STATE OF MINNESOTA
IN COURT OF APPEALS
A10-319

State of Minnesota,
Respondent,

vs.

Michael Leon Jensen,
Appellant.

Filed January 11, 2011
Affirmed
Bjorkman, Judge

Nicollet County District Court
File No. 52-CR-08-333

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

Eileen M. Wells, Mankato City Attorney, Christopher M. Kennedy, Assistant City Attorney, Mankato, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Stoneburner, 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 challenges his convictions of three alcohol-related driving offenses, arguing that (1) the stop of his vehicle was not valid, (2) the test-refusal jury instruction constituted plain error, (3) the evidence was not sufficient to sustain the driving-while-impaired (DWI) conviction, and (4) prosecutorial misconduct in closing argument affected appellant's substantial rights. We affirm.

FACTS

On November 15, 2008, Officer Shawn Morgan of the North Mankato Police Department responded to a call regarding a suspected drunk driver who recently left the Colony Court apartment complex following a physical altercation with his girlfriend. The unidentified caller informed the police that the suspect was driving a white vehicle, provided the vehicle's license-plate number, and indicated that the vehicle was traveling down Lee Boulevard toward Belgrade Avenue.

Officer Morgan found and stopped a vehicle matching the description in the reported area. He noticed that the driver was smoking and smelled of alcohol and identified the driver as appellant Michael Leon Jensen. Jensen admitted that he had been in an altercation with his girlfriend and that he had consumed "a couple" of drinks. Officer Morgan asked Jensen to perform two field sobriety tests. Jensen did not complete the horizontal gaze nystagmus (HGN) test as instructed and failed the preliminary breath test (PBT). Officer Morgan arrested him for suspicion of DWI. A second officer spoke with Jensen's passenger, T.M., and discovered an open can of beer in the vehicle.

Officer Morgan read Jensen the implied-consent advisory. Jensen indicated he understood the advisory and asked to speak to an attorney. Jensen was provided a phone and phone books, and he made one approximately eight-minute phone call. After the call, Officer Morgan asked Jensen if he would take a breath test. Jensen refused and was charged with second- and third-degree test refusal, second- and third-degree DWI, and allowing an open bottle.

Jensen challenged the basis for the stop and probable cause for the breath test at an omnibus hearing. The district court concluded that Officer Morgan had a reasonable basis to stop Jensen's vehicle and had probable cause to require him to submit to a breath test. After trial, a jury found Jensen guilty of second-degree refusal, second-degree DWI, and allowing an open bottle. The district court denied Jensen's motion for judgment of acquittal or a new trial. This appeal follows.

D E C I S I O N

I. The stop of Jensen's vehicle was valid.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The district court's findings of fact are given deference unless they are clearly erroneous. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

Jensen argues that the district court erred when it concluded that the information provided by the unidentified caller provided a valid basis to stop Jensen's vehicle. An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop

when the officer has a reasonable, articulable suspicion of criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968)). The investigatory stop must be supported by a "particularized and objective basis for suspecting the particular persons stopped of criminal activity." *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (quotation omitted). But the factual basis required for an officer to conduct a routine traffic stop is minimal, so long as it is not the product of mere whim, caprice, or idle curiosity. *State v. Bauman*, 616 N.W.2d 771, 774 (Minn. App. 2000), *review denied* (Minn. Nov. 15, 2000).

The reasonable-suspicion standard can be met based on information provided by an unknown or anonymous person. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997). When assessing reliability, courts examine the credibility of the informant and the basis of the informant's knowledge in light of all the circumstances. *Id.* at 691.

Jensen argues that the tip in this case was unreliable because the record does not disclose the identity of the informant or the basis of the informant's knowledge. He cites *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 553-56 (Minn. 1985), in which the supreme court held that an anonymous caller's report of "possibly a drunken driver" that included the location, color, and license plate of the vehicle was not sufficiently reliable to justify a stop, to support his argument that the tip was not sufficiently reliable. We disagree.

Unlike in *Olson*, the informant here called the police from a specific, identified location and provided information about two separate criminal acts—domestic assault and impaired driving. The caller reported that the driver was involved in a physical

altercation with his girlfriend at the Colony Court apartment complex and had been drinking. The caller further provided a detailed description of the suspect's vehicle, including its license-plate number, current location, and the direction it was traveling. When Officer Morgan arrived at the location identified by the caller, he found the vehicle, initiated the investigatory stop, and was "able to quickly confirm that [Jensen] was in an altercation with his girlfriend, and that he was drinking and driving." On this record, we conclude that the information provided by the unidentified caller was sufficiently detailed and reliable to justify a brief investigatory stop. The stop was not the product of whim, idle curiosity, or a "hunch" that criminal activity may be afoot. *See State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008).

II. Plain error in the district court's jury instruction was harmless.

Jensen challenges the district court's test-refusal instruction. Because he did not object to the instruction, we review it under the plain-error standard. *See State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). If these three prongs are satisfied, we may correct the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). But an instruction constitutes error if it "materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). In determining whether an erroneous instruction is

harmless, the inquiry is not whether the jury could have convicted the defendant without the error, but rather, what effect the error had on the jury's verdict, "and more specifically, whether the jury's verdict is 'surely unattributable' to [the error]." *State v. King*, 622 N.W.2d 800, 811 (Minn. 2001) (quoting *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997)).

The district court instructed the jury on the elements of test-refusal as follows:

> The elements of test refusal are:
>
> First, 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. Probable cause means that it was more likely than not that the defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol.
>
> Second, the peace officer placed defendant under lawful arrest for driving while impaired. An arrest is "lawful" when the officer has reason to believe that a person is in violation of the law and the officer can explain the reason.

Jensen argues that this instruction misstates when an arrest is "lawful." We agree. An officer may request chemical testing if there is probable cause to place a person under arrest for DWI and the person has been lawfully arrested. Minn. Stat. § 169A.51, subd. 1(b)(1) (2008). The existence of probable cause is an objective inquiry based on the totality of the circumstances. *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 708 (Minn. App. 2008). The instruction given was plainly erroneous because it focused the inquiry on the officer's subjective reasons for requesting the test.

Having concluded that the challenged instruction constitutes plain error, we consider whether the error prejudiced Jensen's substantial rights. We are guided by our decision in *State v. Koppi*, 779 N.W.2d 562 (Minn. App. 2010), *review granted* (Minn.

May 18, 2010). In *Koppi*, we analyzed a pattern test-refusal jury instruction defining probable cause as meaning "'that the officer can explain the reason the officer believes it was more likely than not that the defendant drove, operated or was in physical control of a motor vehicle while under the influence of alcohol.'" 779 N.W.2d at 567 (quoting 10A *Minnesota Practice*, CRIMJIG 29.28 (Supp. 2009)). We held that the instruction only implied the correct law of probable cause and that the instruction failed to require that the officer explain the reason for his belief by reference to objective facts and circumstances. *Id.* at 568. But we also held that the erroneous instruction was harmless. *Id.*

We conclude that the error in this case is likewise harmless. As in *Koppi*, the district court's instruction directed the jury to apply a subjective, rather than objective, analysis as to whether an arrest is "lawful." But this error is overcome by the evidence providing an objective basis for the jury to conclude that the arrest was lawful. The jury was not left to rely on the officer's subjective belief; Officer Morgan testified to the objective facts that supported a probable-cause determination, including Jensen's strong odor of alcohol, his inability to complete the HGN test, his failing the PBT, and Jensen's admissions that he had been drinking. Accordingly, we conclude that the jury had an objective basis to find probable cause, and the instruction, while plain error, is harmless.

III. Sufficient evidence supports the DWI conviction.

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). We 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). 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The state had the burden of proving beyond a reasonable doubt that Jensen drove his vehicle while under the influence of alcohol. *See* Minn. Stat. § 169A.20, subd. 1(1) (2008). A person is "under the influence" when the person does not "possess that clearness of intellect and control of himself that he otherwise would have." *State v. Teske*, 390 N.W.2d 388, 390 (Minn. App. 1986) (quotation omitted). The state must show that "the driver had drunk enough alcohol so that the driver's ability or capacity to drive was impaired in some way or to some degree." *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992).

Jensen argues that there was not sufficient evidence that his alcohol consumption impaired his driving ability. We disagree. Officer Morgan testified that after stopping Jensen, he noted a strong odor of alcohol from the vehicle and from Jensen, and indicated that he thought Jensen was smoking to mask the odor. Officer Morgan stated that Jensen was not able to perform the HGN test because he could not follow the officer's instructions and repeatedly moved his head. Passenger T.M. testified that Jensen consumed five beers during the afternoon in question and that Jensen consumed a beer just prior to leaving the apartment complex. Jensen admitted that he had been drinking prior to driving.

Jensen emphasizes that Officer Morgan did not observe any erratic or illegal driving conduct prior to the stop and that the supreme court has set aside convictions where a driver's manifestations of intoxication were "in somewhat uneasy equilibrium." *See State v. Elmourabit*, 373 N.W.2d 290, 291-93 (Minn. 1985) (holding that the unique facts and circumstances of the case, including a lack of erratic driving, no proof of any alcohol in the breath, blood, or urine, and satisfactory performance of the dexterity tests, required reversal of the conviction). But in *Elmourabit*, "the state lacked direct proof of actual consumption." *Id.* at 293. Here, Jensen admitted drinking shortly before driving, smelled of alcohol, and failed the HGN test. Accordingly, we conclude that the evidence, when viewed in the light most favorable to the conviction, is sufficient to support the conviction.

IV. Error in the prosecutor's closing argument did not affect Jensen's substantial rights.

Jensen contends that he is entitled to a new trial due to prosecutorial misconduct during closing argument. Because Jensen did not object to the prosecutor's statements during closing argument, we review this issue under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 298-99, 302 (Minn. 2006). Under this analysis, if a defendant demonstrates that plain error occurred, the state must prove that there is no reasonable likelihood that the absence of the prosecutor's misconduct would have a significant effect on the jury's verdict. *Id.* at 302.

Jensen contends that the prosecutor committed misconduct during closing argument when he referenced Jensen's PBT result when discussing the DWI offense.

The results of preliminary screening tests may only be used "for the purpose of deciding whether an arrest should be made and whether to require [chemical tests for intoxication]." Minn. Stat. § 169A.41, subd. 2 (2008). Use of the results in court is strictly limited, and results are not admissible in a prosecution for driving while impaired. *Id.*, subd. 2(4).

During closing argument, the prosecutor stated,

> when you weigh all the evidence . . . it's real clear that the defendant is guilty of driving under the influence, based on the HGN, based on the failure of the PBT, based on the officer's other observations. I also think it's clear that he did not have a right to refuse, and that he refused in this matter in an improper fashion and, therefore, he's violating the refusal law.

We agree that referencing the PBT while arguing for a conviction of DWI constitutes plain error. But we conclude that this error did not affect Jensen's substantial rights.

Jensen was charged with multiple offenses. While it is true that the prosecutor improperly referenced the PBT while discussing the DWI charge, Jensen ignores the context of the surrounding argument. Immediately following that statement, the prosecutor discussed the refusal charge. Referencing the PBT in the context of the refusal charge is authorized by the statute, and the jury properly heard evidence relating to the PBT test throughout the trial. *See* Minn. Stat. § 169A.41, subd. 2(4). As respondent notes, the statement at issue was "part of a summary" of the larger case, not a focus. Accordingly, we conclude that there is no reasonable likelihood that the absence of the prosecutor's misconduct would have a significant effect on the jury's verdict.

Affirmed.