minn. R. Evid. 402) (quotation omitted), *review denied* (Minn. Mar. 27, 2001). We conclude that the district court did not abuse its discretion by preventing Isaacson from questioning Deputy Pederson about facts that would support Isaacson's reasonable-refusal defense.

Test-Refusal Jury Instruction

Isaacson argues, and the state concedes, that the district court committed plain error when it instructed the jury that the second element of the test-refusal charge was that "the peace officer placed the defendant under lawful arrest for driving while impaired. An arrest is lawful *when the officer has reason to believe that the defendant is in violation of the law and the officer can explain the reason.*" (Emphasis added.) Isaacson did not object to this jury instruction, so we review the unobjected-to jury instruction under a plain-error analysis. *See State v. Larson*, 787 N.W.2d 592, 600 (Minn. 2010). Under the plain-error three-prong test, this court reviews whether there is "(1) error; (2) that is plain; and (3) the error . . . affect[s] substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity

of the judicial proceedings." *Id.* "A jury instruction is erroneous if it materially misstates the applicable law." *Koppi*, 798 N.W.2d at 362.

Isaacson argues that the district court's instructions were erroneous because "whether an arrest is lawful is an objective test and it is not determined by whether the arresting officer believes a violation of the law exists and can explain his reasoning." Isaacson's argument has merit. Instructing the jury that an arrest may be lawful if based on the officer's subjective belief is error because the instruction focuses on the officer's subjective reasons for making the arrest, rather than the requisite objective standard. *See id.* at 362–63. Moreover, the instruction constitutes plain error because it contravenes the supreme court's holding in *Koppi*. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (stating that "[a]n error is plain if it was 'clear' or 'obvious,'" which is "[u]sually . . . shown if the error contravenes case law, a rule, or a standard of conduct" (quotation omitted)).

But we disagree with Isaacson that the district court's plainly erroneous jury instruction requires reversal. Isaacson does not satisfy the heavy burden of persuasion to satisfy the third prong of the plain-error test, which requires that "the error . . . affect [the defendant's] substantial rights." *Griller*, 583 N.W.2d at 740−41. Overwhelming evidence in this case supports the jury's finding that Deputy Pedersen's arrest of Isaacson was lawful. We conclude that the district court's plainly erroneous jury instruction did not affect Isaacson's substantial rights. *See State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (concluding that plainly erroneous prosecutorial misconduct did not affect Dobbins's substantial rights because the "state's case against Dobbins was very strong");

Rairdon v. State, 557 N.W.2d 318, 323–25 (Minn. 1996) (concluding in plain-error analysis that prosecutorial misconduct did not deprive defendant of a fair trial when, among other things, the evidence against him was overwhelming).

Sufficiency of the Evidence

Isaacson argues that the record does not support his DWI conviction beyond a reasonable doubt and that this court must reverse his conviction. "When reviewing the sufficiency of the evidence leading to a conviction, we 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. Hayes*, 831 N.W.2d 546, 552 (Minn. 2013) (quotation omitted). "The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense." *Id.* (quotation omitted). The reviewing court "must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted).

As a preliminary matter, Isaacson argues that the testimony of Deputy Pederson and the corrections sergeant constitutes only circumstantial evidence that he drove under the influence. He argues therefore that this court should apply the higher standard that is applicable to convictions based on circumstantial evidence. Isaacson's argument is unpersuasive because this court has previously concluded that observations by police of a driver who was "'unsteady,' smelled of alcohol, etc., are direct evidence of the conditions they observed." *State v. Stokes*, 354 N.W.2d 53, 56 (Minn. App. 1984).

To support Isaacson's conviction for DWI, the state was required to prove beyond a reasonable doubt that Isaacson drove, operated, or was in physical control of his vehicle while under the influence of alcohol. *See* Minn. Stat. § 169A.20, subd. 1(1). "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 was required to 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.* (quoting *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992)). Construing the evidence in favor of the verdict, we conclude that Isaacson's DWI conviction is supported by sufficient evidence.

Isaacson cites *State, City of Eagan v. Elmourabit*, 373 N.W.2d 290 (Minn. 1985), to support his argument that the evidence is insufficient to sustain his conviction. In *Elmourabit*, the supreme court affirmed this court's reversal of a jury conviction where there were "unique facts and circumstances," in that defendant admitted to drinking "one beer and a few sips of another" and

> was driving 13 miles over the speed limit, but this is not uncommon for sober drivers too. There was an odor of alcohol, but the recent drinking of one bottle of beer may leave an odor of alcohol on the breath. Defendant's speech was at times slurred, but English is not his native tongue. There was testimony of some lack of coordination, but the video-taped dexterity tests showed none. There was evidence of glassy, bloodshot eyes, but also evidence of a heightened hyperventilative state. There was evidence defendant was not having a heart attack, but neither could the officers nor the paramedics say authoritatively that defendant had no medical problems or was not experiencing pain. If defendant's behavior in the police station was at times strange, to account

> for that behavior by the amount of alcohol consumed between 11:30 p.m. and 12:26 a.m., after allowing for defendant's itinerary on leaving work, seems also difficult to explain.

373 N.W.2d at 291, 293–94. The court specifically stated that the case was "of little precedential value" and emphasized that the case turned on "unique facts and circumstances." *Id.* at 293–94.

Isaacson emphasizes the statement he made during the implied-consent advisory that "he had just driven across the country from Baltimore and . . . was tired" and argues that his fatigue could have caused his "eye redness and other coordination issues." But this court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Caldwell*, 803 N.W.2d at 384 (quotation omitted). Moreover, unlike in *Elmourabit*, the record before us contains no evidence showing that English is not Isaacson's first language, or other evidence that might explain his mumbling and slurred speech. *See* 373 N.W.2d at 293. Further, unlike the defendant in *Elmourabit*, who was merely speeding, *id.*, Isaacson was driving aggressively and swerving, and Deputy Pedersen testified that the odor of alcohol was so "overwhelming" that his squad smelled of alcohol even after Isaacson left it. Isaacson's reliance on *Elmourabit* is misplaced.

We conclude that the evidence in this case is sufficient to sustain Isaacson's DWI conviction.

Sentencing

Isaacson argues that the district court abused its discretion by assigning him one-half felony point for his Wisconsin conviction of attempted battery of a peace officer. The Minnesota Sentencing Guidelines "direct that out-of-state felony convictions be

included in a defendant's criminal-history score." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006); *see* Minn. Sent. Guidelines 2.B.5 (Supp. 2011). For the conviction to be included, the state must "establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota." *Maley*, 714 N.W.2d at 711 (citing *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983)). This court reviews the district court's inclusion of an out-of-state felony conviction in a defendant's criminal-history score for an abuse of discretion. *See Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992) (noting that a district court's inclusion of an out-of-state conviction may be reversed if the court "abuses its discretion"); *see also* Minn. Sent. Guidelines 2.B.5 (stating that the "determination of the equivalent Minnesota felony for an out-of-state felony is an exercise of the sentencing court's discretion"). "The designation of out-of-state convictions as felonies . . . shall be governed by the offense definitions and sentences provided in Minnesota law" and is based "on the severity level of the equivalent Minnesota felony offense." Minn. Sent. Guidelines 2.B.5.

Isaacson pleaded guilty to attempted battery of a peace officer in Wisconsin in 2004 under Wis. Stat. § 940.20(2) (2002). That statute provides that a defendant is guilty of battery of law enforcement officers if he "intentionally causes bodily harm to a law enforcement officer." Wis. Stat. § 940.20(2). "'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." Wis. Stat. § 939.22(4) (2002). The district court reasoned that the "most comparable" Minnesota felony was fourth-degree assault under Minn. Stat. § 609.2231, subd. 1 (2010), which provides that

"[w]hoever physically assaults a peace officer . . . when that officer is effecting a lawful arrest or executing any other duty imposed by law is guilty of a gross misdemeanor" but that if the "assault inflicts demonstrable bodily harm," the defendant is guilty of a felony. Bodily harm is "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2010).

Isaacson argues that the district court abused its discretion because the "Wisconsin offense requires less proof of injury than the Minnesota felony offense." We conclude that the district court did not abuse its discretion because Isaacson's prior offense is the equivalent of a felony offense in Minnesota. The Wisconsin complaint alleges that Isaacson charged a police officer while carrying two sticks and screaming obscenities and that the police officer became "worried for his safety" and fired his duty pistol at Isaacson. The nature of Isaacson's offense is equivalent to the Minnesota felony of attempted assault in the second degree. *See* Minn. Stat. § 609.17, subd. 1 (2010) ("Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime . . . ."); Minn. Stat. § 609.222, subd. 1 (2010) ("Whoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than seven years . . . .").

Isaacson argues that sentencing courts may not consider the nature of the offense when determining criminal-history scores because "the Guidelines now direct the court to look at only the offense definitions and sentence." *Compare* Minn. Sent. Guidelines cmt. II.B.504 (2004) ("[S]entencing courts should consider the nature and definition of the

foreign offense, as well as the sentence received by the offender."), *with* Minn. Sent. Guidelines cmt. 2.B.5 (Supp. 2011) (omitting reference to "the nature" of the offense). But the comments to the sentencing guidelines are "advisory and not binding on the courts." *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003). And "restrict[ing] the sentencing court to looking at the definition of the out-of-state or foreign offense would in effect . . . unjustifiably bar the sentencing court from designating scores of felony offenses from other states as felonies for criminal history purposes in Minnesota" and would "be unfair" to defendants with Minnesota convictions. *Hill*, 483 N.W.2d at 61.

Isaacson argues that the district court's consideration of the Wisconsin complaint "is bad policy and runs up against basic due process safeguards." But this court has considered complaints when determining whether an out-of-state offense is a felony in Minnesota. *See State v. Edmison*, 398 N.W.2d 584, 588 (Minn. App. 1986) (considering the complaint when determining if a Wisconsin conviction for "'battery to a peace officer'" was equivalent to a Minnesota felony). Further, Isaacson conceded at the sentencing hearing that when the Wisconsin offense occurred he "had a stick in [his] hand" and "moved towards" the officer.

We conclude the district court acted within its discretion by assigning Isaacson one-half felony point for his Wisconsin conviction of attempted battery of a peace officer.

Pro Se Arguments

In a 73-page pro se supplemental brief, Isaacson argues that he was unconstitutionally "'inhibited'" from making a phone call to an attorney during the implied-consent advisory; that the district court erred by "not suppressing or excluding

from trial and dis[]missing the DWI-chemical test refusal offense . . . because the appellant was confused or had a mistaken belief that he had a *Miranda* . . . right . . . during the [implied]- consent advisory"; and that the district court showed "bias" and "fail[ed] to remain impartial" and "committed reversible error . . . by not ruling on an argument the appellant made in an omnibus motion and was raised orally in open court." In a 26-page pro se supplemental reply brief, Isaacson identifies clerical errors in his 73-page supplemental brief and reiterates the arguments made in that brief.

We have carefully considered all of Isaacson's pro se arguments and conclude that none of them has merit.

Affirmed.