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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1374

State of Minnesota,
Respondent,

vs.

Clifton NMN Brown, Jr.,
Appellant.

Filed August 18, 2009
Affirmed
Shumaker, Judge

Hennepin County District Court
File Nos. 27-CR-07-114604, 27-CV-07-20651

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

Appellant, who was found guilty by a jury of driving while impaired and test refusal, argues that the evidence was insufficient to support his conviction of driving while impaired and that errors in the court's jury instructions require the reversal of his convictions. He also argues several pro se issues. Because the evidence was sufficient to support appellant's convictions, any error in the jury instructions was harmless, and the pro se issues are without merit, we affirm.

FACTS

At approximately 11 p.m. on September 26, 2007, Officer Hofius stopped appellant Clifton Brown, Jr. for driving without his headlights on. As the officer stood next to Brown's vehicle and spoke to him, Brown looked straight ahead. Officer Hofius found this suspicious, and he also noticed that Brown smelled of alcohol. When Officer Hofius conducted the horizontal gaze nystagmus (HGN) test on Brown, he noted a lack of smooth pursuit in both eyes, indicating impairment. When the officer attempted to have Brown take a preliminary breath test (PBT), Brown stuck his tongue into the PBT device, preventing a breath sample. Officer Hofius arrested Brown, brought him to the station, and read the implied-consent advisory. When the officer asked Brown whether he would provide a blood, urine or breath test, Brown said, "I'm not going to voluntarily give you any of my bodily [inaudible]."

The state charged Brown with driving under the influence of alcohol and test refusal. Brown pleaded not guilty and, in Brown's jury trial, the state offered testimony

from Officer Hofius, the implied-consent advisory form, and a videotape of the officer reading the implied-consent advisory to Brown. After the state rested, Brown moved for judgment of acquittal. The district court denied the motion, and then Brown called his girlfriend Zoe Thomas to testify. She testified that she was with Brown when he was arrested, that he did not drink that day, and that she did not notice any signs of his being impaired.

The jury found Brown guilty of driving while impaired and refusal. Brown appealed from the judgment of conviction.

D E C I S I O N

On appeal from his convictions of driving while impaired and test refusal, Brown argues that (1) there was insufficient evidence to sustain his conviction for driving under the influence of alcohol; (2) the district court erred by failing to instruct the jury on all the elements of test refusal; (3) the district court erred by instructing the jury about his right not to testify without obtaining his consent to the instruction; (4) the test-refusal statute is unconstitutional; and (5) several pro se issues.

Sufficiency of the Evidence

Brown first challenges the sufficiency of the evidence underlying his conviction of driving while impaired. When considering a challenge to the sufficiency of the evidence, we conduct a painstaking analysis of the record, viewing the evidence in the light most favorable to the verdict and assuming the jury believed the state's witnesses and evidence and disbelieved the evidence to the contrary. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988).

To sustain a conviction for driving while impaired, the state must prove that Brown (1) operated a motor vehicle; (2) while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1) (2006); *see* 10A *Minnesota Practice*, CRIMJIG 29.02 (2006). Brown does not deny that he was driving. Rather, he claims the state did not prove he was under the influence while he was driving. A person is "under the influence" when the person does not "possess that clearness of intellect and control of himself that he otherwise would have." *City of Eagan v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985) (quotation omitted). A conviction of driving while impaired may be upheld when the "state shows 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." *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992).

Brown compares his case to *City of Eagan v. Elmourabit*. In that case, defendant Elmourabit was stopped for speeding. *Elmourabit*, 373 N.W.2d at 291. The officer noticed an odor of alcohol, and observed that Elmourabit's eyes were glassy and bloodshot and that he had an "unsteady gait" while walking to the squad car. *Id.* At the police station, Elmourabit performed normally on the relevant dexterity tests, but suddenly "fell to the floor, moaning and groaning," while talking on the telephone with an attorney. *Id.* When placed in the ambulance, he became "physically aggressive, trying to bite and kick." *Id.* The supreme court found the state had presented insufficient evidence of Elmourabit's intoxication because the evidence was in an "uneasy equilibrium." *Id.* at 293-94. The supreme court noted the lack of direct proof of Elmourabit's consumption of alcohol (except for his admission of drinking one beer plus

a few sips), and that "the state relied primarily on outward manifestations of intoxication observed after the defendant was stopped." *Id.* at 293. These outward manifestations, the supreme court concluded, did not necessarily show that Elmourabit was impaired. The court explained that speeding was "not uncommon for sober drivers too;" that the smell of alcohol could have come from the one bottle of beer that Elmourabit admitted to drinking; that English was not Elmourabit's native language, which could account for his allegedly slurred speech; and that neither the officers nor the paramedics could "say authoritatively that [Elmourabit] had no medical problems or was not experiencing pain" which would explain his odd behavior. *Id.* Even when viewed in the light most favorable to the prosecution, the supreme court held that this was the "rare" case wherein the "unique facts and circumstances" required the conclusion that the state did not meet its burden. *Id.* at 294.

Brown's case is distinguishable from *Elmourabit*. Although Brown's driving was not unequivocally characteristic of that of a drunk driver, and even though the state lacked direct evidence of Brown's consumption of alcohol, the state presented sufficient evidence to show Brown's impairment. The officer testified to the odor of alcohol present around Brown, his glassy eyes, and his "side-to-side stagger." The jury also watched a video in which Brown refused to take any test of his blood alcohol content, repeatedly told the officer that he was going to "pee myself," and had trouble understanding the implied-consent advisory. Unlike in *Elmourabit*, the state presented evidence that Brown displayed distinct nystagmus in both eyes, which is indicative of

alcohol impairment. The evidence was sufficient to show that Brown was "impaired to some degree."

Jury Instructions

Test Refusal Instruction

Next, Brown argues that the district court committed reversible error when it failed to instruct the jury about the "prerequisites to the administration of a chemical test," as required by *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Brown concedes that he did not object to this omission at trial. A defendant's failure to object to a particular jury instruction generally forfeits the issue for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). This court has discretion to consider Brown's allegation of error if he can show "plain error affecting substantial rights or an error of fundamental law." *Id.* (citation omitted). Plain error is error, that is plain, that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740-41 (Minn. 1998). Failure to instruct the jury on an element of a crime has been held to be an error of fundamental law. *State v. Williams*, 324 N.W.2d 154, 157 (Minn. 1982).

In *State v. Ouellette*, we held that, in a test-refusal case, the district court must instruct the jury as to the prerequisites to an officer's request for a chemical test included in the applicable statute because these prerequisites are "incorporated into, and are elements of the criminal-refusal statute." 740 N.W.2d at 359-60. A defendant's lawful arrest and refusal to submit to a preliminary screening test are two prerequisites to an officer's request for chemical testing. Minn. Stat. § 169A.51, subd. 1(b) (2006). Here, the district court did not instruct the jury as to these applicable prerequisites, and,

therefore, this omission was plain error. The state concedes that the district court's instructions "did not conform to *Ouellette*," but maintains that Brown has not shown that the error affected his substantial rights. We agree.

An error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. Error in omitting a jury instruction is prejudicial if there is a reasonable likelihood that the instruction would have had a significant effect on the jury's verdict. *Id.* at 740. Brown argues that this error "can never be harmless," because it is a structural error, but he offers no genuine analysis on this point. Furthermore, in *Ouellette*, we impliedly rejected any such argument by holding that the same error committed here was harmless beyond a reasonable doubt. 740 N.W.2d at 360.

Brown's case is indistinguishable from *Ouellette*. The instructions given in *Ouellette* are nearly identical to the instructions given in Brown's case. *Id.* at 359-60. There, as here, the district court instructed the jury that, to convict, it must find beyond a reasonable doubt that the officer had probable cause to believe that the defendant drove a motor vehicle while under the influence of alcohol. *Id.* Because an arrest without probable cause would be illegal, a finding of probable cause necessarily includes an implicit finding of a lawful arrest. *See id.* at 360 (recognizing the redundancy in the implied-consent statute). Brown has not shown how the omission of this element affected the outcome of the case.

Brown also complains that the district court did not instruct the jury about the prerequisite that he refused a preliminary screening test. But this omission was also nonprejudicial. The jury need only find that one of the procedural prerequisites was

present to convict a defendant of test refusal. *See* Minn. Stat. § 169.51A, subd. 1(b). The jury found there was probable cause to arrest Brown, and probable cause supporting a lawful arrest is one of the prerequisites to a request for testing and a finding of test refusal. Additionally, the officer gave uncontradicted testimony that Brown stuck his tongue into the PBT machine, thus preventing a preliminary breath sample. The court's omission of the PBT prerequisite did not affect Brown's substantial rights.

Adverse-Inference Instruction

Brown did not testify, and the district court instructed the jury that it was to draw no adverse inferences from his failure to testify. Brown did not request that instruction but did not object to it. Therefore, his claim is reviewed for plain error affecting substantial rights. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). A court should not instruct the jury about a criminal defendant's right not to testify unless the defendant specifically requests such an instruction on the record. *Id.* "If the defendant requests the instruction, the court or the defendant's counsel must make a record of 'the defendant's clear consent and insistence that the instruction be given.'" *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006) (quoting *McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002)). Brown's "clear consent" is not part of the record, and, therefore, the instruction was plain error. But "[g]iving the no-adverse-inference instruction without consent, absent a showing of prejudice, is harmless." *Id.* Thus, Brown must still show some prejudice resulting from the instruction.

Brown argues he was prejudiced by the instruction because "[t]he case boiled down to credibility," and the instruction focused the jury on the fact that he made "no

attempt to testify on his own behalf." While it is true that much of the case depended upon whether the jury believed Officer Hofius—there being no direct evidence of Brown's consumption of alcohol—the jury was also able to view a videotape of the implied-consent reading. The video showed Brown refusing more than once to take a test, and given the other evidence about Brown's behavior, we cannot conclude that Brown has met the "heavy burden" of showing that his substantial rights were affected by the instruction. *See Darris*, 648 N.W.2d at 240 (stating that the defendant bears a heavy burden to show substantial rights were affected); *see also Gomez*, 721 N.W.2d at 881 (stating that given the totality of the evidence, defendant's rights were not affected by the unconsented-to instruction).

Constitutionality of the test-refusal statute

Brown argues that Minnesota's test-refusal statute is unconstitutional because the legislature "has made it a crime to exercise one's constitutional right to withhold consent to a search," and "violates the constitutional prohibition against unreasonable searches and seizures and the due process clauses of the federal and state constitutions." Brown did not raise this argument in the district court, and, therefore, it is waived on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Pro Se Arguments

Brown makes several arguments in his pro se brief. Brown's claims regarding ineffective assistance of counsel and the racial makeup of his jury pool are without support in the record or the law, and, therefore, we find these claims are without merit. *See State ex rel. Moriarty v. Tahash*, 261 Minn. 426, 429, 112 N.W.2d 816, 819 (1962)

(stating a defendant's bare assertions of ineffective assistance of counsel will not suffice to meet applicable burden); *State v. Gail*, 713 N.W.2d 851, 862 (Minn. 2006) (stating defendant's burden of establishing a prima facie showing of a "systematic exclusion" over time to support a Sixth Amendment challenge to jury pool). Finally, Brown argues that he was not given a *Miranda* warning before being questioned regarding the implied-consent advisory, but the reading of the implied consent is not "interrogation" subject to a *Miranda* warning. *State v. Gross*, 335 N.W.2d 509, 510 (Minn. 1983) (citing *South Dakota v. Neville*, 459 U.S. 553, 564 n.15, 103 S. Ct. 916, 923 n.15 (1983)). Thus, none of Brown's pro se arguments have merit.

Affirmed.