STATE OF MINNESOTA
IN COURT OF APPEALS
A07-45

State of Minnesota,
Respondent,

vs.

Paul Rogalski,
Appellant.

Filed April 15, 2008
Affirmed in part and remanded
Connolly, Judge

Hennepin County District Court
File No. 06044335

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, 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 challenged his conviction of first-degree driving-while-impaired and first-degree test refusal. Because no reversible error was committed, we affirm his conviction. However, because appellant was not given an opportunity to exercise his right to allocute at sentencing, we remand for a new sentencing hearing.

FACTS

Appellant Paul Rogalski was arrested on June 30, 2006 on suspicion of driving-while-impaired. Officers David O'Connor and Jeffrey Carter of the Minneapolis Police Department were on patrol together in North Minneapolis when they noticed appellant's vehicle. Officer O'Connor saw that appellant's vehicle had a large crack in the windshield that he thought would impair the driver's ability to see. Officer Carter observed appellant's car make a left turn without signaling and then observed the crack in the windshield. Officer Carter activated the lights on the squad car and initiated a traffic stop of appellant's vehicle. Officer Carter approached the driver's side of the vehicle, and Officer O'Connor approached the passenger side. Both officers noticed an odor of alcohol coming from the vehicle and a plastic cup with a drink spilling out of it on the passenger side floorboards. Both officers suspected that appellant was impaired. Officer Carter then asked appellant to step out of his vehicle. Both officers observed appellant to have bloodshot, watery eyes and slurred speech. Officer Carter also observed that appellant's movements were slow and unresponsive and that appellant appeared shaky.

As they removed appellant from his vehicle, the officers heard what they thought were gunshots close to their location. The officers placed appellant in their squad car for his safety and did not conduct any field sobriety tests. A check of appellant's driver's license record revealed that his license was cancelled as inimical to public safety. Appellant was then placed under arrest and transported to the police chemical testing unit. No video recording of the traffic stop exists.

Once at the chemical testing unit, Officer O'Connor read appellant the implied-consent advisory. After he was given time to contact an attorney, appellant was asked if he would provide a breath sample. Appellant refused.

Appellant was charged with one count of first-degree driving-while-impaired. At trial, the state introduced the implied-consent advisory form and a video recording of appellant being read the implied-consent advisory. Appellant did not testify at trial. Before the case went to the jury, the state filed an amended complaint, over defense objection, adding the charge of refusal to submit to a chemical test. The jury was instructed on the elements of driving a motor vehicle while under the influence of alcohol and refusal to submit to testing. 10A *Minnesota Practice*, CRIMJIG 29.01-.02, 29.27-.28 (2006). Appellant did not object to these instructions, nor did he offer an alternative instruction. The jury returned a verdict of guilty on both counts.

Appellant was sentenced to 89 months in prison. Appellant was not given an opportunity to speak on his own behalf at his sentencing hearing. This appeal follows.

D E C I S I O N

I.

A. The Stop

The district court's determination as to whether the limited investigatory stop was legal is subject to de novo review. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). But when the facts are in dispute, this court reviews the district court's findings of fact for clear error and accords great deference to the district court's credibility determinations. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000); *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993).

A police officer may make an investigatory stop of a person if, based on the totality of the circumstances, the officer has a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *U.S. v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981); *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). A brief investigatory stop requires only reasonable suspicion of criminal activity rather than probable cause. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). The suspicion must be "specific and articulable" before such a stop is justified. *Marben v. State, Dept. of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). However, actual violation of the traffic laws is not required. *Id.* The intrusion cannot be based on an inarticulate hunch, and must be reasonable in light of the particular circumstances. A police officer may approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *State v. Engholm*, 290 N.W.2d 780, 783 (Minn. 1980) (citing *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880).

In this case, the officers had a particularized and objective basis for suspecting criminal activity. Officer David O'Connor testified that he observed appellant's vehicle with a noticeable crack in the windshield that he believed obstructed the driver's view, in violation of Minn. Stat. § 169.71, subd. 1(a)(1) (2006). Officer Jeffrey Carter testified that he was on patrol with his partner, Officer O'Connor, when he observed appellant's vehicle make a left turn without signaling, in violation of Minn. Stat. § 169.19, subds. 4, 5 (2006). He testified that he then observed the crack in appellant's windshield. "[I]f an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *State v. Battleson*, 567 N.W.2d 69, 71 (Minn. App. 1997) (quoting *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997)).

Appellant argues that the stop of appellant's vehicle was pretextual. He argues that the officers were involved in DWI "proactive enforcement" patrol and pulled his vehicle over merely because it was suspicious, not for any objective reason. Appellant essentially asks this court to disregard the credibility determinations made by the district court about the officers' observations, and to instead consider the weight that evidence not produced at the *Rasmussen* hearing would have had on the determination of the reasonableness of the officers' actions. Appellant goes so far as to characterize the officers' testimony as a "fabrication," but provides no authority for this court to set aside the district court's credibility determinations.

We do not believe that the stop of appellant's vehicle was pretextual. However, even if the officers did have some pretext for stopping appellant, the subjective frame of mind that an officer possesses at the time of an arrest does not invalidate the stop if an

objective viewing of the circumstances justifies the actions taken by the officer. *Scott v. U.S.*, 436 U.S. 128, 138, 98 S. Ct. 1717, 1723 (1978); *see State v. Olson*, 482 N.W.2d 212, 214 (Minn. 1992) ("[I]f there is an objective legal basis for it, an arrest or search is lawful even if the officer making the arrest or conducting the search based his or her action on the wrong ground or had an improper motive."). "[T]he United States Supreme Court has determined that the actual or ulterior motives of an officer do not invalidate police action that is justifiable on the basis that a violation of law has occurred." *Battleson*, 567 N.W.2d at 71 (citing *Whren v. United States*, 517 U.S. 806, 812, 116 S. Ct. 1769, 1773-74 (1996)).

The stop of appellant's vehicle was a legitimate investigatory stop supported by a particularized and objective basis when the officers observed the crack in the vehicle's windshield that they believed obstructed the driver's view and when Officer Carter observed appellant make a left turn without signaling.

B. Probable Cause for Arrest

Probable cause to arrest exists when the objective facts allow a person of ordinary care and prudence to entertain an honest and strong suspicion that a crime has been committed. *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982).

Officer O'Connor testified that he could smell an odor of alcohol coming from appellant's vehicle during the traffic stop. He testified that he observed a beverage spilled on the floor of the passenger side of the vehicle, soaking into the floorboards. He testified that when the appellant got out of his vehicle, his eyes were watery and bloodshot, and that appellant's speech was mostly unintelligible. While appellant was

being escorted to the squad car, the officers heard what they thought were gunshots, so they placed him in the car and did not require him to perform any field sobriety tests.

Officer Carter testified that he approached the driver's side of appellant's vehicle and immediately noticed the odor of alcohol coming from the car. Officer Carter also noticed the spilled cup on the passenger side of the vehicle and appellant's bloodshot, watery eyes. Officer Carter observed that appellant was slow-moving and unresponsive when he stepped out of his vehicle. Officer Carter also testified that appellant's speech was slow and slurred. Officer Carter's testimony supported Officer O'Connor's statements about the supposed gunshots and the lack of field sobriety testing.

"An officer needs only one objective indication of intoxication to constitute probable cause to believe a person is under the influence." *State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004) (citing *State v. Carver*, 577 N.W.2d 245, 248 (Minn. App. 1998)); *Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983). "[R]oadside sobriety tests are not required to support an officer's reasonable belief that a driver is intoxicated." *Holtz*, 340 N.W.2d at 365 (finding that officer's observations of bloodshot and watery eyes, slurred speech, odor of alcohol, and uncooperative attitude were sufficient grounds to support a finding of probable cause).

The district court's findings of fact regarding probable cause for appellant's arrest are not clearly erroneous based upon the record. An objective examination of the facts and circumstances surrounding the arrest demonstrate that the officers had probable cause to believe appellant had committed the crimes charged.

II.

Appellant argues that his conviction cannot stand when there was no evidence of bad driving conduct, no field sobriety tests, no test results, and when the officers' credibility was challenged.

When assessing the sufficiency of evidence, an appellate court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to permit the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume 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). The verdict should stand "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quoting *State v. McCullum*, 289 N.W.2d 89, 91 (Minn. 1979)).

"Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the jury." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). Appellant argues that the officers contradicted each other and other evidence and, therefore, are not credible. But "[i]nconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *Id.*

Appellant's other arguments do not provide a basis for reversal. The charges for which appellant was convicted have no requirement that an officer observe bad driving conduct, conduct field sobriety tests, administer a PBT, or video record a traffic stop to meet the state's burden of proof at trial. *See* Minn. Stat. §§ 169A.20, .24 (2006). The absence of these types of evidence must be viewed in the proper context of examining the evidence in the entire record in the light most favorable to the conviction.

When the evidence in the record is examined in the light most favorable to the conviction, assuming that the jury believed the officers' testimony and found them to be credible, the jury could reasonably conclude the defendant was guilty of the offenses charged. The evidence is sufficient to support his convictions.

III.

Appellant next argues that the district court erred when it did not instruct the jury to determine whether the state had proven, beyond a reasonable doubt, that the implied-consent advisory was read to appellant and whether appellant was lawfully arrested for driving-while-impaired.

District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law. Furthermore, it is well-settled that the court's instructions must define the crime charged. In accordance with this, it is desirable for the court to explain the elements of the offense rather than

simply to read statutes." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (citations omitted).

Appellant did not object to the instructions as given at trial. A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal this issue. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998) (citing *State v. LaForge*, 347 N.W.2d 247, 251 (Minn. 1984)). "Nevertheless, a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id.* (citing *State v. Malaski*, 330 N.W.2d 447, 451 (Minn. 1983)).

When a defendant fails to request a jury instruction that the district court is obligated to give, the erroneous omission is properly viewed under the plain-error standard. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007).

> This analysis involves consideration of four factors. The first three factors are expressly articulated in Minn. R. Crim. P. 31.02 (providing that [p]lain errors or defects affecting substantial rights may be considered by the court . . . although they were not brought to the attention of the trial court). Under the first three factors there must be: (1) an error, (2) that was plain, and (3) that affected the defendant's substantial rights. If these three factors are satisfied, the appellate court then considers the fourth factor: whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.

Id. (citations and quotations omitted). The burden is on the appellant to show that the district court committed a "plain error" that prejudiced his case by failing to give the instructions. *U.S. v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1983) (noting that

an appellant has the burden of showing that he or she was prejudiced by the plain error committed at trial.).

In a recent decision, this court held:

> Because a peace officer can only request a chemical test under Minn. Stat. § 169A.51, when one of the conditions listed in subdivision 1(b) exists, and because section 169A.51, subdivision 2, requires that the implied-consent advisory must be given at the time the test is requested, we now hold that these prerequisites to the administration of a chemical test are incorporated into, and are elements of the criminal-refusal statute on which the jury must be instructed.

State v. Ouellette, 740 N.W.2d 355, 360 (Minn. App. 2007) *review denied* (Minn. Dec. 19, 2007).

Appellant has, therefore, established that it was error when the district court failed to instruct the jury that it must find, beyond a reasonable doubt, that the appellant had been read the implied-consent advisory and that appellant had been lawfully arrested. *See id.* at 358 ("Failure to instruct on an essential element of a crime has been held to be fundamental error.") (citing *State v. Williams*, 324 N.W.2d 154, 157 (Minn. 1982)). The second prong is also satisfied as the error was plain. "Usually [clear or obvious error] is shown if the error contravenes case law, a rule, or a standard of conduct." *Reed*, 737 N.W.2d at 583 (quotation omitted).

But appellant fails to satisfy the third prong of the plain-error analysis. "Under the third plain error factor, an error affects substantial rights where there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Id.* (quotation omitted). Appellant bears the burden of proof with respect to this

third element. *Id.* at 583-84. Appellant argues that the district court's failure to instruct the jury that it must find, beyond a reasonable doubt, that he was read the implied-consent advisory and was lawfully arrested was prejudicial. But in returning a verdict of guilty on the test-refusal charge, the jury had already determined that the officers had probable cause to believe that appellant drove a motor vehicle while under the influence of alcohol and to arrest him. *See* 10A *Minnesota Practice*, CRIMJIG 29.28 (2006) (requiring that a peace officer have probable cause to believe that a defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol). In addition, the jury viewed the videotape of appellant being read the implied-consent advisory three times on the final day of the trial. All relevant factors indicate that the error did not have a significant impact on the jury's verdict and, therefore, was not prejudicial.

IV.

Appellant next argues that the district court abused its discretion when it allowed the jury to view the videotape of appellant being read the implied-consent advisory after the jury requested to view it during deliberations, the third time the jury viewed that particular piece of evidence that day. Appellant argues that allowing the repeated viewing of the videotape unfairly emphasized one piece of evidence over all of the other evidence.

Jury requests for review of testimony are governed by Minn. R. Crim. P. 26.03, subd. 19(2). We review the district court's decision under an abuse of discretion

standard. *State v. Haynes*, 725 N.W.2d 524, 528 (Minn. 2007) (citing *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991)).

Upon being brought into the courtroom after requesting to view the videotape,[1] the jury foreperson told the judge that several of the jurors had difficulty seeing the videotape when it was played during the trial and closing arguments because of lighting conditions and their location in the courtroom. The district court then allowed the jury an opportunity to view the videotape in the courtroom with the lights dimmed, seated so that they could see the screen. The district court's decision does not demonstrate an abuse of its discretion.

By replaying the videotape to the jurors in the courtroom rather than allowing them to take it into the jury room, the district court followed the Minnesota Supreme Court's recommended practice. *See Haynes*, 725 N.W.2d at 528; *Kraushaar*, 470 N.W.2d at 516. Indeed, the district court's handling of this entire episode was a textbook example of proper procedure.

V.

Appellant next argues that the district court erred by not offering him the opportunity to allocute at the sentencing hearing. The state concedes that appellant is entitled to a new sentencing hearing. *See* Minn. R. Crim. P. 27.03, subd. 3 (requiring the district court to address the defendant personally and inquire whether the defendant wishes to make a statement); *see also State v. Young*, 610 N.W.2d 361, 363 (Minn. App.

[1] This procedure was consistent with the requirements of Minn. R. Crim. P. 26.03, subd. 19(2)(1) (2006).

2000) (noting that the district court erred by not extending the right of allocution to the defendant), *review denied* (Minn. July 25, 2000). We agree and remand for a new sentencing hearing to allow appellant to make a statement if he so chooses.[2]

VI.

Appellant raises two additional issues in his pro se supplemental brief. He is not entitled to relief on either claim.

First, appellant asserts that he was denied effective assistance of counsel at trial when his counsel failed to argue for the recusal of the district court judge after the judge acknowledged that she knew one of the potential jurors on the case.

> "The defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)).

Appellant has not demonstrated that the assistance of his counsel fell below an objective standard of reasonableness. The record is clear that the district court judge excused the potentially conflicted juror even before the venire was brought into the

[2] We do not reverse appellant's conviction because of this error, we simply remand for a new sentencing. *See State v. Nippa*, 2007 WL 446738 at *3 (Minn. App. 2007) (remanding for a new sentencing hearing when a defendant was not offered the opportunity to allocate at sentencing, but not reversing the conviction). Pursuant to Minn. Stat. § 480A.08, subd. 3 (2006), this case is not precedential and is cited only as illustration of consistent dispositions.

courtroom for the first time. The prompt and professional handling of the issue by the attorneys and the district court judge belies any claim that appellant's counsel's conduct fell below an objective standard of reasonableness.

Appellant next argues that the initial stop of his vehicle was invalid because he was racially profiled "as a white man in a black neighborhood." This argument was not raised during the pretrial proceedings on this case. As such, it is deemed waived. *City of Minneapolis v. Buschette*, 307 Minn. 60, 66, 240 N.W.2d 500, 503 (1976) (holding that a defense of discriminatory enforcement by law-enforcement officials may be raised by a defendant but must be raised in a pretrial motion pursuant to the Minnesota Rules of Criminal Procedure or it may be deemed waived).

Affirmed in part and remanded.