STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1191

State of Minnesota,
Respondent,

vs.
Shane Victor Edstrom,
Appellant.

Filed September 12, 2011
Affirmed
Collins, Judge[*]

Washington County District Court
File No. 82-CR-08-4172

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

David T. Magnuson, Stillwater City Attorney, John D. Magnuson, Assistant City Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Collins, 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

COLLINS, Judge

Appellant challenges his convictions of second-degree test refusal and third-degree driving while impaired (DWI), arguing that the district court (1) violated his Sixth Amendment right to counsel; (2) committed plain error by misstating the definition of probable cause when instructing the jury on the test-refusal charge; and (3) committed plain error by allowing a police officer to offer expert-opinion testimony that appellant was under the influence of alcohol. Appellant also challenges the sufficiency of the evidence supporting the DWI conviction. We affirm.

FACTS

On April 21, 2008, a Stillwater police officer stopped a car driven by appellant Shane Edstrom. As Edstrom got out of the car, the officer observed multiple common signs of intoxication. A horizontal gaze nystagmus (HGN) test conducted by the officer further suggested Edstrom was under the influence of alcohol. The officer then administered a preliminary breath test (PBT), which registered alcohol concentration of .137. Edstrom was arrested for DWI.

At the police station, the arresting officer read Edstrom the Minnesota Implied Consent Advisory and enabled him to contact an attorney. The officer then offered Edstrom a blood or urine test. After Edstrom instead requested a breath test repeatedly,

the officer concluded that Edstrom had refused testing and he was charged with test refusal.[1]

At Edstrom's initial appearance on June 26, 2008, the district court approved his application for a public defender, and the public defender appeared with Edstrom at three subsequent hearings. On December 18, Edstrom appeared with his public defender, who asked the district court to determine probable cause on the basis of the complaint. Edstrom exclaimed: "Hold on, I wish to get rid of this guy right now," and sought a continuance to "look for counsel." The district court explained that Edstrom could "discharge the public defender" in general, not limited to the one assigned to him, in which event a different public defender would not be appointed. The district court continued:

> [Y]ou either have [the public defender] or you don't now. If you want to go find counsel and your counsel shows up on the day of your jury trial, that's fine, then you can discharge [the public defender] that day. You will have wasted a lot of time that these people would have loved to have had, but you can do that. What we're not going to do is try to spend any more time trying to figure out what we're going to do when we have a courtroom full of people waiting.

Based on the complaint, the district court found probable cause supporting the charges.

Edstrom then asserted his wish to dismiss his public defender and challenge probable cause. This exchange followed:

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[1] This court previously held that appellant's pre-test right to counsel was vindicated, his failure to chose one of the two offered tests constituted refusal, and that the refusal was not reasonable. *Edstrom v. Comm'r of Pub. Safety*, A08-1815 (Minn. App. Sept. 9, 2009) (order opinion).

> THE COURT: Okay. Well, probable cause has been considered.
> [EDSTROM]: I'm objecting to that, because I haven't had my rights to due process and be able to actually present due process issues.
> . . . .
> THE COURT: All right. So for now, the public defender is not discharged yet.
> [EDSTROM]: Well, I fired him.
> THE COURT: Not discharged.
> PUBLIC DEFENDER: You have to tell her you want to discharge the public defender.
> [EDSTROM]: I want to discharge the public defender. I don't want any probable cause issues done until I can properly motion the court.
> THE COURT: All right. And I will vacate my order finding probable cause. I set the case for jury trial, you sign for the date, the public defender is discharged.

Edstrom appeared pro se at hearings on March 9 and April 27, 2009. At the April 27 hearing, the district court informed Edstrom that the case would be set for trial "in approximately one month," noted that he had been granted "more than one continuance," and advised him that the matter would "proceed with or without counsel on the continued date."

On the scheduled jury-trial date, June 8, 2009, Edstrom appeared represented by private counsel who had been retained earlier that day. The case was continued to June 22 when, following discussion regarding a discovery violation, the district court continued the trial to August 10, adding that there would be no more continuances.

Edstrom failed to appear on August 10, and a bench warrant was issued. Edstrom was apprehended and appeared before the district court on November 30, 2009. At that

hearing, the district court found Edstrom eligible for the services of the public defender and reappointed the public defender. The case was continued for trial.

On the rescheduled jury-trial date, January 11, 2010, Edstrom appeared without counsel. When asked by the district court if he was representing himself, Edstrom alluded to his private counsel. The court reiterated that because he had discharged the public defender, Edstrom could no longer receive public defender services for this case. The court continued the hearing to the next day to allow Edstrom to contact his private counsel. In the meantime, the district court contacted Edstrom's private counsel who responded that he was unable to appear, and the court granted his request to withdraw. On January 12, after being informed of this, Edstrom agreed that he would represent himself. An evidentiary hearing was conducted on Edstrom's pretrial motions, at the conclusion of which the district court admonished Edstrom that he was free to be represented by private counsel, but that the public defender's office was "no longer an option."

Edstrom appeared for jury trial without counsel on February 22, 2010. Edstrom refused to sign the petition to proceed pro se and expressly declined to waive his right to counsel. The district court verified that Edstrom understood the charges against him; explained that the prosecution was going to present its case, consisting mainly of the arresting officer's testimony; explained to Edstrom his rights to remain silent, subpoena witnesses, and be tried by a jury; and reiterated that, having previously discharged the public defender, that office was no longer available to Edstrom. Edstrom was tried, found guilty, and convicted of second-degree test refusal in violation of Minn. Stat.

§ 169A.20, subd. 2 (2006), third-degree DWI in violation of Minn. Stat. § 169A.20, subd. 1 (2006), and driving after revocation in violation of Minn. Stat. § 171.24, subd. 2 (2006). This appeal followed.

D E C I S I O N

I.

We first address Edstrom's contention that his convictions must be reversed because the district court violated his Sixth Amendment right to counsel by requiring him to represent himself.

A criminal defendant is constitutionally guaranteed the right to the assistance of counsel. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. "Criminal defendants have a . . . corollary constitutional right to choose to represent themselves in their own trial." *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998). Thus, a defendant may waive the right to an attorney. *Id.* at 275 (citing *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023 (1938)). But any such waiver must be "competent and intelligent." *Id.* We review a waiver of a defendant's right to counsel to determine whether the "record supports a determination that [the defendant] knowingly, voluntarily, and intelligently waived his right to counsel." *State v. Garibaldi*, 726 N.W.2d 823, 829 (Minn. App. 2007).

"It is the duty of the trial court to ensure a knowing and intelligent waiver of the right to counsel." *State v. Krejci*, 458 N.W.2d 407, 412 (Minn. 1990). Minn. Stat. § 611.19 (2008) requires that "[w]here counsel is waived by a defendant, the waiver shall in all instances be made in writing, signed by the defendant, except that in such situation

if the defendant refuses to sign the written waiver, then the court shall make a record evidencing such refusal of counsel."

The record here does not contain a written waiver of the right to counsel, as Edstrom refused to sign the petition to proceed pro se. Moreover, although Edstrom agreed to represent himself at the January 11 hearing, he specifically stated on the day of trial that he did not agree to waive his right to counsel. Thus, we conclude that Edstrom did not make a constitutionally valid waiver of his Sixth Amendment right to counsel.

However, even absent a constitutionally valid waiver, the right to counsel may be relinquished by forfeiture. *See State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009) (stating that right to counsel may be relinquished by waiver, waiver by conduct, or forfeiture). A defendant who engages in extremely dilatory conduct may forfeit his right to counsel. *Id.* at 505. And unlike waiver or waiver by conduct, the district court need not conduct a waiver colloquy before finding that a defendant has forfeited the right. *Id.*

In *Jones*, the supreme court held that a defendant had forfeited his Sixth Amendment right to counsel. *Id.* at 506. There, "[a]lmost a full year" had passed between Jones's first appearance and trial, and Jones had appeared without counsel on eight occasions, including seven in which he was instructed to retain counsel. We conclude that *Jones* is controlling here. As in *Jones*, over a year passed between Edstrom's first appearance and trial. He also appeared pro se at multiple hearings and was instructed to retain counsel. And, on numerous occasions, the district court admonished Edstrom that it would not grant further continuances and that if he failed to retain counsel, he would have to represent himself. On this record, the district court did

not clearly err by concluding that Edstrom had relinquished his right to counsel. *See id.* at 506 (applying a clearly erroneous standard of review on whether a defendant had forfeited right to counsel).

II.

Edstrom next argues that the district court erroneously defined probable cause in its jury instructions on the test-refusal charge. The district court, reciting the then-applicable pattern instruction, instructed the jury that "'[p]robable 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." *See* 10A *Minnesota Practice*, CRIMJIG 29.28 (2008).

Edstrom did not object to this instruction. A defendant's failure to propose specific jury instructions or to object to instructions before they are given generally constitutes a waiver of the right to challenge the instructions on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But "a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id.* The plain-error doctrine is satisfied by (1) an error, (2) that is plain, and (3) affects a party's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are met, a reviewing court must determine "whether it should address the error to ensure fairness and the integrity of the judicial proceeding." *Id.*

While this appeal was pending, the supreme court rendered its decision in *State v. Koppi*, 798 N.W.2d 358 (Minn. 2011). In the opinion, the supreme court expressed its

disapproval of the same pattern jury instruction that is before us, finding it to be flawed in three respects: (1) "it does not require the officer to recite actual observations and circumstances supporting a finding of probable cause"; (2) it "fails to include the requirement that the jury evaluate the totality of the circumstances from the viewpoint of a reasonable police officer"; and (3) it "erroneously requires that an officer believe a driver 'was more likely than not' driving while impaired, a standard that is at odds with case law on probable cause requiring only an 'honest and strong suspicion' of criminal activity." 798 N.W.2d at 363. The supreme court's holding in *Koppi* compels the same conclusion here; because the pattern instruction is "an erroneous statement of the law in three significant respects," the district court erred by so instructing the jury. *See id.* at 364.

We next turn to whether the error was plain. An error is plain if it is clear or obvious. *State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007). An error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

While in this case the district court did not have the benefit of the supreme court's analysis and holding in *Koppi*, and was misled by the pattern instruction, there is an abundance of prior Minnesota caselaw defining probable cause in the context of DWI and test-refusal proceedings.[2] Probable cause exists when all the facts and circumstances would warrant a "cautious man" to believe that the suspect was driving or operating a

[2] We also note that the second prong of the plain-error test is satisfied when the error is shown to be plain "at the time of the appeal." *Griller*, 583 N.W.2d at 741.

vehicle while under the influence. *State v. Harris*, 295 Minn. 38, 42, 202 N.W.2d 878, 881 (1972); *State v. Olson*, 342 N.W.2d 638, 640 (Minn. App. 1984). It is evaluated 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) (quotation omitted). "But the issue is not whether the officers *subjectively* felt that they had probable cause but whether they had *objective* probable cause." *Costillo v. Comm'r of Pub. Safety*, 416 N.W.2d 730, 733 (Minn. 1987) (emphasis added); *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.").

The pattern instruction at issue contravened caselaw by indicating that a jury's probable-cause finding may be based solely on an officer's subjective belief as to the existence of probable cause. Notwithstanding the district court's reliance on a published pattern instruction, it was plain error for the district court to misstate the law of probable cause. *See also State v. Jones*, 556 N.W.2d 903, 915 (Minn. 1996) (Tomljanovich, J., concurring) (stating that it is the duty of the district court to properly instruct the jury); *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007) ("[J]ury instruction guides merely provide guidelines and are not mandatory rules."), *review denied* (Minn. Sept. 18, 2007).

Having determined that the district court plainly erred in its instruction to the jury, we turn to the third prong of the plain-error standard—whether the error affected Edstrom's substantial rights. *See Griller*, 583 N.W.2d at 740 (stating test). An error

affects a party's substantial rights if "the error was prejudicial and affected the outcome of the case." *Id.* at 741.

Edstrom argues that the error affected his substantial rights because it "eliminated an essential element of the charged offense," relying on *State v. Mahkuk*, 736 N.W.2d 675, 683 (Minn. 2007), and *Vance*, 734 N.W.2d at 659-62. In both cited cases, the instruction given by the district court relieved the state from its burden of proving an essential element beyond a reasonable doubt. *See Mahkuk*, 736 N.W.2d at 683 (an aiding-and-abetting instruction removed element that defendant knew a crime would be committed and intended his presence to further the commission of a crime); *Vance*, 734 N.W.2d at 661-62 (an assault instruction omitted the element of intent). But unlike those instructions, the instruction here addressed every element of the crime of test-refusal. We therefore analyze the third-prong of the plain-error doctrine applying the standard reaffirmed by the supreme court in *Koppi*. Under this test, even though the jury instruction was erroneous, "instructional error regarding an element of an offense requires a new trial only if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict."[3] *Koppi*, 798 N.W.2d at 364.

[3] We recognize that *Koppi* involved a properly objected-to instruction, and therefore utilized the harmless-error standard, which differs from the plain-error doctrine. But both the harmless-error standard and the third prong of the plain-error doctrine consider whether the error contributed to the verdict. The supreme court has therefore stated that cases applying the harmless-error standard, as well as those applying the plain-error doctrine, are relevant considerations when determining whether an erroneous jury instruction affected a jury's verdict. *Vance*, 734 N.W.2d at 660 n.8. Because both tests require that an error affect a defendant's substantial rights before a reversal is required, Minn. R. Crim. P. 31.01, here we employ the more stringent harmless-beyond-a-reasonable-doubt standard.

As in *Koppi*, the jury instruction here "deviates so substantially from applicable law that it is difficult to determine the impact of the erroneous instruction on the jury, particularly where the element of probable cause was fervently disputed by the parties at trial." *Id.* at 365. When analyzing whether the error was harmless beyond a reasonable doubt—or, in other words, whether the error affected Edstrom's substantial rights—we must determine "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." *Id.*

In *Koppi*, the arresting officer testified that Koppi had bloodshot eyes, emitted a slight odor of alcohol, became upset, and swayed slightly as he walked toward the rear of his vehicle. *Id.* The supreme court noted that, given those facts, "a properly instructed jury could have found that probable cause existed." *Id.* But the court went on to observe that suspects in DWI arrests tend to emit a "moderate to strong" (as opposed to slight) odor of alcohol, Koppi did not slur his speech, the officer did not observe erratic driving conduct, and the only aberrant driving behavior was excessive speed. *Id.* The supreme court, noting the conflicting nature of the trial evidence, concluded that the jury instruction was not harmless beyond a reasonable doubt. *Id.* at 365-66.

Here, there is no dispute about the traffic stop. The officer testified that Edstrom swayed as he got out of the car, his eyes were bloodshot and watery, there was a strong odor of alcohol coming from inside the car, and Edstrom admitted that he had consumed a couple of drinks. Perhaps, in light of *Koppi*, this evidence—without more—would not

be so overwhelmingly in support of probable cause as to lead us to conclude that the instructional error was harmless beyond a reasonable doubt.

But *Koppi* leaves open the question of the point at which evidence *is* sufficiently overwhelming to enable a reviewing court to conclude that an instructional error was harmless; which we believe to be susceptible of case-by-case analysis. And in addition to displaying typical indicia of intoxication similar to Koppi, Edstrom failed a specific sobriety test (HGN) and a PBT revealed an alcohol concentration of .137, well in excess of the legal-driving limit of .08. Edstrom offers an explanation for his failed HGN eye-movement evaluation, but he provides no explanation for the PBT result.

Edstrom does, however, argue that the results of the PBT are irrelevant to "the question of whether, before the officer administered the PBT, there was probable cause to believe that Edstrom was operating a vehicle under the influence of alcohol." But the critical inquiry is not whether the arresting officer had the requisite probable cause at the time a PBT is administered, but rather whether there was such probable cause at the time the chemical test of the driver's blood, breath or urine was requested. *See* Minn. Stat. § 169A.51, subd. 1(a) (stating conditions under which a chemical test is required); *see also State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986) ("An officer need not possess probable cause to believe that a DWI violation has occurred in order to administer a preliminary breath test."), *review denied* (Minn. May 16, 1986). And the legislature has explicitly provided that PBT results "must be used for the purpose of deciding . . . whether to require the tests authorized in section 169A.51." Minn. Stat. § 169A.41, subd. 2 (2006). We therefore reject Edstrom's argument that the PBT result

is not relevant to our decision on whether the instructional error affected his substantial rights.

While the limited cumulative indicia of intoxication in *Koppi* was deemed insufficient for the supreme court to conclude that the instructional error was harmless beyond a reasonable doubt, the cumulative similar signs of intoxication observed by the arresting officer here is buttressed by a failed HGN test and a PBT that registered Edstrom's level of alcohol concentration substantially in excess of the legal-driving limit. We hold that, with these additional factors, "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." *See Koppi*, 798 N.W.2d at 365 (conducting similar analysis). And because the instructional error was harmless beyond a reasonable doubt, it did not affect Edstrom's substantial rights, and he is not entitled to reversal on this ground.

III.

We next address Edstrom's assertion that the district court violated his right to a fair trial by allowing, albeit without objection, the arresting officer to testify that he "was impaired by alcohol." Expert testimony is admissible if it will assist the jury in understanding the evidence or in determining a fact in issue. Minn. R. Evid. 702. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. However, an expert should generally not address a mixed question of law and fact or make a legal analysis. *State v. Collard*, 414 N.W.2d 733, 736 (Minn.

App. 1987), *review denied* (Minn. Jan. 15, 1988). "Expert opinion testimony is not helpful if the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quotation omitted). Thus, a judge may exclude ultimate opinion testimony if the testimony "would merely tell the jury what result to reach." *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003).

An appellate court will reverse a district court's evidentiary rulings only for an abuse of discretion. *Bernhardt v. State*, 684 N.W.2d 465, 474 (Minn. 2004). We review unobjected-to evidence under a plain-error standard. *State v. Medal-Mendoza*, 718 N.W.2d 910, 919 (Minn. 2006). As discussed in part II, under the plain-error standard, Edstrom "must show that the district court's failure to sua sponte exclude the testimony at issue constituted (1) an error; (2) that was plain; and (3) that affected [appellant's] substantial rights." *Id.* at 919. Plain error is "clear error affecting substantial rights that resulted in a miscarriage of justice," and "an error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Vance*, 734 N.W.2d at 656 (quotation omitted). If this court determines that all three prongs of the plain-error test are satisfied, we may reverse in order to assure fairness and the integrity of the judicial process. *Id.*

Minnesota caselaw allows police officers to provide expert testimony "concerning subjects that fall within the ambit of their expertise in law enforcement." *State v. Carillo*, 623 N.W.2d 922, 926 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). This

includes testimony as to whether a driver was intoxicated. *State v. Peterson*, 266 Minn. 77, 82, 123 N.W.2d 177, 181 (1963) (allowing experienced officers to offer opinions that defendant exhibited signs of intoxication); *see also Carillo*, 623 N.W.2d at 926 (citing *Peterson* for this proposition).

Edstrom was charged with DWI in violation of Minn. Stat. § 169A.20, subd. 1(1). The jury's task as to that charge was to determine whether Edstrom met the legal definition of "driving under the influence of alcohol," a category of the crime of "driving-while-impaired." Minn. Stat. § 169A.20, subd. 1(1). Here, the arresting officer's testimony regarding the odor of alcohol coming from Edstrom's car; Edstrom's admission that he had been drinking; his bloodshot, watery eyes; his swaying as he got out of the car; the HGN test; and the PBT was relevant and could assist the jury in making its determination. However, the officer's affirmative response to the specific question of whether he "[felt] that [Edstrom] was impaired by alcohol that night" may have been improper. The challenged testimony comes perilously close to telling the jury "what result to reach," which the supreme court condemned in *Lopez-Rios*, 669 N.W.2d at 613.

Nonetheless, in our view, the district court's failure to sua sponte exclude this testimony was not plain error affecting Edstrom's substantial rights. *Cf. id.* (applying harmless-error standard and holding that error in admitting expert testimony that a defendant was a gang member was harmless when, given other testimony, no reasonable possibility existed that expert testimony substantially influenced guilty verdict). As discussed above, the litany of properly admitted evidence of Edstrom's intoxication—

including the HGN test and the PBT—was strong. And Edstrom was able to cross-examine the arresting officer regarding the observed indicia of intoxication. Therefore, any error in admitting the arresting officer's opinion testimony did not affect Edstrom's substantial rights because there is no reasonable likelihood that such error significantly affected the verdict. We conclude that Edstrom is not entitled to reversal on this ground.

IV.

Finally, Edstrom challenges his DWI conviction, arguing that the state failed to establish beyond a reasonable doubt that he was under the influence of alcohol. This argument is unavailing.

When considering a claim of insufficient evidence, an appellate court's 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 sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We "must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude the defendant was guilty of the offense charged." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). In conducting this analysis, we 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).

Edstrom analogizes this case to *State, City of Eagan v. Elmourabit*, 373 N.W.2d 290 (Minn. 1985). In *Elmourabit*, the supreme court affirmed this court's reversal of a driving-under-the-influence conviction, holding that the state had not presented sufficient evidence to sustain the conviction. 373 N.W.2d at 291. The evidence relied on by the

state in *Elmourabit* was as follows: (1) that Elmourabit drove 13 miles per hour over the speed limit; (2) his breath smelled of alcohol; (3) he had slurred speech, unsteadiness, and glassy, bloodshot eyes; (4) he exhibited "bizarre aggressive behavior and mood changes"; and (5) he had access to alcohol. *Id.* at 291-93. The supreme court, acknowledging that such issues are traditionally left to a jury, decided that the case was "one of those rare exceptions" and concluded that the state's evidence was insufficient to sustain the conviction. *Id.* at 293-94.

The present case, however, is more aligned with *State v. Mohomoud*, in which this court addressed whether a DWI conviction was supported by sufficient evidence. 788 N.W.2d 152, 155-57 (Minn. App. 2010), *vacated and remanded on evidentiary issue only* (Minn. Nov. 23, 2010). There, following a traffic stop, an officer smelled the odor of alcohol coming from Mohomoud and he admitted having consumed about four drinks. *Id.* at 154. The officer had Mohomoud perform the one-leg stand and walk-and-turn field sobriety tests, and concluded that he had failed both tests. *Id.* The HGN test suggested alcohol impairment, and the PBT registered alcohol concentration of .151. *Id.* We determined that despite the absence of evidence of "egregious driving conduct," it was nonetheless plausible that Mohomoud was impaired by the alcohol he consumed. *Id.* at 156. Noting that it was not necessary to prove that Mohomoud was "drunk", we concluded that the evidence was sufficient to support the DWI conviction. *Id.* at 156-57.

Here, as in *Mohomoud*, there is little affirmative evidence negating the plausibility of the charge. Because the evidence is sufficient to allow a jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable

doubt, to reasonably conclude that Edstrom was guilty of third-degree driving while impaired, he is not entitled to reversal of his DWI conviction on this ground. *See Bernhardt*, 684 N.W.2d at 476-77 (stating standard of review for sufficiency-of-the-evidence claims).

Affirmed.