STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1867

State of Minnesota,
Respondent,

vs.

Terry Dean Ronning,
Appellant.

Filed September 7, 2010
Affirmed
Minge, Judge

Rice County District Court
File No. 66-CR-08-1236

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

G. Paul Beaumaster, Rice County Attorney, Faribault, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Johnson, Judge.

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

MINGE, Judge

Appellant challenges his conviction of first-degree driving while impaired, arguing that (1) the evidence is insufficient to support his conviction; (2) his trial attorney was

ineffective because he failed to introduce an alibi witness's written statement after the witness invoked his privilege against self-incrimination and refused to testify at trial; and (3) there were various other errors. Because we conclude that the evidence is sufficient to support the jury's guilty verdict, that the statement of the alibi witness is inadmissible, and that the other claims of error are not meritorious, we affirm.

FACTS

During the night of April 1, 2008, appellant Terry Ronning was arrested for driving under the influence of alcohol. After having the implied-consent advisory read to him, Ronning refused to take a blood or urine test. The state ultimately charged Ronning with driving while impaired under Minn. Stat. § 169A.20, subd. 1(1) (2008); first-degree refusal to submit to chemical testing under Minn. Stat. § 169A.20, subd. 2 (2008); and driving after cancellation-inimical to public safety under Minn. Stat. § 171.24, subd. 5 (2008).

The jury convicted Ronning of all three charges. The district court sentenced him to 42 months in prison for the first-degree driving-while-impaired conviction but stayed execution of that sentence for seven years, conditioned on probation that included serving 365 days in jail. The district court did not sentence Ronning on the other convictions. This appeal followed.

D E C I S I O N

I.

The first issue is whether there was sufficient evidence to sustain Ronning's convictions. 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 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). "A defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). We must assume that "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). 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 offenses. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). We consider Ronning's three convictions in turn.

Conviction for test refusal

A conviction for refusing to submit to an alcohol test requires that the state prove that a peace officer had probable cause to believe that the defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. Minn. Stat. §§ 169A.20, subd. 2, .51, subd. 1(b) (2008); *State v. Ouellette*, 740 N.W.2d 355, 359-60 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Ronning argues that the state failed to establish probable cause.

"Probable cause exists where all the facts and circumstances would warrant a cautious person to believe that the suspect was driving or operating a vehicle while under the influence." *Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985). We analyze probable cause from the point of view of a "prudent and cautious police officer on the scene at the time of arrest." *State v. Harris*, 265 Minn. 260, 264,

121 N.W.2d 327, 331 (1963), *cert. denied*, 375 U.S. 867, 84 S. Ct. 141 (1963). In reviewing the officer's actions, we consider the totality of the circumstances and defer to the officer's experience and judgment. *Johnson*, 366 N.W.2d at 350. An officer need not see the defendant drive or operate the vehicle to have probable cause to request a test to determine the alcohol content of his blood. *Harris*, 295 Minn. at 42, 202 N.W.2d at 880-81. A probable-cause determination is a mixed question of fact and of law. *Johnson*, 366 N.W.2d at 350. "Once the facts have been found the court must apply the law to determine if probable cause exists." *Id*. (quotation omitted).

The record before the jury provides detailed information about what the law-enforcement officer knew at the time he asked Ronning to take the test. Deputy Sheriff Nathan Budin testified that on April 1, 2008, at about 8:00 p.m., he responded to a dispatch call regarding a pickup truck in the ditch on Highway 21 in Rice County. The caller identified himself and said the occupant of the vehicle was drunk and that the vehicle could not be driven. When Budin arrived, he saw the pickup, unoccupied and still in the ditch. Based on circumstances at the scene, he concluded that the pickup had crossed the center line before going off the road into the ditch and that the driver got stuck in the ditch while trying to get out.

Budin then saw a green Ford Explorer approaching from the driveway across the highway. After the Explorer stopped, Budin spoke to the driver, who identified herself as the former wife of appellant Terry Ronning, her passenger. She explained to Budin that Ronning had called her a short while before, told her his truck was in the ditch across from a mutual acquaintance's house, and asked her to come get him. While Budin spoke

with her, he could smell alcohol odor coming from inside the Explorer. When Budin went to the passenger's side where Ronning sat, Budin smelled an extremely strong alcohol odor. Budin observed that Ronning's eyes were bloodshot and watery and he slurred his speech. Ronning told Budin that he had a couple of drinks at a bar in Shieldsville and that after leaving the bar he was driving to Montgomery when his pickup went into the ditch. He gave Budin two different versions of how his pickup ended up in the ditch. First, he said he lost control on the slippery roads. Then he said he got stuck in the ditch while trying to turn around. When Ronning got out of his former wife's vehicle, he swayed so much that Budin had him sit on the bumper of Budin's squad car. Ronning failed two field-sobriety tests. Budin believed that Ronning was extremely intoxicated.

Ronning argues that he never admitted he drove into the ditch because he was under the influence of alcohol. This is irrelevant. Budin just needed probable cause to believe that Ronning drove under the influence. Budin could reasonably infer based on Ronning's behavior that Ronning was intoxicated when he drove. Ronning did not indicate that he had had anything to drink after he left Shieldsville. He admitted driving from Shieldsville after he drank there. Budin could easily conclude that Ronning was intoxicated when Budin encountered him. From these facts it is reasonable to infer that Ronning was just as intoxicated—if not more intoxicated—when he drove from Shieldsville.

Ronning also argues that none of the field-sobriety tests were conclusive. Even if this were true, it is irrelevant. Probable cause is determined on the totality of the circumstances; "there is no rule of thumb to be employed in evaluating an officer's

probable grounds to proceed under the implied-consent law. *Martin v. Comm'r of Pub. Safety*, 353 N.W.2d 202, 204 (Minn. App. 1984).

Because Ronning admitted driving into a ditch, admitted drinking in Shieldsville just prior to going in the ditch, and exhibited several signs of intoxication, we conclude Budin had probable cause to arrest him on suspicion of driving under the influence and request that he submit to a test to determine his blood-alcohol content.

Driving while impaired

In arguing that there was insufficient evidence to convict Ronning of driving while impaired, Ronning largely repeats the arguments he made against the test-refusal conviction. He argues that there was insufficient evidence to prove that he drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. In these arguments, he asserts that the evidence in convictions based entirely on circumstantial evidence must be consistent with guilt and exclude other explanations as unreasonable. But because Ronning admitted that he drove and Budin observed his condition, this conviction is not entirely based on circumstantial evidence and the circumstantial-evidence rule does not apply. *See State v. Stein*, 776 N.W.2d 709, 722 (Minn. 2010) ("Direct evidence is that which proves a fact without an inference or presumption and which in itself, if true, establishes that fact.") (plurality op.).

Because Ronning admitted that he drove, all that is necessary to support the conviction is that the jury could reasonably conclude that he drove while impaired because of alcohol. All of Budin's arrest observations apply to this conviction as well. The jury heard additional evidence about Ronning's condition:

First, there is Chad Peters's testimony. Peters was the passing motorist who initially reported the pickup in the ditch. He stated that sometime between 7:30 and 8:00 p.m. he stopped to determine whether anyone in the pickup needed help and saw Ronning sitting behind the steering wheel. He added that as he was helping Ronning out of the truck, beer cans and bottles on the floor of the truck fell out and Ronning stumbled. Peters testified that based on Ronning's slurred speech and body language and the alcohol smell, he concluded that Ronning had been drinking and was heavily intoxicated. Peters stated that he called the police and reported what he had seen. Officer Budin respond to his call.

Second, after his arrest, Ronning made additional incriminating admissions. During the *Miranda*-colloquy portion of Ronning's implied-consent advisory at the jail, Ronning said to Officer Budin, "I didn't remain silent, I just told you exactly what it was. *I went in the ditch*." (Emphasis added.) A video recording of the statement was played for the jury. Also, Ronning admitted at trial that he had too much to drink: "[T]here is no doubt about it that I had too much to drink, I'm not denying that." Ronning testified at trial that he drove to a bar in Faribault and that he remembered drinking six to seven beers there from 10:00 or 11:00 a.m. to 3:00 or 4:00 p.m. He said that he did not recall anything after 4:00 p.m. until he woke up the next day in a jail cell around 7:00 a.m. No testimony showed that he drank anything after his car was in the ditch. Any intoxication was due to the drinks he had before driving. Because there was ample evidence to conclude Ronning was under the influence when Peters and Budin encountered him, it is reasonable to infer that he was also under the influence when he drove. We conclude that

the jury could reasonably determine that the record established beyond a reasonable doubt that Ronning had driven while under the influence of alcohol.

Driving after cancellation

Ronning also argues that the evidence was insufficient to support his conviction for driving after cancellation under Minn. Stat. § 171.24, subd. 5. This argument is meritless. Ronning stipulated that the vehicle he allegedly drove required a license; that on April 1, 2008, his driver's license was cancelled as inimical to public safety; and that he had notice of this cancellation. In addition, he testified that he drove his truck to the bar in Faribault on April 1, 2008. Thus, there is sufficient evidence to sustain the conviction on this count.

II.

The next issue is whether Ronning received ineffective assistance of counsel. To prevail in an ineffective-assistance-of-counsel claim, 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)). Because ineffective-assistance-of-counsel claims involve mixed questions of law and fact, our review is de novo. *Strickland*, 466 U.S. at 698, 104 S. Ct. 2070; *Vance v. State*, 752 N.W.2d 509, 513 (Minn. 2008).

Defense counsel's performance is presumed to be 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 his counsel did not employ "the customary skills and diligence that a reasonably competent attorney would [employ] under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). We do not second guess an attorney's decision on matters of trial strategy, which includes what evidence to present, which witnesses to call, and what defenses to raise. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Ronning contends that he did not receive effective legal assistance because his lawyer did not attempt to introduce a written statement[1] from Robert Quaale when Quaale declined to testify. After the state rested its case, Ronning's attorney indicated that he intended to call Quaale as a witness and that he expected Quaale to testify consistent with his written statement. That statement recounts that Quaale—not Ronning—was driving the pickup on the evening of April 1. However, because Quaale's driver's license had been cancelled, the district court informed Quaale that his driving was a crime and that he had the right to refuse to answer incriminating questions. Quaale then asserted his privilege against self-incrimination and declined to testify about whether he drove the truck on April 1. Based on Quaale's written statement, Ronning's attorney made an offer of proof that Quaale was expected to testify as follows: that Quaale drove

[1] The briefs refer to this written statement as Quaale's affidavit. As the state notes, however, the statement only contains the signature of Quaale, the date he signed, and a notary public's signature and stamp. There is no indication that Quaale's statement was sworn. Thus, it does not appear that the statement is an affidavit.

Ronning's pickup from Shieldsville; that the pickup went off the road into the ditch because Ronning had fallen asleep while leaning towards Quaale and then fallen forward, grabbing the steering wheel to pull himself up; that the truck was stuck; and that Quaale got out and caught a ride to Faribault from passersby.

Ronning's attorney did not attempt to introduce Quaale's written statement in lieu of his testimony. Ronning argues that this decision by his attorney constitutes ineffective assistance of counsel because this statement, although hearsay, (1) would have been admissible under Minn. R. Evid. 804(b)(3)—the declaration-against-interest hearsay exception—and (2) would have helped establish his defense that he never drove the truck under the influence of alcohol.

Because the ineffective-assistance-of-counsel argument is premised on the admissibility of the statement pursuant to the hearsay exception in Minn. R. Evid. 804(b)(3), we begin by examining the admissibility question. Quaale's statement is admissible under this rule if three conditions are satisfied: (1) Quaale is unavailable within the meaning of the rule; (2) the statement is against Quaale's interest at the time it was made; and (3) "corroborating circumstances clearly indicate the trustworthiness of the statement." Minn. R. Evid. 804(b)(3). The first two conditions are met. Quaale was unavailable because he successfully asserted his Fifth Amendment privilege and did not have to testify. The statement was against Quaale's interest because it tended to subject him to criminal liability for driving without a valid license under Minn. Stat. § 171.24 (2008). The issue is the third condition.

This third condition emerged from *State v. Higginbotham*, in which the supreme court held that "declarations against penal interest must be proven trustworthy by independent corroborating evidence that bespeaks reliability." 298 Minn. 1, 5, 212 N.W.2d 881, 883 (1973). The court crafted this rule "[b]ecause hearsay statements tending to exculpate the accused must be regarded with suspicion." *Id*. The statement itself is not independent, corroborating evidence. *State v. Burrell*, 697 N.W.2d 579, 602 (Minn. 2005). Similarly, lack of evidence addressing the question of whether the declarant has a motive to fabricate the statement does not constitute corroborating evidence. *State v. Glaze*, 452 N.W.2d 655, 661 (Minn. 1990). Rather, independent corroboration should come from witnesses who could verify the statement based on personal knowledge. *Burrell*, 697 N.W.2d at 602. Corroboration is compromised if the source of the exculpatory information never went to the authorities with that information and if the exculpatory statement is contradicted by other evidence. *State v. Renier*, 373 N.W.2d 282, 285 (Minn. 1985).

Here, the circumstances include the following:

- Passerby Peters found Ronning drunk and in the driver's seat.
- Peters saw no other person around.
- Ronning admitted he was driving when he first told Officer Budin that he slid off the slippery road.
- Ronning admitted he was driving again when he next told Budin that he got stuck in the ditch trying to turn around.
- When Ronning denied driving, he never mentioned that he had been with Quaale or claimed that Quaale had been driving.
- Even after denying that he was driving during the implied consent advisory, Ronning said during the *Miranda* colloquy, "I didn't' remain silent, I just told you exactly what it was. *I went in the ditch*." (Emphasis added).

- The day after being arrested, Ronning went before the district court for his first appearance on April 2, 2008, and, while answering how long he had lived at his address, he voluntarily told the court, "But I haven't drank for over six and a half years. Just been having some problems and it just, and everything just kind of went to pieces, and I went back to, and I got caught."
- Ronning never told Budin, Peters, his ex-wife, or the court during his first appearance on April 2 that someone else had been driving or was even in the pickup with him.
- There were no witnesses who could verify Quaale's statement based on personal knowledge.[2]
- Quaale's statement is not attested or under oath.
- Quaale never went to the authorities with the information in his statement.
- The statement appeared over three and a half months after the incident.

The foregoing circumstances indicate that the third condition—trustworthiness—is not met. Accordingly, we conclude that the statement would not be admissible under rule 804(b)(3), and that Ronning's counsel did not provide ineffective assistance by failing to attempt to introduce apparently inadmissible evidence.

Because the statement would not have been admitted, Ronning cannot show that but for his counsel's decision, the result of his trial would have been different.

III.

The final issue is whether Ronning raises any meritorious issues in his pro se brief. If a pro se brief contains no argument or citation to legal authority in support of its allegations raised, the allegations are waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). We disregard allegations outside of the record. *See* Minn. R. Crim. P.

[2] Because Ronning testified that he could not remember anything after 4 p.m. on April 1, he could only testify that Quaale told him that Quaale had been driving. The district court struck this testimony because it was hearsay.

28.02, subd. 8 (stating that "[t]he record on appeal consists of the papers filed in the district court, the offered exhibits, and the transcript of the proceeding, if any").

The assertions of error in Ronning's pro se brief contain minimal argument, fail to cite legal authority, refer to matters outside the record, focus on irrelevant details, and ignore the record developed at trial. We conclude these arguments are without merit.

Affirmed.

Dated: