STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1896

State of Minnesota,
Respondent,

vs.

Arlan Ray Bergstrom, Sr.,
Appellant.

Filed January 26, 2010
Affirmed as modified
Bjorkman, Judge

Becker County District Court
File No. 03-CR-08-1352

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael Fritz, Becker County Attorney, Gretchen D. Thilmony, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

Jacob T. Erickson, Vermeulen Law Office, P.A., St. Cloud, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant Arlan Ray Bergstrom, Sr. challenges his convictions of two counts of driving while impaired (DWI) under Minn. Stat. § 169A.20, subds. 1(1), 1(5) (2006), alleging that (1) he had ineffective assistance of counsel, (2) the district court abused its

discretion in its evidentiary rulings, (3) the district court erred in failing to grant a mistrial, (4) the prosecutor committed misconduct, and (5) the district court erred by entering judgments of conviction on both charged offenses. Because the district court erred in entering two convictions, we affirm as modified.

FACTS

On May 21, 2008, at approximately 1:20 a.m., Officer Brent Fulton was driving westbound on Highway 10 in Detroit Lakes when he noticed a vehicle traveling eastbound at a high rate of speed. Officer Fulton clocked the vehicle at 68 miles per hour on a stretch of road that was under construction and had a posted speed limit of 35 miles per hour.

Officer Fulton stopped the vehicle and identified the driver as appellant. Officer Fulton noticed that appellant's eyes were watery and there was a smell of alcohol coming from the vehicle. Appellant stated that he had consumed two beers within the last 35 minutes. When asked why he was speeding, appellant told Officer Fulton that he was trying to beat a train. Officer Fulton asked appellant to step out of the vehicle in order to determine whether the smell of alcohol was coming from appellant or the other occupants.

After he got out of the vehicle, appellant placed his hands on the vehicle, apparently to steady himself. Officer Fulton administered the standard field sobriety tests, including the horizontal gaze nystagmus (HGN) test. Before conducting the HGN, Officer Fulton asked appellant if he had any neurological disorders or recent head injuries. Appellant responded "no." He did not reveal that he had suffered significant

neurological damage from a job-related accident several years earlier. Appellant exhibited four of the six "cues" indicating intoxication.

Officer Fulton next administered the one-legged stand test. During the test, appellant dropped his foot twice, and swayed from side to side. Officer Fulton next asked appellant to recite a portion of the alphabet and count from 47 to 63. Appellant was initially unable to comply but, with prompting by Officer Fulton, did perform these tests correctly.

Based on the field sobriety testing, appellant's admission that he had been drinking, his appearance, and his driving conduct, Officer Fulton believed that appellant was intoxicated. After arresting appellant, Officer Fulton learned from the dispatcher that appellant had a prior DWI conviction. At 2:12 a.m., Officer Fulton administered a breath test using an Intoxilyzer 5000. The Intoxilyzer test revealed an alcohol concentration of .09.

Appellant was charged with one count of driving under the influence and one count of driving with an alcohol concentration of .08 or more within two hours of driving. Appellant was tried before a jury and the evidence was presented in a single day. Appellant's counsel became ill shortly after beginning his closing argument. The district court adjourned the trial for the day. The next morning, counsel moved for a mistrial on the basis that he did not provide effective assistance to appellant. Counsel noted that his illness the previous day affected his ability to concentrate and question witnesses. The district court denied the motion, and appellant's counsel elected to finish his closing argument rather than delay the proceedings further.

The jury found appellant guilty of both DWI charges. The district court entered convictions on both counts and imposed a single sentence of 48 months. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying relief based on ineffective assistance of counsel.

Appellant contends that he did not receive effective legal assistance because his lawyer was ill during trial and made improper statements during his closing argument. To prevail in an ineffective-assistance-of-counsel claim,

> [t]he 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)). Because ineffective-assistance-of-counsel claims involve mixed questions of law and fact, the standard of review is de novo. *Strickland*, 466 U.S. at 698, 104 S. Ct. 2052.

Defense counsel's performance is presumed reasonable. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). A defendant challenging the effectiveness of counsel has the heavy burden of showing that counsel's performance falls below the applicable standard of "representation by an attorney exercising the customary skills and diligence

that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted).

In support of his ineffective-assistance claim, appellant points to trial counsel's statements to the jury that appellant "did something wrong on May 21st," that by speeding to beat a train he "did something that was both foolish and illegal," and that he "is even a bad enough driver that he shouldn't be allowed on the road," and that "[m]aybe he shouldn't have a license." Citing *State v. Wiplinger*, 343 N.W.2d 858, 860 (Minn. 1984), appellant argues that these statements amounted to an admission of guilt without his consent. We disagree.

In *Wiplinger*, the defendant was charged with kidnapping and criminal sexual conduct in the first degree stemming from a sexual assault of a ten-year-old girl. While cross-examining the victim and the victim's grandmother, defense counsel asked questions that were prefaced on the sexual contact having taken place, but indicating that the defendant did not use force and that the victim did not suffer lasting psychological harm. *Id*. at 859-60. Counsel did so without Wiplinger's permission, and Wiplinger subsequently moved for a mistrial and fired counsel. *Id.* at 860. The supreme court determined that defense counsel implicitly admitted Wiplinger's guilt thereby violating his right to decide whether to plead guilty. *Id.* at 861.

Here, unlike *Wiplinger*, appellant's trial counsel did not even suggest that appellant was guilty of either charged offense. Appellant was not charged with speeding or reckless driving. And appellant acknowledged, in his direct testimony, that he had been speeding and driving erratically prior to the stop. Under these circumstances, trial

counsel's statements to the jury seem to us to represent a tactical decision aimed at mitigating the impact of appellant's driving conduct. We do not second guess an attorney's decision on matters of trial strategy. *See State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) ("Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel.").

Appellant's challenge based on his counsel's illness also fails. It is undisputed that counsel became observably ill only after all of the evidence had been presented. Because he was unable to present closing argument, he asked for and received a continuance. The following morning, the district court inquired as to counsel's ability to proceed and offered him a further continuance. Counsel declined the invitation, stating that he was prepared to proceed. On this record, we conclude that counsel's performance did not fall below that of a reasonably competent attorney under similar circumstances.

Having found that appellant has not met his burden of proof on the first *Strickland* prong, we need not address the issue of prejudice. *Hale v. State*, 566 N.W.2d 923, 927 (Minn. 1997) (reviewing court need not address both the performance and prejudice prongs if one is determinative).

II. The district court did not abuse its discretion in its evidentiary rulings.

Appellant contends that the district court abused its discretion by allowing Officer Fulton to testify that appellant was intoxicated and had a prior DWI conviction. "Evidentiary rulings rest 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). If the district court erred in admitting evidence, we determine whether there is a

"reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

Appellant argues that both areas of testimony were inadmissible because they were improper expert opinions, concerned ultimate issues of fact, and involved mixed questions of law and fact. These arguments are unavailing.

The state did not present Officer Fulton as an expert witness. Rather, he testified based on his personal observations. Minn. R. Evid. 701 governs the admission of his opinion testimony:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Officer Fulton personally observed appellant's behavior and performed field sobriety tests that led him to conclude that appellant was intoxicated. This testimony was entirely based on the officer's perceptions. And his observation that appellant was intoxicated was helpful to the jury's determination of a fact in issue: whether appellant operated his vehicle while he was under the influence of alcohol. A district court "has broad discretion in determining the adequacy of foundation for a lay person's opinion whether another person at a certain time was intoxicated or under the influence." *State v. Schneider*, 311 Minn. 566, 566, 249 N.W.2d 720, 721 (1977). Likewise, Officer Fulton's testimony that appellant had a prior DWI conviction was rationally based on his observation, having accessed appellant's driving records after placing him under arrest,

and was helpful to the jury's determination as to whether appellant was subject to a first-degree offense.

Appellant's argument that the district court abused its discretion by allowing the testimony because it went to an ultimate issue of fact in the case also fails. Opinion testimony is not excluded simply because it embraces an ultimate issue of fact. Minn. R. Evid. 704. The jury has the right to accept or reject the opinion testimony. *See State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) (stating that in reviewing jury credibility determinations this court "must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence."). Here, the jury credited Officer Fulton's testimony over appellant's alternative explanations for his conduct.

Finally, appellant argues that the challenged testimony addressed a mixed question of law and fact. Evidence that is otherwise admissible under Minn. R. Evid. 704 is improper if it includes a legal analysis or a mixed question of law and fact. Appellant cites *State v. Saldana*, where an expert testified about the typical behavior of rape victims, but went on to opine that the victim in the case was truthful and had been raped. 324 N.W.2d 227, 230 (Minn. 1982). The supreme court held that the expert's testimony "was a legal conclusion which was of no use to the jury." *Id.* at 231.

In contrast to *Saldana*, Officer Fulton's testimony was limited to factual matters. His opinion that appellant was intoxicated was based on his personal observations, viewed through the lens of his training and experience. Likewise, his testimony concerning appellant's prior DWI conviction was based on his act of obtaining information about appellant's driving record from the dispatcher at the time of the arrest.

On this record, we conclude that the district court did not abuse its discretion in admitting Officer Fulton's testimony as to both appellant's intoxication and his prior DWI conviction.

Even if the district court abused its discretion in admitting the testimony as to appellant's prior DWI conviction, the error was harmless. Evidence of appellant's prior conviction was admitted through appellant's certified driving record, two district court orders regarding the prior conviction, and appellant's own testimony. Even absent the challenged testimony, there is no reasonable possibility that the verdict would have changed. *See Post*, 512 N.W.2d at 102 n.2 (stating if there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial).

III. The district court did not abuse its discretion in denying the mistrial motion.

We review the denial of a motion for a mistrial for abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). Unless there is a reasonable probability that the outcome of the trial would have been different had the incident resulting in the motion not occurred, a district court should not order a new trial. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

The parties agree that appellant's trial counsel did not become visibly ill until shortly after he began his closing argument. At that time, all of the evidence had been submitted. Appellant does not point to particular conduct of counsel that reflected his illness and adversely impacted appellant's trial rights. And appellant's counsel was able to present his closing argument the following day when counsel was, in his own

estimation, able and prepared to proceed with his argument. Appellant has not demonstrated that the district court abused its discretion in denying the mistrial motion.

IV. The prosecutor did not commit misconduct warranting a new trial.

Appellant argues that the prosecutor committed misconduct during closing argument by interjecting her own opinions, making arguments based on facts not in evidence, indicating that appellant had tailored his testimony for trial, and appealing to public safety. Appellant also alleges that the prosecutor committed misconduct by asking Officer Fulton a "were they lying" question. Appellant did not object to any of these claimed instances of misconduct at trial.

When the defendant fails to object at trial, we review claims of prosecutorial misconduct to see whether there is "(1) error; (2) that is plain; and (3) [that] affects substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "An error is plain if it contravenes case law, a rule, or a standard of conduct." *Id.* On the third, or "prejudice" prong, the state must prove that there is no reasonable likelihood that the absence of the misconduct would have a significant effect on the jury's verdict. *Id.*

Appellant asserts that the prosecutor's statement that no one can "do anything to fake or pass" the HGN test constitutes improper interjection of her own opinion and is based on facts not in evidence. We disagree. The prosecutor was merely restating Officer Fulton's testimony that the HGN test is based on involuntary eye movements. "Counsel have the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn

therefrom." *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980). The challenged statement does not constitute misconduct.

Appellant also argues that the prosecutor committed misconduct by stating, in reference to the evidence of appellant's prior DWI conviction, that "if you look on the records, the court documents cannot lie." While this statement may approach improper vouching for the documents, we need not decide this question. The document the prosecutor referenced was admitted into evidence without objection. Because the fact that appellant had a prior conviction was not in dispute, any claimed error did not affect his substantial rights.

Appellant's tailoring argument also fails. It is improper for a prosecutor to argue that a defendant observed the full presentation of evidence and then "took the witness stand and concocted a story exonerating himself." *State v. Buggs*, 581 N.W.2d 329, 341 (Minn. 1998). Appellant asserts that the prosecutor essentially accused him of concocting his brain injury at trial to exonerate himself. This assertion is without merit. The prosecutor stated, "Now you heard the defendant testify as to his injuries he sustained in his 2001 accident and they are extremely unfortunate." Noticeably absent is any suggestion by the prosecutor that appellant made up his 2001 injury after hearing the evidence at trial. The prosecutor acknowledged that appellant had suffered a brain injury, but argued that that injury did not cause appellant to fail the field sobriety tests.

Lastly, appellant argues that the prosecutor committed misconduct by appealing to public safety. A prosecutor may not make statements urging the jury to protect society or send a message with its verdict. *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App.

2000), *review denied* (Minn. May 16, 2000). Appellant's counsel analogized the prosecution's case to baking, arguing that the state had failed to correctly follow the "recipe" necessary to secure a conviction. In rebuttal, the prosecutor stated, "[T]his case is not about baking, it's not about cooking, and it's not about biscuits. It's a public safety issue." The prosecutor then correctly stated that the state has the burden of proving its case beyond a reasonable doubt. We are not persuaded that the prosecutor's single statement about the baking analogy was intended to appeal to the passions of the jury. Even if it was, the record evidence shows that, even absent the alleged misconduct, the verdict would remain the same. *See Ramey*, 721 N.W.2d at 302.

V. The district court erred in entering convictions on both counts.

The parties agree that the district court erred by entering convictions on both DWI counts. Minn. Stat. § 609.04, subd. 2, provides that "[a] conviction or acquittal of a crime is a bar to further prosecution of any included offense, or other degree of the same crime." While both driving under the influence and driving with an alcohol concentration of .08 or more within two hours of driving may be charged and tried together, they are different sections of the same criminal statute, and a defendant may be convicted and sentenced under only one. *See State v. Clark*, 486 N.W.2d 166, 170-71 (Minn. App. 1992) (reversing dual convictions under the same charges). Accordingly, appellant's conviction on the second count, driving with an alcohol concentration of .08 or more, is vacated.

Affirmed as modified.