STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1597

State of Minnesota,
Respondent,

vs.

Shawn Corey Seebeck,
Appellant.

Filed December 19, 2011
Affirmed
Ross, Judge

Lyon County District Court
File No. 42-CR-09-1068

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

Richard R. Maes, Lyon County Attorney, Tricia Zimmer, Assistant County Attorney, Marshall, Minnesota (for respondent)

Steven J. Wright, Special Assistant State Public Defender, Minneapolis, Minnesota; and

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

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Hudson, Judge.

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

ROSS, Judge

A sheriff's deputy found Shawn Seebeck at two o'clock in the morning, alone, drunk, and wandering away from an unoccupied pickup truck on Highway 23. Seebeck agreed with the deputy that he should not have been driving because of his license revocation, suggested that he was not too impaired to drive, performed field sobriety tests, was arrested for drunk driving, and then submitted to a blood test without ever suggesting that he actually had *not* been driving. At the impaired-driving trial, the state emphasized Seebeck's omission to the jury, which convicted him. We must decide whether the federal and state constitutions prohibited the state from emphasizing Seebeck's silence to bolster its trial position that, by saying nothing, Seebeck tacitly verified the deputy's understanding that he had been driving. We must also decide whether the prosecutor plainly erred by misstating the law of physical control of a vehicle under the impaired-driving law. Because his right to remain silent does not prevent the state from using evidence of his prearrest silence and use of his postarrest silence was at most harmless error, and because the prosecutor did not misstate the law of physical control, we affirm.

FACTS

At about 2:00 a.m. on October 7, 2009, Lyon County Sheriff's Deputy Jeff Hasch noticed an unoccupied pickup truck on the northbound shoulder of Highway 23 south of Cottonwood. Deputy Hasch drove north and soon encountered a man, Shawn Seebeck, walking toward Cottonwood from the pickup. Seebeck told Deputy Hasch that his truck

had run out of gas, and the deputy learned that the state had revoked Seebeck's driver's license. Seebeck said that he was unaware his license was revoked but acknowledged that he should not be driving. Deputy Hasch told Seebeck he would cite him for driving after revocation. Seebeck said nothing during this exchange that suggested that he had not been driving.

It was cold, so Deputy Hasch asked Seebeck to sit in his patrol car while he drafted the citation. Once both men sat inside the car, the deputy noticed that Seebeck smelled strongly of alcoholic beverages. He asked Seebeck how much he had to drink and if he thought he should be driving. Seebeck told the deputy that he drank three beers but that he was fine to drive. Unconvinced, the deputy administered field sobriety tests and a preliminary breath test. Seebeck's field testing indicated intoxication and the breath test confirmed it. Deputy Hasch told Seebeck he was under arrest for driving while intoxicated. Seebeck said nothing during the drunk-driving discussion, the field sobriety and breath tests, or the arrest for drunk driving to suggest that he had not been driving.

The deputy took Seebeck to the Lyon County jail. There he read Seebeck the Minnesota Implied Consent Advisory. Specifically, he told Seebeck, "Shawn Corey Seebeck, I believe you have been driving or operating or controlling a motor vehicle in violation of Minnesota's D.W.I. laws and you have been placed under arrest for this offense." Seebeck indicated "yes," he understood the advisory, and he submitted to a blood test. During this exchange, Seebeck again said nothing to call into question the assumption that he had been driving.

Seebeck's blood test revealed that his alcohol concentration was 0.15, and the state charged him with two counts of driving while impaired and driving after license revocation.

Before trial, Seebeck moved the district court to prohibit the state from presenting evidence of his prearrest and postarrest silence bearing on the issue of whether he had been driving. The district court denied his motion. The state elicited trial testimony from Deputy Hasch. The testimony highlighted that, although the prearrest and postarrest events and discussions implied that Seebeck had been driving, Seebeck never objected to being treated as the driver or said anything to contradict the belief that he was.

But Seebeck's stepson testified that Seebeck was not the driver. He said that he had driven Seebeck to Marshall and dropped him off at a bar. He told the jury that he returned a few hours later and collected Seebeck from a different bar before starting toward home in Cottonwood. He said that Seebeck was passed-out drunk on the way home and that, about two miles short of Cottonwood, the truck ran out of gas. He testified that he decided to walk home for gas, leaving Seebeck behind, unconscious in the truck.

Seebeck picked up the story from there testifying in his own defense. He claimed that he awoke and found himself alone in the truck and that he got out to look for his stepson. He said he removed the key from the ignition, shut off the hazard lights, and started walking toward town. The prosecutor challenged that account on cross-examination, asking why Seebeck never told Deputy Hasch that his stepson had been driving. Seebeck responded that his experience with law enforcement taught him not to

argue with police and that he had "a feeling" the deputy would not believe him. For those reasons, he claimed, he thought he should exercise his right to remain silent.

The prosecutor summed up her case offering alternative theories for a guilty verdict. She first maintained that Seebeck's claim not to have been driving was simply unbelievable. She alternatively maintained that even if Seebeck's version were true, he was still guilty of impaired driving because, driving or not, an intoxicated person need only be in physical control of a vehicle to violate the law and Seebeck demonstrated his physical control by his described conduct after he awoke. She read aloud the jury instruction on physical control, then offered a brief interpretation of the instruction.

The prosecutor then recounted Seebeck's story: he woke up; he walked around the truck; he turned off the hazard lights; he pulled the key from the ignition. She summarized, "I would submit to you ladies and gentlemen, that even under that scenario, . . . [Seebeck] was in a position to direct the movement of the vehicle or keep the vehicle in restraint. Engine doesn't have to be running. The vehicle doesn't have to be operable." She argued that the jurors should find him guilty "whether or not [they] believe that he drove it to that location where . . . he ran out of gas, or whether he simply just woke up after being passed out in the vehicle."

The jury found Seebeck guilty of driving while impaired but acquitted him of driving after revocation. Seebeck moved for judgment of acquittal or for a new trial for impaired driving, and the district court denied the motion. Seebeck appeals.

D E C I S I O N

I

Seebeck contends that the district court erred by permitting the state to use evidence of his silence in its case-in-chief. Evidentiary rulings generally rest in the district court's discretion and we will not reverse them absent a clear abuse of discretion. *State v. Glaze*, 452 N.W.2d 655, 660 (Minn. 1990). But Seebeck's challenge to the evidentiary ruling implicates his constitutional rights. He contends that the state unconstitutionally relied on his silence to convict him. Both the United States and Minnesota Constitutions guarantee a criminal defendant the right not to be compelled to testify against himself. U.S. Const. amend. V; Minn. Const. art. I, § 7. This right has been construed as a right to remain silent. *Griffin v. Cal.*, 380 U.S. 609, 614–15, 85 S. Ct. 1229, 1232–33 (1965). Because exercising this right may be interpreted as an admission of guilt, allowing the state to introduce evidence of a defendant's silence may deprive him of a fair trial. *Doyle v. Ohio*, 426 U.S. 610, 617–18, 96 S. Ct. 2240, 2245, (1976).

Seebeck challenges as unconstitutional the district court's admission of evidence of his prearrest silence and evidence of his postarrest silence. Neither challenge persuades us to reverse his conviction.

Seebeck's constitutional challenge to the use of his prearrest silence fails without the need for much discussion under the supreme court's recent decision in *State v. Borg*, No. A09-0243, ___ N.W.2d ____, 2011 WL 5560172 (Minn. Sept. 21, 2011). The *Borg* court reasoned that a defendant's silence that "is not in response to a choice compelled by the government to speak or remain silent" is not subject to Fifth Amendment protection.

Id. at *7. After it extensively quoted Justice Stevens's concurring opinion in *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124 (1980) (Stevens, J., concurring), the court expressly adopted his view that the decision whether to admit evidence of prearrest silence (as opposed to postarrest silence) raises no constitutional concerns, posing instead only "a routine evidentiary question." *Id*. at *6–7 (quotations omitted). A prosecutor's comment about a defendant's prearrest silence therefore does not offend the defendant's constitutional right to silence. *Id*. at *7.

Seebeck's constitutional challenge concerning the prosecutor's use of his postarrest silence fails for a different reason. The prosecutor pointed out during her opening statement to the jury and also elicited through Deputy Hasch's direct-examination testimony that, neither in responding to being told he was under arrest for drunk driving nor in responding to being advised of his blood-testing duty under the implied-consent law related to drunk driving, did Seebeck ever correct the deputy's assumption that he had been driving. This circumstance is different from those cases in which appellate courts have found no constitutional violation when the prosecutor used the defendant's postarrest silence to impeach the credibility of a defendant's trial testimony. *See Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312 (1982) (holding that absent a *Miranda* warning, due process is not violated when a prosecutor relies on a defendant's postarrest silence to impeach his trial testimony); *State v. Dobbins*, 725 N.W.2d 492, 510 (Minn. 2006) (recognizing that the Constitution does not bar the use of postarrest silence to impeach the credibility of a defendant who was not given a *Miranda* warning). In this case, by contrast, the state did not limit its use of the

evidence of the defendant's postarrest silence to impeaching his trial testimony; it instead relied broadly on that evidence in its case-in-chief as substantive proof of an element of the offense charged. Neither the federal Supreme Court nor our state supreme court has decided the constitutional implication of a prosecutor's use of a defendant's postarrest, pre-*Miranda* silence in the prosecutor's case-in-chief rather than solely for impeachment. This court has similarly never answered the question.

Several federal appellate courts have addressed the question, but with contradictory results. Three federal circuit courts (the Fourth, Eighth, and Eleventh Circuits) have deemed evidence of postarrest, pre-*Miranda* silence to be constitutionally admissible for use in the state's case-in-chief, while three others (the Seventh, Ninth, and D.C. Circuits) have deemed this use unconstitutional. *Compare U.S. v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *U.S. v. Frazier*, 408 F.3d 1102, 1109–11 (8th Cir. 2005); *U.S. v. Rivera*, 944 F.2d 1563, 1567–68 (11th Cir. 1991), *with U.S. v. Hernandez*, 948 F.2d 316, 322–24 (7th Cir. 1991); *U.S. v. Velarde-Gomez*, 269 F.3d 1023, 1028–30, 1036 (9th Cir. 2001); *U.S. v. Moore*, 104 F.3d 377, 384–89 (D.C. Cir. 1997). Of those courts, the two that most thoroughly addressed the constitutional concerns came to different conclusions. The D.C. Circuit in *Moore* and the Eighth Circuit in *Frazier* carefully discussed the compelled-statement concerns of the Fifth Amendment as well as due process concerns indirectly related to *Miranda*. *See Moore*, 104 F.3d at 385–87; *Frazier*, 408 F.3d at 1109–11. The *Moore* court surveyed the Supreme Court cases and interpreted their rationale to conclude that the prosecution can never constitutionally use a defendant's silence against him as evidence of guilt. 104 F.3d at 389. In contrast, the

Frazier court rejected a bright-line prohibition and held that the silence may be applied by the state in its case-in-chief if the silence was not the result of compulsion by law enforcement. 408 F.3d at 1110–11.

We need not decide whether to follow the approach in *Frazier* or *Moore*. Even if we find error in the district court's decision to admit evidence about Seebeck's postarrest, pre-*Miranda* silence, his constitutional challenge would still not warrant reversal because any constitutional error was harmless. A conviction following a district court's error in admitting evidence unconstitutionally will stand if the error was harmless beyond a reasonable doubt. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005). The error is harmless beyond a reasonable doubt if the jury's guilty verdict was surely not attributable to the error. *Id*. For the following reasons, we are confident the jury's guilty verdict could not possibly have resulted from the allegedly erroneous admission of Seebeck's postarrest silence.

First, the state was not prohibited from using the prearrest silence, and so evidence of his postarrest silence was mostly cumulative. Second, we consider the import of the evidence and conclude that it had no effect. The prosecutor's use of the silence was straightforward: by choosing not to correct the deputy's assumption that Seebeck was the driver, Seebeck implicitly admitted the truth of the assumption. That is, the prosecutor wanted the jury to accept Seebeck's silence as admitting that he had been driving the pickup truck. But we know that the jury certainly did *not* believe that Seebeck had been driving the pickup truck. We know this because it acquitted Seebeck of driving while revoked and convicted him of driving while impaired. One is "driving" for the purposes

of driving while revoked if he is actually driving a vehicle after his license has been revoked. *See* Minn. Stat. § 171.24, subd. 2(3) (2010). There was no question at trial whether Seebeck's license had been revoked—it had been. So the only question for the jury on that charge was whether he had been driving. By acquitting him on that charge, the jury implicitly rejected the state's argument from Seebeck's silence that Seebeck had actually been driving the truck.

The jury's finding that Seebeck was guilty of driving while impaired therefore must have depended on something other than the fact of his driving. The state's alternative theory provided the basis. The prosecutor argued to the jury that if Seebeck was not actually driving the truck, he was still guilty of driving while impaired because he was at least in physical control of the truck. The argument justifies the conviction because a person is guilty of driving while impaired either by actually "driving" while impaired, or, alternatively by having physical control of a vehicle while being impaired. *See* Minn. Stat. § 169A.20, subd. 1 (2010) ("It is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . within this state . . . when the person is under the influence of alcohol"). A person is in "physical control" of a vehicle if he is

> in a position to exercise dominion or control over the vehicle. Thus, a person [is] in physical control of a vehicle if he has the means to initiate any movement of that vehicle and he is in close proximity to the operating controls of the vehicle, and this is true whether the vehicle can be driven on the highway at that point or not.

Snyder v. Comm'r of Pub. Safety, 744 N.W.2d 19, 22 (Minn. App. 2008) (quotations omitted). The evidence that the prosecutor pointed to indicating that Seebeck was in

physical control of the pickup but not driving it came from Seebeck's own testimony to the jury, not from his silence with the deputy. He had testified that, among other things, he had awoken alone in the stopped pickup, turned off its hazard lights, and removed the key from its ignition. The jury's conviction and acquittal decisions demonstrate that it rejected the state's argument based on Seebeck's silence (that Seebeck had actually been driving) but accepted its argument based on Seebeck's testimony (that Seebeck had only been in physical control of the truck). This renders the evidence of Seebeck's silence immaterial to his conviction and its admission was therefore harmless beyond a reasonable doubt.

Recognizing this apparent obstacle to Seebeck's constitutional challenge, Seebeck's counsel contended at oral argument to this court that the admission of the evidence of Seebeck's silence was prejudicial rather than harmless because it forced Seebeck to testify in his own defense and give the incriminating testimony that resulted in his conviction. Rather than address the legal difficulty of this argument, we need only observe that its two obvious logical flaws independently defeat it.

First, the argument mistakenly assumes that Seebeck's postarrest silence was the only evidence that he was driving. Before Seebeck took the stand, the jury had sufficient evidence other than his silence from which it could have found that he was driving (specifically, his walking alone from the pickup truck in the middle of the night, his acknowledging that he should not have been driving while revoked and saying that he thought he was physically safe to drive, and his prearrest silence). And second, the argument mistakenly assumes that Seebeck's incriminating testimony resulted from his

attempt to rebut the evidence inferred from his silence. The incriminating portion of Seebeck's direct testimony about the details of his contact with the vehicle's controls was wholly unnecessary to rebut the inculpatory inference from his silence. So to the extent that Seebeck believed that he needed to testify to rebut the assertion that he was actually driving, that need existed irrespective of any allegedly unconstitutionally admitted evidence of his silence; and the incriminating portion of Seebeck's voluntary testimony was unnecessary to rebut the only incriminating inference that could have been drawn from the challenged evidence. Seebeck's arguments do not overcome our impression beyond a reasonable doubt that the allegedly unconstitutional admission of evidence did not influence the jury in reaching the guilty verdict.

II

Seebeck also argues that the prosecutor materially misstated the law in her closing argument to the jury. Where, as here, defense counsel fails to object to alleged prosecutorial misconduct, we review the conduct under the modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The appellant has the burden of proving that an error occurred and that the error was plain. *Id*. If he satisfies that burden, the state must then demonstrate that the error did not affect the defendant's substantial rights. *Id*. An error that had no impact on the verdict does not affect a defendant's substantial rights. *Id*. When assessing whether a prosecutor's closing argument includes an error that warrants reversal, we review "the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Seebeck asserts that the prosecutor misstated to the jury the law of physical control of a motor vehicle. A person violates the impaired-driving law if he drives or is "in physical control" of a motor vehicle while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1). "Physical control" of a motor vehicle under section 169A.20 has been found to encompass an array of conduct. We have summarized that "'physical control' exists when, because the motorist is found alone on the side of the road with the vehicle, circumstances indicate the vehicle involved had either been parked while the person operating it was under the influence of alcohol, or that there was a significant risk he or she would soon be starting and driving the vehicle." *Snyder*, 744 N.W.2d at 23. The prosecutor read the jury instruction on physical control and followed by saying, "Now you can see, just in listening to that definition that physical control is even . . . broader than the conduct of driving. The vehicle doesn't even have to be running. You have to be – just have to be in it." She added later, "[The] [e]ngine doesn't have to be running. The vehicle doesn't have to be operable." The prosecutor then emphasized Seebeck's testimony about his handling of the keys and controlling the hazard lights and argued that Seebeck's conduct with the pickup exhibited his exercising physical control over it.

Seebeck's argument about the quality of the prosecutor's explanation of the law is somewhat confusing because it is interspersed with references to the quality of the evidence of physical control. Ultimately Seebeck contends only that we should reverse because the prosecutor misstated the law, which allowed the jury to convict him on thin evidence. We therefore limit our discussion to that contention. We do not see the prosecutor's statements, "[You] just have to be in it" or "[the] [e]ngine doesn't have to be

running. The vehicle doesn't have to be operable," as materially misleading statements of the law; she made the statements after reading the jury instruction that accurately states the law and then emphasized behavior that went beyond Seebeck's merely being in the truck. The jury heard the prosecutor's comments as part of a full argument, and so we do not review the statements as if they were delivered in isolation. Although the isolated statements standing alone may have been erroneous, the description of the law in the full argument was not. Considered a different way, we hold that the statements, framed in a discussion that accurately stated the law, were not clear or obvious error, and an error is plain only if it was clear or obvious. *See Ramey*, 721 N.W.2d at 302.

Seebeck goes further to claim that the purportedly false argument led the jury to convict him on an improper basis, but we do not reach this argument that the error prejudiced Seebeck because we have decided that no plain error occurred. We therefore reject Seebeck's contention that the alleged legal misstatements constitute reversible error.

Affirmed.