STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2254

State of Minnesota,
Respondent,

vs.

Michael Paul Weaver,
Appellant.

Filed December 7, 2010
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-09-32113

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

Michele R. Wallace, MacMillan, Wallace, Athanases & Patera, P.A., Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this appeal from convictions of second-degree test refusal and gross-misdemeanor driving after cancellation, appellant argues that the district court committed

plain error when instructing the jury on test refusal by misstating the law on probable cause. We affirm.

FACTS

Crystal Patrol Sergeant Robin Erkenbrack was on patrol on June 28, 2009, when he saw a vehicle that appeared to be speeding down a hill. Erkenbrack followed the vehicle and saw it make a wide turn onto a highway entrance ramp, almost striking the curb, before jerking back into its lane. Erkenbrack then turned on his squad car's red lights, but the vehicle continued to travel down the ramp. Erkenbrack activated his siren, and, after traveling on the shoulder for about a mile, the vehicle abruptly stopped, jumped a curb, and pulled up on a cement retaining wall.

Erkenbrack approached the vehicle and immediately detected a strong odor of alcohol. The driver of the vehicle identified himself as appellant Michael Paul Weaver and admitted that he did not have a driver's license. Erkenbrack observed that appellant's speech was slurred and that his eyes were bloodshot and watery. Erkenbrack administered two field sobriety tests, and appellant failed both. Erkenbrack then administered a preliminary screening test, which indicated that appellant's alcohol-concentration level was over the legal limit. Erkenbrack arrested appellant on suspicion of driving under the influence and transported him to the Crystal Police Department.

Appellant was charged with second-degree refusal to submit to a chemical test in violation of Minn. Stat. § 169A.20, subd. 2, .25, subd. 1(b) (2008); second-degree driving while impaired (DWI) in violation of Minn. Stat. § 169A.20, subd. 1(1), .25, subd. 1(a) (2008); and gross-misdemeanor driving after cancellation in violation of Minn. Stat.

§ 171.24, subd. 5 (2008). The case was tried to a jury, which found appellant guilty of test refusal and driving after cancellation but not guilty of DWI. This appeal followed.

D E C I S I O N

Appellant argues that the district court committed reversible error because it misstated the law of probable cause when instructing the jury on the elements of test refusal. Probable cause exists when all the facts and circumstances would lead a cautious person to believe that the suspect was driving or operating a vehicle while under the influence. *State v. Harris*, 295 Minn. 38, 42, 202 N.W.2d 878, 881 (1972); *Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 392 (Minn. App. 1993), *aff'd*, 517 N.W.2d 901 (Minn. 1994); *Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985). "The test for probable cause is objective, viewed from the perspective of a prudent and cautious police officer." *State v. Schauer*, 501 N.W.2d 673, 674 (Minn. App. 1993) (quotation omitted); *see also State v. Olson*, 342 N.W.2d 638, 640 (Minn. App. 1984) ("Probable cause is not based upon the 'reasonable man' concept, but upon the situation of the officer and the particular situation in which he finds himself, conditioned by his observations, information, training and experience." (quotation omitted)).

The district court instructed the jury that "[p]robable cause means that the officer can explain the reason the officer believes it is more likely than not that the Defendant drove, operated or was in physical control of a motor vehicle while under the influence of alcohol." This definition followed verbatim the recommended language on probable cause from the 2009 version of the Jury Instruction Guide. *See State v. Koppi*, 779 N.W.2d 562, 567 (Minn. App. 2010) (quoting same version of CRIMJIG 29.28), *review*

granted (Minn. May 18, 2010). Appellant argues that the pattern jury instruction misstates the law because it instructs the jury to determine whether there was probable cause based solely on an officer's subjective belief. But appellant did not object to the jury instruction at trial.

Generally, failure to object to a particular jury instruction forfeits the issue for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). However, we may review the issue for plain error that affects a substantial right. Minn. R. Crim. P. 31.02; *State v. Goodloe*, 718 N.W.2d 413, 420 (Minn. 2006). Under the plain-error test, a defendant must make a showing of three elements: (1) there must be error; (2) that is plain; and (3) the error must affect the defendant's substantial rights. *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005). "If those three prongs are met, [an appellate court] may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotations omitted).

A jury instruction is erroneous "if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). The district court's instruction that probable cause exists when "the officer can explain the reason the officer believes it is more likely than not that the Defendant drove, operated or was in physical control of a motor vehicle while under the influence of alcohol" implies that a determination of probable cause may be based solely upon the officer's subjective belief as to the existence of probable cause. But "[t]he test for probable cause is not whether the officers subjectively felt they had probable cause, but whether they had objective probable cause." *Steele v. Comm'r of*

Pub. Safety, 439 N.W.2d 427, 429 (Minn. App. 1989) (citing *Costillo v. Comm'r of Pub. Safety*, 416 N.W.2d 730, 733 (Minn. 1987)); *see also State v. Speak*, 339 N.W.2d 741, 745 (Minn. 1983) ("[T]he issue is whether there was objective probable cause, not whether the officers subjectively felt that they had probable cause."). Therefore, the district court's instruction materially misstated the law,[1] and the first prong of the plain-error test is satisfied.

To satisfy the second prong of the plain-error test, "the error must be plain at the time of the appeal." *State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006). "An error is plain if it is clear or obvious." *State v. Jones*, 753 N.W.2d 677, 694 (Minn. 2008). Generally, this degree of error "is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Because our case law clearly states that the test for probable cause is an objective one, the error here was plain. Therefore, the second prong of the plain-error test is satisfied.

The third prong of the plain-error test requires that the error affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). This prong "is satisfied if the error was prejudicial and affected the outcome of the case." *Id.* "An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Pearson*, 775 N.W.2d 155, 162 (Minn. 2009) (quotation omitted). But, a jury instruction that misstates the law requires reversal "only if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict."

[1] The same conclusion was reached by this court in *Koppi*, 779 N.W.2d at 568, which is pending before the supreme court.

State v. Porter, 674 N.W.2d 424, 429 (Minn. App. 2004). The defendant bears a heavy burden of persuasion on this third prong. *Griller*, 583 N.W.2d at 741.

Appellant argues that the district court's erroneous instruction had a significant effect on the jury's verdict because the jury struggled with the question of probable cause. This argument is based on the fact that, during deliberations, the jury submitted to the court two questions concerning probable cause. But neither of these questions asked about the meaning or definition of probable cause. Rather, both questions concerned the "time line" for when a determination of probable cause needs to be made. Thus, the questions submitted by the jury do not indicate that the error had a significant effect on the jury's verdict.

Appellant also argues that his acquittal of DWI means that the jury did not uniformly accept Erkenbrack's version of the stop and, therefore, "it is impossible to say that the [district] court's error did not influence the jury's verdict." But appellant's argument ignores the fact that

> [t]he evidence necessary to support a finding of probable cause is significantly less than that required to support a conviction. Unlike proof beyond a reasonable doubt or preponderance of the evidence, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."

State v. Harris, 589 N.W.2d 782, 790-91 (Minn. 1999) (quoting *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13, 103 S. Ct. 2317, 2335 n.13 (1983)); *see also State v. Camp*, 590 N.W.2d 115, 119 n.9 (Minn. 1999) (noting that probable cause requires more than mere suspicion but less than evidence needed to sustain conviction). Erkenbrack testified that

he observed multiple objective indicia of intoxication: erratic driving, a strong odor of alcohol, slurred speech, bloodshot and watery eyes, and difficulty reciting the alphabet. He further testified that appellant failed both the horizontal-gaze nystagmus test and the preliminary screening test. This testimony gave the jury an objective basis for concluding that probable cause existed. Because Erkenbrack testified to objective facts, the jury was not left to rely solely on his subjective beliefs regarding the existence of probable cause. Therefore, it can be said beyond a reasonable doubt that the erroneous instruction had no significant impact on the verdict and did not affect appellant's substantial rights.

Affirmed.