**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-1696**

State of Minnesota,
Respondent,

vs.

Jonathan Douglas Kurilla,
Appellant.

**Filed September 26, 2011**
**Affirmed**
**Kalitowski, Judge**

Cass County District Court
File No. 11-CR-09-1411

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

Christopher J. Strandlie, Cass County Attorney, Aaron K. Jordan, Assistant County Attorney, Walker, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Michael Cromett, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Klaphake, Judge; and Stoneburner, Judge.

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

**KALITOWSKI**, Judge

Appellant Jonathan Douglas Kurilla was convicted of criminal vehicular operation and injury with a blood alcohol content of .08 or more following his operation of a plane

that crashed into a lake. Appellant argues that the circumstantial evidence of his guilt was insufficient to support the jury's verdict. He also contends that he was denied his right to a fair trial because the district court erroneously admitted certain evidence and the prosecutor committed misconduct in closing argument. We affirm.

## D E C I S I O N

### I.

An appellate court "will not disturb a guilty verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (quotations omitted). We must review the record "in the light most favorable to the [s]tate." *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). But "[a] conviction based on circumstantial evidence receives stricter scrutiny than a conviction based on direct evidence." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) (plurality opinion); *see State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (stating that a conviction based on circumstantial evidence is subject to stricter scrutiny).

Circumstantial evidence "is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994) (quotation omitted). "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any

reasonable inference other than guilt." *Stein*, 776 N.W.2d at 714 (quotation omitted). The inquiry must demonstrate that "there are no other reasonable, rational inferences that are inconsistent with guilt." *Id.* at 716. Unlike the deference an appellate court gives when reviewing circumstances proved, we do not defer to the fact-finder's choice between reasonable inferences. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010). But juries are generally "in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008).

Appellant argues that because the state failed to produce any direct evidence at trial regarding his level of intoxication prior to or while flying his plane, the evidence was insufficient to support the jury's verdict finding him guilty of criminal vehicular operation and injury with a blood alcohol content (BAC) of over .08 or more. We disagree.

Claiming post-accident consumption of alcohol, appellant compares this case to the unpublished case of *State v. Riesgraf*, No. A10-0985, 2011 WL 891118 (Minn. App. Mar. 15, 2011). But unpublished cases are not precedential. Minn. Stat. § 408A.08, subd. 3(b) (2010).

Moreover, unlike the facts in *Riesgraf*, here the state provided evidence to the jury regarding the timing of events leading up to and immediately following the accident. Appellant does not contest that he crashed the aircraft he was operating into a lake. Persons on a pontoon in the lake called 911 immediately after they observed the plane crash, and proceeded to rescue appellant and the passenger who had been riding with

appellant on the plane. The police officers who responded to the call about the plane crash received the dispatch at 7:21 p.m. The officers arrived on the scene and found appellant at a bar a few minutes before 7:40 p.m. and appellant was arrested at 8:08 p.m. Appellant was taken to the hospital and submitted to a blood test at 8:44 p.m., which revealed a BAC of .24.

The jury heard testimony from an expert toxicologist that in order for appellant to have a BAC of .24, someone of his size would have to have consumed at least 11 drinks. Thus, based on the evidence available to the jury, appellant would had to have consumed the equivalent of 11 drinks in the 20 minutes or less between the airplane crash and when the officers arrived at the bar. This is not a reasonable scenario and the only other reasonable inference available to the jury was that appellant consumed alcohol prior to flying the plane.

Furthermore, appellant called into question his own credibility by presenting varying accounts as to how much alcohol he consumed and the time at which he consumed it. And appellant's trial testimony regarding his alleged alcohol consumption differed from the officers and other witnesses who testified at trial. One of the officers testified that appellant told the officer that he had arrived at the bar "about five minutes before" the officers. At the pretrial hearing on June 23, 2009, appellant stated that it had been 35 minutes. Appellant testified at trial that he was actually at the bar "a good 20 minutes" before the officers, but agreed that he was still "sopping wet" when they arrived. Appellant told one of the officers that he was served mixed drinks on the pontoon after he was rescued. But the pontoon driver and the other passenger from the

plane testified that appellant was not served any alcohol on the pontoon. At trial, appellant said he was not given any alcohol on the pontoon boat after he was rescued but instead testified that he had three mixed drinks on a different pontoon boat docked near the bar. And appellant testified that he was drinking beer in front of the police officers. But the officers testified that they would not have allowed appellant to drink in front of them. The officers testified that when they questioned appellant at the bar, he told them that he had had part of a drink following the plane crash. But appellant testified at trial that he consumed five drinks at the bar before the police questioned him.

It is the prerogative of the jury not to believe appellant regarding his alcohol consumption after the plane crash, and we defer to the jury for such credibility determinations. *State v. Carufel*, 783 N.W.2d 539, 546 (Minn. 2010). The jury's assessment of appellant's credibility coupled with the other evidence presented at trial provided sufficient evidence to support appellant's conviction.

**II.**

Appellant argues that "his conviction must be reversed because the cumulative effect of errors committed during trial denied [him] the right to a fair trial." We disagree.

**Appellant's refusal to take a preliminary breath test**

Appellant argues that the district court erred when it allowed the state to introduce evidence that he refused to take a preliminary breath test (PBT). If there is a proper objection, this court reviews evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "Absent a clear abuse of discretion, a district court's

evidentiary ruling will not be reversed." *State v. Bolstad*, 686 N.W.2d 531, 541 (Minn. 2004).

Prior to the start of trial, appellant requested that the court exclude any evidence regarding his refusal to take a PBT; thus, appellant properly objected to the evidence. Appellant argued that such evidence is not relevant, nor is it admissible under Minn. Stat. § 169A.41, subd. 2 (2008), which states that the results of a PBT should not be used in any court action, subject to some exceptions not applicable here.

Generally, evidence is admissible only if it is relevant. Minn. R. Evid. 402. Evidence is relevant when it logically tends to prove or disprove a material fact. *State v. Lee*, 282 N.W.2d 896, 901 (Minn. 1979). Here, evidence of appellant's refusal to submit to a PBT was probative of whether he was operating a vehicle while under the influence of alcohol. Part of the state's theory of the case was that appellant had the ability to appear sober while under the influence because of his past experience with alcohol. In refusing to take the PBT, appellant stated that he did not want to take the test because PBTs "always read high," he "didn't trust them," and that he'd just drank some alcohol so that would "make that reading high." Thus, relevant to the state's argument, these statements demonstrate that appellant had previous experience with PBTs and blood testing. Furthermore, Minn. Stat. § 169A.41, subd. 2, only prohibits the test results of a PBT from coming in as evidence. The statute is silent regarding the evidence of a person's refusal to take the test.

Moreover, even if it was error to admit evidence of appellant's refusal to take the PBT, we conclude that the error was harmless beyond a reasonable doubt. *State v.*

*Courtney*, 696 N.W.2d 73, 79-80 (Minn. 2005) (stating that even if evidence was erroneously admitted, the conviction may stand if the error was harmless beyond a reasonable doubt, meaning that the guilty verdict was "'surely unattributable' to the error" (quoting *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997))). Here, the prosecutor made no subsequent references during the trial to appellant's refusal to take the test, not even to support his point in closing argument that appellant was an experienced drinker. And the jury was provided with ample evidence other than appellant's refusal to take the test on which to base its finding that appellant was intoxicated: the officers' observations of appellant's bloodshot, watery eyes and slurred speech; his poor performance on the field sobriety tests; and his BAC of .24.

**Testimony from the expert toxicologist**

Appellant argues that the district court abused its discretion by allowing into evidence the testimony of the state's expert toxicologist. Appellant asserts that the state did not fulfill its obligation under Minn. R. Crim. P. 9.01, subd. 1(4)(a) to disclose "[t]he results or reports of physical or mental examination, scientific tests, experiments, or comparisons made to the case," because the prosecutor did not disclose the substance of the toxicologist's testimony prior to trial. A testifying expert "who created no results or reports in connection with the case must provide to . . . the defense a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications." Minn. R. Crim. P. 901, subd. 1(4)(c).

Here, the district court allowed the testimony of the expert as rebuttal evidence, reasoning that the toxicologist "would not have had any numbers to calculate until defendant testified." The "determination of what constitutes proper rebuttal evidence rests almost wholly in the discretion of the district court." *State v. Eling*, 355 N.W.2d 286, 291 (Minn. 1984) (citing *State v. Collins*, 276 Minn. 459, 473, 150 N.W.2d 850, 860 (1967)). Generally, rebuttal evidence "consists of that which explains, contradicts, or refutes the defendant's evidence." *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993). Rebuttal testimony is "a function of the trial as it develop[s]" and thus rebuttal witnesses are not the same as witnesses whom a party "intends to call as witnesses at the trial." *See State v. Anderson*, 405 N.W.2d 527, 531 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. July 22, 1987).

We conclude that the district court did not abuse its discretion in admitting the toxicologist's testimony as rebuttal evidence. The toxicologist was not called as a witness during the state's case-in-chief, and his testimony was used solely to rebut appellant's affirmative defense that he did not start drinking until he arrived at the bar after the plane crash. Thus, the disclosure requirement does not apply to the toxicologist's testimony. *See State v. Yang*, 627 N.W.2d 666, 677 (Minn. App. 2001), *review denied* (Minn. July 24, 2001) (stating that the disclosure requirement does not apply to rebuttal evidence).

**Prosecutorial misconduct**

Appellant argues that the state committed prejudicial prosecutorial misconduct because it twice referred to appellant as an alcoholic in its closing argument. The

standard of review for claims of prosecutorial misconduct depends on whether the defendant objected at trial. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009).

This court has the discretion to review unobjected-to prosecutorial misconduct if plain error is established. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, (1) the prosecutor's unobjected-to argument must be erroneous, (2) the error must be plain, and (3) the error must affect the appellant's substantial rights. *Id*. at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), or if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. The burden rests with the appellant to demonstrate that plain error has occurred. *Id*. If plain error is established, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Id.* An error affects substantial rights when it was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If plain error affecting substantial rights is established, this court will assess whether to address the error to ensure the fairness and integrity of the judicial proceedings. *Id.* at 740, 742 (stating that a court may exercise discretion to correct a plain error only if such error seriously affected the fairness, integrity, or public reputation of judicial proceedings).

Objected-to errors of misconduct are reviewed under a two-tiered harmless-error test: "For cases involving claims of unusually serious prosecutorial misconduct, there must be certainty beyond a reasonable doubt that misconduct was harmless. We review cases involving claims of less-serious prosecutorial misconduct to determine whether the

misconduct likely played a substantial part in influencing the jury to convict." *Yang*, 774 N.W.2d at 559 (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)). *But see State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (stating that the continued viability of the two-tiered *Caron* approach has not yet been decided).

Appellant points to two specific instances during closing argument where the prosecutor referred to him as an alcoholic, only one of which he objected to. Because appellant takes issue with the prosecutor generally referring to him as an alcoholic, for purposes of this analysis, we will assume that he objected to both instances, and determine whether the alleged misconduct entitles appellant to a new trial. *See id.* (analyzing alleged instances of prosecutorial misconduct as if they had all been objected to, even though some had been and some had not).

In his closing argument, the prosecutor commented on why the witnesses who testified did not observe signs of appellant's intoxication before the accident, stating that "[s]ome of you have experience with alcoholics that did a good job of covering their disease. Perhaps that's the reason." Appellant did not object to this statement. In his rebuttal closing argument, the prosecutor also stated that "[i]t was raised that . . . a person who was drunk would not be able to take clear pictures . . . . I would ask you, would an alcoholic be able to take those pictures? Would an alcoholic be able to --," at which point defense counsel objected, arguing that the prosecutor was "characterizing improperly." The district court sustained the objection.

The state correctly concedes that "gratuitously" calling appellant an alcoholic would have been improper, because it may inflame the passions and prejudices of the

jury and distract the jury from deciding whether the state had met its burden. "Prosecutors may not make arguments that are not supported by evidence or that are designed to inflame the passions and prejudices of the jury." *State v. Bobo,* 770 N.W.2d 129, 142 (Minn. 2009). But we agree with the state that here, the term "alcoholic" was not "thrown about gratuitously." Appellant's defense, that he did not consume alcohol before flying the plane, rested largely on the fact that the witnesses who testified at trial did not observe signs of intoxication in appellant prior to him flying the plane. By asking the jury to consider the possibility that appellant was an experienced drinker and thus, better able to mask his intoxication in front of others, the state was refuting appellant's theory. A prosecutor may present to the jury all legitimate arguments on the evidence, analyze and explain the evidence, and present all proper inferences to be drawn from the evidence in closing argument. *State v. Starkey*, 516 N.W.2d 918, 927 (Minn. 1994).

Furthermore, we conclude that the prosecutor's reference to appellant as an alcoholic did not play a substantial part in influencing the jury to convict. This court considers closing arguments in their entirety in determining whether prosecutorial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). The challenged remarks of the prosecutor are a small part of the prosecutor's closing argument, which primarily concentrated on the inconsistencies in appellant's testimony and the implausibility of appellant's assertion that he drank enough alcohol in 20 minutes to reach a BAC of .24. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (refusing to grant new trial when objectionable statements consisted of two sentences in a closing argument covering 20 pages in transcript).

On this record, we conclude that appellant's substantial rights were not affected nor was the fairness and integrity of the proceedings disrupted by the prosecutor's statements at closing argument. The alleged errors appellant raises on appeal, considered separately or cumulatively, do not warrant a new trial.

**Affirmed.**