**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-2253**

State of Minnesota,
Respondent,

vs.

Lorelee Marie Hamlin,
Appellant.

**Filed January 27, 2009**
**Affirmed**
**Crippen, Judge**[*]

Anoka County District Court
File No. K0-06-9715

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Johnson, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

**CRIPPEN**, Judge

On appeal from her convictions of first-degree driving while impaired under Minn. Stat. §§ 169A.20, subd. 2, .24, subd. 1(1) (2006), and driving without a valid license under Minn. Stat. § 171.24, subd. 5 (2006), appellant Lorelee Hamlin seeks a new trial, arguing that the district court omitted required elements in its jury instructions. The omission of these elements did not constitute plain error and we affirm.

## FACTS

On September 20, 2006, St. Francis police officers stopped a vehicle driven by appellant after it crossed the centerline. Police observed numerous indications that appellant was intoxicated, and she could not produce a driver's license because it had been cancelled as being inimical to public safety. After appellant refused field sobriety tests and stated, "Just take me – I'm drunk; just take me to jail and get this over with," she was taken to the St. Francis Police Department, and implied-consent procedures were instituted. Appellant refused to submit to testing.

The state tried two counts to the jury: test refusal under Minn. Stat. § 169A.20, subd. 2,[1] and driving after cancellation under Minn. Stat. § 171.24, subd. 5. After the state offered the testimony of the arresting officers, appellant testified in her own defense

[1] Before trial, appellant stipulated that she had three prior convictions for driving while impaired, dating from July 16, 2005, August 26, 2000, and March 28, 1999. Respondent was ultimately convicted of First-Degree DWI under Minn. Stat. § 169A.24, subd. 1(1). A person violates section 169A.24, subd. 1(1) by violating Minn. Stat. § 169A.20 "within ten years of the first of three or more qualified prior impaired driving incidents."

and denied that she consumed alcohol, crossed the center line, or received the implied-consent advisory. Subsequently, the district court instructed the jury regarding both counts. When identifying the elements of test refusal, the court gave the pattern jury instruction for test refusal from 10A *Minnesota Practice*, CRIMJIG 29.28 (2006), but failed to instruct the jury to find that appellant was lawfully arrested and that the implied-consent advisory was read to her. The jury found appellant guilty of both counts.

**D E C I S I O N**

For a proper conviction of test refusal, a jury must find both the elements of the crime described in Minn. Stat. § 169A.20, subd. 2, and the procedural elements set forth in the implied-consent statute[2] beyond a reasonable doubt. *See State v. Ouellette*, 740 N.W.2d 355, 359-60 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Thus, in addition to the elements stated in Minn. Stat. § 169A.20, subd. 2, the jury must be instructed to find (1) whether the implied-consent advisory was read, and (2) whether the

[2] The implied-consent statute states:

> (b) The test may be required of a person when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist:
>
> (1) the person has been lawfully placed under arrest for violation of section 169A.20 or an ordinance in conformity with it;
>
> (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death;
>
> (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) (2006). The person also must be informed of specific information that is set out in the statute. *Id.*, subd. 2 (2006).

driver has been lawfully placed under arrest for violation of section 169A.20 (or when pertinent, one of the other three conditions listed in Minn. Stat. § 169A.51, subd. 1(b)). *Id*.; *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007) ("[J]ury instructions must define the crime charged and explain the elements of the offense to the jury.").

District courts are allowed "considerable latitude in selecting the language of jury instructions," *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002), and "failure . . . to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *Ouellette*, 740 N.W.2d at 358 (quoting *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998)). When a defendant fails to request a jury instruction that the district court is obligated to give, we have previously reviewed the erroneous omission under a harmless-error analysis. *Ouellette*, 740 N.W.2d at 360 (citing *State v. Moon*, 717 N.W.2d 429, 437 (Minn. App. 2006)). But in *State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007), the supreme court overruled *Moon* and called for use of a plain error analysis to review the omission of a necessary instruction on accomplice testimony.

We have discretion, despite waiver of the objection to jury instructions, to consider "[p]lain errors or defects affecting substantial rights . . . although they were not brought to the attention of the trial court." Minn. R. Crim. P. 31.02; *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). The error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case."

*Griller*, 583 N.W.2d at 741.[3] And even if plain error occurs affecting substantial rights, we must affirm unless the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

Appellant asserts that the district court's instruction omissions were reversible error because they constituted "a structural error." But in *Ouellette*, virtually the same procedural elements were omitted from the instructions as in appellant's case, and this court held that, because the elements omitted from the instructions were supported by unchallenged evidence at trial, there was no prejudicial error. *Ouellette*, 740 N.W.2d at 360; *see also Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999) (concluding that erroneous jury instructions were harmless when the omitted element was not contested at trial and the record contained overwhelming evidence establishing the omitted element). Similarly, it is evident that the omission in this case was not "prejudicial," "affect[ing] the outcome of the case," the standard employed in the search for plain error. *Griller*, 583 N.W.2d at 741.

Appellant claims error because the jury was not instructed to find whether appellant was arrested. The record includes an officer's testimony that he arrested appellant and took her into custody. Further, the district court instructed the jury that, to

[3] In this sense, the standard differs little from the measure of harmless error. An error is harmless if the error did not have a significant impact on the verdict beyond a reasonable doubt. *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989). If the error might have prompted the jury "to reach a harsher verdict than it might have otherwise reached," the defendant is entitled to a new trial. *Id.*

convict appellant, it needed to find that there was probable cause to believe that appellant was driving under the influence. Appellant did not contest that she was arrested, and, despite her denial that she drank alcohol, the jury found that there was probable cause to believe that she was driving under the influence of alcohol. Because an officer may arrest a driver if there is probable cause to believe the driver is driving under the influence, *Reeves v. Comm'r of Pub. Safety*, 751 N.W.2d 117, 120 (Minn. App. 2008), the jury's probable cause determination is virtually the same as a finding that there was a proper arrest. Consequently, omitting this element of lawful arrest was not plain error that affected the outcome of the case. *See Ouellette*, 740 N.W.2d at 360 (finding this missed instruction "redundant" in similar circumstances).

Similarly, as to the reading of the advisory to appellant, both officers testified that the reading occurred, and the state introduced the advisory form that apparently was read and filled out by the officers. In the face of this evidence, appellant's attorney did not cross-examine the officers on whether the advisory was read. What distinguishes this case from *Ouellette* is that appellant *denied* that the advisory was read to her and stated that the filled-out form was a "lie." In *Ouellette*, the elements missing from the jury instructions were satisfied by uncontradicted evidence. *Id.*

It is notable that, when appellant testified, she denied consuming alcohol, crossing the center line, stumbling when exiting her car, and receiving a request to provide a breath sample. At the same time, the record indicates that appellant admitted that the officers complied with one part of the advisory by offering her a telephone to contact an attorney, and, when she was shown the advisory form at trial, appellant admitted that the

form "look[ed] like the sheet that [one of the officers] had when he asked me if I would further test . . . ." The jury's verdict makes evident that the jury did not find that appellant had a credible recollection of events, rejected her blanket denials, and, instead, believed the state's argument that appellant refused to submit to a test after being requested to do so. Thus, if the jury had been asked to decide whether the advisory was read, it is evident beyond a reasonable doubt that this would not have affected the outcome; the jury would have determined that the officers read the advisory to appellant and that the advisory form correctly reflected what occurred.

Appellant has failed to articulate any theory whereby the district court's failure to instruct the jury on these elements had a significant impact on the jury's verdict or otherwise affected the trial, arguing only that this facet of the plain error standard should not be considered. In addition, appellant has failed to suggest how the omission affected the "fairness, integrity, or public reputation" of these or other proceedings. *Strommen*, 648 N.W.2d at 686. Appellant is not entitled to a new trial.

In a separate claim, appellant argues that the district court erred by failing to acquit her of the driving after cancellation charge after the state presented its case-in-chief. We have no occasion to consider appellant's claim because it was not argued to or considered by the district court,[4] s*ee Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996), but we may review any matter in "the interests of justice," *see* Minn. R. Crim. P. 28.02, subd. 11.

[4] Appellant made an oral motion for acquittal after the state's case-in-chief, but the record indicates that it pertained solely to the test refusal charge.

Appellant's concern is that the state provided no evidence in its case-in-chief that appellant had received notice of her cancellation, which is an essential element of the offense. *See* Minn. Stat. § 171.24, subd. 5. But before trial, the parties and the district court agreed to postpone introduction of this evidence until appellant testified, and the district court stated that, if appellant denied this element, the state could reopen its case to prove it. Appellant's counsel did not object to the procedure, and appellant freely testified that she had notice of her license cancellation. The district court's decision to permit the postponement of the introduction of evidence of this apparently uncontested element is within its discretion under Minn. R. Evid. 611(a), and the court's failure to acquit was not error.

Because the district court's erroneous omission of two elements of the test refusal charge in the jury instructions did not constitute plain error, and because the postponement of the introduction of evidence of notice of license cancellation was not error, we affirm.

**Affirmed.**