STATE OF MINNESOTA
IN COURT OF APPEALS
A11-174

State of Minnesota,
Respondent,

vs.

Stephen Watters,
Appellant.

Filed December 27, 2011
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Mille Lacs County District Court
File No. 48-CR-08-2605

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

KALITOWSKI, Judge

Appellant Stephen Watters challenges his convictions of driving in violation of a restricted license, possession of a small amount of marijuana, possession of drug

paraphernalia, and driving a vehicle at night without two operational headlamps, contending that the district court (1) improperly instructed the jury that the crime of driving in violation of a restricted license under Minn. Stat. § 171.09 (2008) does not have a willfulness element, and (2) failed to remove a biased juror for cause. We reverse appellant's conviction of driving in violation of a restricted license and remand for a new trial on that charge. We affirm the remaining convictions.

D E C I S I O N

A state trooper pulled appellant over in the early morning hours of September 20, 2008. Appellant handed the trooper his "B card" driver's license which included a notation that appellant was restricted from consuming alcohol or controlled substances. A search of appellant's driving record confirmed the restriction. During their conversation, the trooper noticed a slight odor of alcohol on appellant's breath. When the trooper asked appellant where he was coming from, appellant indicated he had been at a nearby bar where, he admitted, he had consumed one drink. A preliminary breath test indicated appellant's alcohol concentration was .071. The trooper also noticed a baggie containing what he believed to be marijuana on the center console. A search of the car turned up another baggie containing marijuana residue and a marijuana pipe.

Appellant was arrested and charged with driving in violation of a restricted license, possession of a small amount of marijuana, possession of drug paraphernalia, failure to have two operational headlamps at night, and failure to stop at a stop sign. After a jury trial, appellant was acquitted of failing to stop at a stop sign and convicted of the remaining charges.

I.

Appellant argues that the district court erred when it instructed the jury that it need not find that appellant willfully violated the no-use restriction on his driver's license. A district court has broad discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Willfulness element

Appellant was charged with driving in violation of a restricted license under Minn. Stat. §§ 171.09, subd. 1(d)(1)[1] and 171.241 (2008). Violating the terms of a restricted license is made a crime under section 171.09, subdivision 1, which provided:

> (a) The commissioner, when good cause appears, may impose restrictions suitable to the licensee's driving ability or other restrictions applicable to the licensee as the commissioner may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.
>
> . . . .
>
> (d) A person who drives, operates, or is in physical control of a motor vehicle while in violation of the restrictions imposed in a restricted driver's license issued to that person under this section is guilty of a crime as follows:

[1] An amendment renumbering this provision became effective on August 1, 2011. 2010 Minn. Laws ch. 242, § 7, at 394. This provision is now codified at Minn. Stat. § 171.09, subd. 1(f) (2010). The substance of the provision is identical to the version that applies here.

> (1) if the restriction relates to the possession or consumption of alcohol or controlled substances, the person is guilty of a gross misdemeanor; . . . .

Minn. Stat. § 171.09, subd. 1. Section 171.241 establishes the penalty for violations of criminal provisions throughout chapter 171. That section reads, "[i]t is a misdemeanor for any person to willfully violate any of the provisions of this chapter unless the violation is declared by any law to be a felony or gross misdemeanor, or the violation is declared by a section of this chapter to be a misdemeanor." Minn. Stat. § 171.241. Sections 171.09 and 171.241 must be read together. *State v. Tofte*, 563 N.W.2d 322, 324 (Minn. App. 1997).

The state requested a jury instruction that omitted a willfulness element. Appellant objected. In a pretrial ruling, the district court concluded that the language "unless the violation is declared by any law to be a felony or gross misdemeanor" creates an exception for gross misdemeanors and felonies to the general rule that the state must prove willfulness. Because appellant's no-use violation was a gross misdemeanor, the district court ruled that no scienter was required. The court also relied on *State v. Rhode*, which held that a "'B card' restriction, which invalidates a driver's license if the holder of the license uses alcohol or drugs, provides sufficient notice 'as to what is prohibited and the consequences of violating the restrictions . . . .'" 628 N.W.2d 617, 619 (Minn. App. 2001) (quoting *Tofte*, 563 N.W.2d at 325). Thus, because such a restriction would be evident on the face of the license, the court concluded that "there isn't an issue of notice."

The jury instruction included four elements: (1) appellant drove, operated, or was in physical control of a motor vehicle; (2) appellant was the holder of a restricted license;

(3) appellant possessed or consumed alcohol or a controlled substance, thus violating the restriction; and (4) appellant's act took place on September 20, 2008, in Mille Lacs County.

Appellant argues that the instruction misstated the law by excluding a willfulness element. We agree.

We begin with the general presumption that a criminal statute requires scienter. *See In re C.R.M.*, 611 N.W.2d 802, 809 (Minn. 2000) ("[W]e are guided by the public policy that if criminal liability, particularly gross misdemeanor or felony liability, is to be imposed for conduct unaccompanied by fault, the legislative intent to do so should be clear.") (quoting *State v. Neisen*, 415 N.W.2d 326, 329 (Minn. 1987)). Nothing in the language of sections 171.09 or 171.241 indicates a clear legislative intent to make driving in violation of a license restriction a strict-liability offense.

The phrase "[i]t is a misdemeanor for any person to willfully violate any of the provisions of this chapter" in section 171.241 establishes that "willfull" is "an essential element of the offense charged." *State v. Green*, 351 N.W.2d 42, 44 (Minn. App. 1984). And rather than establish an exception to the willfulness requirement, the phrase "unless the violation is declared by any law to be a felony or gross misdemeanor" in section 171.241 creates an exception to the general rule that violations of criminal provisions in chapter 171 are misdemeanors. Thus, this phrase is an attempt to avoid a conflict between the section 171.241 general penalty provision and the penalty provisions throughout the chapter that establish more severe penalties for specific crimes.

Moreover, the district court's interpretation of section 171.241 would lead to the unreasonable result that every gross misdemeanor or felony in chapter 171 is a strict-liability offense. Because the phrase "unless the violation is declared by any law to be a felony or gross misdemeanor" does not create an exception to the willfulness requirement, we conclude that the state must prove that a defendant is aware of a license restriction.

We also conclude that the mere issuance of a restricted license to a driver does not automatically satisfy this notice requirement, although it may constitute evidence of knowledge. In *Rhode*, we reversed the defendant's conviction because the state failed to prove that the defendant received a restricted license card that would have put him on notice as to its restrictions. 628 N.W.2d at 619-20. And here, although appellant's license was stamped with a notation of the no-use restriction, his defense was that he was unaware of the restriction because he had never looked at the back of his license, he suffered from memory problems, and he was unable to read.

We thus conclude that the jury instructions materially misstated the law. The district court instructed the jurors only that they must find appellant "was the holder of a restricted license" and that he "was in violation of the imposed restrictions." Neither instruction required the jury to find that appellant was aware of the restriction before he violated it. Accordingly, the district court abused its discretion in crafting the jury instructions.

Harmless Error

An erroneous jury instruction by the district court does not necessarily entitle appellant to a new trial. *State v. Koppi*, 798 N.W.2d 358, 364 (Minn. 2011). Erroneous jury instructions are reviewed under a harmless error standard. *Id.* "A properly objected-to 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." *Id.* (quotations omitted).

Appellant argues that the erroneous instruction was not harmless because it omitted a necessary element of the offense. *See State v. Carlson*, 268 N.W.2d 553, 560 (Minn. 1978) ("[A defendant] is entitled to have all the elements of the offense with which he is charged submitted even if the evidence relating to these elements is uncontradicted."). The state argues that the error was harmless because the evidence overwhelmingly demonstrated that appellant knew he was not allowed to consume alcohol or drugs.

The authority addressing whether omission of an element of the offense may ever be harmless error is unclear. *See State v. Vance*, 734 N.W.2d 650, 661 (Minn. 2007) ("We acknowledge that the law is unclear regarding whether the omission of an element from jury instructions is necessarily prejudicial or may instead be subject to a harmless error analysis."). But as the supreme court noted in *Vance*, the critical distinction is whether the omitted element was contested at trial. 734 N.W.2d at 660-61.

Here, appellant's primary defense against this charge was to contest the knowledge issue. He testified that he was unaware of the restriction because he had

"never looked at the back of [his] license." He also testified that his recollection of meeting with an employee of the Driver and Vehicle Services division of the Minnesota Department of Public Safety who walked him through the no-use agreement was clouded because he suffered from brain damage. Appellant's counsel also challenged the state's witnesses whose testimony either directly or circumstantially established appellant's knowledge. Thus, "[a]lthough [appellant] *probably* would have been convicted in any event," it may be difficult to "conclude *beyond a reasonable doubt* that he would have been convicted in any event." *State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992) (reversing a conviction where the district court erroneously instructed the jury on a "permissive inference"). Moreover, the prosecutor here compounded the district court's erroneous instructions by reiterating them twice to the jury. *See State v. Hall*, 722 N.W.2d 472, 478-79 (Minn. 2006) (reversing a conviction where the prosecutor's closing argument reiterated the erroneous instruction); *Olson*, 482 N.W.2d at 216 (holding that a reviewing court may consider a prosecutor's closing argument to determine whether an erroneous instruction had a significant impact on the verdict).

Given our exacting standard of review, we conclude that the district court's error was not harmless. We therefore reverse appellant's conviction of driving in violation of a restricted license and remand for a new trial on this charge.

II.

Appellant also argues that the district court erred by denying his request to remove a juror for cause. A defendant in a criminal case has a constitutional right to an impartial jury. U.S. Const. amend. VI, XIV; Minn. Const. art. I, §§ 6, 7. "Because the impartiality

of the adjudicator goes to the very integrity of the legal system, . . . the bias of a single juror violates the defendant's right to a fair trial." *State v. Evans*, 756 N.W.2d 854, 863 (Minn. 2008) (quotation omitted). "[T]he presence of a biased fact finder constitutes structural error, which requires automatic reversal." *Id.* We afford a district court's ruling on a challenge for cause considerable deference. *State v. Prtine*, 784 N.W.2d 303, 310 (Minn. 2010).

The exclusive grounds upon which jurors may be challenged for cause are found in Minn. R. Crim. P. 26.02, subd. 5. *State v. Roan*, 532 N.W.2d 563, 568 (Minn. 1995). A juror may be stricken for cause if "[t]he juror's state of mind—in reference to the case or to either party—satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party." Minn. R. Crim. P. 26.02, subd. 5(1)1. This is known as "actual bias." *State v. Brown*, 732 N.W.2d 625, 629 n.2 (Minn. 2007).

During jury selection, appellant's counsel asked the members of the jury pool to raise their hands if they were inclined to lend greater weight to the testimony of a police officer than a lay witness. Two prospective jurors raised their hands and appellant's counsel questioned them to probe for bias. An exchange with one of those jurors, D.G., went as follows:

> MR. DAVIS: [D.G.], you raised your hand too.
> [D.G.]: Yeah, I work currently . . . as a security officer in [a casino].
> MR. DAVIS: Okay.
> [D.G.]: So I'm constantly working with Tribal Police right across the street in fact. And um,—also—there's a lot of

guys who work as security right now that were a police officer at one time.
MR. DAVIS: So what you're saying is you don't think you could be fair?
[D.G.]: Well—you'd mentioned that you tend to believe somebody in law enforcement more and—that's where I came—it's more like I would tend to believe somebody with law enforcement—
MR. DAVIS: So you would give their testimony more weight?——Do you think even if the Judge instructed you not to do that that you'd have difficulty being impartial?
[D.G.]: I couldn't tell you for sure; I just—
MR. DAVIS: Okay, how often do you have interactions with Tribal Police?
[D.G.]: Every day.
MR. DAVIS: Okay, how long have you worked at the casino?
[D.G.]: Oh, a year and three months.
MR. DAVIS: Okay,——Your Honor, I'd ask that—motion to strike for cause.
PROSECUTOR: If I can voir dire?
THE COURT: Go ahead.
. . . .
PROSECUTOR: Okay, now I know some of these questions are kind of hard cause you haven't heard anything about this case really so we're asking you to kind of tell us what you're going to do without even knowing anything and that's—that's an impossible question. But the issue is um, you work with law enforcement and you said you might give them more credibility, but um, do you feel that you could keep an open mind during the course of the trial until you hear all the evidence in this case and then make a decision based on whether you believe that the State which I represent, has met its burden of proof beyond a reasonable doubt? Do you think you can do that or do you think that just knowing that there may be a police officer that would testify that you would just automatically find that whatever he says is the truth?
[D.G.]: I think it's pretty safe to say that I can be open minded, I mean, I'm not going to just assume that whatever a law enforcement person would say is automatically true. I mean it would definitely be under circumstances, but ah, I think—
PROSECUTOR: Okay,—okay so you feel—oh, I'm sorry.

> [D.G.]: —yeah, I think it would be safe to say that I could be pretty fair.
> PROSECUTOR: Okay and so you can keep an open mind until you hear all the evidence in the case and then ask yourself whether what the officer is saying makes sense and fits in with that or not and make a decision?—And if the evidence didn't support what the officer was saying do you feel that you would have a problem with finding that . . . particular officer, may be less credible than some of the ones that you've encountered?
> [D.G.]: I don't think that would be a problem.
> PROSECUTOR: Okay, so you—so the general question here is aside from the fact that you think generally officers are credible, um, you can come into this case not knowing this particular officer or the facts that you're going to hear and just decide it based on what you hear in this case setting aside all other experiences that you may have had with officers elsewhere, is that correct?
> [D.G.]: Yes.
> PROSECUTOR: Your Honor, I'd oppose the motion.
> THE COURT: The motion is denied.

Following the denial of appellant's motion to remove for cause, appellant and the state exercised preemptory challenges. Juror D.G. was not among those challenged, and he sat on the jury.

As a threshold matter, appellant argues that juror D.G. expressed actual bias in favor of law enforcement witnesses. Specifically, he points to D.G.'s statements that he would be inclined to find police officers more credible than lay witnesses. The state contends that D.G. never expressed actual bias because he disagreed with appellant's counsel's suggestion that he could not be fair and because his opinion related to Tribal Police, not the state trooper involved in this case.

We agree with appellant that D.G.'s initial statements indicated actual bias. D.G. raised his hand when the jurors were asked whether they "might tend to believe an officer—or somebody in uniform—an officer as opposed to just Joe Blow . . . ." When questioned whether he could be fair, D.G. explained in his own words that he would "tend to believe somebody with law enforcement." This statement indicates a clear tendency to favor law enforcement witnesses over lay witnesses, which was significant because the state's case rested largely on the testimony of a state trooper.

A juror with actual bias must be excused from jury service unless the juror is "rehabilitated." *State v. Logan*, 535 N.W.2d 320, 323 (Minn. 1995). A biased juror is rehabilitated "if he or she agrees to set aside any preconceived notions and make a decision based on the evidence and the court's instructions." *Brown*, 732 N.W.2d at 629 n.2. Whether a biased juror has been rehabilitated is a two-step inquiry. The first step is to determine whether the juror swore "'that he could set aside any opinion he might hold and decide the case on the evidence.'" *Logan*, 535 N.W.2d at 323 (quoting *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S. Ct. 2885, 2891 (1984)). The second step is to determine whether "the juror's protestation of impartiality [should] have been believed." *Id.* (quotation omitted). A district court's answer to the second question "is entitled to special deference because the determination is essentially one of credibility, and therefore largely one of demeanor." *Id.* (quotation omitted).

Appellant contends that D.G. was not sufficiently rehabilitated because he did not "unequivocally assert" that he would be impartial. *See id.* ("Typically rehabilitation takes the form of the prospective juror stating unequivocally that he/she will follow the trial

court's instructions and will fairly evaluate the evidence."). Appellant argues that D.G. was equivocal when he responded "yeah, I think it would be safe to say that I could be pretty fair." We disagree.

Here the prosecutor's rehabilitative questioning brought D.G. out of the abstract and into the particular. To a question about whether D.G. could keep an open mind or would "automatically find" a particular police officer to be truthful, D.G. stated, "I think it's pretty safe to say that I can be open minded, I mean, I'm not going to just assume that whatever a law enforcement person would say is automatically true . . . . [Y]eah, I think it would be safe to say that I could be pretty fair." When asked to respond to a scenario where the evidence did not match an officer's testimony, D.G. stated that he did not think he would have a problem finding that particular officer less credible than others he had encountered. He also agreed that he could set aside his other experiences and decide the case based on the facts he heard. Compared with his more abstract statements of bias, these responses demonstrate that D.G. was capable of fairly evaluating the individual witnesses who would testify before him.

When dealing with responses from a lay jury, the district court is in the best position to judge the credibility of a juror. *See Patton*, 467 U.S. at 1038-39, 104 S. Ct. at 2892-93 (discussing the rationale for granting the district court juror-credibility determinations "special deference"). Here, the district court observed D.G.'s colloquy with appellant's trial counsel and the prosecutor and determined that D.G. had been rehabilitated. This determination is supported by the record. Therefore, we conclude that

the district court did not abuse its discretion in denying appellant's motion to remove D.G.

Affirmed in part, reversed in part, and remanded.