STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2136

State of Minnesota,
Respondent,

vs.

Jessica Lou Zielske,
Appellant.

Filed June 10, 2008
Affirmed
Collins, Judge[*]

Freeborn County District Court
File No. 24VB071873

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

Craig S. Nelson, Freeborn County Attorney, Karyn D. McBride, Assistant County Attorney, Freeborn County Government Center, 411 South Broadway, Albert Lea, MN 56007 (for respondent)

Samuel A. McCloud, Carson Heefner, McCloud & Heefner, P.A., Suite 1000, Circle K, Box 216, Shakopee, MN 55379 (for appellant)

Considered and decided by Lansing, 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

COLLINS, Judge

Appellant Jessica Lou Zielske challenges her petty-misdemeanor conviction of failure to reduce speed in violation of Minn. Stat. § 169.14, subd. 3(a) (2006), arguing that (1) the statute under which she was convicted is unconstitutionally vague and (2) the evidence was insufficient to sustain her conviction. Because appellant challenges the constitutionality of the statute for the first time on appeal, we decline to address that issue conclusively. And because the evidence, consisting of the trooper's testimony and a videotape of the incident taken from the dashboard of the trooper's squad, reasonably supports the district court's determination that appellant failed to drive at an appropriate reduced speed when passing the squad, we affirm.

D E C I S I O N

Appellant was convicted of violating the following statute:

> The driver of any vehicle shall, consistent with the requirements, *drive at an appropriate reduced speed when approaching or passing an authorized emergency vehicle stopped with emergency lights flashing on any street or highway*, when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Minn. Stat. § 169.14, subd. 3(a) (2006) (emphasis added).

Constitutionality of statute

Appellant argues that the statute is unconstitutionally vague because it is unclear what the phrase "appropriate reduced speed" means. Appellant asserts that by requiring a driver to "drive at an appropriate reduced speed," the statute requires a driver to do something that is so vague that no reasonable person of common intelligence can ascertain its meaning. *See State v. Christie*, 506 N.W.2d 293, 301 (Minn. 1993) (adopting standard for vagueness).

But appellant raises this argument for the first time on appeal. Appellant's attorney did characterize the phrase as "vague" during final argument at the trial, but it was in the context of suggesting reasonable doubt. The district court did not construe the argument as a constitutional challenge to the statute, and appellant did not preserve it as such. Because the constitutional issue has not been adequately briefed or litigated, and because the record on this issue has not been fully developed, it would be imprudent to conclusively address this issue for the first time on this appeal. *See State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (stating that appellate courts may address issues raised for the first time on appeal "when the interests of justice require their consideration and addressing them would not work an unfair surprise on a party"); *see also State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) ("The law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal.").

Nevertheless, we note that the "use of somewhat general language in a statute . . . does not render it vague." *Christie*, 506 N.W.2d at 301. A criminal statute need only be specific enough "to provide fair warning that certain kinds of conduct are prohibited." *Id.*

(quotation omitted). In *State v. Domke*, 392 N.W.2d 645, 646 (Minn. App. 1986), the defendants challenged the constitutionality of a city ordinance that prohibited unnecessary displays of speed; in rejecting the challenge to the statute, this court concluded that "[a]bsolute certainty is not required" and that the law need only be "definite enough to give notice of the conduct prohibited."

The statute at issue here requires a driver to drive at an "appropriate reduced speed" under a wide variety of commonly-encountered circumstances including "when approaching or passing" an emergency vehicle stopped with its flashing lights activated. Minn. Stat. § 169.14, subd. 3(a). While appellant quibbles with what speed is "appropriate," any person of ordinary intelligence or common sense is at least put on notice that "reduced" speed would require a driver traveling at or near the maximum speed limit to exercise caution and slow down in the face of such circumstances. We therefore conclude that as applied to the facts here the statute is not vague in any sense useful to appellant.

Sufficiency of the evidence

When assessing the sufficiency of the evidence to sustain a conviction, a reviewing court 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 [finder of fact] to reach the verdict which [it] did." *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005) (quotation omitted). We must assume that the fact-finder believed the state's witnesses and disbelieved any evidence to the contrary; thus, all

conflicts in the evidence are resolved in favor of the state. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Appellant argues that the evidence is insufficient to sustain her conviction because the following evidence was undisputed: the trooper activated his radar *after* appellant's vehicle passed the squad; appellant's vehicle was traveling under the maximum speed limit at that point; and appellant gradually started to increase her speed *after* she passed by. Appellant strains to insist that the only reasonable inference that can be drawn from the evidence is that she must have reduced her speed as she was approaching the squad, because after appellant passed the squad the radar recorded her acceleration to her previous speed. And she further argues that although the squad "rocked" as appellant's vehicle passed by, the trooper acknowledged that three other vehicles passed by at roughly the same time.

But the district court heard the testimony and had an opportunity to assess the credibility of the trooper, who was the only witness to testify. The trooper, who has 23 years of experience in law enforcement, testified that he was stopped on the shoulder of the interstate highway completing paperwork from a previous traffic stop, with his emergency lights activated, when appellant's vehicle passed in the lane closest to him and "rocked" his squad. He testified that the speed limit at that location is 70 miles per hour and that when he activated his radar just as appellant passed, he obtained readings that indicated appellant was traveling at 69 and 70 miles per hour.

The district court also viewed the videotape of the incident recorded from the dashboard of the trooper's squad, which depicts the squad "rocking" as appellant's

vehicle passed. It also shows that there were no vehicles following directly behind appellant and that appellant's brake lights were not activated as she passed. The trooper is heard on the soundtrack of the videotape telling appellant that she could see his emergency lights for approximately three-quarters of a mile, but that she still did not slow down. Appellant is heard to respond that she could not get over into the other lane because there were three cars next to her, but she admitted that she was traveling 70 to 72 miles per hour, that she did not slow down because the cars next to her were going too fast, and that it was her fault.

The district court was entitled to credit the trooper's testimony that appellant did not attempt to reduce her speed, even though his squad was visible to her from a long distance, and that nothing prevented her from applying the brakes and slowing down. The district court was also entitled to consider the evidence of all of the circumstances surrounding the incident and to conclude that appellant failed to drive at an "appropriate reduced speed" when she approached and passed the trooper's squad. The evidence thus reasonably supports the verdict reached by the district court.

Affirmed.