STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1318

State of Minnesota,
Respondent,

vs.

David Joseph Berryhill,
Appellant.

Filed August 4, 2009
Affirmed
Connolly, Judge

Otter Tail County District Court
File No. 56-CR-08-567

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

David J. Hauser, Otter Tail County Attorney, Chris A. Stuber, Assistant County Attorney, 121 West Junius, Suite 320, Fergus Falls, MN 56537 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of felony driving, operating, or being in physical control of a motor vehicle with an alcohol concentration of .08 or greater as measured within two hours, arguing that his attorney deprived him of effective assistance of counsel by failing to assert the affirmative defense of post-driving consumption of alcohol, and that the evidence was insufficient to support his conviction. We affirm.

FACTS

On February 18, 2008, appellant David Joseph Berryhill and his half-brother and friend Kelly Heinrich stopped in Fergus Falls as part of a driving trip from Washington state to Alexandria, Minnesota. The pair was travelling to Alexandria because Heinrich was a potential heir to a dairy farm in Alexandria. Prior to reaching Alexandria, the pair decided to stop for the night in Fergus Falls and camp in appellant's van in a WalMart parking lot. Appellant admitted that he had beer and hard alcohol, specifically bottles of 151-proof Bacardi rum and vodka, in the vehicle.

The assistant manager of the WalMart noticed appellant's van in the parking lot after receiving complaints that people were "panhandling" in the parking lot. The assistant manager called the police, but when the police responded, they were unable to locate appellant's vehicle. Later that night, the assistant manager saw appellant's vehicle again and called police again. Before the police arrived, the assistant manager saw the vehicle move from the middle of the lot to another area and saw a man exit the driver's

side of the vehicle, whom the assistant manager identified as appellant. The assistant manager then saw the vehicle move again to the corner of the parking lot.

When the police arrived, they approached the vehicle from the rear. Sergeant Terry Eldien of the Fergus Falls Police Department testified that as he approached the vehicle from the rear, he noticed it was running and that exhaust was coming from the tailpipe. Sergeant Eldien identified appellant as the person seated in the driver's seat of the vehicle. Sergeant Eldien noticed a strong odor of alcohol coming from the vehicle as well as an open container of malt liquor and several empty and full beer cans. Sergeant Eldien testified that the keys were in the vehicle's ignition and that he had to request that appellant turn the vehicle off.

In speaking with Sergeant Eldien, appellant initially denied consuming alcohol that night, saying he had been drinking the day before. Sergeant Eldien noted that appellant's eyes were glassy and bloodshot. Sergeant Eldien suspected that appellant was under the influence of alcohol, so he placed appellant in his squad car and performed a horizontal gaze nystagmus (HGN) test to check for consumption of alcohol. Based upon his observations during the HGN test, Sergeant Eldien believed appellant was under the influence of alcohol. Although he initially intended to, Sergeant Eldien did not require appellant to complete any additional tests because of the cold weather and pre-existing physical injuries that appellant had suffered during his career as a rodeo cowboy.

Appellant was transported to the police station where he agreed to submit to an Intoxilyzer test. The test result showed an alcohol concentration of .23. Appellant did not dispute the accuracy of this test result.

Appellant was charged with one count of felony first-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2006), and one count of felony first-degree driving, operating, or being in physical control of a motor vehicle with an alcohol concentration of .08 or greater as measured within two hours, in violation of Minn. Stat. § 169A.20, subd. 1(5) (2006). Following a jury trial, appellant was found guilty on both counts. Appellant was sentenced to 54 months in prison on the second count. This appeal follows.

D E C I S I O N

I. Appellant's attorney's failure to give notice of the affirmative defense of post-driving consumption of alcohol, which resulted in a waiver of that defense, did not deprive appellant of effective assistance of counsel at his trial.

Appellant argues that his attorney's failure to raise the affirmative defense of post-driving consumption of alcohol by failing to provide the state with the statutorily required notice of the defense deprived him of effective assistance of counsel.[1]

"The defendant 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *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, 2064, 2068 (1984)).

[1] Minn. Stat. § 169A.46 (2006) provides, in relevant part: "Evidence that the defendant consumed alcohol after the time of the violation may not be admitted in defense to any alleged violation of section 169A.20, unless notice is given to the prosecution prior to the omnibus or pretrial hearing in the matter."

Appellant argues that his attorney's conduct fell below an objective standard of reasonableness because his attorney impermissibly forfeited an affirmative defense available to him by failing to provide the state with notice of the defense. Appellant argues that this is akin to a concession by his attorney of appellant's guilt. Neither case appellant cites is apposite authority. Both cases cited by appellant dealt with situations where a defendant's attorney had erroneously made admissions of the defendant's guilt, either directly or implicitly, to the offenses charged or to a lesser offense. *See State v. Moore*, 458 N.W.2d 90, 95-96 (Minn. 1990); *State v. Wiplinger*, 343 N.W.2d 858, 860-61 (Minn. 1984). We do not agree that an attorney's failure to assert an affirmative defense is the same as an erroneous admission of a defendant's guilt.

As appellant recognizes, Minnesota courts have found the waiver of an affirmative defense, or the failure to assert such a defense, to be a permissible exercise of the defense attorney's discretion in selecting trial strategy. *See State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) ("[T]he attorney stated that it was 'a tactical decision not to focus on intoxication as a defense because [the attorney], after discussion with [Doppler], believed it was better to focus on [Doppler's] main defense of self-defense'. . . . [T]he attorney's decision not to 'focus on intoxication as a defense' provides no basis for relief."); *Noske v. Friedberg*, 713 N.W.2d 866, 874-75 (Minn. App. 2006) (holding in an attorney malpractice case that "an attorney is not liable for mistakes made in the honest exercise of professional judgment"). *Doppler* is analogous to the situation here. In *Doppler*, the defendant argued that his attorney had acted ineffectively by "(1) failing to present evidence that Doppler was too intoxicated to be capable of premeditating his killing of

[the victim] and (2) failing to request an intoxication instruction be given to the jury." *Doppler*, 590 N.W.2d at 635. Our supreme court rejected Doppler's argument, holding that the attorney's actions were a matter of trial strategy based on discussions with Doppler, and that "we do not review for competence matters of trial strategy." *Id.*

The burden is on appellant to demonstrate that his attorney's actions fell below an objectively reasonable standard, *i.e.*, that the decision not to give notice of the post-driving-consumption defense was not a matter of trial strategy. *See Gates*, 398 N.W.2d at 561 (stating that burden to prove ineffective assistance of counsel is on the defendant). Appellant asserts that his attorney failed to give notice of the defense without making any strategy decision, or alternatively, that any strategy decision by the attorney to not assert the defense would be an ineffective one. The record does not support appellant's argument.

Following appellant's trial testimony in which appellant testified that he began drinking after parking his vehicle for the night, the state objected to any attempt by the defense to pursue a post-driving-consumption defense, arguing that no notice was given that the defense intended to pursue a post-driving-consumption theory, and that the state had proceeded on the understanding that the defense intended to argue that appellant was not in physical control of the vehicle. Appellant's attorney stated that he intended to argue that appellant was under the influence of alcohol but was not in physical control of the vehicle at the time Officer Eldien arrived. The record indicates that appellant's attorney made a decision to pursue a particular trial strategy.

Appellant argues that any strategy decision made by his attorney to waive the post-driving-consumption defense was an ineffective one. In support of this argument, appellant cites a case from the Ninth Circuit that is neither precedential nor persuasive. *See Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984) (noting that decisions from foreign jurisdictions are not binding as authority). In *United States v. Span*, the Ninth Circuit found a defendant had been deprived of effective assistance of counsel where the errors by the defendant's counsel, who intended to present an excessive-force defense but failed to do so effectively, were not a strategic decision, but were the result of a misunderstanding of the law. 75 F.3d 1383, 1389-90 (9th Cir. 1996). This is distinguishable from the case here. Appellant's attorney did not attempt to argue a post-driving-consumption defense, and therefore, could not have failed to argue it effectively. Moreover, the record does not indicate that appellant's attorney did not properly understand the law, but rather demonstrates that appellant's attorney chose a different strategy, which ultimately failed.

We also note that even if appellant's attorney's conduct had fallen below an objectively reasonable standard, appellant suffered no prejudice. *See Gates*, 398 N.W.2d at 561 (stating that appellant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (quotation omitted)). Appellant argues that he was deprived of a jury decision based on the defense of post-driving consumption because his attorney was unable to mention post-driving consumption. The record does not support this argument as appellant's version of the facts was presented to the jury.

Appellant testified, without objection by the state, that he had driven the vehicle around the parking lot but did not begin drinking until after the "final park." Despite this testimony, the jury found appellant guilty. The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Even after stating he would not argue the defense of post-driving consumption, appellant's attorney said in closing arguments:

> [P]eople that drive motor homes . . . and park in a Walmart parking lot that have the keys available to them . . . and then they happen to have a few brandies at night before bed or happen to have a couple of beers before bed, do we ever see cases like that here? No, we don't. And I ask you, what's the difference?
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> . . . .
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> [Appellant] does not deny that he was under the influence of alcohol. He denies that he ever operated that vehicle while under the influence of alcohol. . . . He states that when they got here, they ran their errands, they put the keys away and they were going to catch a good buzz.
>
> . . . .
>
> [Appellant] states that once he parked, that's when he started mixing drinks with Bacardi 151, 151 proof liquor. More than 75 percent alcohol. And if you're going to catch a good buzz, that would be something to do it with.
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> . . . .
>
> Basically, ladies and gentlemen, what it comes down to is, is it against the law to park in WalMart? And is it against the law to have drinks there, after you've parked? Any different than the motor homes or anybody else that uses a WalMart parking lot for a camping grounds?

While these statements were made in the context of appellant's attorney's argument that appellant was not in physical control of the vehicle, it demonstrates that the jury was aware of appellant's argument that he did not start drinking until after he was parked in the parking lot.

To find that appellant was denied effective assistance of counsel, we must determine that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Gates*, 398 N.W.2d at 561 (quotation omitted). Because the jury heard appellant's version of the evidence and appellant's attorney's argument regarding appellant's version, there is not a reasonable probability that the result of the proceedings would have been different that is sufficient to undermine confidence in the outcome of the trial.

II. The evidence was sufficient to support appellant's conviction.

In considering a claim of insufficient evidence, this court's review 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 the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Moore*, 438 N.W.2d at 108. This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *Jones*, 516 N.W.2d at 549. A jury, however, is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

Appellant argues that the evidence does not prove beyond a reasonable doubt that he was in physical control of the vehicle while he was under the influence of alcohol because the state presented no evidence of bad or erratic driving conduct, or that his coordination, reaction time, or other characteristics necessary for driving were affected. Appellant focuses solely on the HGN test administered by the police, arguing that the HGN test by itself is insufficient to prove beyond a reasonable doubt that appellant was under the influence of alcohol, and that this theory is supported by the arresting officer's attempt to require appellant to perform additional field sobriety tests after the HGN test. Appellant seems to be arguing that the fact that the officer attempted to administer further tests demonstrates the insufficiency of the HGN test. This argument is unavailing.

Sergeant Eldien testified about the procedure he followed in administering the HGN test to appellant, why he asked appellant to perform it, and what aspects of appellant's performance indicated that appellant was under the influence. Appellant highlights Sergeant Eldien's testimony that this test was "a reliable indicator as to whether or not a person has consumed alcohol" to argue that this test provides no evidence that appellant was under the influence of alcohol when he was in physical control of the vehicle, simply that he had consumed alcohol. Appellant disregards Sergeant Eldien's testimony that, based on the HGN test, he believed appellant was under the influence of alcohol, as well as the Intoxilyzer test results, which showed appellant had an alcohol concentration of .23, and which appellant did not dispute.

The evidence in this case is sufficient to support appellant's conviction. The assistant manager observed appellant's vehicle drive around the parking lot and identified appellant as the person who exited out of the driver's door. Sergeant Eldien testified that when he arrived, the vehicle was running with the keys in the ignition, and that appellant was in the driver's seat. The sergeant noticed a strong odor of alcohol coming from the vehicle, an open container of malt liquor, and numerous full and empty beer cans in the vehicle.

Appellant's testimony was the only evidence supporting appellant's version of the facts, that the vehicle was not running and that the keys were stored in a compartment beneath the dash. We must assume the jury believed the state's evidence and disbelieved any evidence to the contrary. *Moore*, 438 N.W.2d at 108.

Affirmed.