STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1840

State of Minnesota,
Respondent,

vs.

Thomas John Lichtenberg,
Appellant.

Filed August 24, 2010
Affirmed
Larkin, Judge

Douglas County District Court
File No. 21-K0-06-1038

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

John C. Lervick, Alexandria City Attorney, Heidi E. Schultz, Assistant City Attorney, Alexandria, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Shumaker, 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 second-degree driving while impaired, second-degree test refusal, and driving after cancellation. Appellant argues that the district court erred by limiting defense counsel's cross-examination of a police officer at trial and committed plain error by telling the jury that it would be allowed only one opportunity to see and hear recordings that were received as exhibits. Because appellant's constitutional right of confrontation was not violated and because appellant is not otherwise entitled to relief, we affirm.

FACTS

On August 9, 2006, a 911 caller reported that a man, who was later identified as appellant Thomas John Lichtenberg, had fallen off a "motor scooter" and was "hurt really, really bad." The caller provided their location and said that a cut on Lichtenberg's "knee is very, very deep. The bone is like gonna come out right there." The caller reported that Lichtenberg was drunk, and she advised him not to "run from the cops." A recording of the 911 call reveals that Lichtenberg resisted the caller's attempts to keep him at the scene until help arrived. Two police officers responded. They concluded that Lichtenberg was under the influence of alcohol, arrested him for driving while impaired (DWI), and transported him to the Douglas County Jail.

At the jail, Officer Burton Crary read Lichtenberg the implied-consent advisory and asked him if he would submit to chemical testing to determine his blood alcohol concentration. Lichtenberg refused. The state charged Lichtenberg with two counts of

second-degree DWI, one count of second-degree refusal to submit to testing, and one count of driving after cancellation—inimical to public safety. The state later dismissed one of the second-degree DWI charges.

The case was tried to a jury. The state called the owner of the vehicle that Lichtenberg was operating at the time of the offense and Officer Crary as witnesses. The vehicle owner testified that the vehicle was a 1980 Yamaha with a 50 cc gas motor and a top speed of "about 30 miles an hour." Officer Crary testified that, under his understanding of the relevant statute, the Yamaha was "what's called a 'motorized bicycle'" and that a license is required to operate it. Officer Crary also testified that at the time of the accident, Lichtenberg did not have a valid driver's license or permit.

An audio recording of the 911 call and an audio-visual recording of Officer Crary's administration of the implied-consent advisory were received as exhibits and played for the jury. Before the recording of the 911 call was played, the district court told the jury that it would be played only once and the jury could not ask to listen to the recording a second time. The district court provided a similar instruction before playing the recording of the implied-consent advisory for the jury.

The jury found Lichtenberg guilty of second-degree DWI, second-degree test refusal, and driving after cancellation. This appeal follows.

D E C I S I O N

I.

Lichtenberg claims that the district court violated his Sixth Amendment right to confront the witnesses against him by preventing cross-examination of Officer Crary

regarding (1) his knowledge of statutory licensing requirements, (2) his opinion that a license was required to operate the Yamaha, and (3) the statutory definition of a motorized foot scooter and the associated license requirements.

A reviewing court normally defers to the district court's evidentiary rulings and will not overturn those rulings absent a clear abuse of discretion. *State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006) (citing *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989)). But whether an evidentiary ruling violated a defendant's right of confrontation is a question of law subject to de novo review. *Id.* (citing *State v. King*, 622 N.W.2d 800, 806 (Minn. 2001)).

A defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The main purpose of the right of confrontation "is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110 (1974) (emphasis omitted) (quotation omitted). But "'[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Dobbins*, 725 N.W.2d at 505 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 2664 (1987)) (other quotation omitted). The right is violated if a defendant is denied the opportunity to "expose to the jury the facts from which [it] . . . could appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436 (1986) (quotation omitted).

Lichtenberg was charged with driving after cancellation—inimical to public safety under Minn. Stat. § 171.24, subd. 5 (2006). A person is guilty of this offense if (1) the

person's driver's license or driving privilege has been cancelled or denied under Minn. Stat. § 171.04, subd. 1(10) (2006); (2) the person has been given notice of or reasonably should know of the cancellation or denial; and (3) the person operates any motor vehicle, "the operation of which requires a driver's license," while the person's license or privilege is cancelled or denied. Minn. Stat. § 171.24, subd. 5. Lichtenberg stipulated to the fact that his license had been cancelled and that he knew or should have known of the cancellation. His defense related to the third element: Lichtenberg asserted that the Yamaha was a motorized foot scooter, the operation of which does not require a driver's license.[1]

On direct examination, Officer Crary testified that the Yahama qualified as a "motorized bicycle" under statute, that either a valid driver's license or a motorized bicycle permit is required to operate the vehicle, and that Lichtenberg did not have a valid driver's license or a permit on the date of offense.[2] During cross-examination, defense

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[1] The statute in effect at the time of Lichtenberg's offense defined a motorized foot scooter as

> a device with handlebars designed to be stood or sat upon by the operator, and powered by an internal combustion engine or electric motor that is capable of propelling the device with or without human propulsion, and that has either (1) no more than two ten-inch or smaller diameter wheels or (2) an engine or motor that is capable of a maximum speed of 15 miles per hour on a flat surface with not more than one percent grade in any direction when the motor is engaged.

Minn. Stat. § 169.01, subd. 4c (2006). The definition has since changed and is now codified at Minn. Stat. § 169.011, subd. 46 (2008).

[2] The relevant statute defines a motorized bicycle as

> a bicycle that is propelled by an electric or a liquid fuel motor of a piston displacement capacity of 50 cubic centimeters or less, and a maximum of two brake horsepower which is

counsel questioned Officer Crary regarding the statutory definition of a motorized foot scooter and the associated licensing requirements. When defense counsel asked whether a license is required to operate a foot scooter, the state objected on relevancy grounds. The district court judge overruled the objection and told defense counsel, "I'll give you some leeway."

Subsequently, the district court sustained only two objections to defense counsel's cross-examination of Officer Crary. The first was in response to the following question: "If I were to tell you that the statute says that a foot scooter can be powered by an internal combustion engine or electric motor, would you disagree?" The district court sustained the prosecutor's objection that "[c]ounsel is testifying." But defense counsel immediately asked, without objection, whether the officer was sure about the definition of a foot scooter, "or are you just guessing?" The officer responded that he was "not aware of what [a] foot scooter would be." Defense counsel next asked, "Well, I realize that there are some foot scooters that can be self-propelled, but would you agree. . . ." The prosecutor objected that "[c]ounsel is testifying again." The district court judge sustained the objection, stating: "This is argumentative. You can argue with him all day. It's not accomplishing anything. We have no evidence that there is a foot scooter here." Defense

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> capable of a maximum speed of not more than 30 miles per hour on a flat surface with not more than one percent grade in any direction when the motor is engaged.

Minn. Stat. § 171.01, subd. 41 (2006). "A motorized bicycle may not be operated on any public roadway by any person who does not possess a valid driver's license, unless the person has obtained a motorized bicycle operator's permit or motorized bicycle instruction permit from the commissioner of public safety." Minn. Stat. § 171.02, subd. 3 (2006).

counsel changed his line of questioning but later asked additional questions regarding the characteristics of the Yamaha that Lichtenberg was operating.

When Officer Crary's cross-examination is considered in its entirety, the record refutes Lichtenberg's assertion that the district court "cut off" cross-examination regarding Officer Crary's knowledge of statutory licensing requirements, his opinion that a license was required to operate the Yamaha, and the statutory definition of a motorized foot scooter and related licensing requirements. Defense counsel asked multiple questions regarding the Yamaha, including whether Officer Crary personally examined the vehicle. Defense counsel also asked several questions regarding licensing requirements. As a result, cross-examination produced the following information: Officer Crary did not recall if he had examined the Yamaha; his report did not indicate that he actually saw the Yamaha; he based his conclusion that the Yamaha was a motorized bicycle, as defined by statute, on "what was reflected" to him; and while he saw a "moped" at the scene, he did not know if it was the vehicle that Lichtenberg had been operating.

Cross-examination also revealed that Officer Crary was aware that statutes indicate whether a particular type of vehicle requires an operational license and that he would look up a licensing requirement if he was unaware of it. While Officer Crary believed that if a vehicle was not powered, it would be a foot scooter and would not require a license, he admitted that he had not reviewed the foot scooter statute recently and was "not aware of what [a] foot scooter would be."

Regarding the Yamaha that Lichtenberg was operating, cross-examination revealed that Officer Crary did not know the brake horsepower of the vehicle, and he did not measure the diameter of its wheels. The officer's belief regarding the proper classification of the Yamaha was based on a vehicle description that had been provided by the department of public safety. The department of public safety information indicated that the vehicle was a "minibike," but it did not indicate anything about the size or power of the vehicle's engine, the brake horsepower, how fast it could go, or the diameter of the wheels.

Defense counsel's cross-examination of Officer Crary laid the groundwork for an argument that the officer was not a credible witness regarding statutory licensing requirements, the proper statutory classification of the Yamaha, or whether a license was necessary to operate the vehicle. We appreciate that additional questioning to establish that, under the statutory definition, a motorized foot scooter may be self propelled might have given the jury further reason to question the reliability and accuracy of Officer Crary's testimony. But the district court reasonably perceived these questions as irrelevant, explaining that there was "no evidence" that Lichtenberg was operating a foot scooter.

A defendant does not have a constitutional right to present irrelevant evidence. *State v. Jensen*, 373 N.W.2d 364, 366 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). Even though the district court sustained the prosecutor's objection to the two questions described above, Lichtenberg effectively cross-examined Officer Crary. The jury was exposed to facts "from which [it] . . . could appropriately draw inferences

relating to the reliability of the witness." *Van Arsdall*, 475 U.S. at 680, 106 S. Ct. at 1436 (quotation omitted). The district court's limitation of Lichtenberg's cross-examination of Officer Crary therefore did not violate his right of confrontation.

II.

We next address Lichtenberg's claim that the district court plainly erred by not providing the jury with a copy of the recordings of the 911 call and implied-consent advisory during its deliberations and by refusing to allow the jury to otherwise review these exhibits. Lichtenberg did not object when the district court informed the jury that it would only see or hear the recordings one time. Nor did he object to the district court's failure to send the recordings to the jury room as exhibits.

An appellate court will generally not consider matters that were not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we may review an error not brought to the district court's attention if the error affects a party's substantial rights. Minn. R. Crim. P. 31.02. "[An appellate court] may review and correct an unobjected-to, alleged error only if: (1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). If these three prongs are met, we address the error only if it seriously affects the fairness and integrity of judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Before the recording of the 911 call was played for the jury, the district court told the jury:

> This is the only time this DVD is going to be played. So you can't go back to the jury room and then send me a note asking for you to listen to it again, which I experienced the first few times I did this. So, this is testimony. It's as if the witness is testifying. And so you only get to hear it once, just so you know. So I want you to listen carefully to it because it's the only time you are going to be able to hear it, even though it's an exhibit.

And when the recording of the implied-consent advisory was played for the jury, the district court stated: "I'll give you the same caution, Members of the Jury. You're about to watch a scene which essentially is testimony from both of these individuals, so you get to watch it once. You won't be able to play it again back in the jury room, just so you understand."

Lichtenberg relies exclusively on the Minnesota Rules of Criminal Procedure to challenge the district court's decision not to send the recordings into the jury room during deliberations. "The materials that may go to the jury room and jury requests for review of evidence are governed by Minn. R. Crim. P. 26.03, subd. 19(1) and (2)[.]"[3] *State v. Kraushaar*, 470 N.W.2d 509, 514 (Minn. 1991). The rule, in relevant part, provides that the district court "must permit received exhibits or copies, except depositions, into the jury room." Minn. R. Crim. P. 26.03, subd. 20(1). Notwithstanding the mandatory language of subdivision 20(1), the Minnesota Supreme Court has held that the rule "authorizes the [district] court, in the exercise of its discretion, to preclude some exhibits

[3] These provisions have since been renumbered as Minn. R. Crim. P. 26.03, subd. 20(1), (2), respectively. Because the substantive content of the rule remained unchanged, we cite the current version of the rule.

from being taken to the jury room." *State v. Fossen*, 282 N.W.2d 496, 509 (Minn. 1979).[4]

Regarding the district court's refusal to allow the jury to otherwise review these exhibits during its deliberations, the rules provide that "[i]f the jury requests review of specific evidence during deliberations, the [district] court may permit review of that evidence after notice to the parties." Minn. R. Crim. P. 26.03, subd. 20(2)(a). "Whether or not to grant a jury's request for a reading of trial testimony is within the discretion of the [district] court." *State v. Spaulding*, 296 N.W.2d 870, 878 (Minn. 1980). But the supreme court has explained that a district court abuses its discretion by "refus[ing] to exercise its discretion at all by determining at the outset of deliberations, and before any requests from the jury, that *no* testimony would be reread." *Id.*; *see also id.* at 872 (holding that the district court "abused its discretion by instructing the jury that no testimony would be reread and by categorically refusing to consider the jury's request to read defendant's testimony"). When determining whether to grant a jury's request to review an exhibit, the district court "should" consider whether (1) the material will aid the jury in proper consideration of the case, (2) any party will be unduly prejudiced by submission of the material, and (3) the material may be subjected to improper use by the jury. *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008) (citing *Kraushaar* for rule that district court should consider these factors).

[4] At the time of the *Fossen* decision, the rule provided in relevant part: "The [district] court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions. . . ." 282 N.W.2d at 508-09 (quoting predecessor Minn. R. Crim. P. 26.03, subd. 19(1)).

But we need not determine whether the district court abused its discretion by not sending the exhibits into the jury room or by refusing to allow the jury to otherwise review the exhibits, because Lichtenberg fails to establish that the alleged errors affected his substantial rights. Before an appellate court will review an unobjected-to error, an appellant must establish not only an error that is plain, but also that the error affected his or her substantial rights. *State v. Jones*, 753 N.W.2d 677, 694 (Minn. 2008). In order to establish this prong, "a defendant bears a 'heavy burden' of persuasion to show that 'the error was prejudicial and affected the outcome of the case.'" *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (quoting *Griller*, 583 N.W.2d at 741).

Lichtenberg generally asserts that the district court's action "prevented *the jury* from deciding whether [it] needed to review the recordings, what use to make of that evidence, and what weight [it] may attach to it." But he does not explain why the limitation was prejudicial, how it harmed his case, or why the outcome of the trial would have been different if the district court had allowed the jury to review the exhibits. We note that the 911 recording indicates that Lichtenberg was intoxicated, uncooperative, and combative. The recording of the implied-consent advisory similarly indicates that he was combative. Lichtenberg does not explain, and we do not see, how the jury's review of these exhibits would have benefited Lichtenberg's defense. In fact, defense counsel argued that the first 5 to 15 minutes of the implied-consent-advisory recording was irrelevant and should not be played at trial. Because Lichtenberg has not established that his substantial rights were affected by the alleged errors, he is not entitled to relief. *See Everson*, 749 N.W.2d at 349 (looking no further than the substantial-rights factor to hold

that an unobjected-to error relating to the jury's review of recorded statements did not constitute plain error).

Affirmed.

Dated:

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Judge Michelle A. Larkin