STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1515

State of Minnesota,
Respondent,

vs.

Billy O. Vanlandingham, Jr.,
Appellant.

Filed August 19, 2008
Affirmed
Hudson, Judge

Washington County District Court
File No. K9-06-2388

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

Doug Johnson, Washington County Attorney, Michael Hutchinson, Assistant County Attorney, 14949 – 62nd Street North, P.O. Box 6, Stillwater, Minnesota 55082-0006 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

HUDSON, Judge

On appeal from conviction and sentence for felony first-degree test-refusal, appellant argues that (1) his conviction must be reversed because the district court committed prejudicial error by failing to identify all the elements of the offense in the jury instructions; and (2) the principles of fairness and equity require that his sentence be reduced from 48 months to 42 months because the state used appellant's prior felony driving-while-intoxicated conviction from Louisiana to increase his criminal history score instead of using it to enhance the Minnesota charge to a felony. We affirm.

FACTS

Appellant Billy Vanlandingham was convicted in Louisiana of driving while intoxicated (DWI) in 1998, 1999, 2000, and 2001. The 2001 conviction constituted a felony. In April 2006, appellant was charged in Washington County with first-degree DWI and first-degree test refusal. Prior to the scheduled jury trial, appellant stipulated that he had the requisite three DWI convictions within the last ten years to enhance the Minnesota charges to felonies. When asked by the district court whether appellant needed to specify the convictions to which he was stipulating, the prosecutor replied that it was not necessary.

At trial, Officer Allan Olson testified that on April 16, 2006, he stopped appellant for speeding. Officer Olson testified that when he approached the vehicle driven by appellant, he noticed a "strong odor of alcoholic beverage coming from him and inside the vehicle." When asked whether he had been drinking, appellant stated that he had

been out celebrating with some co-workers and admitted to consuming "a couple beers and a couple shots." Based on appellant's admission that he had been drinking, Officer Olson asked appellant to perform several field sobriety tests. When appellant performed poorly on the field sobriety tests, Officer Olson arrested appellant for DWI.

After appellant was arrested and transported to the police station, appellant was read the implied-consent advisory. According to Officer Olson, appellant refused to take a breath test. Officer Olson testified that appellant cited "medications" as his reason for refusing the breath test.

Appellant testified in his defense and admitted being out with a coworker the night he was arrested. According to appellant, he drank two beers and two shots that evening, but he left the bar because he began to feel ill. Appellant also testified that after he was arrested for DWI, he refused to take the breath test because he did not trust the accuracy of the intoxilyzer.

Following the trial, the jury found appellant not guilty of first-degree DWI but guilty of first-degree test refusal. Appellant was sentenced to 48 months in prison, followed by five years of conditional release. This appeal follows.

D E C I S I O N

I

The district court has significant discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). A jury instruction is erroneous if it materially misstates the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and

adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

Appellant contends that his test-refusal conviction must be reversed because the district court erred by failing to instruct the jury on all of the elements. But appellant failed to object to the jury instruction at trial. When a party does not object to a jury instruction at trial, this court may consider the issue only if the challenged instruction amounts to "plain error affecting substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To affect substantial rights, the error must be prejudicial; that is, there must be a "reasonable likelihood" that giving the instruction would have had a significant effect on the verdict. *Id.* at 741. If the error was prejudicial, this court must assess whether it should remedy the error "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740.

Here, the district court followed the standard jury instruction and instructed the jury on the elements of criminal test-refusal as follows:

> The elements of refusal to submit to testing are, first, a peace officer had probable cause to believe that [appellant] drove a motor vehicle while under the influence of alcohol. Probable [cause] means that it was more likely than not that [appellant] drove a motor vehicle while under the influence of alcohol.
>
> Second, [appellant] was requested by a peace officer to submit to a chemical test of [appellant's] breath. Third, [appellant] refused to submit to the test. Fourth, [appellant's] act took place on or about April 17th, 2006, in Washington County.

Appellant argues that this instruction is inadequate because it fails to include the procedural prerequisites of the implied-consent statute. This statute provides that a

chemical test of a person's breath may be required "when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of [Minn. Stat. §] 169A.20." In addition, one of the following conditions must exist:

> (1) the person has been lawfully placed under arrest for violation of section 169A.20 . . .;
> (2) the person has been involved in a motor vehicle accident . . .;
> (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or
> (4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.51, subd. 1(b) (2004). The person must also be informed of specific information that is set out in the statute and included in the implied-consent-advisory form. Minn. Stat. § 169A.51, subd. 2 (2004).

Recently, this court held that because an officer can request a test only when a condition exists under the implied-consent statute, and because the implied-consent advisory must be given when the test is requested, those prerequisites are incorporated into the criminal-refusal statute. *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Thus, this court held that a jury must be instructed on those elements. *Id.* Here, the jury instruction did not include these procedural prerequisites. We conclude that the omission constituted plain error.

Appellant argues that because the district court's instruction failed to include every element of the crime, he is entitled to a new trial. To support his claim, appellant cites language in *State v. Mahkuk*, 736 N.W.2d 675, 683 (Minn. 2007), which states:

"[w]e have consistently held that when an erroneous jury instruction eliminates a required element of the crime this type of error is not harmless beyond a reasonable doubt." But appellant misconstrues the language in *Mahkuk*. In that case, the defendant appealed his conviction for aiding and abetting the shooting deaths of the two victims.[1] *Mahkuk*, 736 N.W.2d at 678. The defendant argued that the district court's jury instruction on accomplice liability misstated the law because it permitted the jury to find him guilty if it found that he was intentionally present at the scene of the crime without also finding that it was his intent that his presence aid or encourage the commission of the crime. *Id.* at 681. The supreme court agreed and remanded the case for a new trial, holding that the instruction

> relieved the state of its burden of proving that [the defendant] aided and abetted the killing of [the victims] by instructing the jury that it need only consider, not find beyond a reasonable doubt, whether [the defendant] had knowledge that a crime was going to be committed and whether [the defendant] intended for his presence to encourage or further the completion of that crime. The court's instructions left the jury with the impression that [the defendant's] intentional presence was sufficient to find guilt without also requiring the jury to find that he intended his presence to encourage or further the commission of the crime. For those reasons, we cannot say that the errors were harmless beyond a reasonable doubt.

Id. at 683.

[1] Notably, the defendant in *Mahkuk* objected to the jury instructions at trial and requested that the district court use only the standard CRIMJIG for aiding and abetting rather than including a supplemental instruction that included language in addition to the language contained in the standard CRIMJIG. 736 N.W.2d at 680–81.

Here, unlike *Mahkuk*, the omitted elements of the jury instruction were not contested. The jury found that the officer had probable cause to arrest appellant for DWI, and there is unchallenged evidence that appellant was placed under lawful arrest for DWI. Moreover, the officer testified that he read appellant the implied-consent advisory, and appellant admitted that the officer read the advisory to him. Because there was more than sufficient evidence that the procedural perquisites contained in the implied-consent advisory were met, there is no reasonable likelihood that the district court's omission affected the verdict. *See Ouellette*, 740 N.W.2d at 360 (holding that where there was no dispute that the officer read the defendant the implied-consent advisory, and where there was unchallenged evidence that the defendant was placed under lawful arrest for DWI, the district court's failure to instruct the jury on the procedural prerequisites of the implied-consent statute constituted harmless error). Accordingly, appellant is not entitled to a new trial.

II

Appellant argues that the district court erred by failing to use his felony DWI conviction from Louisiana to enhance the Minnesota test-refusal charge to a felony. On appeal, the reviewing court "may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2006). "Whether a statute or a provision of the sentencing guidelines has been properly construed is a question of law to be reviewed de novo." *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005).

In Minnesota, the first-degree DWI statute makes a driving-while-impaired offense, including refusal to test, a felony when the person "(1) commits the [current] violation within ten years of the first of three or more qualified prior impaired driving incidents; or (2) has previously been convicted of a felony under this section." Minn. Stat. § 169A.24, subd. 1 (2004). Here, appellant stipulated at trial that he has the three requisite qualified impaired-driving incidents, but he did not specify which of his four convictions he was stipulating to. After appellant was found guilty, the district court sentenced him to 48 months. In arriving at that sentence, the district court used appellant's three non-felony Louisiana DWI convictions to enhance the Minnesota charge to a felony, and used the remaining felony DWI conviction from Louisiana to increase appellant's criminal-history score. Because appellant received two criminal-history points, the sentencing worksheet called for an executed sentence of 48 months.

Appellant argues that his felony conviction from Louisiana should have been used as an enhancer rather than to increase his criminal-history score. Appellant contends that, had his felony DWI conviction from Louisiana been used as one of the three qualifying convictions required for enhancement, his sentence would have been 42 months rather than 48 months.[2] Thus, appellant argues that his increased sentence was the product of

[2] If the felony DWI was used for enhancement purposes, appellant would have a criminal-history score of one, based on the custody-status point. The remaining DWI conviction from Louisiana that was not used for enhancement purposes would not have generated any additional points because it was only a misdemeanor or gross misdemeanor. *See* Minn. Sent. Guidelines II.B.3 (providing that one unit is to be assigned for each misdemeanor or gross misdemeanor, with four units equal to one point).

manipulation and that the principles of fairness and equity require that his sentence be reduced from 48 months to 42 months.

To support his claim, appellant cites language from *Zeimet*, in which the supreme court stated: "the sentencing guidelines were created to assure equity in sentencing. In achieving this goal, substantial efforts have been made to avoid systematic manipulation." 696 N.W.2d at 796 (citation omitted). But appellant's reliance on *Zeimet* is misplaced. In that case, the defendant disputed the computation of his criminal-history score in sentencing for first-degree DWI. *Id.* at 793. The supreme court noted the potential problems associated with sentencing individuals convicted of DWI, but noted that the sentencing guidelines were created to assure equity in sentencing and to avoid manipulation in the sentencing context. *Id.* at 796–97. The supreme court further held that

> to advance the interests of consistency and avoidance of manipulation, qualified prior impaired driving incidents, whether evidenced by criminal conviction or civil losses of license, may be ordered by a bright-line rule. This could be accomplished by the date of the underlying impaired driving behavior. Then the first three incidents, whether established by criminal conviction or license revocation, would be applied as enhancers unavailable to be double counted thereafter in the computation of the criminal history score. If there are subsequent qualified impaired driving incidents that resulted in convictions, those convictions would be available in the computation of the criminal history score.

Id. at 797 (citation omitted).

Here, appellant's sentence was consistent with the holding in *Zeimet*. Appellant's first three DWI convictions from Louisiana were used to enhance the Minnesota test-

refusal charge to a felony. Because his last DWI conviction from Louisiana was a felony, that conviction was used to increase appellant's criminal-history score. Accordingly, the district court properly considered appellant's prior DWI convictions from Louisiana in sentencing appellant to the presumptive 48-month sentence.

Affirmed.