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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2275**

State of Minnesota,
Respondent,

vs.

Mohammed Gazizamil Al-Naseer,
Appellant.

**Filed February 10, 2009
Reversed and remanded
Lansing, Judge**

Clay County District Court
File No. K1-02-1163

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Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Worke, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In amended findings following remand for the purpose of applying a newly adopted mens rea standard, the district court found, beyond a reasonable doubt, that Mohammed Al-Naseer was guilty of vehicular homicide based on his knowledge that the vehicle that he was driving had struck both a person and another vehicle before he left the scene of the accident. Although the existing record provides a basis for the district court's finding on Al-Naseer's knowledge of striking a person—and we therefore reject an outright reversal that would result in dismissal—we agree with Al-Naseer's claim that the restrictions imposed on remand denied him the full exercise of his fundamental trial rights, and we therefore reverse and remand for a new trial.

F A C T S

This case has had an uneasy procedural history. The state charged Mohammed Al-Naseer with two counts of criminal vehicular homicide arising from an accident in June 2002 in which Al-Naseer's car struck and fatally injured Kane Thomson, the driver of another car who was changing a flat tire. The first count of criminal vehicular homicide was based on gross negligence under Minn. Stat. § 609.21, subd. 1(1) (2000). The second count was based on leaving the scene of an accident under Minn. Stat. § 609.21, subd. 1(7) (2000). A jury found Al-Naseer guilty of both counts in January 2003.

Both convictions were ultimately reversed on appeal. The conviction for leaving-the-scene vehicular homicide was reversed on appeal to this court because of an incorrect

strict-liability jury instruction. *State v. Al-Naseer*, 678 N.W.2d 679, 696 (Minn. App. 2004) (*Al-Naseer I*). On further review, the supreme court reversed and remanded the gross-negligence vehicular-homicide conviction because of evidentiary errors, failure to instruct on careless driving as a lesser-included offense, and—overruling earlier precedent—error in defining the elements of the offense. *State v. Al-Naseer*, 690 N.W.2d 744, 750-53 (Minn. 2005) (*Al-Naseer II*).

Al-Naseer waived his right to a jury trial on remand and elected not to testify. The district court found Al-Naseer guilty of leaving-the-scene vehicular homicide but not guilty of gross-negligence vehicular homicide. Instead, the district court found him guilty of the lesser-included offense of careless driving. The conviction of leaving-the-scene vehicular homicide was again reversed on appeal. First, this court reversed because the district court applied an incorrect mens rea standard. *State v. Al-Naseer*, 721 N.W.2d 623, 626 (Minn. App. 2006) (*Al-Naseer III*). On further review, the supreme court affirmed the reversal, adopting a different mens rea standard and remanding to the district court to reconsider its verdict “based on the present record and to make amended findings in light of the [newly adopted] mens rea standard.” *State v. Al-Naseer*, 734 N.W.2d 679, 689 (Minn. 2007) (*Al-Naseer IV*).

The facts that constituted the “present record” were, in major part, undisputed. Al-Naseer stipulated that he was driving the car that caused the death. The record established that his car was travelling westbound on Highway 10 in Clay County, when it gradually crossed the fog line at a slight angle at the point where the accident occurred. Thomson was on the shoulder of the highway, crouching over to change the rear,

driver's-side tire. He had removed the tire and placed it next to him between the fog line and his car. His passenger was standing to Thomson's right, holding a flashlight, and the car's flashers and trunk light were illuminated. Al-Naseer's car brushed the passenger, struck Thomson, and rode over the removed tire with sufficient force to drive it into the asphalt, leaving a gouge.

The passenger described the sound of the impact as a crunch or loud thud. An accident-reconstruction expert testified that the impact would have caused a loud noise and a jolt to the driver of the striking car. The force of the impact threw Thomson's body against his own car door and then forward approximately twenty-five feet in front of his car. The impact disabled Al-Naseer's front headlight, damaged his right front tire, and caused general damage to the entire front corner of Al-Naseer's car. Pieces of the car's undercarriage were scattered for nearly 125 feet forward of the impact site.

After impact, Al-Naseer's car moved gradually left, returning to the right lane of the highway without braking, accelerating, or swerving. The passenger described the movement by saying "it just gradually pulled back onto the road as if nothing had happened." He did not know whether the driver looked in the rearview mirror. But an investigator who examined the site testified that, if Al-Naseer had looked in his mirror, he would have seen the headlights of Thomson's car, but the headlights would likely have prevented him from seeing Thomson's body. The record provided no evidence of what Al-Naseer did once he drove beyond the passenger's immediate sight, but, a short time later, a Dilworth police officer spotted Al-Naseer about six or seven miles from the accident site, still traveling west on Highway 10. Al-Naseer was driving about forty or

forty-five miles an hour with only his hazard lights illuminated. The officer testified that he was surprised by the speed of the car traveling without lights.

When the officer stopped the car, Al-Naseer got out and walked to the front right corner of his car, where he was assessing the damage as the officer approached him. Both headlights were out and the right front tire was flat. The officer testified that it was difficult to communicate with Al-Naseer, who is pre-literate in his first language of Arabic and does not speak English well. A second officer who arrived at the stop site testified that Al-Naseer told both officers he knew he had been in an accident but did not know what he had hit. The officers took Al-Naseer into custody, and he was later charged.

Through cross-examination of state witnesses and direct examination of a state trooper, Al-Naseer presented a defense that relied on an inference that he had been asleep at the wheel and that, even if awakened by the impact, he was still not fully aware of the accident. The trooper and one of the state's witnesses agreed that the evidence was consistent with the possibility that Al-Naseer had been asleep at the moment of impact. Al-Naseer's defense was also directed at challenging the state's implication that his continued driving from the site of the accident evinced an acknowledgement of guilt through flight and at discrediting the testimony of the officer who stated that Al-Naseer admitted knowing about the accident when he was stopped.

Al-Naseer argued to the district court that he should be given a new opportunity to exercise his trial rights before the district court reached a decision on the second remand. Constrained by the remand instructions to base the amended findings on the "present

record,” the district court denied the request. Before issuing a decision, the district court permitted Al-Naseer and the state to submit written arguments. Based on these arguments, and applying the newly adopted mens rea standard, the district court found, beyond a reasonable doubt, that Al-Naseer knew that he was involved in an accident in which the car that he was driving struck both a person and another motor vehicle, and adjudged him guilty of leaving-the-scene vehicular homicide under Minn. Stat. § 609.21, subd. 1(7). The district court found Al-Naseer not guilty of gross-negligence vehicular homicide, instead finding him guilty of the lesser-included offense of misdemeanor careless driving. Al-Naseer appeals the leaving-the-scene vehicular-homicide conviction.

D E C I S I O N

In this appeal from conviction following the second remand, Al-Naseer raises two issues. First, he contends that the record does not provide sufficient evidence to sustain the court’s adjudication of guilt on leaving-the-scene vehicular homicide. Second, he argues that the conviction violates his right to a fair trial. The absence of sufficient evidence to support the leaving-the-scene vehicular-homicide conviction would result in an outright reversal that would make it unnecessary to address the fair-trial issue. Accordingly, we address Al-Naseer’s sufficiency-of-the-evidence argument first.

I

A person commits criminal vehicular homicide if, as a result of operating a motor vehicle, that person causes the death of another and leaves the scene of the accident in violation of his duty to stop, remain, give information, and notify law enforcement. Minn. Stat. § 609.21, subd. 1(7) (defining violation through incorporation of Minn. Stat. § 169.09, subds. 1, 6 (2000)). A conviction under this subdivision requires the state to prove that the defendant knew his vehicle was in an accident that triggers a duty not to leave, namely, “one involving a person or another vehicle.” *Al-Naseer IV*, 734 N.W.2d at 687.

When sufficiency of the evidence is challenged on appeal, we review all evidence in a light most favorable to the verdict and assume that the fact-finder credited testimony that supported the verdict and discredited testimony that did not. *State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994). If the evidence thus viewed is sufficient to establish the elements of the crime, the verdict will stand. *Id.*

The district court made a series of findings on the degree of Al-Naseer’s knowledge and whether it was sufficient to satisfy the elements of the charged crime. In the district court’s original findings in 2005, incorporated into the 2007 findings by reference, the district court found that “the corrective steering action undertaken by [Al-Naseer] immediately after the accident, establishe[d] that he was aware of his surroundings at that time.” The court found that the accident caused a loud noise, a “significant bump or jolt in the steering wheel,” and damage resulting in “no headlights when he proceeded westward” and a tire that was “either flat or losing air.” The district

court further found that when the police officers stopped Al-Naseer he admitted “that he had struck ‘something’ . . . but did not know what he had hit.” The district court found beyond a reasonable doubt that Al-Naseer “was aware and/or conscious that he had been involved in a motor vehicle accident and consciously and intentionally left the scene.”

In the 2007 amended findings, the district court found “beyond a reasonable doubt that [Al-Naseer] knew that he was involved in an accident in which the motor vehicle that he was driving struck and/or collided with a living person.” The district court also found, beyond a reasonable doubt, that Al-Naseer “knew that the right frontal portion of his vehicle struck the left door of [Thomson’s] red Monte Carlo and also struck the Monte Carlo’s spare tire lying on the roadway.” The district court’s memorandum in support of this determination explains that it is based on the “good visibility existing immediately prior to the accident, the extensive damage to [Al-Naseer]’s vehicle and the highway, the force of the impact . . . [and Al-Naseer]’s overtly intentionally evasive driving behavior following the collision.”

The district court’s findings are erroneous in one significant respect: no evidence supports a finding that Al-Naseer’s car struck Thomson’s car. All who testified agreed that the two cars did not actually make contact and that the dent in the door of Thomson’s car was caused by the force of his body being thrown into it on impact. Consequently, Al-Naseer could not have known that the two cars hit each other because in fact they did not. Al-Naseer, thus, cannot be charged with knowledge that he struck the car. But the elements of the conviction are satisfied by knowledge that his vehicle was involved in an accident either with a person or another vehicle.

The district court's finding that Al-Naseer knew he struck a person survives because it is independent of the finding that Al-Naseer knew that he struck the car, and sufficient evidence in the record provides a basis for a fact-finder to reach the conclusion that Al-Naseer knew that the car that he was driving struck a person. First, the district court could simply have discredited Al-Naseer's implication that he had been asleep at the wheel. The record allows a conclusion that Thomson and his car were sufficiently visible for an awake driver to see them. Likewise, the district court was free to discredit Al-Naseer's statement to officers, when stopped, that he did not know what it was he had hit. Furthermore, even assuming Al-Naseer was sleeping before the accident, the district court could infer from evidence about the nature of the impact that it awakened Al-Naseer sufficiently to see what he had struck. Assuming the court credited all of the evidence from which inferences of Al-Naseer's knowledge might be drawn, we conclude that adequate evidence in the record supports the conviction.

Al-Naseer alternatively argues that, even if the fact-finder could reasonably infer that Al-Naseer knew that he struck a person, that inference is not the only reasonable conclusion to draw from the evidence. He urges other reasonable hypotheses and argues that application of the circumstantial-evidence standard of review allows a conviction to stand only when the reasonable inferences drawn from the evidence are inconsistent with any rational hypothesis except guilt. *See State v. Anderson*, 379 N.W.2d 70, 78 (Minn. 1985) (setting forth circumstantial-evidence standard of review). But Al-Naseer misreads that rule's applicability, because it controls only when every element required for conviction has been proved entirely by circumstantial evidence. *State v. Jones*, 516

N.W.2d 545, 549 (Minn. 1994) (stating rule as applicable when conviction rests “*entirely* on circumstantial evidence” (emphasis added)); *see also, e.g., State v. Bolstad*, 686 N.W.2d 531, 539 (Minn. 2004) (addressing murder conviction based entirely on circumstantial evidence).

The state’s case against Al-Naseer consisted of a significant amount of direct evidence on elements of the charge, including eyewitness testimony and physical evidence of the impact. The fact that Al-Naseer’s knowledge was proved by circumstantial evidence is unremarkable because a defendant’s mental state can rarely be proved in any other way. *State v. Davis*, 656 N.W.2d 900, 905 (Minn. App. 2003), *review denied* (Minn. May 20, 2003). If *Anderson* imposed a heightened standard of review in this case, it would apply any time that scienter must be established, which would include virtually every criminal case.

Applying the appropriately deferential standard of review, we conclude the record is sufficient for the fact-finder to have inferred that Al-Naseer knew that he had struck a person when he left the scene of the accident. Because the other elements of the offense were established by stipulated facts, the record supports the conviction.

II

Having concluded that Al-Naseer’s conviction would otherwise stand based on the record, we address his claim that he was deprived of a fair trial. Under the Sixth and Fourteenth Amendments, the state must inform a defendant of the “nature and cause” of an accusation against him. *State v. Chauvin*, 723 N.W.2d 20, 29 (Minn. 2006). The charging instrument must therefore contain a sufficient description of the offense to allow

for presentation of a defense. *Id.* Furthermore, in presenting his defense, the defendant has a right to testify, which can only be validly waived knowingly and voluntarily. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). The same is true of a defendant's right to have a jury determine whether facts sufficient to establish the offense have been proved beyond a reasonable doubt. *State v. Dettman*, 719 N.W.2d 644, 651 (Minn. 2006).

Al-Naseer did not have notice of the elemental facts that had to be proved at his trial until 2007, long after the 2005 bench trial. When Al-Naseer was charged in 2002, the complaint indicated that violation of Minn. Stat. § 609.21, subd. 1(7), was a strict-liability offense and noted only that Al-Naseer had told police officers “he may have hit something approximately ten miles prior to being stopped.” The complaint therefore put Al-Naseer on notice that he could only overcome the state's evidence at trial by challenging his own statement to police.

When Al-Naseer had his second opportunity to present evidence at the 2005 bench trial, the district court construed the mens rea element as requiring only that the driver “was aware that he had been involved in a ‘motor vehicle accident.’” *Al-Naseer IV*, 734 N.W.2d at 689. Under the revised standard, the complaint was still sufficient to notify Al-Naseer of the defense he had to present. Nothing had changed in this regard: Al-Naseer could only overcome the state's evidence by challenging his own statement to police.

The complaint, therefore, did not become inadequate for notice purposes until 2007 when *Al-Naseer IV* established that the mens rea element in Minn. Stat. § 609.21, subd. 1(7), requires the state to prove that the defendant knew his vehicle was in an

accident that involved “a person or another vehicle.” *Al-Naseer IV*, 734 N.W.2d at 687; *see also* 10 *Minnesota Practice*, CRIMJIG 11.65 (5th ed. Supp. 2008) (listing revised mens rea requirement as fourth element of leaving-the-scene vehicular homicide). Under the new standard, the complaint was no longer adequate because it did not contain a sufficient description of the offense to allow for a fair presentation of a defense. Specifically, Al-Naseer did not have notice at his 2005 bench trial that acquittal was possible if he could persuade the fact-finder, consistent with his purported statement to the police, that he did not know what he had hit.

Thus, under these specific facts, the announcement of the new mens rea element had the same effect as a late amendment of charges. *See* Minn. R. Crim. P. 17.05 (limiting state’s ability to amend charges); *State v. Guerra*, 562 N.W.2d 10, 14 (Minn. App. 1997) (holding that defendant was prejudiced when trial proceeded with essential element of charge having been amended). It violated “due process notions of timely notice” and “adversely affect[ed] the trial tactics of the defense.” *State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980).

We also conclude that Al-Naseer did not knowingly waive his right to a jury or his right to testify. He could not have knowingly waived these rights when he did not know the potential effect of his testimony with respect to the knowledge element. *Cf. State v. Zulu*, 706 N.W.2d 919, 927 (Minn. App. 2005) (holding waiver of jury not knowing, intelligent, or voluntary because obtained before particular jury question arose); *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004) (holding that district court erred in failing to obtain jury waiver specific to single element).

Violation of a defendant's constitutional rights warrants a new trial unless the error was harmless beyond a reasonable doubt. *State v. King*, 622 N.W.2d 800, 809 (Minn. 2001). An error is harmless beyond a reasonable doubt when the verdict is "surely unattributable" to the error. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). The question raised by these proceedings is whether the verdict is unattributable to the absence of a jury or the absence of Al-Naseer's testimony.

Because *Al-Naseer IV* altered the calculus on the knowledge element, it is reasonable to conclude that it could bear on Al-Naseer's decision of whether to testify and whether to request a jury trial. Thus, it was not harmless error to convict Al-Naseer without adequate notice of the knowledge element, without an opportunity to adequately defend against that element, and without permitting him to knowingly decide whether to exercise fundamental rights. We, as well as the district court, recognize the need for closure in this extended proceeding, and we do not lightly view the requirement of a new trial. Nonetheless, we conclude that a new trial is warranted.

The state argues that Al-Naseer is not entitled to argue now for a new trial because the question has already been answered. We disagree. In the prior direct appeal, this court remanded for additional findings, but not a new trial, after providing a definition of the knowledge element. *Al-Naseer III*, 721 N.W.2d at 626-27. Al-Naseer agreed with that definition but petitioned for review, asking the supreme court to address whether remand was improper without opportunity for a new trial. The supreme court denied Al-Naseer's petition for review but granted the state's petition to review the definition of the knowledge element.

The *Al-Naseer IV* opinion refined the knowledge definition, but otherwise reiterated this court's remedy of remanding for findings on the existing record. 734 N.W.2d at 689. The question of whether a new trial should be granted on the newly adopted knowledge element was not argued to this court or the supreme court, was not briefed by either Al-Naseer or the state in the appeal to either court, and was not addressed on the merits in either court's opinion. We do not attempt to discern from that absence the basis for the original instructions. We hold only that the 2007 conviction infringed Al-Naseer's rights, and we are compelled, in the interests of justice, to ameliorate that violation. Minn. R. Civ. App. P. 103.04. We remand to allow Al-Naseer, now properly on notice of the facts that must be proved in the charge against him, to exercise his fundamental trial rights and to present his defense.

Reversed and remanded.