STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2161

State of Minnesota,
Respondent,

vs.

John R. Gerardy,
Appellant.

Filed March 17, 2009
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 07021840

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

David E. Ornstein, Bloomington City Attorney, Lisa C. Netzer, Assistant City Attorney, 1800 West Old Shakopee Road, Bloomington, Minnesota 55431 (for respondent)

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

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Connolly, Judge.

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

HUDSON, Judge

On appeal from convictions of test refusal and driving while impaired (DWI), appellant contends that (1) he was denied effective assistance of counsel when his trial counsel did not move to suppress evidence of his refusal to submit to chemical testing; (2) the district court abused its discretion by amending the standard test-refusal jury instruction; (3) the district court committed plain error by failing to instruct the jury on the procedural prerequisites of the test-refusal offense; and (4) Minnesota's test-refusal statute is unconstitutional. We affirm.

FACTS

On April 5, 2007, law-enforcement officer Brant Richardson arrested appellant John R. Gerardy for DWI, after a portable breath test revealed an alcohol concentration of .225. The officer took appellant to the Bloomington Police Department and attempted to read the implied-consent advisory to him.

During the reading, appellant repeatedly interrupted Officer Richardson and yelled, "What are you talking about? I blew in the box. What more do you want from me?" Appellant used expletives and stated that he "wasn't driving," "did take the test," "blew in a box," that he was "drunk," and had "been drinking." He also told the officer not to "talk to [him] anymore." When Officer Richardson asked appellant if he understood the advisory, appellant responded, "I don't give a damn what you said to me."

Having received no indication that appellant understood the advisory, Officer Richardson attempted once more to read it to him. But before he could begin the second

reading, appellant began repeatedly shouting, "I don't wanna hear it!" As the officer went through the advisory a second time, appellant again repeatedly interrupted him, stating, "I want my lawyer here," and "You leave me alone." When he finished the second reading of the advisory, Officer Richardson asked appellant if he understood the reading; appellant responded, "I want my lawyer! I want my lawyer here!" Then Officer Richardson asked appellant if he would "take the breath test." Instead of saying that he would or would not take it, appellant responded, "I already did that. I already did that. I want my lawyer. You're not gonna crucify me any more than you already did. Bloomington Police Department's a . . . [unintelligible] . . . you leave me alone! I want my lawyer and I want a jury to hear just everything you just said."

The dialogue between the officer and appellant continued, with the officer continuing his attempts to determine whether appellant had understood the advisory, would take the test, wanted to contact an attorney, or wanted to be left alone. Appellant continued to be belligerent; he swore at the officer, rambled about Russia, and asked for water.

Appellant did not contact an attorney and did not submit to the test.

Appellant was charged with one count each of gross misdemeanor second-degree failure to submit to chemical testing, gross misdemeanor third-degree DWI, and misdemeanor driving after revocation. The misdemeanor charge was dismissed before trial. Appellant was convicted of the remaining charges following a jury trial. The district court sentenced appellant to 365 days in the Hennepin County Adult Correctional

Facility, stayed execution, and placed appellant on probation for four years. This appeal follows.

D E C I S I O N

I

Appellant first argues that his trial counsel provided ineffective assistance of counsel because he did not move to suppress the evidence of appellant's refusal to submit to chemical testing.[1] Appellant asserts that such evidence should have been suppressed because it occurred after law-enforcement officers violated his right to counsel.

To succeed on an ineffective-assistance-of-counsel claim, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2068 (1984)). A court "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

[1] Generally, "an appeal from a judgment of conviction is not the most appropriate way of raising an issue concerning the effectiveness of the trial counsel's representation because the reviewing court does not have the benefit of all the facts concerning why defense counsel did or did not do certain things." *State v. Hanson*, 366 N.W.2d 377, 379 (Minn. App. 1985). "This issue is more effectively presented in a postconviction proceeding." *Id.* Here, appellant is raising his claim on direct appeal. But neither party has suggested that additional fact-finding is needed, and the record is sufficient to provide for meaningful review of appellant's claim.

"[T]here is a strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). An attorney's actions are "within the objective standard of reasonableness when [the attorney] provides [the] client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted).

Appellant's ineffective-assistance-of-counsel claim fails because appellant cannot demonstrate that his counsel's performance fell below an objective standard of reasonableness. "A claim of ineffective assistance of counsel may not rest on the failure of an attorney to make a motion that would have been denied if it had been made." *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004). In this case, a motion to suppress the test-refusal evidence would have been denied by the district court.

In Minnesota, drivers arrested for DWI have a limited right to consult with counsel before testing so long as the consultation does not unreasonably delay testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991); *see also* Minn. Stat. § 169A.51, subd. 2(4) (2006) (requiring that when "a test is requested, the person must be informed . . . that the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test"). This right includes the right to consult a lawyer of the driver's own choosing. *State v. Collins*, 655 N.W.2d 652, 656 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). "A police officer not only must inform the driver of the right to counsel but also must assist

in vindicating this right." *Id.* That right is vindicated if the driver is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel. *Id.* Neither party asserts on appeal that Officer Richardson gave appellant the opportunity to consult with a lawyer.

Whether a driver's right to counsel has been vindicated is a mixed question of law and fact. *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). On undisputed facts, "this court makes a legal determination [as to] whether or not the defendant 'was accorded a reasonable opportunity to consult with counsel.'" *Id.* (quoting *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992)), *review denied* (Minn. Oct. 20, 1992)).

Behavior aimed at frustrating the implied-consent process may constitute a retraction of the original request for an attorney. *Collins*, 655 N.W.2d at 658. "[T]he implied consent law imposes on a driver a requirement to act in a manner so as to not frustrate the testing process. If a driver does frustrate the process, [the] conduct will amount to a refusal to test." *Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 1995).

In *Collins*, the defendant was convicted of misdemeanor DWI, refusal to submit to testing, disorderly conduct, and obstructing legal process. 655 N.W.2d at 655. She appealed her conviction, arguing that she had requested three times to have her attorney present, that her right to counsel was violated when she was not able to consult an attorney, and that her test-refusal conviction should be reversed. *Id.* at 656. This court concluded that her right to counsel under the implied-consent statute had not been

violated, noting that when the officer attempted to read her the advisory, the defendant "began screaming, swearing, making accusations of rape, and insisting that she would not listen." *Id.* at 658. The defendant's own "conduct frustrated the implied-consent procedure and amounted to a retraction of her request to contact an attorney." *Id.*

Similarly, in *Busch*, the defendant challenged the decision to revoke his driver's license under the implied-consent law based on his refusal to submit to alcohol testing. 614 N.W.2d at 257. He argued, on appeal, that his right to counsel was not vindicated, and that therefore his refusal to test was reasonable. *Id.* at 258. Right before the officer began reading the advisory, the defendant asked to talk to a lawyer. *Id.* at 257. The request was ignored. *Id.* The officer then read the advisory three times and asked the defendant if he understood. *Id.* Each time, the defendant refused to respond. *Id.* Then the defendant also refused to respond when the officer asked him three times if he wished to consult an attorney. *Id.* Finally, when the officer asked the defendant if he would take the test, the defendant again failed to respond. *Id.* On those facts, this court held that the driver's conduct and his behavior after his request for an attorney and during the reading of the implied-consent advisory "frustrated the implied consent process and constituted a retraction of his request for an attorney and a refusal to test." *Id.* at 260. We specifically noted that the defendant frustrated the officer's attempts "by refusing to respond to his questions, by rolling his head away while [the officer] read the advisory, and by telling [the officer] that he wanted to make things difficult for the officer and that the officer would pay for this." *Id.* at 259.

Appellant here engaged in similar conduct. He repeatedly interrupted the first reading of the implied-consent advisory, swearing at the officer and yelling, "I blew in a box," "[d]on't talk to me anymore," and "let a jury hear about it." When the officer asked appellant whether he had understood the advisory, appellant refused to answer the question, instead stating that he did not "give a damn what [the officer] said."

To ensure that appellant understood his rights, the officer again attempted to read the implied-consent advisory to appellant. Again, appellant repeatedly interrupted the officer, stating several times, "I do not wanna hear it!" and "[y]ou leave me alone!" During the second reading, appellant also stated numerous times that he wanted his lawyer there. When the officer finished the second reading of the advisory, he asked appellant if he had understood the advisory. Appellant did not answer the question, instead he stated, "I want my lawyer! I want my lawyer here!" The officer then asked, "Will you take the breath test?" And appellant claimed that he "already did that," that he "want[ed] [his] lawyer," that he was not going to be "crucif[ied]," and that he wanted to be left alone.

Finally, after being repeatedly interrupted and after another officer had to intervene in an attempt to calm appellant down, Officer Richardson asked appellant if he wanted to talk to an attorney before proceeding further. Appellant responded, "You leave me alone!" Appellant continued shouting that he did not want to talk to the officers, wanted to be left alone, that he was not intoxicated, that he was being lied to, and that the officer was "full of sh-t." At the end of the advisory, appellant did state that he "will call." But he continued to rant and swear at the officers.

Clearly, appellant repeatedly stated that he wanted an opportunity to talk with a lawyer but he also told Officer Richardson several times not to speak to him and repeatedly told the officer to leave him alone. Equally significant, appellant never stated whether he understood the advisory or whether he would take the breath test. And when Officer Richardson repeatedly asked whether he wanted to contact an attorney, appellant did not say, in response to those questions, that he wanted to contact an attorney. Instead, appellant repeatedly told him, "You leave me alone."

Under these circumstances, we conclude that appellant did request an attorney, but that his subsequent behavior frustrated the testing process and constituted a retraction of that request and a refusal to take the test. In light of appellant's behavior and our decisions in *Collins* and *Busch*, appellant's limited right to counsel was not violated, and his trial counsel's failure to move to suppress the evidence on that basis did not constitute ineffective assistance of counsel.

II

Appellant next makes two arguments challenging the district court's test-refusal instruction. The district court has significant discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000); *see also Johnson v. State*, 421 N.W.2d 327, 330 (Minn. App. 1988) ("Trial courts have broad discretion in determining the propriety of a specific jury instruction."), *review denied* (Minn. May 4, 1988). 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 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).

Prior to trial, the prosecution moved to amend the test-refusal jury instructions, arguing that the instruction did not address cases—such as this one—in which the defendant's behavior frustrates the process. The defense opposed amending the instruction. At trial, the district court instructed the jury on the elements of the test-refusal offense, and, consistent with the prosecution's request, on the second element, told the jury: "Second, a peace officer requested the defendant to submit to a chemical test of his breath, or attempted to request the defendant to submit to a chemical test of his breath."

Appellant argues that the addition of the language—"or attempted to request the defendant to submit to a chemical test of his breath"—was error. He argues that because an essential element of the crime of test refusal is whether the law-enforcement officer requested the defendant to submit to a test, the additional language misstated the law by relieving the state of its burden to prove that the police officer had actually requested that the defendant take the test. We disagree.

A peace officer may administer a chemical test to a person suspected of committing a DWI. Minn. Stat. § 169A.51, subd. 1. "It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51." Minn. Stat. § 169A.20, subd. 2 (2006). A driver's conduct can constitute test refusal. In *Busch*, this court stated, "If a driver does frustrate the process, his conduct

will amount to a refusal to test." 614 N.W.2d at 259. The district court concluded that, in this case, appellant's behavior frustrated the testing process, and therefore determined that the additional language was necessary to avoid a misstatement of the law. In light of *Busch*, this determination was not an abuse of discretion.

But even assuming the district court abused its discretion in amending the instruction, we conclude that the error would have been harmless beyond a reasonable doubt. An error is harmless if all relevant factors indicate that, beyond a reasonable doubt, the error did not have a significant impact on the verdict. *State v. Shoop*, 441 N.W.2d 475, 480–81 (Minn. 1989).

Officer Richardson testified that he read the implied-consent advisory twice to appellant. The jury saw the video recording and heard the audio tape of the reading. The transcript of the reading, likewise, indicates that Officer Richardson went through the advisory twice. This evidence seems to be uncontroverted. During his trial, appellant argued that he had not been driving the vehicle; he did not dispute that the officer had requested the test or that he refused it.[2] Thus, any error in amending the jury instruction was harmless beyond a reasonable doubt.

III

Appellant next contends that the district court committed plain error by failing to instruct the jury on the procedural prerequisites of the test-refusal offense. He concedes that he did not object to the district court's instructions. Generally, failure to object to

[2] In fact, when discussing the test-refusal charge, appellant's trial counsel told the jury that appellant "has admitted, and the evidence did show that he refused the chemical test."

jury instructions before they are submitted to the jury constitutes a waiver of the issue on appeal. *State v. Richardson*, 633 N.W.2d 879, 885 (Minn. App. 2001). Nonetheless, we may consider appellant's claim under a plain-error analysis. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The implied-consent statute provides that a chemical test of a person's breath may be required when an officer has probable cause to believe that the person was driving, operating, or in physical control of a motor vehicle in violation of Minn. Stat. § 169A.20, and if one of the following conditions 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). 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.

In *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007), we 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. Accordingly, a jury must be instructed on those elements. *Id.* Failure to so instruct is "an error of fundamental law," and thus, appellant

is "entitled to appellate review despite his failure to object to the instructions at trial." *Id.* at 358, 360; *see also State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998) ("[A] failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law.").

Here, the jury was not instructed regarding the requirement that one of the four conditions set forth in Minn. Stat. § 169A.51, subd. 1(b), must be established beyond a reasonable doubt. Likewise, the jury was not instructed that it had to find beyond a reasonable doubt that appellant had been read the implied-consent advisory. Minn. Stat. § 169A.51, subd. 2. Thus, it is clear that the jury instructions did not include either of the two elements on which *Ouellette* holds the jury must be instructed. The district court's failure to instruct the jury on the procedural prerequisites constituted plain error, and appellant is entitled to review of his claim.[3] 740 N.W.2d at 360.

But to prevail, appellant must show that the error affected his substantial rights. *Griller*, 583 N.W.2d at 740. For plain error to affect substantial rights, it must be

[3] Respondent asserts that appellant is not entitled to retroactive application of *Ouellette*. Appellant's jury trial occurred in July 2007, and he was adjudicated guilty and sentenced in August 2007. Our decision in *Ouellette* was filed a few months later in October 2007. He filed this appeal in November 2007. The term "final," for purposes of retroactivity, means "'a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or . . . finally denied.'" *State v. Lewis*, 656 N.W.2d 535, 538 n.2 (Minn. 2003) (alteration in original) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 712 n. 6 (1987)); *see also State v. Losh*, 694 N.W.2d 98, 101 (Minn. App. 2005) ("The application of new rules to pending matters protects the integrity of judicial review by avoiding inequities between treatment of similarly situated defendants."), *aff'd*, 721 N.W.2d 886 (Minn. 2006). Here, appellant's time for appeal had not expired when *Ouellette* was decided, and therefore, we conclude that respondent's argument lacks merit. *See Griller*, 583 N.W.2d at 741 (indicating that the second prong of the plain-error analysis is satisfied if "the error is plain at the time of the appeal").

prejudicial; that is, there must be a reasonable likelihood that the error significantly affected the verdict. *Id.* at 741. An appellant has the burden of proving the prejudice prong of the plain-error test. *Id.* An error is harmless if all relevant factors indicate that, beyond a reasonable doubt, the error did not have a significant impact on the verdict. *Shoop*, 441 N.W.2d at 480–81. If the error might have prompted the jury to reach a harsher verdict than it might otherwise have reached, the defendant is entitled to a new trial. *Id*. at 481.

Appellant contends that the omission of the procedural prerequisites from the jury instructions could *never* be harmless, and that he is thus entitled to a new trial. In support of his claim, he points out that the Minnesota Supreme Court has "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." *State v. Mahkuk*, 736 N.W.2d 675, 683 (Minn. 2007). But in *Mahkuk*, the omitted elements of the jury instruction were contested. *Id.* at 80.

Furthermore, appellant's contention is directly contrary to this court's decision in *Ouellette*, where this court held that the district court's failure to instruct the jury on the reading of the implied-consent advisory was harmless error. 740 N.W.2d at 360. There, the officer had testified that he read the implied-consent advisory to the defendant, a copy of the officer's notations of the defendant's answers to the advisory questions was admitted into evidence, and the defendant testified that he remembered the officer "talking about" the advisory, but he did not remember that the officer had a piece of paper in his hand. *Id.*

Appellant does not explain how he was prejudiced by the failure to instruct the jury that it had to find that he had been read the advisory. The audio and video recordings of the reading were played for the jury, and the jury reviewed a transcript of the audio recording. Officer Richardson testified that he read the implied-consent advisory two times to appellant. The reading of the advisory is undisputed, and the omission of the requirement from the jury instructions was harmless beyond a reasonable doubt. Under these circumstances, appellant is not entitled to a new trial simply because the district court did not instruct the jury that the state was required to prove that appellant had been read the implied consent advisory.

In *Ouellette*, the appellant also contended that the jury could have found that the state had failed to prove that he had been lawfully arrested for DWI if it had been properly instructed on the elements of test refusal. *Id.* But there, the officer testified that he had arrested the appellant and taken him into custody, and the jury found that the officer had probable cause to arrest the appellant for DWI. *Id.* This court held that "[a]ny error in omitting the redundant element of lawful arrest in [that] case was harmless beyond a reasonable doubt." *Id.*

Here, as in *Ouellette*, the jury found that the officer had probable cause to arrest appellant for DWI. The district court instructed the jury that, to find appellant guilty of refusing to submit to a chemical test, it first had to find that "a peace officer had probable cause to believe that the defendant drove, operated or was in physical control of a motor [vehicle] while under the influence of alcohol." And appellant's arrest was not disputed at trial. Officer Richardson testified that after the PBT was administered, he "advised

[appellant] he was under arrest for driving under the influence and placed him in handcuffs." And when the prosecutor asked, "So after you arrested [appellant], where did you take him?" Officer Richardson responded, "To the Bloomington Police Department." Another officer, who also testified at the jury trial, confirmed that appellant's arrest occurred on April 5. Therefore, just like in *Oullette*, any error in omitting the redundant element of lawful arrest was harmless beyond a reasonable doubt.

IV

Finally, appellant asserts that Minnesota's test-refusal statute is unconstitutional because it violates the prohibition of unreasonable searches and seizures, the prohibition against self-incrimination, and the due process clauses of the United States Constitution and Minnesota Constitution.

Under Minnesota law, "[a]ny person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol." Minn. Stat. § 169A.51, subd. 1. "It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." Minn. Stat. § 169A.20, subd. 2.

The constitutionality of a statute is a question of law, which is reviewed de novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). A statute is presumed constitutional, and "will not be declared unconstitutional unless the party challenging it demonstrates

beyond a reasonable doubt that the statute violates some constitutional provision." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979).

Appellant admits that he did not raise this issue below. Generally, we will decline to consider issues that are not first addressed by the district court and are raised for the first time on appeal, even if the issues involve constitutional questions. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). We may, however, exercise our discretion and hear such issues when the interests of justice require their consideration and addressing them would not work an unfair surprise on a party. *Id*.

Minnesota courts have previously held that Minn. Stat. § 169A.20, subd. 2, which criminalizes test refusal, does not violate an individual's Fourth Amendment rights or the Fifth Amendment rights against self-incrimination. *State v. Mellett*, 642 N.W.2d 779, 784–85 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). Recently, the Minnesota Supreme Court rejected a constitutional challenge to the criminal test-refusal statute, holding that the statute "does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions." *State v. Netland*, ___ N.W.2d ___, 2009 WL 330940, at *9 (Minn. 2009). And in *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 856 (Minn. 1991), the Minnesota Supreme Court held that the test-refusal statute did not violate either the United States or Minnesota constitutional protections against self-incrimination. The holdings in *Netland*, *McDonnell*, and *Mellett* are dispositive; appellant's constitutional challenges to the test-refusal statute fail.

Affirmed.