STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1710

State of Minnesota,
Respondent,

vs.

Michael David Blinkinsop,
Appellant.

Filed August 10, 2010
Affirmed
Toussaint, Chief Judge

Waseca County District Court
File No. 81-CR-08-1569

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

Paul M. Dressler, Waseca County Attorney, Waseca, Minnesota (for respondent)

Christopher P. Rosengren, Rosengren Kohlmeyer Law Office, Chtd., Mankato, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Lansing, Judge; and Shumaker, Judge.

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

TOUSSAINT, Chief Judge

Appellant Michael David Blinkinsop appeals his conviction for refusal to submit to a chemical test. Appellant argues: (1) there was insufficient evidence to prove that the

arresting officer had probable cause to arrest; (2) appellant's Fifth Amendment rights were violated by the officer's continued interrogation following his request to speak with an attorney; (3) appellant's Due Process rights were violated by the officer's failure to remedy appellant's confusion regarding the implied-consent advisory; (4) there was insufficient evidence to show that appellant was offered alternative tests; and (5) the district court erred by failing to suppress evidence arising from an unrecorded interrogation. Because we see no error of law, we affirm.

D E C I S I O N

I.

Appellant argues that insufficient evidence was presented at trial to support his conviction under Minn. Stat. § 169A.20 (2008). The elements of refusal to submit to testing are: (1) probable cause to arrest for driving while impaired; (2) a request by a police officer to submit to a chemical test; and (3) refusal to submit to the requested chemical test. 10A *Minnesota Practice*, CRIMJIG 29.28 (2008); *see also* Minn. Stat. §§ 169A.20, subd. 2; .52, subd. 3 (2008). Specifically, appellant challenges the district court's finding of probable cause to arrest for driving while impaired.

In considering a claim of insufficient evidence, our review 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 [fact-finder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court will not reverse a conviction if the fact-finder, acting with due regard for the presumption of innocence and for the requirement of proof beyond a reasonable doubt,

could reasonably have concluded that the appellant was proven guilty of the offense charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). A determination of probable cause is a mixed question of fact and of law. *Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985). There are many indicia of intoxication that may provide probable cause for an arrest, whether they appear independently or in combination. *Musgjerd v. Comm'r of Pub. Safety*, 384 N.W.2d 571, 573 (Minn. App. 1986). The presence of a single indicium is sufficient, depending on the circumstances of a particular case, but mere suspicion of intoxication is insufficient. *Id.* at 573-74; *see also State v. Camp*, 590 N.W.2d 115, 119 n. 9 (Minn. 1999) (noting that probable cause may not rest on mere suspicion, but does not require evidence sufficient to sustain a conviction). A driver may be convicted of DWI for driving under the influence not only of alcohol but also of controlled substances and "hazardous substance[s] that affect[] the nervous system, brain, or muscles of the person so as to substantially impair the person's ability to drive or operate the motor vehicle[.]" Minn. Stat. § 169A.20, subd. 1(2), (3) (2008).

Here, evidence was presented that, while driving, an eyewitness observed appellant swerving, driving slowly, stopping in the middle of an intersection, and crossing both the right traffic line and the middle traffic line, into the oncoming-traffic line and across into the left-side ditch. Upon stopping him, the officer observed that appellant's speech was slurred, that his eyes were bloodshot and droopy, and that he was unable to stand without assistance. Appellant twice asked the officer to search his vehicle for his prescription drugs, which he admits to taking, but none were found in the

vehicle. Appellant passed out in the officer's squad car while she searched his car.

Based on these facts, the district court found that the officer had probable cause to arrest appellant for driving while impaired. We find that the evidence supports the district court's conclusion.

II.

Appellant next argues that his Fifth Amendment rights were violated when the officer continued the interrogation following his request to speak with an attorney. *Miranda* establishes that a person in custody has the right to consult with an attorney at any point during police interrogation. *Miranda v. Arizona*, 384 U.S. 436, 470, 86 S. Ct. 1602, 1625-26 (1966). Once a person in custody invokes his *Miranda* right to counsel, all police interrogation must cease. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85 (1981). We will uphold a district court's Fifth Amendment determination unless it was clearly erroneous. *State v. Johnson*, 463 N.W.2d 527, 532 (Minn. 1990); *State v. Anderson*, 396 N.W.2d 564, 565 (Minn. 1986).

Although the record establishes show that appellant asked to speak with an attorney, appellant fails to indicate any specific statements arising from the interrogation or any prejudice to him from the officer's failure to cease the interrogation. Even when a constitutional right is implicated, evidentiary challenges are subject to a harmless-error analysis. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). An error is harmless if the "verdict was surely unattributable to the error." *Id.* Here, because appellant has cited no statements that were erroneously admitted by the district court, he has proved neither a constitutional violation nor any prejudice resulting from error.

III.

Appellant next argues that his Due Process rights were violated when his confusion regarding the implied-consent advisory was not remedied by the officer. An affirmative defense to a test-refusal charge is that the refusal was based upon reasonable grounds, and a defendant's confusion regarding his rights under the implied-consent advisory could invoke this defense. *State of Minnesota, Dept. of Highways v. Beckey*, 291 Minn. 483, 486, 192 N.W.2d 441, 444-45 (1971). Appellant fails to cite any evidence that he was confused by the implied-consent advisory. Similarly, the appellate record contains no evidence that appellant indicated confusion. Appellant's Due Process challenge therefore fails.

IV.

Appellant next argues that insufficient evidence was presented to prove that the officer offered an alternative test. Minn. Stat. § 169A.51, subd. 3 (2008) requires that an alternative test must be offered to a person who refuses a blood test before the person can be prosecuted for test refusal. The statutory requirement of an alternative-test offer is satisfied if a choice between a blood and a urine test is made available at the outset. *Mahanke v. Comm'r of Pub. Safety*, 395 N.W.2d 437, 438 (Minn. App. 1986) ("If an officer directs that the test be of blood or urine, a driver has three choices: a blood test, a urine test, or refusing to take a test.").

Here, the district court found that the officer offered appellant a blood or urine test. This finding is based on the officer's testimony that, despite the fact that she did not specifically recall offering both tests, it was her practice to offer both tests, and that she

circled "blood or urine" on the advisory sheet. "The weight and credibility of the testimony of individual witnesses is for the jury to determine." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). When determining the sufficiency of evidence, this court's review of bench trials is the same as the review of jury trials. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). This court reviews the record in the light most favorable to the verdict. *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998). The factfinder is the exclusive judge of witness credibility, and this court assumes the factfinder believed the evidence supporting the state's case and disbelieved contrary evidence. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995). In light of the district court's prerogative to assess credibility, there is sufficient evidence to prove that appellant was offered alternative tests.

V.

Finally, appellant argues that the district court erred by failing to suppress statements made during an unrecorded interrogation.

> All custodial interrogation, including any information about rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs in a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.

State v. Scales, 518 N.W.2d 587, 588 (Minn. 1994). Appellant argues that the failure to record the entire interrogation requires the suppression of evidence. However, appellant's argument fails because implied-consent test requests are not custodial interrogations. *See Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 640 (Minn.

1995) ("[B]ecause the supreme court and this court have indicated that the implied consent test request is not a custodial interrogation, and no Minnesota case has applied *Scales* to implied consent proceedings, we hold that *Scales* does not apply to this case.").

Affirmed.