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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1530**

State of Minnesota,
Respondent,

vs.

Anthony Paul Braun,
Appellant.

**Filed August 12, 2013
Affirmed
Schellhas, Judge**

Dakota County District Court
File No. 19HA-CR-11-342

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

James C. Backstrom, Dakota County Attorney, Heather D. Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of first-degree driving while impaired and first-degree refusal to submit to an implied-consent test. Appellant argues that the district

court committed plain error by admitting invalid Intoxilyzer results into evidence and that the evidence is insufficient to sustain his convictions. We affirm.

FACTS

While driving from Farmington to Hastings in the early morning hours of January 28, 2011, H.G. saw a white truck in a ditch with a person sitting in the driver's seat. Thirty to forty minutes later, H.G. noticed that the truck was still in the ditch and saw a man walking along the road about a mile from the truck. The man was later identified as appellant Anthony Braun. H.G. stopped and offered Braun her phone so that he could call someone for a ride. Instead, H.G. drove Braun to the truck that he identified as his. Braun told H.G. that someone else had been in the truck. H.G. observed that Braun was "very drunk." When H.G. and Braun reached the truck, no one was in it, and Braun said that he would be unable to get the truck out of the ditch. H.G. therefore called the Dakota County Sheriff's Office for help and waited for help to arrive.

When Dakota County Sergeant James Iliff arrived at the scene, he observed that the truck was stuck in the snow on a snowmobile trail far from the road. At 3:14 a.m., Dakota County Deputies Daniel Siebenaler and Gordon Steffel also arrived at the scene. With a cigarette that had a charred filter backwards in his mouth, Braun approached Deputy Siebenaler and asked if he "had a match." Deputy Siebenaler observed that Braun's speech was very slurred, slow, and disoriented; he had a strong odor of an alcoholic beverage; he was staggering, swaying, and unsure of himself; and he had disheveled clothing and wet pants. Based on Siebenaler's training and 30 years' experience, he believed that Braun was under the influence of alcohol, and Deputy Steffel

formed the same belief. When Braun ignored several requests to perform field-sobriety tests, Deputy Siebenaler placed him under arrest for driving while impaired and found a set of keys to the truck in Braun's pocket. After Deputy Siebenaler handcuffed Braun and placed him in the squad car, Braun complained of problems breathing and Deputy Siebenaler therefore adjusted Braun's handcuffs and removed them upon arrival at the jail. Braun expressed no further concerns about his breathing.

At 4:06 a.m., Deputy Siebenaler began reading Braun the implied-consent advisory, and he and Deputy Steffel attempted to help Braun contact an attorney but to no avail. At approximately 5:23 a.m., Braun agreed to submit to a breath test. Deputy Steffel, certified in the Intoxilyzer 5000, then attempted to administer the test. Braun's first breath sample was deficient but showed an alcohol concentration of .185. For the second breath sample, Braun breathed no air into the Intoxilyzer, also resulting in a deficient sample. Deputy Steffel restarted the testing process and administered a second Intoxilyzer test to Braun, whose first breath sample was adequate and showed an alcohol concentration of .177. Braun's second breath sample was deficient but showed an alcohol concentration of .189. The Intoxilyzer did not provide a final result because Braun did not provide two adequate breath samples. Deputy Steffel observed that Braun's deficient breath samples were the result of his blowing around the breath tube rather than through it and not blowing long enough into the tube.

Respondent State of Minnesota charged Braun with first-degree driving while impaired (DWI) under Minn. Stat. §§ 169A.20, subd. 1(1); .24 (2010), and first-degree refusal to submit to implied-consent test under Minn. Stat. §§ 169A.20, subd. 2; .24

(2010). On November 22, 2011, the district court found Braun to be incompetent under Minn. R. Crim. P. 20.01, subd. 2, and suspended the proceedings. On December 2, 2011, the district court found Braun to be competent; reinstated the proceedings; and commenced a jury trial on April 17, 2012. Braun testified that his truck broke down, he went to retrieve it, he had the truck keys in his pocket, and he was not under the influence of alcohol. Braun also testified that, at the time of his arrest, he had chest pains and thought that he was having a heart attack. The implied-consent advisory confused him, and, although he attempted to cooperate with Deputy Steffel's instructions, he testified that he was unable to do so. The state impeached Braun with his 2007 felony DWI conviction. Without objection by Braun, the district court admitted into evidence the Intoxilyzer tests. The jury found Braun guilty of both offenses.

This appeal follows.

DECISION

Admission of Partial Intoxilyzer Test Results

Braun argues that the district court committed plain error by admitting partial Intoxilyzer test results in evidence. We review the district court's evidentiary ruling for plain error because Braun did not object to the admission of the evidence. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error test, there must be "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* If all 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.* If the "answer to any one of the three initial questions is resolved in the negative, the claim fails and the

defendant is not entitled to any relief.” *State v. Jenkins*, 782 N.W.2d 211, 230 (Minn. 2010). Appellate courts “review a trial court’s evidentiary rulings for an abuse of discretion.” *Id.* at 229.

From the attempted administration of two Intoxilyzer tests, the district court admitted the partial test results of three breath samples—one adequate and two deficient.

Admission of Partial Test Result from Adequate Breath Sample

The district court admitted in evidence the test result from Braun’s adequate breath sample that he provided during the second attempted administration of the Intoxilyzer test. The adequate breath sample showed an alcohol concentration of .177.

Under Minn. Stat. § 169A.51, subd. 5(a) (2010), a “[breath] test must consist of analyses in the following sequence: one adequate breath-sample analysis, one control analysis, and a second, adequate breath-sample analysis.” “[A] sample is adequate if the instrument analyzes the sample and does not indicate the sample is deficient.” Minn. Stat. § 169A.51, subd. 5(b) (2010). “[A] breath test consisting of two separate, adequate breath samples within 0.02 alcohol concentration is acceptable. A breath *test* consisting of two separate, adequate breath samples failing to meet this criterion is *deficient*.” *Id.*, subd. 5(d) (2010) (emphasis added). “If the first breath test is deficient, as defined by paragraph (d), a second breath test must be administered.” *Id.*, subd. 5(e) (2010). Generally, the results of a breath test, when performed by a trained person, are admissible in evidence without expert testimony that an approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath. Minn. Stat. § 634.16 (2010). “Upon the trial of any prosecution arising out of acts alleged to have been

committed by any person arrested for violating section 169A.20 (driving while impaired) . . . , the court may admit evidence of the presence or amount of alcohol in the person’s . . . breath, . . . as shown by an analysis of [the breath].” Minn. Stat. § 169A.45, subd. 1 (2010). “Evidence of the refusal to take a test is admissible into evidence in a prosecution under section 169A.20 (driving while impaired).” *Id.*, subd. 3 (2010).

Moreover, section 169A.45, subdivisions 1–3 (2010),

do not limit the introduction of any other competent evidence bearing upon the question of whether the person violated section 169A.20 (driving while impaired) . . . , including . . . *results obtained from partial tests* on an infrared or other approved breath-testing instrument. A result from a *partial test* is the measurement obtained by analyzing *one adequate breath sample*, as described in section 169A.51, subdivision 5, paragraph (b) (breath test using infrared or other approved breath-testing instrument).

Minn. Stat. § 169A.45, subd. 4 (2010) (emphasis added). The admission of a partial test is allowed to prove that a person is impaired. *See State v. Netland*, 742 N.W.2d 207, 222 (Minn. App. 2007) (“A partial Intoxilyzer test may be competent evidence bearing upon the question of whether the person violated section 169A.20.” (quotation omitted)), *aff’d in part, rev’d on other grounds*, 762 N.W.2d 202 (Minn. 2009); *State v. Hallfielder*, 375 N.W.2d 571, 572 (Minn. App. 1985) (noting that DWI statute “allow[s] the use of a partial test to prove that someone is *under the influence*”), *review denied* (Minn. Dec. 19, 1985).

Here, the state charged Braun with first-degree driving while impaired under Minn. Stat. §§ 169A.20, .24. Based on the statute and caselaw, we conclude that the

district court did not err in admitting the partial test result from Braun's adequate breath sample that showed an alcohol concentration of .177.

Admission of Partial Test Results from Deficient Samples

Without objection from Braun, the district court admitted in evidence the test result from Braun's deficient breath samples that he provided during the first and second attempted administrations of the Intoxilyzer test. Braun's deficient breath samples showed alcohol concentrations of .185 and .189.

“The district court has the discretion to determine whether partial-test evidence is competent.” *Netland*, 742 N.W.2d at 222; see *State v. Kieley*, 413 N.W.2d 886, 888 (Minn. App. 1987) (affirming district court's admission of deficient breath samples in DWI case in which competency of evidence to show intoxication was based on expert testimony). In *Netland*, we concluded that evidence that the Intoxilyzer test was incomplete was competent circumstantial evidence that Netland was unwilling to provide a reliable sample of her breath and that whether she was actually impaired by alcohol was irrelevant. *Netland*, 742 N.W.2d at 223. In reliance on *Netland*, the state argues that the district court properly admitted the deficient samples as competent circumstantial evidence that Braun refused to provide a reliable breath sample. Although neither this court, in *Netland*, nor any other Minnesota appellate court has stated that test results from deficient breath samples are admissible to show impairment, no court has said that they are inadmissible.

Even if we were to conclude that the district court committed error by admitting the test results of the deficient breath samples to show impairment, Braun has not shown

that the error was plain. *See Griller*, 583 N.W.2d at 741. “An error is plain if it is clear or obvious.” *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (quotation omitted). “Typically this is shown if the error contravenes case law, a rule, or a standard of conduct.” *Id.* We recognize that, in *Kieley*, the district court heard expert testimony before determining that the deficient-sample test results constituted competent evidence of intoxication. 413 N.W.2d at 888. But, because no appellate court has determined that expert testimony is *required* to establish the competency of a deficient-sample test result to show impairment, Braun cannot meet his burden of showing that any error was plain. *See also* Minn. Stat. § 169A.45, subd. 4 (“The preceding provisions do not limit the introduction of any other competent evidence bearing upon the question of whether the person violated section 169A.20 (driving while impaired) . . .”).

And, even if the district court committed plain error by admitting the deficient-sample test results to show impairment, Braun has not shown that the error was prejudicial and affected the outcome of the case, thereby affecting his substantial rights. “Plain error is prejudicial when there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *Sontoya*, 788 N.W.2d at 872. “The defendant bears a heavy burden of persuasion on this prong.” *Id.* (quotation omitted). Because the evidence of Braun’s impairment was overwhelming, Braun has not shown a reasonable likelihood that admission of the deficient-sample test results had a significant effect on the jury’s verdict.

We conclude that, whether the district court admitted the deficient-sample test results to prove that Braun was impaired by alcohol or to prove that he refused to submit

to the breath test, or both, the district court did not commit plain error by admitting the deficient-sample test results.

Sufficiency of the Evidence

Braun argues that the evidence was insufficient to support his convictions. When an appellate court “assess[es] the sufficiency of the evidence, [it] determine[s] whether the legitimate inferences drawn from the facts in the record would reasonably support the jury’s conclusion that the defendant was guilty beyond a reasonable doubt.” *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). The court must “give due regard to the defendant’s presumption of innocence and the State’s burden of proof, and will uphold the verdict if the jury could reasonably have found the defendant guilty.” *Id.*

Appellate courts apply heightened scrutiny when reviewing verdicts based on circumstantial evidence. *Id.* 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.* 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.* 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. *Id.*

We first identify the circumstances proved. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). 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).

First-Degree Driving While Impaired

A person commits first-degree driving while impaired by “driv[ing], operat[ing], or be[ing] in physical control of any motor vehicle . . . when . . . under the influence of alcohol.” Minn. Stat. § 169A.20, subd. 1(1). Here, H.G. saw someone sitting in the truck when she first passed it. After H.G. saw Braun walking down the road, Braun told her that the truck was his. The deputies observed only one set of footprints leading from the truck—the driver’s side—to the road and found the truck keys in Braun’s pocket.

We conclude that the circumstances proved were consistent with Braun’s guilt and inconsistent, on the whole, with any reasonable hypothesis of innocence. *See Hawes*, 801 N.W.2d at 669 (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” (quotations omitted)). The circumstantial evidence was sufficient to support Braun’s conviction of first-degree driving while impaired.

Refusal to Submit to a Chemical Test

Section 169A.20, subdivision 2, provides that “[i]t is a crime for any person to refuse to submit to a blood, breath, or urine test under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).” In a prosecution under that statutory provision, the state must prove “[a]ctual unwillingness” to “do, accept, give or allow something.” *State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. Mar. 15, 2011). The state can establish refusal by circumstantial evidence, and “refusal 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 (emphasis added).

Here, the evidence shows Braun’s actual unwillingness to participate in the testing process. Although Braun consented to administration of the Intoxilyzer test, he blew around the breath tube and failed to provide adequate breath samples necessary to complete the test. While Braun complained about breathing difficulty in the squad car before the deputies adjusted his hand cuffs, Deputy Steffel testified that Braun was not having any trouble breathing or medical issues during the administration of the Intoxilyzer. And the jury’s verdict shows that it rejected Braun’s contention that his breathing difficulties caused him to provide the partial samples.

Pro Se Arguments

Braun raises constitutional arguments in his supplemental pro se brief, including the following: the state infringed on his free exercise of religion and freedom of speech; he was searched and his truck was seized without probable cause; he was denied a speedy trial; he did not have effective assistance of counsel; the district court judge was not impartial, having been improperly influenced by law enforcement officers involved in the case; and he received a cruel and unusual punishment. Braun fails to support his supplemental arguments with relevant facts or legal authority. We therefore deem Braun's pro se arguments waived. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (deeming as waived pro se argument that included “no citation to any relevant legal authority”); *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (same).

Affirmed.