STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1591

State of Minnesota,
Respondent,

vs.

William Michael Mahoney,
Appellant.

Filed August 8, 2011
Affirmed
Johnson, Chief Judge

Dakota County District Court
File No. 19HA-CR-09-4223

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

Samuel J. Edmunds, Campbell Knutson, P.A., Eagan, Minnesota (for respondent)

Rick E. Mattox, Prior Lake, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Worke, Judge; and Muehlberg, Judge.*

*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

JOHNSON, Chief Judge

A Dakota County jury found William Michael Mahoney guilty of refusal to submit to a chemical test and possession of drug paraphernalia. On appeal, Mahoney argues that he is entitled to a new trial because the jury instructions on test refusal were erroneous. Mahoney also argues that the district court erred by admitting a pipe into evidence and permitting a law enforcement officer to testify that it is a "marijuana pipe." He further challenges the sufficiency of the evidence on the charge of possession of drug paraphernalia. We affirm.

FACTS

On August 25, 2009, a Dakota County deputy sheriff arrested Mahoney in the city of Farmington on suspicion of driving a vehicle while under the influence of alcohol. The deputy observed Mahoney driving a pickup truck that crossed the center line while making an "extremely wide turn" and later drove onto a curb with both passenger-side tires. Based on these observations, the deputy stopped Mahoney's pickup truck as it pulled into a gas-station parking lot.

While speaking with Mahoney, the deputy smelled a "strong" odor of alcohol on Mahoney, and Mahoney offered "confused" or "slow" responses to the deputy's questions and spoke in "broken sentences." When Mahoney exited the pickup truck, he was "swaying," "unable to stand straight," and "leaning into the tailgate of his truck while he answered the questions, to maintain his balance." The deputy administered three field-sobriety tests, and Mahoney failed each one. The deputy asked Mahoney four

or five times to take a breath test, but Mahoney refused each time and denied that he had been drinking alcohol. The deputy arrested Mahoney. Mahoney later refused multiple requests by the deputy to take a blood or urine test. During a post-arrest inventory search of Mahoney's pickup truck, the deputy found a small amount of marijuana and a glass pipe that was encrusted with what appeared to be a small amount of charred marijuana.

In September 2009, the state charged Mahoney with five offenses: (1) second-degree refusal to submit to a chemical test, a violation of Minn. Stat. §§ 169A.20, subd. 2, .25, subd. 2 (2008); (2) third-degree driving while under the influence of alcohol, a violation of Minn. Stat. §§ 169A.20, subd. 1(1), .26, subd. 2 (2008); (3) failure to drive in a single traffic lane, a violation of Minn. Stat. §§ 169.18, subd. 7(a), .89, subd. 1(1) (2008); (4) possession of marijuana, a violation of Minn. Stat. § 152.027, subd. 4(a) (2008); and (5) possession of drug paraphernalia, a violation of Minn. Stat. § 152.092 (2008). The fourth count later was dismissed.

The case was tried to a jury over two days in June 2010. The jury found Mahoney guilty on the first count, refusal to submit to a chemical test, and the fifth count, possession of drug paraphernalia. The jury found Mahoney not guilty on the second and third counts. The district court imposed fines of $650, stayed the imposition of sentences, and placed Mahoney on supervised probation for two years. Mahoney appeals.

D E C I S I O N

I. Possession of Drug Paraphernalia

Mahoney raises three related issues concerning his conviction on the fifth count, the petty misdemeanor offense of possession of drug paraphernalia.

A. Admission of Pipe

Mahoney argues that the district court erred by admitting into evidence a glass pipe that the deputy found in Mahoney's pickup truck. We review a district court's admission of evidence to determine whether the court abused its discretion. *State v. McDaniel*, 777 N.W.2d 739, 746 (Minn. 2010).

Before the presentation of evidence, Mahoney objected to the state's introduction of the pipe. Mahoney's objection focused on the fact that the pipe was encrusted with a small amount of charred vegetable substance. At that time, Mahoney was charged with both possession of marijuana and possession of drug paraphernalia. Mahoney's attorney argued to the district court that, because the vegetable substance could not be reliably identified, the presence of the charred substance would be unduly prejudicial. The district court agreed and further ruled that the evidence of the charred vegetable substance, by itself, would be insufficient to support a conviction on the charge of marijuana possession. The state then conducted tests to develop scientific evidence that the charred substance was indeed marijuana. But the district court ruled that the introduction of that evidence would be unduly prejudicial to Mahoney because the jury had been selected and his attorney had not had the opportunity to refer to the marijuana-possession charge during *voir dire*. Accordingly, that charge was withdrawn.

After the withdrawal of the charge of marijuana possession, Mahoney's only remaining objection to the introduction of the pipe was that it should be cleaned before being introduced so that it was free of the charred substance. It appears that this objection was discussed in a chambers conference that was not reported. Mahoney renewed his objection to the introduction of the pipe when it was offered into evidence. The district court overruled the objection.

A district court, when considering whether to admit an item of evidence, must be satisfied that "the item offered is the same as the item seized and is substantially unchanged in condition." *State v. Johnson*, 307 Minn. 501, 505, 239 N.W.2d 239, 242 (1976). Mahoney's argument appears to contradict *Johnson*. Mahoney has not cited any authority that would permit the district court to order the state to alter the glass pipe by removing the charred substance, let alone any authority suggesting that a district court abuses its discretion by *not* ordering the state to alter the exhibit. Thus, the district court did not err by admitting the glass pipe into evidence with the charred vegetable substance.

B. Motion for Mistrial

Mahoney also argues that the district court erred by denying his motion for a mistrial. Mahoney moved for a mistrial on two grounds after the close of evidence but before the case was submitted to the jury. First, he reasserted his objection to the introduction of the pipe that was encrusted with a charred vegetable substance. Second, he asserted that he was prejudiced by the deputy's testimony that the pipe is a marijuana pipe. The district court denied the motion. We apply an abuse-of-discretion standard of

review to a district court's denial of a motion for a mistrial. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

For the reasons stated above in part I.A., the district court did not err by rejecting Mahoney's first assertion. With respect to the second assertion, Mahoney contends only that the deputy violated the district court's pretrial admonition that the state's witnesses should not testify concerning the nature of the charred vegetable substance on the pipe. The deputy did not violate this admonition. When Exhibit 8 was offered, the prosecutor asked the deputy to identify it. The deputy said, "It is a multicolored glass pipe that is commonly used in the smoking of marijuana." In response to further questioning, the deputy testified that he has experience with marijuana pipes because he has found them in searches of persons and vehicles. He also testified to his belief that Exhibit 8 is a marijuana pipe because of its shape, color, and "the way that it's made." Mahoney did not object to this testimony. The deputy did not violate the district court's prohibition on testimony that the charred vegetable substance encrusted on the pipe is marijuana. Thus, the district court did not err by denying Mahoney's motion for a mistrial on this ground.

C. Sufficiency of the Evidence

Mahoney challenges the sufficiency of the evidence of possession of drug paraphernalia. Mahoney contends that the evidence is insufficient because the state did not prove that the charred vegetable substance encrusted on the pipe actually is marijuana. He asserts that there "was no scientific evidence of any kind, just the individual and indirect opinion of the Deputy." He further asserts, "A charred vegetable substance may be marijuana, but it *could be* tobacco, parsley or any other vegetables."

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they reached. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). 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 '[i]f 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 crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quoting *State v. McCullum*, 289 N.W.2d 89, 91 (Minn. 1979)).

"It is unlawful for any person knowingly or intentionally to use or to possess drug paraphernalia." Minn. Stat. § 152.092 (2010). "Drug paraphernalia" is defined as

> all equipment, products, and materials of any kind, . . . , which are knowingly or intentionally used primarily in (1) manufacturing a controlled substance, (2) injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, (3) testing the strength, effectiveness, or purity of a controlled substance, or (4) enhancing the effect of a controlled substance.

Minn. Stat. § 152.01, subd. 18(a) (2010). In a case of the civil forfeiture of drug paraphernalia, this court imposed two requirements. First, the item must "have the physical characteristics necessary to meet the statutory definition of drug paraphernalia" in section 152.01. Second, the possessor must intend that the item be used "as drug paraphernalia, that is, with controlled substances." *City of St. Paul v. Various Items of*

Drug Paraphernalia, 474 N.W.2d 413, 416 (Minn. App. 1991). We concluded that the requisite intent must be incorporated into the definition of "drug paraphernalia" to ensure that section 152.01, subdivision 18, is not unconstitutionally vague. *Id.* at 415-16. We read *Various Items of Drug Paraphernalia* to require the state to establish the same two elements in the prosecution of an individual charged with possession of drug paraphernalia—that the item has the characteristics described in section 152.01 and that the possessor intended that the item be used with a controlled substance. *See id.* at 416.

The state's evidence is sufficient because the deputy's testimony satisfied the two requirements of the crime of drug-paraphernalia possession. First, the deputy's testimony established that the glass pipe found in Mahoney's pickup truck has the "physical characteristics" of drug paraphernalia that are described in section 152.01, subdivision 18(a), because the deputy testified that the pipe was of a type used for smoking marijuana. Second, the testimony established that Mahoney intended to use the pipe to smoke marijuana, a controlled substance, or intended for someone else to do so. The deputy testified that he found the pipe in Mahoney's pickup truck while performing a post-arrest search. The deputy testified that there is no other purpose for the pipe other than to smoke marijuana. Thus, the evidence is sufficient to prove that Mahoney possessed drug paraphernalia.

II. Test Refusal

Mahoney also argues that the district court erred by misstating the law when it instructed the jury on the charge of refusal to submit to a chemical test. We apply an abuse-of-discretion standard of review to a district court's formulation of jury

instructions. *Stewart v. Koenig*, 783 N.W.2d 164, 166 (Minn. 2010). We will not reverse a conviction if jury instructions "overall fairly and correctly state the applicable law." *Id.* (quoting *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002)). An instruction is erroneous if it "materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

A. Definition of Probable Cause

The statute of which Mahoney was convicted provides, "It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." Minn. Stat. § 169A.20, subd. 2 (2008). A law enforcement officer may request (and thus, as a matter of law, require) a person to submit to a chemical test if the officer

> has *probable cause* to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist:
>
> (1) the person has been lawfully placed under arrest for violation of section 169A.20 or an ordinance in conformity with it;
>
> (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death;
>
> (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or
>
> (4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.51, subd. 1(b) (2008) (emphasis added).

Mahoney challenges the district court's definition of the term "probable cause," as used in section 169A.51, subdivision 1(b). That definition was discussed in depth at the instructions conference. The district court and counsel were aware of the 2009 version of the pattern instruction recommended by the district judge's association, which provides: "'Probable cause' means 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." *State v. Koppi*, 779 N.W.2d 562, 568 (Minn. App. 2010), *rev'd*, 798 N.W.2d 358 (Minn. 2011) (quoting 10A *Minnesota Practice*, CRIMJIG 29.28). The district court and counsel also were aware that this court had concluded that this pattern instruction contains an erroneous statement of the law. This court had held that a law enforcement officer must have an objective basis for believing that a crime has been committed and, thus, that the pattern instruction is incorrect to the extent that it states that a law enforcement officer must have only a subjective basis for believing that a crime has been committed. *Id.* at 568. The district court and counsel also were aware that the supreme court had, one month earlier, granted a petition for further review in *Koppi*.

Nonetheless, Mahoney and the state disagreed on how the district court should modify the pattern instruction. The district court ultimately adopted the state's proposal and instructed the jury as follows: "Probable cause means that the officer can explain *by reference to objective facts and circumstances* the reason that the officer *reasonably*

believed that it was more likely than not that the defendant drove a motor vehicle while under the influence of alcohol." (Emphasis added.) This instruction generally follows the pattern instruction but adds the language we have highlighted. Most notably, the district court inserted the phrase "by reference to objective facts and circumstances," which is language that appears in this court's *Koppi* opinion, in an attempt to remedy the inaccuracy of the pattern instruction. *See id.* at 567.

After oral argument in this case, the supreme court issued its opinion in *Koppi*. The supreme court held that the pattern instruction misstates the law of probable cause in three ways. First, the pattern instruction "fails to require an officer to articulate the specific observations and circumstances that support a finding of probable cause." 798 N.W.2d at 363. Second, the pattern instruction fails to require the jury to consider the totality of the circumstances and to apply an objective standard—"a reasonable police officer"—to determine whether there was probable cause that the defendant drove a motor vehicle while impaired. *Id.* at 363-64. Third, the pattern instruction states that a jury must determine "that it is more likely than not" that a defendant drove while impaired. *Id.* at 364. The supreme court stated that the law of probable cause requires that "under the totality of the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *Id.* (quotation omitted). Accordingly, the supreme court concluded that the district court in *Koppi* erred when instructing the jury on the definition of probable cause. *Id.*

On appeal, Mahoney contends that the district court erred by defining probable cause based on a subjective test, not an objective test. Mahoney contends that the

instruction is erroneous because "it defined the element of probable cause as a standard based on [an] individual officer's subjective explanation instead of a perspective of a prudent and cautious police officer." The supreme court's opinion in *Koppi* controls our analysis, and we construe Mahoney's argument to encompass the first and second reasons for the supreme court's reversal in *Koppi*.

We believe that the district court's modification of the pattern instruction adequately corrected the pattern instruction's misstatements of law. The district court cured the first defect of the pattern instruction by inserting the phrase "by reference to objective facts and circumstances." The district court actually used the word "objective," which, assuming it is understood by jurors, effectively negates any suggestion that the officer's subjective assessment would be sufficient. The district court also inserted language that requires the officer to "refer[]" to the "facts and circumstances" and to use those facts and circumstances to "explain" why probable cause was present, thereby anticipating the supreme court's statement in *Koppi* that the pattern instruction "does not require the officer to recite actual observations and circumstances supporting a finding of probable cause." *Id.* at 363.

The district court's revision of the pattern instruction also addressed the second defect identified by the supreme court in *Koppi*. The supreme court held that the pattern instruction was flawed because it did not require *the jury* to apply an objective standard to the totality of the circumstances. *See id.* 363-64. In this case, the district court did not make the same error because the revised instruction requires the officer to explain why he "*reasonably* believed" that probable cause was present, which connotes an objective

standard. This revision presaged the supreme court's statement that the jury must focus on whether "a *reasonable* police officer [would] entertain an honest and strong suspicion" that a driver was impaired. *Id.* at 364 (emphasis added). Granted, the district court's revision was short and subtle, but it effectively communicated that the jury was required to conduct its own evaluation of the reasonableness of the officer's probable-cause determination.

Thus, we conclude that the district court did not err for either of the reasons urged by Mahoney when it instructed the jury on the definition of the term "probable cause." Thus, the district court did not err when instructing the jury on the charge of test refusal.

B. Harmlessness

Even if we were to conclude that the district court erred when instructing the jury on probable cause, we nonetheless would conclude that the error is harmless. *See* Minn. R. Crim. P. 31.01. As stated in *Koppi*, "the question is whether the evidence points so overwhelmingly in favor of probable cause that we can say beyond a reasonable doubt that the instructional error had no significant impact on the verdict." *Koppi*, 798 N.W.2d at 365.

The supreme court concluded in *Koppi* that the erroneous instruction in that case was not harmless and, therefore, reversed the conviction and remanded for a new trial. *Id.* at 366. The evidentiary record in this case is, however, significantly different from the evidentiary record in *Koppi* in several important ways. First, the deputy in this case testified that he smelled a "strong" odor of alcohol on Mahoney's breath. This evidence stands in contrast to evidence that Koppi had only a "slight odor of alcohol." *Id.* at 365.

Second, the deputy testified that Mahoney offered "confused" or "slow" responses to the deputy's questions and spoke in "broken sentences." This evidence is unlike the evidence that Koppi did not slur his speech or otherwise display any audible indication of impairment. *Id.* Third, the deputy testified that when Mahoney exited the pickup truck, he was "swaying," "unable to stand straight," and "leaning into the tailgate of his truck while he answered the questions, to maintain his balance." In contrast, Koppi merely "kind of sway[ed] side to side a little bit." *Id.* Fourth, the deputy testified that Mahoney failed three field-sobriety tests. There was no such evidence in *Koppi* because Koppi refused to take field-sobriety tests. *Id.* at 360. And fifth, the deputy testified that he observed Mahoney's pickup truck cross the center line and drive onto a curb with two tires. In contrast, the officer in *Koppi* testified that "he did not observe Koppi's vehicle touch the center or fog lines prior to the stop." *Id.* at 365.

We conclude that this evidence would establish beyond a reasonable doubt that the district court's instruction, if erroneous or less than ideal in its definition of probable cause, did not have a significant impact on the jury's verdict. If the jury had received a perfect instruction on the definition of probable cause, we are convinced that the jury would have concluded that the deputy had probable cause to believe that Mahoney was driving while impaired and, thus, would have found Mahoney guilty of test refusal.

Affirmed.