STATE OF MINNESOTA
IN COURT OF APPEALS
A09-139

State of Minnesota,
Respondent,

vs.

Louis Joseph Bacigalupo,
Appellant.

Filed January 19, 2010
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. 62-CR-08-5829

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Shumaker, Judge; and Connolly, Judge.

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

SHUMAKER, Judge

Appellant challenges his convictions of felony refusal to submit to chemical testing, in violation of Minn. Stat. §§ 169A.20, subd. 2, .24, subd. 1(2) (2008), and gross

misdemeanor driving after cancellation of his driver's license, in violation of Minn. Stat. § 171.24, subd. 5 (2008). He claims that the district court (1) erred when it allowed the jury to hear an audiotape of a police officer reading the *Miranda* warning to him and his reply that the police should deal with his attorney, and (2) abused its discretion in imposing consecutive sentences. We affirm.

FACTS

Although this case concerns alcohol-related driving offenses, it arose out of a shoplifting incident that received more than a passing focus during appellant Louis Joseph Bacigalupo's jury trial.

Bacigalupo's trouble began when he walked out of a Cub Foods store with two porterhouse steaks, two walleye fillets, corn, mushrooms, sour cream, and a bouquet of flowers not in Cub bags but visibly inside a tote basket provided by Cub Foods for shopping inside the store. Suspecting that Bacigalupo had not paid for the goods, Maplewood Police Sergeant Richard Doblar, who was working off-duty at the store, decided to detain him.

Bacigalupo reached his parked car and began to back out of its parking space only to be thwarted by a cluster of shopping carts that a store employee had lined up behind the car. This interruption gave Sergeant Doblar a chance to catch up to the car and to ask Bacigalupo to stop the car and step outside. Bacigalupo did not comply but instead continued to focus on backing his car until Sergeant Doblar opened the door and pointed a canister of mace at him. Bacigalupo then stopped and got out of the car.

At this point, Bacigalupo appeared to be a shoplifter who was trying to elude the police, as Sergeant Doblar was in uniform. But other things about Bacigalupo's appearance and conduct commanded Sergeant Doblar's attention. Sergeant Doblar smelled a strong odor of alcohol coming from Bacigalupo and noticed that his eyes were bloodshot and watery. When Bacigalupo stood outside his car, he leaned against it to brace himself and to help keep his balance. As he spoke, his speech was slurred.

Sergeant Doblar asked Bacigalupo if he had a receipt for the items in the tote basket, which Bacigalupo had put inside his car, and he said he did not. But he explained that a man and a woman, who were waiting nearby in a vehicle, had threatened to kill him and his wife if he did not steal these goods for them. Sergeant Doblar concluded that not only had Bacigalupo committed a theft but that he also had been in physical control of his car while he was impaired by alcohol; so he arrested him; put handcuffs on him; and summoned on-duty officers to take him into custody.

Officer Joseph Steiner, one of the responding officers, gave Bacigalupo a preliminary breath test (PBT). With a failing result of .136 alcohol concentration, Officer Steiner took Bacigalupo to the police station where Bacigalupo fared no better on various field sobriety tests. Like Sergeant Doblar, Officer Steiner concluded that Bacigalupo had been in control of a motor vehicle while impaired by alcohol, and he read to Bacigalupo the Implied Consent Advisory and asked, "Will you take a breath test?" Bacigalupo said he would not do so because "I asked [the] officer to loosen my handcuffs an' he didn't think it was important, so I don't think that his breath test is important. I wasn't drivin'

the truck anyways." Officer Steiner treated this response as a refusal to submit to testing, and he cited Bacigalupo for that offense.

Officer Steiner also informed Bacigalupo of his *Miranda* rights, and at first he agreed to answer the officer's questions. He stated that he did not drive to Cub Foods but that friends had driven him there and that his car had been there for hours. He also stated, "I'm just tellin' ya, I was threatened[.]" Bacigalupo next said, "[D]eal with my attorney, let's just go from, I'll just deal with my attorney." Officer Steiner treated that statement as Bacigalupo's request for counsel, and he terminated the interview.

The state charged Bacigalupo with refusal to submit to testing, a felony, and driving after cancellation of his license, a gross misdemeanor. There was a jury trial at which Bacigalupo testified.

This was Bacigalupo's version of the events: He was shopping at Cub Foods when he became ill. He is a diabetic and he knew he needed to get to his car where he kept syringes and a glucose meter. Everything became foggy as he was having a diabetic reaction. He did not recall starting his car, and he did not recall saying that a man and a woman had threatened him. He did not tell Sergeant Doblar that he was having a medical problem but did say that to Officer Steiner at the scene, a fact that Officer Steiner acknowledged.

On cross-examination, Bacigalupo admitted that he had his car keys in his possession when he left the store and he admitted being in physical control of the car:

> Q. And when you're in your own car sitting in the driver's seat . . . with the wheel in front of you, you agree you're in physical control of that car?

A. I'm in the car, yeah.
Q. So you're in physical control of it?
A. Yes, I would be.

In an effort to impeach Bacigalupo with his prior inconsistent statement about the threat from the man and woman, the prosecutor played the tape recording of Bacigalupo's interview at the police station. The jury heard Officer Steiner read the *Miranda* warning and heard Bacigalupo invoke his right to counsel. Baciagalupo made no objection, declined the district court's offer to give a curative instruction, and made no mistrial motion.

The jury found Bacigalupo guilty of both charges, and the district court imposed consecutive sentences. This appeal followed.

D E C I S I O N

Before the police may ask questions of a person who is in custody upon suspicion of a crime, they must tell the person, among other things, that he has a right to remain silent and to have an attorney present. *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630 (1966). These are rights of a constitutional dimension and the accused's invocation of the rights may not be used against him at trial. *State v. Juarez*, 572 N.W.2d 286, 290 (Minn. 1997) (citing *Miranda*, 384 U.S. at 468 n.37, 86 S. Ct. at 1624 n.37). The reason for this prohibition is that if the jury hears that the accused has chosen not to speak with the police and to have an attorney represent him, the jury might infer that the accused is "concealing his guilt." *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002) (quoting *State v. Roberts*, 296 Minn. 347, 353, 208 N.W.2d 744, 747 (1973)).

Bacigalupo claims that the state violated his constitutional rights and deprived him of a fair trial when it played the portion of the police station interview that included the reading of his *Miranda* rights and his request for counsel. Although he did not object to the evidence, he contends that its admission was plain and reversible error.

A defendant who fails to object to inadmissible evidence forfeits his right to a review of that error unless it was plain error that affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also* Minn. R. Crim. P. 31.02 The admission of the officer's reading of the *Miranda* rights and Bacigalupo's request for counsel constituted plain error. But even plain error "does not require a new trial if the state can show beyond a reasonable doubt that the error was harmless." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996). As Bacigalupo notes, the state has the burden of persuading the appellate court that the state's misconduct did not prejudice him by showing that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (quotation omitted). Another, albeit curiously convoluted, way to state the test is the supreme court's expression in *State v. MacLennan*, "Error is prejudicial if there is a reasonable likelihood that the absence of the misconduct in question 'would have had a significant effect on the verdict of the jury.'" 702 N.W.2d 219, 236 (Minn. 2005) (quoting *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990)). Apparently this means that had the jury not heard the inadmissible evidence, would it likely have reached the same verdicts? We hold that the answer is, beyond a reasonable doubt, yes.

Whether the jury believed that people had coerced Bacigalupo to steal food or else be put to death, and whether the jury believed that he suffered a diabetic reaction, and whether the jury believed that Bacigalupo's friends had driven his car to Cub Foods and left it parked there for hours, the unrefuted evidence is that he exhibited several indicia of alcohol impairment and that he was in physical control of his car. Although Bacigalupo denied actually driving the car, as Sergeant Doblar testified he did, he admitted being in the driver's seat with the car keys in his possession. And he does not dispute that he refused to take a breath test after having heard the Implied Consent Advisory. *See* Minn. Stat. §§ 169A.20, subd. 2; 169A.24, subd. 1(2). Furthermore, Bacigalupo does not challenge the sufficiency of the evidence on appeal. Thus, even if we assume that the misconduct had not occurred and that the jury had not heard the *Miranda* rights and Bacigalupo's request for counsel, the jury still had overwhelming and largely uncontroverted evidence of his guilt on the test-refusal charge.

As to the driving-after-cancellation charge, Bacigalupo stipulated that, as of the time of this incident, his driver's license had been cancelled and he knew of the cancellation.

Sentence

Bacigalupo argues that the district court abused its discretion in imposing consecutive sentences because he did not injure anyone and, at most, tried to back out of a parking space. He has provided no authority to support his proposition that consecutive sentencing in this situation is impermissible. Failure to cite authority ordinarily waives the issue. *Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002), *review denied*

(Minn. Oct. 15, 2002). The authority here is to the contrary, anyway. Consecutive sentences are expressly permissible when a person is being sentenced for refusal to test and for driving after cancellation of a license, notwithstanding the fact that the offenses arose out of the same course of conduct. Minn. Stat. §§ 169A.28, subd. 2, 609.035, subd. 2 (2008). Thus, the district court did not abuse its discretion in ordering consecutive sentences.

Affirmed.