STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2295

State of Minnesota,
Respondent,

vs.

Jefferey Daniel Mariner,
Appellant.

Filed March 25, 2008
Affirmed
Hudson, Judge

Lyon County District Court
File No. K3-06-23

Lori Swanson, Attorney General, Gunnar B. Johnson, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

Rick Maes, Lyon County Attorney, Courthouse, 607 West Main Street, Marshall, Minnesota 56258 (for respondent)

John M. Stuart, State Public Defender, Sharon E. Jacks, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUDSON, Judge

On appeal from his conviction of first-degree driving while impaired, test refusal, driving after cancellation, and fleeing a police officer, appellant argues that he was denied his right to a fair trial because the district court allowed an officer who was an expert on DWI enforcement to testify that, in his opinion, (1) appellant drove while under the influence of alcohol and that his driving was impaired; and (2) appellant's license was cancelled as "inimical to public safety," even though the parties had stipulated to the cancellation in order to keep this prejudicial information from the jury. Because permitting the officer's testimony did not constitute plain error affecting appellant's substantial rights, we affirm.

FACTS

The state charged appellant Jefferey Mariner with first-degree driving while impaired, test refusal, driving after license cancellation, and fleeing a police officer. A Marshall city police officer testified at trial that he saw a car proceed through an intersection against a red light. When the officer activated his emergency lights and followed the car, it pulled into a parking space and stopped abruptly. Appellant, the driver, got out and started running. The officer shot a taser at appellant, which did not stop appellant, but a passerby followed appellant and saw him drop to the ground.

After appellant was secured with handcuffs, the officer noticed an odor of alcohol coming from appellant. The officer also noticed that appellant's eyes were watery and bloodshot, his speech was slurred, his pants were partially unzipped. A weapons search

produced an unopened bottle of whiskey in appellant's pocket. An inventory search of the car produced a 12-pack of beer, with six containers missing. After appellant's driving status was checked, he was arrested for driving after cancellation.

The officer administered standardized field sobriety tests, including the horizontal-gaze nystagmus (HGN) test. The officer testified that a person who shows four or more indicators on the HGN test is considered to have an alcohol level greater than .08 and that appellant showed all six indicators. Appellant was able to count and recite portions of the alphabet, but had very slow, deliberate speech while doing so. When the officer administered a preliminary breath test, he observed that appellant "blew very short and very soft into the instrument," so that the instrument did not automatically lock in a breath sample. The officer manually locked in a sample at .068. The officer read appellant the implied-consent advisory. Appellant refused blood and urine testing.

The officer testified that he had probable cause to arrest appellant for driving while impaired, based on appellant's "poor judgment of getting out and running from the vehicle, . . . his slow and deliberate speech, . . . showing more than four indicators on the HGN [test], . . . [and] a strong odor of an alcoholic beverage."

Before the officer testified, the prosecutor established that the officer was the coordinator for the "Safe and Sober Campaign," that he had specialized training in field sobriety tests, and that other officers called on him to administer those tests. The prosecutor also asked the officer:

> Q: [G]iven your . . . entire observation of [appellant] throughout the course of your encounter with him, . . . do you

have an opinion as to whether or not [appellant] was under the influence of alcohol?
A: Yes, I do.
Q: And, what is that opinion?
A: That he was, in fact, under the influence of alcohol.
Q: Okay. While he was driving?
A: Yes.
. . . .
Q: . . . [W]as his driving impaired in your opinion?
A: Yes.

The defense did not object. The officer testified that his opinion was based, in addition to the other factors mentioned, on appellant's lack of good judgment by driving fast in the parking lot; his running a red light; his bloodshot, watery eyes; his leaning heavily against the squad car; his refusal to take a breath test; and the small amount of air he blew during the PBT, which was insufficient for the instrument to work accurately.

Appellant's mother testified that about an hour before the incident, appellant was not consuming alcoholic beverages and that she heard him rinse his mouth and brush his teeth. Appellant's treating optometrist testified that appellant had a "significant amount" of nystagmus in his eyes.

The parties stipulated before trial that appellant had three prior DWIs, his license had been cancelled, and he had notice of the cancellation. During direct examination, the prosecutor asked the arresting officer:

Q: Did you . . . check . . . [appellant's] driving status?
A: Yes.
Q: Okay. And what was the status?
A: It was cancelled, Inimical to Public Safety.

The defense did not object, and the district court did not give a curative instruction.

The jury convicted appellant on all four counts. This appeal follows.

D E C I S I O N

This court will reverse a district court's evidentiary rulings only for an abuse of discretion. *Bernhardt v. State*, 684 N.W.2d 465, 474 (Minn. 2004). We review unobjected-to evidence under a plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under that standard, appellant "must show that the district court's failure to sua sponte exclude the testimony at issue constituted (1) an error; (2) that was plain; and (3) that affected [appellant's] substantial rights." *State v. Medal-Mendoza*, 718 N.W.2d 910, 919 (Minn. 2006). Plain error is "clear error affecting substantial rights that resulted in a miscarriage of justice," and "an error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007) (quotation omitted). If this court determines that all three prongs of the plain-error test are satisfied, we may reverse in order to assure fairness and the integrity of the judicial process. *Id*.

Expert-opinion testimony

Appellant argues that the district court committed reversible error by allowing into evidence the police officer's opinion testimony that appellant was under the influence of alcohol and that appellant's "driving was impaired." Expert testimony is admissible if it will assist the jury in understanding the evidence or in determining a fact in issue. Minn. R. Evid. 702. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. Generally, however, an expert should not address a mixed question of law and fact, or make a legal analysis. *State v. Collard*, 414 N.W.2d 733, 736

(Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). "Expert opinion testimony is not helpful if the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quotation omitted). Thus, a judge may exclude ultimate opinion testimony if the testimony "would merely tell the jury what result to reach." *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003).

"Minnesota appellate courts have permitted police officers to provide expert testimony concerning subjects that fall within the ambit of their expertise in law enforcement." *State v. Carillo*, 623 N.W.2d 922, 926 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). This includes testimony as to whether a defendant was intoxicated. *State v. Peterson*, 266 Minn. 77, 80, 82, 123 N.W.2d 177, 181 (1963) (experienced police officers were permitted to offer their opinions on whether a defendant was intoxicated).

The officer's testimony about his observations of appellant was relevant and could assist the jury in making its determination. But the officer's specific testimony that appellant was "under the influence of alcohol" while he was driving and that his "driving [was] impaired" may have been improper. In this case, the jury's task was to evaluate whether appellant met the legal definition of "driving under the influence of alcohol," which is a category of "driving-while-impaired" crime. *See* Minn. Stat. § 169A.20, subd. 1(1) (2004). Thus, the challenged opinion testimony came close to telling the jury "what result to reach." *Lopez-Rios*, 669 N.W.2d at 613.

Nonetheless, we conclude that the district court's failure sua sponte to exclude this testimony was not plain error affecting appellant's substantial rights. *Cf. id.*, 669 N.W.2d at 613 (applying harmless-error standard and holding that error in admitting expert testimony that a defendant was a gang member was harmless when, given other testimony, no reasonable possibility existed that expert testimony substantially influenced guilty verdict). Even without the disputed testimony, additional evidence of appellant's intoxication was strong: appellant's slurred speech; his watery, bloodshot eyes; his odor of an alcoholic beverage; his leaning heavily against the squad car; and his showing indicia of intoxication during field testing. And appellant's rights to present evidence and cross-examine witnesses were not abridged. Although appellant exercised his right not to testify, his attorney cross-examined the state's witnesses and presented two witnesses to support the theory that he was not intoxicated at the time of the incident. Therefore, we conclude that any error in admitting the officer's opinion testimony did not affect appellant's substantial rights because there is no reasonable likelihood that the error substantially affected the verdict.

Testimony on stipulation

Appellant also argues that the district court committed plain error by permitting the officer to testify that appellant's driver's license was cancelled as "inimical to public safety." Evidence of a prior revocation is considered prejudicial in a DWI proceeding. *State v. Clark*, 375 N.W.2d 59, 62 (Minn. 1985). And evidence that a defendant's license has been cancelled as "inimical to public safety" may be particularly prejudicial because that offense "implicates the [public policy] . . . concern regarding a person who has

repeatedly (by statute, at least three times) violated Minnesota's driving under the influence laws, and yet continues to drive." *State v. Busse*, 644 N.W.2d 79, 85 (Minn. 2002). The parties stipulated that appellant had three prior DWIs, that his license had been cancelled, and that he had notice of that cancellation, in order to avoid placing that prejudicial information before the jury. *See State v. Berkelman*, 355 N.W.2d 394, 396–97 (Minn. 1984) (prior DWI); *Clark*, 375 N.W.2d at 62 (license revocation). Therefore, the district court's allowance of the officer's testimony that appellant's license was cancelled as "inimical to public safety" was error.

But allowing this testimony did not amount to plain error affecting appellant's substantial rights. The evidence supporting appellant's conviction was substantial. No reference was made to appellant's prior DWI convictions at trial. And the district court correctly instructed the jury, pursuant to the parties' stipulation, that appellant's license had been cancelled and that he admitted notice of the cancellation when he drove the motor vehicle. In this context, the single reference to license cancellation as "inimical to public safety" does not constitute clear error that was reasonably likely to have a significant effect on the jury's verdict. Further, we note that the district court may have been reluctant to issue a limiting instruction, absent a defense objection, when such an instruction could have highlighted the objectionable testimony. *See State v. Provost*, 386 N.W.2d 341, 344 (Minn. App. 1986) (holding that district court did not commit reversible error by failing to give limiting instruction when "the court may have been reluctant to highlight the ruling by giving an instruction that . . . defense counsel had not requested").

Finally, appellant argues that the effect of cumulative errors was sufficiently prejudicial to warrant a new trial. *See State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1995) (reversing when cumulative effect of several errors, including admission of evidence and prosecutorial misconduct, deprived defendant of a fair trial). A new trial is not warranted when "errors did not affect jurors' deliberations or their assumptions about appellant's innocence or guilt." *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000). Although we caution district courts to remain vigilant in monitoring the quality of evidence for its possible prejudicial effect on defendants, we cannot conclude that appellant was deprived of his right to a fair trial.

Affirmed.

Dated: _____

_____
Natalie E. Hudson