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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0536

State of Minnesota,
Respondent,

vs.

Laura Jean Goepfert,
Appellant.

Filed June 24, 2008
Affirmed
Minge, Judge

Mower County District Court
File No. K9-05-970

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Kristen Nelsen, Mower County Attorney, Jeremy Clinefelter, Assistant County Attorney, 201 First Street N.E., Austin, MN 55912 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Poritsky, 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

MINGE, Judge

Appellant argues that because the jury was improperly instructed on the crime of "refusal to test" and because the prosecutor engaged in prejudicial misconduct, she was deprived of a fair trial. Because neither of these errors was prejudicial, we affirm.

FACTS

On July 23, 2005, appellant Laura Goepfert rolled through a stop sign. Cory Howes, a Mower County Sheriff's deputy at the time, observed the traffic violation and pulled her over. In making the stop, Howe noticed that Goepfert was restless. While conversing with Goepfert and obtaining her driver's license, Howes noted that her speech was slurred, her eyes were bloodshot and dilated, she was grinding her teeth, and she was clenching the steering wheel, but that she did not smell of alcohol.

While officer Howes was waiting for the results of a computer check of Goepfert's driver's license, he noticed that she began playing her music loudly and was fidgeting excessively. At that point, Howes approached the car and asked Goepfert whether she had been drinking. When she said "no," he asked her to perform some field sobriety tests or take a preliminary breath test (PBT). Goepfert refused to get out of the car to perform the field sobriety tests and did not take a preliminary breath test.

By-standers who witnessed the stop confirmed that Goepfert refused to get out of the car when the officer requested that she do so. At trial, they testified that a struggle took place between officer Howes and Goepfert when he removed her from her car and that officer Howes asked a bystander to help him handcuff Goepfert. With help, Howes

got Goepfert into the back of his squad car. After arriving at the Mower County Law Enforcement Center, officer Howes read the implied-consent advisory to Goepfert. She asked to contact an attorney and was given a telephone and a telephone book. After Goepfert had spent about 55 minutes unsuccessfully trying to contact an attorney, Howes informed her that she would be required to make a decision on her own about whether to take a drug test. Goepfert refused to take the blood and urine tests, stating that she first wished to consult an attorney.

After a jury trial, Goepfert was convicted of third-degree test refusal, obstruction of legal process, and failure to stop at a stop sign. Goepfert was sentenced to a stayed 180 days in jail and a $500 fine. This appeal follows.

D E C I S I O N

I.

The first issue is whether the jury instructions on the crime of refusal to test were inadequate and require reversal. Goepfert asserts that the instructions failed to incorporate all elements required to find her guilty. In a criminal prosecution, the state must prove beyond a reasonable doubt every element of the crime with which the defendant is charged. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). When charging the jury, the district court "shall state all matters of law which are necessary for the jury's information in rendering a verdict." Minn. R. Crim. P. 26.03, subd. 18(5). A defendant has a right to have the jury receive clear, complete, and unambiguous instructions that fairly explain the law of the case. *State v. McCloud*, 349 N.W.2d 590, 593 (Minn. App. 1984). "Trial courts have broad discretion in determining

the propriety of a specific jury instruction." *Johnson v. State*, 421 N.W.2d 327, 330 (Minn. App. 1988), *review denied* (Minn. May 4, 1988). On review, the district court's jury instructions are considered as a whole. *State v. Daniels*, 361 N.W.2d 819, 831-32 (Minn. 1985).

Goepfert did not object to the jury instructions at trial. In general, the failure to object to jury instructions before they are submitted to a jury constitutes a waiver of the issue on appeal. *State v. Richardson*, 633 N.W.2d 879, 885 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). Despite the foregoing, the Minnesota Rules of Criminal Procedure state that "[p]lain errors or defects affecting substantial rights may be considered by the court . . . on appeal although they were not brought to the attention of the trial court." Minn. R. Crim. P. 31.02; s*ee also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740). "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations omitted).

A. Plain Error

Goepfert's plain error argument is that for a conviction in her case the statute requires that the state must, among other elements, establish that (1) the implied-consent advisory had been read to her; and (2) at the time she refused to take the chemical test either she was under arrest for driving while impaired (DWI) or she had previously refused to take the preliminary screening test (PST). *See* Minn. Stat. § 169A.51, subd.

1(b) (2006) (listing four alternative situations in which a test may be required, of which two may apply here: under arrest for DWI or refusal to take a PST); Minn. Stat. § 169A.51, subd. 2 (requiring reading of the implied-consent advisory). This court recently concluded that if the jury instruction fails to include the two elements identified by Goepfert, it is defective. *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007).

Here, the district court instructed the jury as follows:

> The elements of refusal to submit to testing are: First, a peace officer had probable cause to believe Defendant drove, operated, or was in physical control of a motor vehicle while under the influence of a controlled substance. The words probable cause mean that it was more likely than not the Defendant drove, operated or was in physical control of a motor vehicle while under the influence of a controlled substance.
>
> Second, the Defendant was requested by a peace officer to submit to a chemical test of the Defendant's blood or urine.
>
> Third, the Defendant refused to submit to the test.
>
> Fourth, the Defendant's act took place on or about July 23, 2005, in Mower County.
>
> If you find that each of these elements has been proven beyond a reasonable doubt the Defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the Defendant is not guilty.

It is clear the jury instructions did not include either of the two elements on which *Ouellette* holds the jury must be instructed. The district court's instruction tracks the published guideline instruction, which also omits those elements of the offense. 10A

Minnesota Practice, CRIMJIG 29.28 (2006). Based on our holding in *Ouellette*, we conclude that the use of the jury instruction in question was plain error.

B. Prejudice

For plain error to be prejudicial, it must affect substantial rights. *Griller*, 583 N.W.2d at 741. Prejudice is shown if there is a reasonable likelihood that the error had a significant effect on the verdict. *Id.* The appellant bears the burden of persuasion with regard to this prong. *Id*.

As previously noted, the elements omitted from the jury instructions were that (1) she was read the implied-consent advisory (Minn. Stat. § 169A.51, subd. 2); *and* (2) *either* Goepfert was subject to a lawful arrest (*id.*, subd. 1(b)(1)), *or* she refused to take a PST (*id.*, subd. 1(b)(3)). Goepfert needs to show that she was unfairly prejudiced and did not receive a fair trial because the jury instructions did not require the jury to find either of these two elements.

i. Reading of Advisory

Goepfert does not argue that she was prejudiced by the fact that the jury was not instructed that she must have been read the implied-consent advisory. Indeed, the videotape in the record shows the officer reading the advisory to her. That videotape was played for the jury. The reading of the advisory is undisputed, and there is no prejudice on the omission of the requirement from the jury instruction.

ii. DWI Arrest or Preliminary Test Refusal

Goepfert does argue that she was prejudiced by the instructions because the jury was not asked to determine whether either the officer arrested her for a DWI or she had refused to take the PST. She reasons that:

> [h]ad the jury been properly instructed on the elements[,] they could have found that the State also failed to prove that appellant had been lawfully arrested for DWI. Whether appellant failed to take a [PST] was disputed and whether appellant was lawfully arrested [could have varied] if the jury thought appellant was being arrested for obstruction of legal process instead of DWI.

Goepfert stated at trial that the officer requested that she submit to a PST when she was initially pulled over for a traffic violation. She testified that instead of agreeing to take the test, she asked him why he wanted her to take it. Goepfert also testified that the officer again insisted that she take the PST and that she twice more asked why he thought one was required. She stated that she never refused to take the test, but merely asked why she was being asked to take a PST. But the officer testified that she refused to take the test and that when asked whether she would get out of the car to complete some field sobriety testing, she replied, "I'm not going to do sh-t."

The record is clear that when stopped, Goepfert's conduct was strange and that she physically resisted getting out of the vehicle. There is no question raised about the reasonableness of the officer's request that she exit the car or take the PST. The officer was not obliged to give Goepfert an explanation of why she was required to take the test. There was not conflicting evidence whether Goepfert initially refused the PST test. According to her own testimony, she persisted in asking "why" when the officer required

her to submit to a test rather than agreeing to take one. Consistently asking "why" rather than agreeing to submit is a refusal to take a PST; therefore, even accepting Goepfert's version of events, she refused to take the PST.

Based on this record, we conclude that Geopfert's refusal to take the PBT is clear and that there is not a reasonable likelihood that the error in the jury instruction substantially affected the verdict or that the lack of that element in the instruction was prejudicial. Because of this conclusion regarding the PST, we do not resolve the alternate question of whether the lack of a lawful-arrest charge was prejudicial.

II.

The second issue is whether the prosecutor committed prejudicial misconduct by asking "were they lying" questions during cross-examination of Goepfert. These questions forced Goepfert to comment on whether the prosecution witnesses were truthful. Because these questions were not objected to during trial, the plain error rule again applies. *See Griller*, 583 N.W.2d at 740. Because respondent concedes that this line of questioning constituted plain error, we consider whether the prosecutorial error affected Goepfert's substantial rights. Prejudice is shown if there is a reasonable likelihood that the error substantially affected the verdict. *Griller*, 583 N.W.2d at 741. Because the error is a result of prosecutorial misconduct, the state bears the burden of showing that the conduct did not affect Goepfert's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). The Minnesota Supreme Court has noted that improper statements require reversal in close cases. *State v. Jensen*, 308 Minn. 377, 380, 242 N.W.2d 109, 111 (1976).

Here, the "were they lying" questions were asked in challenging Goepfert's account of her conduct after her arrest. What the citizen witnesses claimed to have observed upon Goepfert's arrest and Goepfert's version of events was a matter of conflicting testimony. These events relate to the charge that she obstructed legal process. Because the obstruction conviction is not directly challenged and because, as analyzed by this court, Goepfert's credibility is not at issue with regard to her refusal to test or the presence of probable cause, there is no reasonable likelihood that the were-they-lying questions substantially affected the verdict. Regardless, in this factual setting, the questions were not prejudicial. We conclude that the prosecutor's misconduct in asking those questions did not support reversal of Goepfert's convictions.

Affirmed.

Dated: