STATE OF MINNESOTA
IN COURT OF APPEALS
A10-607

State of Minnesota,
Respondent,

vs.

Randy Wayne Kinneman,
Appellant.

Filed January 25, 2011
Affirmed
Connolly, Judge

Otter Tail County District Court
File No. 56-CR-09-1268

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

David Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of two counts of first-degree driving while impaired, arguing that the evidence is insufficient and that the district court abused its

discretion in permitting the arresting officer in his testimony to opine that appellant was under the influence of alcohol when arrested. Because the evidence is sufficient to have allowed the jury to reach its verdict and the district court did not abuse its discretion in admitting the officer's testimony, we affirm.

FACTS

In May 2009, appellant Randy Kinneman was stopped by a police officer because he failed to signal a turn when he left a gas station parking lot and his windshield was heavily damaged. The officer noted indicia of alcohol, including an odor of alcohol and appellant's watery, bloodshot eyes. Appellant told the officer he had drunk alcohol within the past half hour. The officer asked appellant to perform sobriety tests: appellant (1) balanced himself on the squad car as he walked past it; (2) showed a lack of smooth visual pursuit and nystagmus (involuntary eye movement) on the horizontal gaze nystagmus (HGN) test; (3) contravened instructions by holding out his hands and crossing his feet on a nine-step, walk-and-turn test; and (4) contravened instructions by stopping the one-legged stand test. The officer determined that appellant was under the influence of alcohol, arrested him, and took him to jail. The officer then administered an Intoxilyzer test, which indicated an alcohol concentration of .08.

Appellant was charged with two felonies: one count of first-degree driving a motor vehicle while under the influence of alcohol and one count of driving a motor vehicle with an alcohol concentration of .08 or more as measured within two hours of driving. A jury found him guilty as charged. He challenges his conviction, arguing that the evidence was insufficient to support the jury's verdict and that the district court abused its

discretion by allowing the officer to testify to his opinion that appellant had been under the influence of alcohol when he was arrested.

D E C I S I O N

I. Sufficiency of the evidence

In reviewing a claim of insufficient evidence, this court is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant argues that his conviction should be reversed because: (A) there was no evidence of impaired driving, (B) factors other than alcohol consumption explain both the presence of indicia of alcohol and appellant's performance on the field sobriety tests, and (C) the Intoxilyzer test was not properly administered.

A. No evidence of impaired driving

Appellant contends that the officer observed no improper driving conduct except for appellant's failure to signal a right turn. He relies on *State, City of Eagan v. Elmourabit*, 373 N.W.2d 290, 291 (Minn. 1985) (affirming reversal of jury's DWI conviction of a driver stopped for going 13 miles over the speed limit). The supreme

court saw that case as a "rare exception" with "unique facts and circumstances," *id.* at 295, and "of little precedential value." *Id.* at 293.

In any event, *Elmourabit* is distinguishable on two grounds. First, in that case the state had not administered an Intoxilyzer test or any other test that would provide proof of alcohol consumption. *Id.* Here, appellant's Intoxilyzer test showed an alcohol concentration of .08. Second, the driver was shown on a video to be successfully performing tests of his dexterity. *Id.* Here, the officer's testimony indicated that appellant's performance on the tests was not successful. This case is not the "rare exception" found in *Elmourabit.*

B. Other factors

Appellant provides this court, as he provided the jury, with alternative explanations for five indicia of intoxication found by the officer: (1) his eyes were watery because he had been crying after learning that his father had cancer; (2) he smelled of alcohol because he had had a drink with a neighbor; (3) he did poorly on the HGN test because the squad car lights were on; (4) his failure to keep his hands at his sides during the walk-and-turn test was irrelevant; and (5) appellant held up his foot for longer than generally required on the balance test.

But the jury heard both appellant's explanations for the various indicia of alcohol he displayed and the officer's testimony as to why the indicia supported the conclusion that appellant was driving under the influence of alcohol. This court "assum[es that] the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of

the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This court does not retry the facts. *State v. Griese*, 565 N.W.2d 419, 429 (Minn. 1997).

Appellant's alternative explanations for the indicia of alcohol consumption did not preclude the jury from concluding he was guilty and are not a basis for reversal.

C. Intoxilyzer test

Appellant claims that the state did not prove his alcohol concentration was .08 or higher because the officer did not properly observe him for 15 to 20 minutes prior to testing, or, more specifically, "did not carefully observe him for the twenty-five minutes from the time [the officer] stopped him until [the officer] conducted the Intoxilyzer test" and "was not able to devote his full attention to him while [the officer] read the Implied Consent Advisory and entered data . . . ."

This court has rejected these arguments: an arresting officer need not devote his attention exclusively to a defendant or keep the defendant under constant observation. *See, e.g.*, *Abe v. Comm'r of Pub. Safety*, 374 N.W.2d 788, 791 (Minn. App. 1985) (observation of suspect riding in back seat is adequate).

Appellant also argues that the officer "easily could have missed a burp," but failure to observe for burping does not invalidate a test. *DeBoer v. Comm'r of Pub. Safety*, 406 N.W.2d 43, 45 (Minn. App. 1987) (officer's failure to watch for burping does not fatally flaw observation).

Finally, appellant argues that the officer "was clearly not attentive when he performed the mouth check, since he did not notice [appellant] wore dentures." This

argument is based on the officer's answer, "I guess I did not notice . . ." to the question, "Did you notice [appellant] had dentures?" But appellant cites no caselaw supporting the proposition that observation of whether a suspect has dentures is a prerequisite to a valid Intoxilyzer test or has an impact on its validity[1]

Based on the facts in the record and legitimate inferences from them, a jury could have found appellant guilty.

II. The officer's testimony

"Evidentiary errors . . . warrant a new trial only when the error substantially influences the jury's decision." *State v. Valtierra*, 718 N.W.2d 425, 435 (Minn. 2006) (quotation omitted). Over appellant's objection, the district court permitted the officer to answer questions as to (1) whether, based on his experience and observations and the Intoxilyzer record, he had formed an opinion as to whether appellant was under the influence of alcohol, and (2) what that opinion was. The officer answered that he had formed an opinion and that his opinion was that appellant was under the influence of alcohol. Appellant argues that permitting this testimony was an abuse of the district court's discretion.

Appellant contends first that he was deprived of a fair trial because the officer's testimony "was not helpful to the jury." *See* Minn. R. Evid. 702 (expert testimony admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue"). The district court reasoned that the evidence would be helpful to the jury,

[1] Moreover, nothing in the record shows that appellant did in fact have dentures when the officer looked in his mouth.

whose members were not familiar with field sobriety testing. Appellant asserts that being under the influence of alcohol is within the average juror's experience, so expert testimony would not be helpful. For this assertion, he relies on three cases that affirmed a district court's decision to exclude expert testimony on the effect of alcohol consumption: *State v. Greenleaf*, 591 N.W.2d 488, 494, 504 (Minn. 1999) (upholding first-degree murder conviction); *State v. Frank*, 364 N.W.2d 398, 399-400 (Minn. 1985) (upholding rape conviction); and *State v. Fratzke*, 354 N.W.2d 402, 399-404, 408-09 (Minn. 1984) (upholding first-degree murder conviction). *Greenleaf* and *Fratzke* concerned whether the defendant's degree of intoxication precluded the intent requisite for murder. *See* 591 N.W.2d at 504, 354 N.W.2d at 408-09. *Frank* concerned whether the victim's degree of intoxication prevented her from withholding consent. *See* 364 N.W.2d at 399-400. All three cases are distinguishable; they did not involve the effect of alcohol consumption on a defendant's performance on field sobriety tests but rather the effect of alcohol on a defendant's capacity to form a specific intent or a victim's capacity to withhold consent.

Appellant also argues that the officer's testimony should not have been admitted because it "was highly persuasive on the ultimate issue for the jury to decide." But opinion testimony "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. It is not unusual for officers to testify that, in their opinion, a suspect was under the influence. *See, e.g.*, *Elmourabit*, 373 N.W.2d at 291 (officer who stopped suspect and another officer testified that they were "of the opinion that defendant was under the influence of liquor"); *State v.*

Decker, 371 N.W.2d 256, 257 (Minn. App. 1985) (officer who stopped defendant "testified that in his opinion [defendant] was under the influence").

In any event, the officer's testimony concerning his opinion of appellant's condition would not have substantially influenced the jury's verdict. *See Valtierra*, 718 N.W.2d at 435. The jury's verdict was supported by the testimony it heard that (1) appellant exhibited to the officer several typical indicators of impairment such as bloodshot, watery eyes, difficulty in following instructions, and balance problems; (2) the officer administered an Intoxilyzer test; and (3) the test showed appellant's alcohol concentration exceeded the legal limit.

Affirmed.