STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0216

State of Minnesota,
Respondent,

vs.

Charles Patrick Maiers,
Appellant.

Filed March 10, 2009
Affirmed
Bjorkman, Judge

Redwood County District Court
File No. CR-07-365

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michelle A. Dietrich, Redwood County Attorney, Redwood County Courthouse, P.O. Box 130, 250 South Jefferson, Redwood Falls, MN 56283 (for respondent)

Francis J. Eggert, P.O. Box 789, 182 Main Avenue West, Winsted, MN 55395 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Bjorkman, 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

BJORKMAN, Judge

Appellant challenges his convictions of first-degree driving while impaired (DWI), refusal to submit to testing, and driving after cancellation of his driver's license as inimical to public safety. Because the district court did not abuse its discretion with respect to its evidentiary rulings and jury instructions, sufficient evidence supports the convictions, and appellant's due-process rights were not violated, we affirm.

FACTS

On June 19, 2007, R.R. was driving through Morton. He observed appellant Charles Maiers "driving very recklessly," crossing the center line and swerving onto the shoulder. R.R. called 911 and described appellant and appellant's vehicle to the operator. As the two vehicles proceeded toward Redwood Falls, R.R. remained on the line with the 911 operator, describing their location and appellant's driving conduct. R.R. observed appellant continue to cross the center line, drive on the shoulder, and pass left-turning vehicles on the right side.

Officers Rachel Johnson and Anthony Evans of the Redwood Falls Police Department responded to the 911 call. Based on the information R.R. provided, Johnson located appellant's vehicle, pulled in behind it and activated her flashing lights. Appellant exited the vehicle, using the door for balance. As she approached appellant, Johnson observed that he had red, watery, glossy eyes and smelled of alcohol. His speech was slurred, and when asked if he had been drinking, appellant responded that he had one cocktail.

Johnson asked appellant to perform three field sobriety tests. Although appellant informed Johnson that he had a traumatic brain injury, he did not believe it would interfere with his ability to perform the tests and agreed to take them. Appellant exhibited multiple signs of impairment on each test. Johnson then asked appellant to take a preliminary breath test (PBT). He blew into the PBT machine for approximately "three to five seconds" and provided an adequate sample, which indicated an alcohol concentration that was more than .08.

Based on the results of the field sobriety tests and the PBT, Johnson arrested appellant for DWI. At the law enforcement center, Johnson read appellant the implied-consent advisory and requested that he submit to an Intoxilyzer breath test. Appellant did not want to take a breath test and requested a blood test instead. Johnson and Evans declined to provide a blood test because they were concerned that it might not be possible to complete it within the necessary time constraints. Appellant spoke by telephone with an attorney. Johnson and Evans informed appellant that he would be permitted to "make arrangements" for a blood test after he took the breath test. Appellant then agreed to take the breath test.

Evans operated the Intoxilyzer and instructed appellant to "take a deep breath and exhale that breath into the mouth tube." Over the course of the four-minute testing period, appellant approached the Intoxilyzer to blow into it three or four times. The Intoxilyzer recorded a total of 26 breaths, none of which was sufficient to test. Appellant repeatedly sucked on the tube, rather than blowing into it, and both Evans and Johnson saw appellant place his finger over the mouth piece. Appellant complained that he was

unable to perform the test because of his traumatic brain injury, but the officers believed that his failure to provide an adequate sample was due to his behavior during the testing. Evans and Johnson advised appellant that his failure to provide an adequate sample for testing was considered a refusal, and he was taken to jail. Appellant never obtained a chemical test.

Appellant was charged with first-degree DWI, a violation of Minn. Stat. §§ 169A.20, subd. 1(1), .24, subd. 1 (2006); refusal to submit to testing, a violation of Minn. Stat. § 169A.20, subd. 2 (2006); and driving after cancellation of his driver's license as inimical to public safety, a violation of Minn. Stat. § 171.24, subd. 5 (2006). A jury found appellant guilty of all three charges. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by refusing to give the jury instructions appellant requested.

"The refusal to give a requested jury instruction lies within the discretion of the district court and no error results if no abuse of discretion is shown." *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). "[A] party is entitled to an instruction on his theory of the case if there is evidence to support it." *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977).

A. Alternative-testing instruction

Appellant argues that the district court "should have instructed the jury that the officers . . . had a duty to allow [him] *an alternative test* . . . pursuant to Minnesota Statute § 169A.51, Subd. 7." (Emphasis added.) But the statute neither provides an

unqualified right to an alternative test nor excuses a defendant's refusal to comply with a lawfully requested test. Rather, the statute permits a person to obtain additional chemical testing only if certain criteria are met. Minn. Stat. § 169A.51, subd. 7(b) (2006). If a person arrested for DWI refuses testing, the statute is inapplicable. *See State v. Larivee*, 656 N.W.2d 226, 229-30 (Minn. 2003) (holding that a person charged with driving under the influence "must submit to the state's test as a condition precedent to the right to an independent test"). The district court properly concluded that the statute does not apply in test-refusal cases and did not abuse its discretion by refusing to give the requested instruction.

B. Instruction regarding testing within two hours

Appellant also requested the following instruction:

> There has been evidence in this case that chemical tests must be obtained within two hours. Minnesota Statutes state that it is a violation of Minnesota law to drive, operate or be in physical control of a motor vehicle when the person's alcohol concentration exceeds the legal limit as measured within two hours of the time of driving, operating or being in physical control of the motor vehicle.

Appellant argues that the instruction was necessary to advise the jury concerning the "two hour rule."

Appellant was charged with DWI, in violation of Minn. Stat. § 169A.20, subd. 1(1). Having an alcohol concentration above the legal limit while driving or within two hours of driving is a distinct offense under Minn. Stat. § 169A.20, subd 1(5). Because the instruction appellant requested relates to an offense with which appellant was not charged, the district court did not abuse its discretion by refusing to give the instruction.

II. The district court did not abuse its discretion by admitting evidence of the PBT results.

Appellant argues that the district court abused its discretion by admitting evidence of the PBT results. He contends that the evidence is more prejudicial than probative and might confuse or mislead a jury, leading to a conviction based on the PBT results.

Evidentiary rulings lie "within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The appealing party "has the burden of establishing that the [district] court abused its discretion." *Id.* "A court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

A test-refusal conviction requires evidence that the request for testing was based on one of the circumstances listed in Minn. Stat. § 169A.51, subd. 1(b) (2006). *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). These circumstances include being "lawfully placed under arrest for violation of section 169A.20," or having a preliminary screening test that "indicated an alcohol concentration of 0.08 or more." Minn. Stat. § 169A.51, subd. 1(b)(1), (4).

The district court permitted the state to introduce evidence that the PBT result was above the legal limit but instructed the jury that the evidence was relevant only to the test-refusal charge. *See State v. Clark*, 755 N.W.2d 241, 261 (Minn. 2008) (stating that jury is presumed to follow district court's instructions). And the district court instructed the jury that the state was required to prove appellant "had been lawfully placed under

arrest for driving while impaired, or a preliminary screening test was administered and indicated an alcohol concentration in excess of the legal limit." Appellant did not object to either instruction. Because the PBT results pertained to the elements of the test-refusal offense, the district court gave a limiting instruction regarding proper use of the evidence, and testimony regarding the results was limited, the district court did not abuse its discretion by admitting the evidence.

In a related argument, appellant contends that the district court abused its discretion by instructing the jury that an alcohol content of .08 is over the legal limit. Jury instructions are reviewed for an abuse of discretion. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). "An instruction is error if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). The district court instructed the jury, in the context of its instruction regarding the test-refusal charge, that "[t]he legal limit in Minnesota is .08." The district court did not abuse its discretion by including this brief, explanatory, and accurate instruction.

III. The district court did not abuse its discretion by admitting evidence of appellant's prior assault conviction.

We review a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993).

Evidence of a witness's prior felony convictions may be admitted for impeachment purposes if the district court determines "that the probative value of

admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1). When assessing this balance, courts must consider

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 537-38 (Minn. 1978).

The state sought to use three prior felony convictions—two DWIs and one assault—to impeach appellant. The district court considered all of the *Jones* factors and determined that they balanced in favor of admitting the assault but not the DWI convictions, which presented too great a risk of prejudice to appellant because of their similarity to the charged offense.

Appellant contends that the assault conviction should not have been admitted because its probative value was outweighed by its prejudicial effect.[1] He argues that he "was not [on] trial for an assault or any other crime of violence" and suffered prejudice "by the mere fact that the jury became aware of that he had been convicted of [assault]." But the district court considered the potential for prejudice, recognizing that admission of the assault conviction likely would have been too prejudicial if appellant had been on trial for a violent crime. *See Gassler*, 505 N.W.2d at 67 (stating that similarity between

[1] Appellant also asserts that the conviction was not admissible under the second part of rule 609(a), but the district court did not admit the conviction on that basis. Moreover, a conviction that "involved dishonesty or false statement" is admissible apart from the *Jones* analysis. Minn. R. Evid. 609(a)(2); *State v. Sims*, 526 N.W.2d 201, 201 (Minn. 1994).

charged crime and prior conviction presents "a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively"). And the jury's awareness of the conviction promotes the very purpose of the impeachment—to permit the jury "to see the whole person and thus to judge better the truth of his testimony." *Id.* (quotation omitted); *see also State v. Swanson*, 707 N.W.2d 645, 655-56 (Minn. 2006) (allowing the admission of prior assault convictions in part because they assisted the jury in assessing the defendant's credibility). The district court did not abuse its discretion by admitting evidence of appellant's prior assault conviction.

IV. There is sufficient evidence to support the convictions.

Appellant challenges the sufficiency of the evidence underlying his DWI and test-refusal convictions. In considering a claim of insufficient evidence, "our review on appeal 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 jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the [requirement of] proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Our review of the record reveals ample evidence of appellant's impaired condition when first observed by Johnson, appellant's poor performance on three field sobriety tests, the appropriateness of his arrest and the officers' request for testing, and his

uncooperative conduct during and after the Intoxilyzer test. Based on all of this evidence, the jury could reasonably have convicted appellant of DWI and test refusal.

V. Appellant's test-refusal conviction does not violate due process.

Finally, appellant argues that his test-refusal conviction violates due process because "the Intoxilyzer rejected [his] breath samples and the officers denied [his] request for additional and alternative forms of chemical testing." Whether the facts establish a violation of due process presents a question of constitutional law, which we review de novo. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007).

Appellant's argument on appeal rests solely on this court's decision in *State v. Netland*, 742 N.W.2d 207 (Minn. App. 2007), *aff'd in part, rev'd in part*, ___ N.W.2d ___, ___ (Minn. Feb. 12, 2009). Since oral argument in this case, the Minnesota Supreme Court reversed the portion of *Netland* on which appellant relies. *State v. Netland*, ___ N.W.2d ___, ___, 2009 WL 330940, at *1 (Minn. Feb. 12, 2009). Based on the supreme court's *Netland* opinion, the facts presented here do not establish a violation of due process.

Evans and Johnson both testified that appellant actively sought to frustrate the Intoxilyzer test. He repeatedly used his finger to block the mouthpiece and sucked on the tube, rather than blowing into it, even after repeated instruction and urging by both officers that he blow. *See Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 2000) ("If a driver does frustrate the process, his conduct will amount to a refusal to test."). Appellant was able to successfully complete the PBT, which Evans testified requires approximately the same amount of air force and volume as the Intoxilyzer.

Because the circumstances presented here indicate that appellant was likely able to perform the Intoxilyzer test, despite his protests, and actively sought to frustrate the testing process, he has not demonstrated any due-process violation.

Affirmed.