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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1266

State of Minnesota,
Respondent,

vs.

Shane Victor Edstrom,
Appellant.

Filed September 12, 2011
Affirmed
Wright, Judge

Ramsey County District Court
File No. 62-CR-08-7282

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

John J. Choi, Ramsey County Attorney, Mark N. Lystig, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of first-degree driving while impaired, first-degree refusal to submit to chemical testing, and driving after cancellation. Appellant argues that (1) the district court erred by denying his requests for substitute counsel and

to proceed pro se, (2) the district court erred by permitting the state to introduce evidence of prior qualifying impaired-driving incidents in violation of the Confrontation Clause, and (3) the evidence presented at trial was insufficient to support the jury's guilty verdicts. Appellant advances additional arguments in his pro se supplemental brief. We affirm.

FACTS

On July 21, 2008, at approximately 2:27 a.m., Roseville Police Officer Matthew Brake observed a vehicle traveling 70 miles per hour, 15 miles per hour above the speed limit. Officer Brake followed the vehicle for approximately one-half mile during which he observed the vehicle accelerate to approximately 80 miles per hour, veer and nearly lose control, and drive on the shoulder of the highway. As a result, Officer Brake stopped the vehicle.

The vehicle's driver, appellant Shane Victor Edstrom, exited the vehicle. Edstrom exhibited bloodshot and watery eyes and slurred speech. He leaned against his vehicle and required Officer Brake's assistance when walking because he could not stand or walk on his own. Officer Brake detected the odor of an alcoholic beverage on Edstrom's breath. Officer Brake did not perform field sobriety tests because Edstrom claimed to experience difficulty walking and standing and to suffer from detached retinas. Edstrom also refused to submit to a preliminary breath test. Officer Brake determined from his squad-car computer that Edstrom's driver's license was cancelled as inimical to public safety. Officer Brake arrested Edstrom and transported him to the Roseville Police Department. After consulting with an attorney, Edstrom refused to take a blood or urine test.

Edstrom subsequently was charged with first-degree driving while impaired (DWI), a violation of Minn. Stat. §§ 169A.20, subd. 1(1), 169A.24, subd. 1(1) (2008); first-degree refusal to submit to chemical testing, a violation of Minn. Stat. §§ 169A.20, subd. 2, 169A.24, subd. 1(1) (2008); and driving after cancellation, a violation of Minn. Stat. § 171.24, subd. 5 (2008). The district court appointed counsel through the public defender's office to represent Edstrom. On the scheduled trial date, Edstrom advised the district court that he wished to challenge the state's evidence of prior impaired-driving incidents, and the district court permitted Edstrom to file a pro se affidavit on the condition that Edstrom's counsel review the affidavit first.

At a February 17, 2009 hearing, Edstrom's counsel filed a speedy-trial demand and a motion to dismiss for lack of any qualifying prior impaired-driving incidents. Edstrom filed additional pretrial motions pro se. At a March 2, 2009 hearing on the pending motions, Edstrom's counsel advised the district court that there was sufficient time to argue only the motion to dismiss. Edstrom personally objected to limiting the hearing to the motion to dismiss and advised the district court that he wanted to file an "affidavit of ineffective assistance." The district court explained to Edstrom that he must decide whether to represent himself or to retain his court-appointed counsel. Edstrom then declined to discharge his counsel, who presented an oral argument in support of the motion to dismiss.

At a hearing on March 16, 2009, the district court denied Edstrom's motion to dismiss. In light of the district court's decision, Edstrom withdrew his speedy-trial demand. Edstrom filed additional pro se motions; and the district court ordered Edstrom's counsel to review the pro se motions, put them in proper form, and serve them

on the state. The district court again advised Edstrom that he could choose to represent himself or retain his court-appointed counsel.

At a hearing later that month, Edstrom moved the district court to discharge his counsel and appoint substitute counsel. The district court again advised Edstrom that his options were to retain his court-appointed counsel or to waive his right to counsel and represent himself. The district court explained that it could appoint standby counsel if Edstrom wished to represent himself, but the district court denied the motion to substitute one court-appointed counsel for another because such substitutions are not permitted by the public defender's office. Edstrom declined to waive his right to counsel and consented to proceed with his court-appointed counsel. The district court scheduled a hearing for all remaining pretrial motions.

Edstrom subsequently moved for a continuance to hire private counsel, which the district court granted. He also filed several additional documents pro se. But Edstrom did not retain private counsel. In its June 18, 2009 order, the district court sealed Edstrom's previously filed pro se documents. The district court observed that it had repeatedly instructed Edstrom that his arguments and documents must be submitted through his counsel. The district court found that Edstrom understood his options and chose to be represented by his court-appointed counsel. In a separate order, the district court denied Edstrom's remaining motions and ordered him to appear for trial in November 2009. When Edstrom failed to appear, a bench warrant was issued for his arrest. After Edstrom's arrest, a new trial date of March 22, 2010 was ordered.

At a hearing on March 19, Edstrom moved to proceed pro se. When Edstrom expressed confusion regarding the potential sentence for the charged offenses, the district

court asked Edstrom whether he needed more sentencing information before deciding whether to represent himself at trial. Edstrom did not offer a direct response. He expressed confusion during the hearing, but he continued to state his desire to represent himself. The district court denied Edstrom's motion to proceed pro se, finding that Edstrom had not made a knowing and intelligent waiver of his right to counsel and expressing "substantial concerns" as to whether Edstrom understood the legal issues. The district court also found that Edstrom's motion to proceed pro se was untimely.

At trial, the district court received evidence of Edstrom's three prior impaired-driving incidents—certified copies of Edstrom's conviction of the DWI offense in 2005 and the 2007 and 2008 DWI-related driver's-license revocations—to satisfy the elements of first-degree DWI. The jury found Edstrom guilty of all charges. After denying Edstrom's motion for a downward durational or dispositional departure, the district court imposed a sentence of 46 months' imprisonment for first-degree DWI and a concurrent sentence of 180 days' imprisonment for driving after cancellation. This appeal followed.

D E C I S I O N

I.

A.

Edstrom argues that the district court abused its discretion by failing to conduct a searching inquiry to determine if exceptional circumstances warranted the appointment of substitute counsel. The decision to appoint substitute counsel is within the district court's broad discretion. *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). In determining whether the district court abused its discretion, we consider whether the defendant "was

so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial." *State v. Vance*, 254 N.W.2d 353, 358-59 (Minn. 1977).

An indigent defendant has a constitutional right to the effective assistance of counsel at every stage of the criminal process. U.S. Const. amend. VI; Minn. Const. art. I, § 6. But the right to counsel does not give an indigent defendant "the unbridled right to be represented by counsel of his own choosing." *State v. Fagerstrom*, 286 Minn. 295, 299, 176 N.W.2d 261, 264 (1970) ("The [district] court is obligated to furnish an indigent [defendant] with a capable attorney, but he must accept the [district] court's appointee."). To prevail on a request for substitute counsel, a defendant must establish that the request is reasonable and that it is justified by "exceptional circumstances." *Id.*

Minnesota courts have not specifically defined what constitutes an exceptional circumstance. *Gillam*, 629 N.W.2d at 449. But Minnesota caselaw indicates that exceptional circumstances are "those that affect a court-appointed attorney's ability or competence to represent the client." *Id.* at 449-50 (concluding that general dissatisfaction with court-appointed counsel's representation or disagreements about trial strategies did not meet "ability or competence" standard); *accord State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (concluding that "personal tension" between counsel and indigent defendant during trial-preparation phase was not exceptional circumstance); *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998) (concluding that general dissatisfaction or disagreement with court-appointed counsel's assessment of case does not constitute exceptional circumstance warranting substitute counsel); *State v. Benniefield*, 668 N.W.2d 430, 434-35 (Minn. App. 2003) (holding that defendant who was dissatisfied with court-appointed counsel's handling of case and wanted attorney who was "willing to

fight" was not entitled to substitute counsel), *aff'd*, 678 N.W.2d 42 (Minn. 2004). And the Minnesota Supreme Court has suggested that a searching inquiry may be necessary when a defendant raises "serious allegations of inadequate representation before trial has commenced." *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

Edstrom's assertion that he did not agree with his counsel's decision to address only one issue at the March 2 hearing does not constitute a "serious allegation[ ] of inadequate representation." That Edstrom's counsel limited the March 2, 2009 hearing to one issue does not reflect inadequate legal representation. Rather, it reflects his counsel's reasoned determination that only one pretrial issue could be adequately addressed during the one-hour hearing. The record expressly establishes that the other pretrial issues were not waived and were addressed at a subsequent hearing. Edstrom's related allegation that his court-appointed counsel, the prosecutor, and the judge held an ex parte meeting also is without merit because a meeting between the judge and counsel for both parties is not an ex parte communication. Edstrom's allegations did not warrant a more searching inquiry because they do not establish "exceptional circumstances" affecting his counsel's ability to represent him.

We observe that the district court's denial of Edstrom's request for substitute counsel before inquiring as to the reasons for the request is troubling. But absent evidence of inadequate representation, any error resulting from the district court's denial of Edstrom's motion for substitute counsel without first considering the reasons for Edstrom's motion is harmless. *See State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991) (concluding that district court's failure to state law correctly was harmless error when there was no showing of inadequate representation), *review denied* (Minn. Sept. 13,

1991); *see also McKee v. Harris*, 649 F.2d 927, 933 (2d Cir. 1981) (concluding that district court's failure to inquire into reasons for defendant's request for substitution of counsel was harmless error when failure to inquire caused no harm).

Edstrom also contends that the district court erred when it told him that, because the public defender's office does not permit substitution of court-appointed counsel, Edstrom had only two options: representing himself or retaining his current counsel. We agree that the district court misstated the law by suggesting that it lacked the discretion to appoint substitute counsel. *See Vance*, 254 N.W.2d at 358 (stating that district court may appoint substitute counsel when "exceptional circumstances" exist). But the misstatement of law did not prejudice Edstrom because the record demonstrates that Edstrom did not receive inadequate legal representation. *See Lamar*, 474 N.W.2d at 3 (holding that although district court inaccurately advised defendant that it could not appoint substitute counsel, error was harmless because defendant made no showing of inadequate representation). Thus, any error was harmless.

B.

Edstrom next argues that the district court erred by denying his motion to discharge his counsel and proceed pro se. When a criminal defendant moves to proceed pro se, a district court must determine (1) whether the request is clear, unequivocal, and timely and (2) whether the defendant knowingly and intelligently waives the right to counsel. *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990). To determine whether a waiver of the right to counsel is voluntary and intelligent, the district court "should comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant

to the defendant's understanding of the consequences of the waiver." *Worthy*, 583 N.W.2d at 276 (quotation omitted). The focus of the inquiry is whether the defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975) (quotation omitted); *accord State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997). We review a district court's denial of a self-representation motion for clear error. *State v. Christian*, 657 N.W.2d 186, 190 (Minn. 2003).

The district court denied Edstrom's self-representation motion because his waiver of the right to counsel was not knowing and intelligent. The record establishes that Edstrom exhibited confusion when questioned about his decision to waive his right to counsel and about the potential sentences for his offenses. Edstrom also expressed concern regarding his ability to prepare for trial adequately. He advised the district court that he lacked access to a typewriter or envelopes and that he needed more evidence. But he was not seeking a continuance because it was not his "intent to win this case," but rather "to go through the motions." On this record, we agree with the district court's conclusion that Edstrom's waiver of his right to counsel was not knowingly and intelligently made.

The district court also found that Edstrom's self-representation motion was untimely. A district court "cannot allow a defendant to use the right of self-representation to delay proceedings or to force a mistrial." *Christian*, 657 N.W.2d at 191 (quotation omitted); *accord State v. VanZee*, 547 N.W.2d 387, 391 (Minn. App. 1996) (holding that totality of evidence supported inference that defendant attempted to delay

trial because he knew that he had right to self-representation "weeks before trial" and that self-representation motion was untimely because it was not made in reasonable time before trial), *review denied* (Minn. July 10, 1996). Here, the record reflects that Edstrom filed his motion to proceed pro se three days before trial. Although the district court provided Edstrom multiple opportunities to proceed pro se at earlier hearings, he expressly declined to do so.

Accordingly, the district court did not clearly err by denying Edstrom's self-representation motion both because it was untimely and because Edstrom did not intelligently and knowingly waive his right to counsel.

II.

Edstrom next argues that his Confrontation Clause rights were violated when the district court admitted two driver's-license-revocation notices to prove prior impaired-driving incidents without requiring the state to produce a witness for cross-examination. The Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the use of a testimonial out-of-court statement in a criminal prosecution if the declarant is not available to testify at trial or has not previously been cross-examined by the defendant. *Crawford v. Washington*, 541 U.S. 36, 53-54, 59, 124 S. Ct. 1354, 1365, 1369 (2004). A testimonial statement is any statement "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (quotation omitted). Whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law, which we review de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

In *State v. Vonderharr*, we held that records from the Minnesota Department of Public Safety (DPS) are not testimonial for purposes of the Confrontation Clause because "the primary purpose of DPS driver's-license records is to provide current information about the license status of drivers to ensure that only drivers with valid licenses operate motor vehicles in the state." 733 N.W.2d 847, 852 (Minn. App. 2007). We also observed that, unlike the laboratory report at issue in *Caulfield*, 722 N.W.2d at 308-10, which the Minnesota Supreme Court held was testimonial for purposes of the Confrontation Clause, the defendant's DPS records in *Vonderharr* "were not prepared for the purpose of prosecuting [the defendant]. The records were produced before [the defendant] was charged and even before the incident that [led] to him being charged occurred." *Vonderharr*, 733 N.W.2d at 852; *accord State v. Jackson*, 764 N.W.2d 612, 618 (Minn. App. 2009) (observing that firearm-trace report was distinguishable from laboratory report in *Caulfield* because it was created many years before prosecution of appellant and was not prepared for purposes of litigation), *review denied* (Minn. July 20, 2009).

Here, as in *Vonderharr*, Edstrom's driver's-license-revocation notices from 2007 and 2008 were issued before Edstrom committed the charged offense and were not created primarily for the purpose of prosecution. Accordingly, the district court properly admitted the driver's-license-revocation notices offered to prove prior impaired-driving incidents without the state's production of a witness for cross-examination. Edstrom is not entitled to relief on this ground.

III.

Edstrom next asserts that the state presented insufficient evidence to sustain his convictions of first-degree DWI and first-degree refusal to submit to chemical testing. Edstrom contends that, because the state did not prove that his 2008 driver's-license revocation had not been subsequently challenged and rescinded, it does not qualify as a prior impaired-driving incident for the purpose of enhancement under section 169A.24, subdivision 1(1). The application of a statute to undisputed facts presents a question of law, which we review de novo. *State v. Maas*, 664 N.W.2d 397, 398 (Minn. App. 2003), *review denied* (Minn. Sept. 16, 2003). When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). We will not disturb the guilty verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

A misdemeanor DWI offense may be enhanced to a felony offense if a driver "violates section 169A.20 (driving while impaired)" and "commits the violation within ten years of the first of three or more qualified prior impaired driving incidents[.]" Minn. Stat. § 169A.24, subd. 1(1). The definition of a "qualified prior impaired driving incident" includes an impaired-driving conviction and an impaired-driving-related driver's-license revocation. Minn. Stat. § 169A.03, subd. 22 (2008). Edstrom does not contest that his actions on July 21, 2008 constitute a DWI offense. But Edstrom

challenges the sufficiency of the state's evidence of a driver's-license revocation in 2008 for refusing to submit to chemical testing.[1]

The availability of judicial review of a license revocation satisfies the due-process requirement of meaningful review even if the defendant does not seek review. *State v. Goharbawang*, 705 N.W.2d 198, 202 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006). But "the use of an *unreviewed* administrative revocation to enhance a subsequent DWI rises to the level of a violation of [the defendant's] right to procedural due process." *State v. Wiltgen*, 737 N.W.2d 561, 570 (Minn. 2007) (emphasis added). In *Wiltgen*, the defendant was charged with a DWI offense that was enhanced to a second-degree DWI offense based on the defendant's prior driver's-license revocation. *Id.* at 565. Although the defendant contested the earlier revocation by petitioning for judicial review, a hearing had not occurred when the defendant was charged with the subsequent DWI. *Id.* The *Wiltgen* court held that the statutory definition of a prior impaired-driving-related loss of a driver's license "limit[s] the use of a license revocation, as an aggravating factor, to a situation *where judicial review has already occurred* or been waived by the failure to file a timely petition." *Id.* at 571 (emphasis added). That legal standard has been satisfied here.

[1] In his pro se supplemental brief, Edstrom also challenges for the first time on appeal the sufficiency of the evidence supporting his 2005 DWI conviction and his 2007 driver's-license revocation to support enhancement in the instant case. This issue is raised without citations to the record or legal authority. We generally decline to decide issues that were not raised before the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also* Minn. R. Crim. P. 10.03 (stating that defendant waives an issue that is available but not raised in pretrial motion). Moreover, pro se litigants are held to the same standards as attorneys; and when a brief does not contain citations to the record or to legal authority in support of the issues raised, such issues are deemed forfeited. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007).

Edstrom challenged his 2008 driver's-license revocation, the Washington County district court sustained the revocation, and Edstrom's appeal of that decision was pending before the Minnesota Court of Appeals when the trial at issue here was held. The district court concluded that, "[n]otwithstanding the pending appeal, the Washington County license revocation was a final order, unlike the administrative order at issue in *Wiltgen*." We agree. Judicial review of a driver's-license revocation, or the waiver thereof, is required before it can be used for enhancement purposes. *Id.* But the *Wiltgen* decision does not require the exhaustion of all appeals after a district court has sustained a driver's-license revocation before it can be used as an aggravating factor in a subsequent DWI offense. Indeed, the *Wiltgen* court acknowledged that "the state can delay the issuance of [an enhanced] DWI complaint until after the implied consent hearing has been conducted and the revocation has been sustained," or amend an existing complaint after the implied-consent hearing has occurred. *Id.* at 572 n.7. Because Edstrom's 2008 driver's-license revocation was judicially reviewed and sustained, its use by the state to enhance Edstrom's DWI charge did not violate Edstrom's right to procedural due process.

Edstrom also contends in his pro se supplemental brief that he has the Sixth Amendment right, under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to have a jury determine the existence of his prior impaired-driving incidents. Because Edstrom provides no legal argument for this assertion, we need not address this issue. *Meldrum*, 724 N.W.2d at 22. We nonetheless observe that the state is not required to prove all of the facts surrounding a prior driver's-license revocation beyond a reasonable doubt; rather, only the existence of the driver's-license revocation must be proved. *State*

v. Omwega, 769 N.W.2d 291, 295 (Minn. App. 2009), *review denied* (Minn. Sept. 29, 2009). Here, the state presented evidence of Edstrom's qualified prior impaired-driving incidents, and the district court instructed the jury to determine whether the state proved the existence of those incidents beyond a reasonable doubt. The jury determined that the state did so.

In addition to evidence of Edstrom's three prior impaired-driving incidents, the record demonstrates that on July 21, 2008, Officer Brake observed Edstrom's vehicle accelerate to approximately 80 miles per hour, a speed well above the speed limit. Edstrom veered and nearly lost control of the vehicle. Officer Brake detected the odor of an alcoholic beverage on Edstrom's breath, Edstrom's eyes were bloodshot and watery, his speech was slurred, and he was unable to stand or walk without assistance. When asked to submit to chemical testing, Edstrom refused. The record contains ample evidence to sustain Edstrom's convictions of first-degree DWI and first-degree refusal to submit to chemical testing. Thus, he is not entitled to relief on this ground.

IV.

In his pro se supplemental brief, Edstrom also argues that the district court exhibited judicial bias, violated his right to a speedy trial, and improperly instructed the jury regarding his refusal to submit to a chemical test.

A.

Edstrom contends that the district court exhibited judicial bias and participated in ex parte communications. A district court judge is presumed to discharge judicial duties in each case with neutrality and objectivity; such presumption is overcome only if the party alleging bias provides evidence of favoritism or antagonism. *State v. Burrell*, 743

N.W.2d 596, 603 (Minn. 2008) (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994)). Our careful review of the record establishes that the district court judge did not participate in ex parte communications, collude with the prosecution, or exhibit favoritism or antagonism as Edstrom alleges. Moreover, Edstrom misquotes the record with respect to alleged inappropriate comments made by the district court judge. Edstrom's allegations of judicial misconduct lack any merit.

B.

Edstrom also argues that he was deprived of the right to a speedy trial. But the record does not support Edstrom's contention. Edstrom withdrew his first speedy-trial demand at the March 16, 2009 hearing. Subsequently, when Edstrom attempted to submit a pro se speedy-trial demand, the district court directed him to submit any motions through his attorney. The record does not reflect that a motion was made. Moreover, "when the overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy trial violation." *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993); *accord State v. Vonbehren*, 777 N.W.2d 48, 53 (Minn. App. 2010) (observing that speedy-trial right may be waived by defendant's conduct), *review denied* (Minn. Mar. 16, 2010). Edstrom requested and received two continuances. Edstrom failed to appear for his November 2009 trial, and his trial began within a month of his arrest on a bench warrant issued for his failure to appear at the November 2009 trial. Edstrom is not entitled to relief on this ground.

C.

Edstrom asserts that the district court erred by erroneously instructing the jury on the law regarding the offense of refusal to submit to chemical testing. In *State v. Koppi*,

the Minnesota Supreme Court held that the district court misstated the law when it instructed the jury that probable cause means that "the officer can explain the reason the officer believes" that the defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. 798 N.W.2d 358, 363-64 (Minn. 2011). The *Koppi* court reasoned that this jury instruction articulated an incorrect standard of probable cause because (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." *Id.* at 363 (quotation omitted). In applying the harmless-error standard in *Koppi*, the Minnesota Supreme Court held that the evidence must "overwhelmingly point toward a finding of probable cause" for the jury instruction to be harmless error. *Id.* at 365.

Here, regarding the offense of refusal to submit to chemical testing, the district court instructed the jury that probable cause "means that it was more likely than not that the defendant drove a motor vehicle while under the influence of alcohol in view of the totality of the circumstances." Although this instruction is not the same instruction delivered in *Koppi*, it suffers from two of three flaws identified in *Koppi*. It did not (1) "require the officer to recite actual observations and circumstances" supporting a finding of probable cause and (2) articulate the requirement that an officer needs only an "honest and strong suspicion" of criminal activity to satisfy the probable-cause element.

Id. at 363. Accordingly, the district court erred by misstating the law when instructing the jury on the probable-cause element of refusal to submit to chemical testing.

An error in a jury instruction addressing 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." *Id.* at 364 (quoting *State v. Valtierra*, 718 N.W.2d 425, 433 (Minn. 2006)). The error in *Koppi* was not harmless beyond a reasonable doubt because of the seriousness of the jury-instruction error and the conflicting nature of the evidence supporting probable cause in that case. *Id.* The erroneous instruction in *Koppi* articulated a subjectively reasonable standard for probable cause. *Id.* The arresting officer testified that the defendant "had bloodshot eyes, emitted a slight odor of alcohol, became upset, and was kind of swaying from side to side a little bit when walking toward the back of his truck." *Id.* at 365 (internal quotation omitted). But the arresting officer also testified that the defendant did not slur his speech and that his only suspicious driving behavior was traveling 11 miles per hour above the speed limit. *Id.*

By contrast, the evidence supporting probable cause was overwhelming here. Officer Brake testified that he observed Edstrom's vehicle travel approximately 80 miles per hour, veer and nearly lose control, and drive on the shoulder of the highway. After stopping the vehicle and speaking with Edstrom, Officer Brake detected the odor of an alcoholic beverage on Edstrom's breath. And Edstrom exhibited bloodshot and watery eyes, slurred speech, and an inability to stand or walk on his own. The evidence amply supports a finding of probable cause. Moreover, the jury-instruction error at issue here was less serious than in *Koppi* because it did not articulate a subjective standard for

probable cause. Accordingly, the error was harmless beyond a reasonable doubt, and Edstrom is not entitled to relief on this ground.

Affirmed.