STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0615

State of Minnesota,
Respondent,

vs.

Lucas Jon Koster,
Appellant.

Filed July 21, 2009
Affirmed in part, reversed in part, and remanded
Collins, Judge[*]

Benton County District Court
File No. 05-CR-06-1858

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

Robert Raupp, Benton County Attorney, Benton County Courts Facility, 615 Highway 23, Foley, MN 56329 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.

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

COLLINS, Judge

Appealing from his felony convictions of and sentences for first-degree driving while impaired (DWI) and refusal to submit to chemical testing, appellant argues that (1) the evidence is not sufficient to sustain the conviction of DWI, (2) the prosecutor committed misconduct by impermissibly questioning appellant about a failed Breathalyzer test, (3) the district court abused its discretion by failing to give a requested jury instruction, (4) the district court erred by communicating improperly with a deliberating jury, and (5) the district court erred by sentencing appellant for both DWI and refusal to submit to chemical testing when both offenses arose out of a single course of conduct. We affirm appellant's convictions, reverse the felony sentences, and remand for resentencing.

FACTS

On July 13, 2006, Sandra Swenson and a friend spent the evening drinking at Jimmy's Pour House (Jimmy's), a Sauk Rapids bar. Swenson, knowing that she was intoxicated, telephoned her son, appellant Lucas Koster, to come and drive her home. Koster, who was on supervised probation and did not have a valid driver's license, walked to Jimmy's and drove his mother in her car toward home. What transpired thereafter is in dispute.

Officer Timothy Sigler testified that while on routine patrol he observed a "boxier, four door, little bit older style vehicle" "go through the alley coming through the 700 block, cross Eighth Street . . . , and proceed into the 800 block alley without any lights

on." As he followed, Officer Sigler briefly lost sight of the car and when it was next seen its headlights were on. As the car rounded a corner, Officer Sigler observed that "it drifted completely over the center line, was in basically the wrong lane of travel for approximately half a block, and then it swiftly swerved back into its proper lane."

Officer Sigler stopped the car and asked Koster for his driver's license and proof of insurance. When Koster did not respond, Officer Sigler ordered him out of the car. After Koster got out and began to flee, Officer Sigler warned him to stop or he would be tased. Koster failed to heed the warning and he was tased.

Koster immediately fell to the ground and Officer Sigler called for medical assistance and backup. Sergeant Brent Bukowski arrived, and the two officers assisted Koster to his feet, "walked him back to Officer Sigler's patrol car," and bandaged the laceration on his head. Sergeant Bukowski noticed a strong odor of alcohol emanating from Koster. Both officers remained with Koster until he was transported to the hospital.

While at the scene, Koster responded to oral commands and never lost consciousness, but Officer Sigler did not conduct any field sobriety tests. At the hospital, Officer Sigler read the implied-consent advisory to Koster, and Koster responded that he wished to speak with an attorney. Officer Sigler "moved the phone from the countertop next to the bed and then . . . gave him a phone book." Koster used the telephone book, made at least one telephone call, and told Officer Sigler that he did not consent to testing because it was "his civil right not to."

Conversely, Koster testified that he and his mother left Jimmy's in a two-door, not a four-door, car and that he "took Second Avenue North, then I hit Ninth Street. I took a

right there. I went up two blocks, and I took a left on Fourth Street[.]" Koster had "no idea" what alley Officer Sigler was referring to. Koster disputes Officer Sigler's assertion that the car's headlights were not turned on or that he made an improper turn between Eighth Street and Ninth Street.

Koster also disputes Officer Sigler's account of the traffic stop. According to Koster, he pulled over as soon as he saw the police lights, and Officer Sigler approached the car, recognized him, and said, "'Mr. Koster, . . . I was waiting for you to mess up again . . . I want to see your ID.'" Koster then admitted that he did not have a driver's license and Officer Sigler stated, "'so you're a runner, huh?'" and already had his Taser drawn. Koster testified that it looked like Officer Sigler "wanted some action," so he got out of the car and "challenged him" by "mocking run[ning]," and he was then tased.

Koster testified that he hit his head on the road and was "knocked out" when he fell down and only remembers the officers bringing him to the grass and laying him down and being in the ambulance going to the hospital. Koster did not recall being moved to the back of a squad car, having a dressing applied to his head, what occurred during the ambulance ride, being read the implied-consent advisory, making a telephone call, or speaking with Officer Sigler at the hospital.

Koster was charged with felony DWI, in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .24 (2004); felony refusal to submit to chemical testing, in violation of Minn. Stat. §§ 169A.20, subd. (2), .24 (2004); driving after cancellation, in violation of Minn. Stat. § 171.24, subd. 5 (2004); and fleeing a peace officer on foot, in violation of Minn. Stat. § 609.487, subd. 6 (2004). After a jury found Koster guilty of the charged

offenses, the district court imposed concurrent sentences of 54 months, 66 months, 365 days, and 90 days, consecutive to Koster's prior stayed DWI sentence. Koster appeals only his current convictions of and sentences for felony DWI and felony test refusal.

D E C I S I O N

I.

Koster challenges the sufficiency of the evidence supporting his conviction of DWI, arguing that his conviction cannot stand when there was no evidence of bad driving conduct, no field sobriety tests, and no test results. Our review of a claim of insufficient evidence is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach a guilty verdict. *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 the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). On review, we assume that the jury believed the state's witnesses and rejected any contrary evidence. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007). "Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the jury." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006).

"It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state or on any boundary water of this state: (1) when the person is under the influence of alcohol[.]" Minn. Stat. § 169A.20, subd. 1 (2004). The DWI

charge for which a defendant was convicted does not require an officer to observe bad driving conduct, conduct field sobriety tests, or administer a Preliminary Breath Test (PBT) or other chemical testing to satisfy the state's burden of proof. *See* Minn. Stat. §§ 169A.20, .24. The absence of this type of evidence must be viewed in the proper context of examining the evidence in the entire record in the light most favorable to the conviction.

Sergeant Bukowski testified that Koster smelled of alcohol and Officer Sigler testified that Koster was driving a car without its headlights on and swerving about the road, all facts that support the jury's verdict. Although Koster testified that the car's headlights were on and he was driving normally, such factual disputes are left to the province of the jury. And because we assume that the jury believed the state's evidence and rejected evidence to the contrary, even though the officers did not conduct field sobriety tests or administer a PBT, there is sufficient evidence in the record to support the jury's verdict.

II.

On direct examination, Koster testified that he had been on intensive supervised probation for seven or eight months, as a condition of his probation he was required to submit to random Breathalyzer tests, and in the seven or eight months on intensive supervised probation he had not failed a test. On cross-examination, however, the state inquired about a failed test on August 31, 2006. On appeal, Koster contends that the prosecutor committed misconduct by questioning him "about violating his conditions of

pretrial release by consuming alcohol because the state did not follow appropriate procedure to admit the bad act evidence and the evidence was otherwise inadmissible."

Generally, if the misconduct was not objected to at trial, the objection is waived on appeal. *State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). But we may review unobjected-to conduct under a three-part plain-error analysis. *State v. Ramey*, 721 N.W.2d 294, 298-99 (Minn. 2006). That analysis is: (1) whether an error is present; (2) whether the error is plain; and (3) whether the error affected the defendant's substantial rights. *Id*. at 298. Error affects a defendant's substantial rights if there is a reasonable likelihood that the misconduct had a significant effect on the verdict of the jury. *Id*. at 302.

Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial. *See State v. Sha*, 292 Minn. 182, 185, 193 N.W.2d 829, 831 (1972). It is improper for a prosecutor to ask questions calculated to elicit or insinuate inadmissible and highly prejudicial answers. *See State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994). However, a defendant may open the door to otherwise improper character evidence inquiry by presenting a favorable but inaccurate picture of himself at trial. *See State v. Goar*, 295 N.W.2d 633, 634-35 (Minn. 1980) (holding that prosecutor may introduce evidence that defendant refused to give written statement to police after defendant testified that he fully cooperated with police during investigation); *see also* Minn. R. Evid. 405(a) (stating that after defendant introduces evidence of his or her good character, prosecutor may inquire on cross-examination "into relevant specific instances of conduct"); *State v. Sharich*, 297 Minn. 19, 23, 209 N.W.2d 907, 911 (1973) (stating

that if defendant raises his or her good character, prosecution is entitled to respond with evidence of bad character). Under such circumstances, the procedural requirements of *Spreigl* do not apply.

Koster testified about specific acts which imply that despite his history of alcohol-related arrests, he is now a cooperative, law-abiding, and responsible member of society. In doing so, Koster put his character in issue, hence the prosecutor was then entitled to inquire about specific acts showing Koster's bad character and present evidence that would paint a more accurate picture of him. As such, the prosecutor did not err by questioning Koster about his failed test.

III.

Koster requested that the jury be instructed that "a person who is unconscious or who is otherwise in a condition rendering the person incapable of refusal is deemed not to have withdrawn the consent to take a chemical test, and the test may be given." The prosecutor opposed the request, and in rejecting Koster's request, the district court stated that "there isn't any objective evidence in this entire case that [Koster] was unconscious or unable to refuse except for his saying . . . . [T]here's no evidence to support that . . . side of the story. [Koster's] credibility here is probably a little suspect given . . . his interest in the case." Koster contends that the district court erred by refusing to give the requested instruction.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). However, a defendant is entitled to an instruction on his theory of the case if there is evidence to

support that theory. *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977), *cert. denied*, 435 U.S. 996, 98 S. Ct. 1648 (1978); *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002). Refusing to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

Koster offered no evidence other than his own testimony to support his contention that after being tased he was unconscious, or that after being tased an individual typically is unconscious or otherwise incapable of refusal. In fact, the evidence in the record is to the contrary. Officer Sigler and Sergeant Bukowski testified that Koster did not lose consciousness at the scene. Officer Sigler also testified that after reading Koster the implied consent advisory, Koster asked for a telephone, made at least one telephone call, and spoke with someone before refusing to submit to a blood test. A physician's assistant also testified that Koster told her that he did not lose consciousness; that during her medical examination he was "oriented to person, place, and time"; that he was alert and aware of what he was being asked and what he was saying; that he was able to walk; and that his CAT scan showed no signs of head or brain trauma.

Caselaw requires a district court to provide a jury instruction when evidence supports the instruction. But on this record, in which Koster's self-serving statement is contrary to all other evidence, including his statement to the physician's assistant, we cannot find that the district court abused its discretion by refusing to give the requested instruction.

IV.

While deliberating, the jury sent a note to the district court, which stated: "Verdict Sheet Count 1 indicates first degree while under the influence. The jury instructions say driving under the influence. Please make clarification." Without consulting counsel or Koster, the district court responded in writing: "There is no difference. It is the same charge, just stated differently. It is also referred to as Driving while impaired." Koster asserts that the district court erred by communicating with a deliberating jury and that because he was prejudiced by the error, he is entitled to a new trial.

The state first argues that because Koster did not and cannot cite to "any part of the record to support his allegation that there were any improper conversations, written communications, or failure to communicate with appellant and counsel," this issue is not properly before us. The record on appeal consists of "papers filed in the [district] court, the exhibits, and the transcript of the proceedings[.]" Minn. R. App. P. 110.01. It is the appellant's duty to provide us with an adequate record on appeal. Minn. R. App. P. 110.02.

Although there is no transcription of the district court's improper communications with the jury (because, improvidently, it did not transpire on the record), the state is nonetheless incorrect in stating that there is no record of improper communications. Contained in the district court file is the jury's note written to the judge and the district court's written response. The issue is therefore properly before us.

The state also contends that even if this issue is properly before us and the district court erred by improperly communicating with a deliberating jury, the error was

harmless. The confrontation clause of the Sixth Amendment to the United States Constitution guarantees a defendant the right to be present at all stages of trial. *State v. Sessions*, 621 N.W.2d 751, 755 (Minn. 2001); *see also* Minn. R. Crim. P. 26.03, subd. 1(1) ("The defendant shall be present . . . at every stage of the trial."). Responding to a deliberating jury's question is a stage of trial. *Sessions*, 621 N.W.2d at 755. The general rule is that the judge should have no communication with the jury after deliberations begin, unless it is in open court and in the defendant's presence. *Id.* at 755-56.

However, even if a defendant's right to be present is violated, "the defendant is not entitled to relief if it can be said that the error was harmless error beyond a reasonable doubt." *State v. Breaux*, 620 N.W.2d 326, 332 (Minn. App. 2001). "If the verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *Sessions*, 621 N.W.2d at 756. In considering whether the erroneous exclusion of a defendant from judge-jury communications constitutes harmless error, we must consider the strength of the evidence and the substance of the judge's response. *Id.*

Although it is beyond dispute that the district court erred in its manner of communicating with the deliberating jury, the jury's question was one of simple semantics—it did not question the law, the meaning of the law, or the proper application of the law. Similarly, the judge's response was not a restatement of the law, or an explanation of the meaning of the law; it was simply a clarification regarding word choice. We cannot reasonably conclude that the jury's verdict is in any way attributable to the judge's clarifying response. As such, although the district court undeniably erred by improperly communicating with a deliberating jury, the error was harmless.

V.

We affirm appellant's convictions and turn attention to the challenged felony sentences. Ordinarily, a district court may not impose more than one sentence for multiple offenses committed during a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2004). But "a judicially created exception to this single-behavioral-incident rule permits the imposition of multiple sentences when (1) the offenses involve multiple victims; and (2) the multiple sentencing does not unfairly exaggerate the criminality of the defendant's conduct." *State v. Rhoades*, 690 N.W.2d 135, 138 (Minn. App. 2004); *see also State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006) (same). There are also statutorily created exceptions. *See* Minn. Stat. §§ 169A.28, subd. 1(3), 609.035, subd. 2 (2004). However, as the state concedes, no exception applies here. Specific to the felony sentences, we reverse the district court's sentencing order, vacate the sentences for the offenses of first-degree DWI and refusal to submit to chemical testing, and remand for resentencing on one of them.

Affirmed in part, reversed in part, and remanded.