STATE OF MINNESOTA
IN COURT OF APPEALS
A11-185

State of Minnesota,
Respondent,

vs.

James Anthony Reek,
Appellant.

Filed December 12, 2011
Affirmed
Worke, Judge

St. Louis County District Court
File No. 69VI-CR-10-664

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant challenges his conviction of first-degree test refusal, arguing that the district court: (1) committed plain error by instructing the jury on probable cause;

(2) committed plain error by admitting a recording of the Implied Consent Advisory without redacting appellant's references to obtaining counsel; (3) abused its discretion by denying appellant's motion for a continuance; and (4) erred by ordering appellant to pay a $75 copayment for public defender services. We affirm.

FACTS

On May 19, 2010, a county deputy observed appellant James Anthony Reek pass another vehicle in a no-passing zone. The deputy accelerated to catch up to appellant's vehicle, which he determined to be travelling over the speed limit, and activated his emergency lights. Appellant did not pull over, but instead increased his speed. The deputy observed appellant drive 70 miles per hour for one mile, crossing over both the centerline and fogline and weaving back and forth in his lane of traffic. Appellant slowed to 45 miles per hour for approximately another half mile and then turned to stop on a side road without using a turn signal.

The deputy ordered appellant to exit the vehicle and get on to the ground. As appellant exited the vehicle, the deputy noticed that appellant was swaying and that his eyes appeared "glassy." Appellant lowered himself to the ground pursuant to the deputy's command and was handcuffed. While trying to understand appellant's slurred speech, the deputy smelled a strong odor of alcohol. Three other officers soon arrived at the scene to assist. The officers also observed a strong odor of alcohol, bloodshot eyes, and slurred speech. Appellant refused to submit to a preliminary breath test and was transported to the nearby county jail.

At the jail, the arresting officer read appellant the Minnesota Implied Consent Advisory (ICA). Appellant indicated that he understood his rights and asked to contact an attorney. Appellant ended his efforts to contact an attorney and refused to take the breath test. Appellant was charged with driving while impaired, test refusal, fleeing a police officer in a motor vehicle, and driving after cancellation as inimical to public safety.

Appellant appeared with his public defender for a pretrial hearing on the day before trial was scheduled to begin. Appellant personally requested a continuance, explaining that "I would like to do some investigating on my own" into the accuracy of the Intoxilyzer and "possibly hire another attorney." The district court informed appellant that the Intoxilyzer was not an issue because he did not submit to a breath test, and denied appellant's request for a continuance. Appellant and his public defender then attempted one final plea negotiation with the prosecutor. After appellant failed to obtain his desired plea deal, appellant informed the district court that he had a conflict of interest with his public defender and requested a continuance so that he could hire private counsel. The district court denied the request, concluding that appellant's only intent was to delay the proceedings. At trial the following morning, appellant again requested a continuance to hire private counsel. The district court informed appellant that he could hire a new attorney, but that the attorney must be prepared to try the case that day. Without another attorney prepared to try the case that day, trial proceeded with appellant represented by his public defender.

The state introduced the recording of appellant's ICA into evidence. The recording featured the arresting officer reading the standard ICA language, and then the following exchange occurred:

> Q: Do you understand what I have just explained?
> A: No.
> Q: What don't you understand? . . .
> A: Well, let me see it.
> Q: Do you want to read it?
> A: Of course I do.
> Q: Go ahead and read it.
> . . . .
> A: Okay.
> Q: Do you understand?
> A: Yes I do.
> Q: Do you wish to consult with an attorney?
> A: Yes.

After appellant took time to contact an attorney, the questioning resumed:

> Q: [Appellant], are you done looking for an attorney?
> A: No.
> Q: Okay. Then you need to get back on the phone. Do you wish to consult with an attorney or not?
> A: For what?
> Q: In order to decide if you're going to take an intoxilyzer test.
> . . . .
> A: No, I'm not going to.
> Q: You're not going to take the breath test?
> A: No, I'm not going to take nothing.
> Q: Any reason why you're not going to take a breath test?
> A: I'm not going to take a breath test. . . .
> Q: What's your reason behind not taking a breath test? It's just a question on the form.
> A: Because you personally are a d*ck.
> Q: Okay. Time completed 1920 hours.

Prior to jury deliberations, the district court instructed the jury on the issue of probable cause relative to the test-refusal charge in accordance with CRIMJIG 29.28:

"Probable cause means that the officer can explain the reason the officer believed it was more likely than not that the defendant drove or operated a motor vehicle while under the influence of alcohol." Appellant did not object to the jury instructions. The jury convicted appellant of first-degree test refusal in violation of Minn. Stat. §§ 169A.20, subds. 2 and .24 (2008). The jury acquitted appellant of the driving-while-impaired and fleeing-police-officer charges. This appeal follows.

D E C I S I O N

Jury Instructions

Appellant first challenges the jury instructions given by the district court. Appellant failed to object to the jury instructions at trial. "[A] failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Accordingly, our analysis is governed by the plain-error test. *Id.*

Error

Appellant first asserts that the probable-cause jury instruction was erroneous. "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). "[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). District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002).

The district court instructed the jury in accordance with CRIMJIG 29.28. Appellant asserts that the district court erred by instructing the jury on the subjective probable-cause standard contained in the standard jury instructions, rather than the objective probable-cause standard consistent with the supreme court's recent decision in *State v. Koppi*, 798 N.W.2d 358 (Minn. 2011). In *Koppi*, the defendant was convicted of second-degree test refusal in violation of Minn. Stat. § 169A.20, subd. 2 (2010). 798 N.W.2d at 361. Over the defendant's objection, the district court provided the jury with the standard probable-cause instruction under CRIMJIG 29.28. The supreme court concluded that the jury instruction was erroneous in three respects: (1) the instruction failed to require an officer to articulate the specific observations and circumstances supporting a probable-cause determination; (2) the instruction failed to inform the jury that it was to consider the totality of the circumstances from the viewpoint of a reasonable police officer in assessing whether probable cause existed; and (3) the instruction provided that the officer believed that it was "more likely than not" that the driver was operating while impaired, rather than requiring an "honest and strong suspicion" as necessitated by caselaw. *Id.* at 363 (citing *State v. Harris*, 589 N.W.2d 782, 791 (Minn. 1999)).

The instruction provided by the district court in this case is fundamentally identical to the instruction declared erroneous by the supreme court in *Koppi*. As such, appellant correctly contends that the district court erred in providing the jury with standard jury instruction of CRIMJIG 29.28. The state concedes this point.

Plainness

Appellant next asserts that the jury-instruction error was plain because the error contravenes caselaw. Appellant again relies on *Koppi*, asserting that the supreme court addressed the exact jury instruction provided by the district court in this case. Because the supreme court declared the jury instruction in *Koppi* to be erroneous, appellant argues that the jury instruction provided by the district court contravenes caselaw and, therefore, was plain error. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (stating that an error is plain when the error "contravenes case law, a rule, or a standard of conduct").

The state responds by arguing that the error was not plain because the supreme court had not decided *Koppi* when appellant's case was tried; indeed, appellant's trial began on September 21, 2010, and the supreme court released *Koppi* on June 8, 2011. *See Koppi*, 798 N.W.2d 358. The state acknowledges that this court reached the same conclusion as the supreme court prior to review being granted. *See State v. Koppi*, 779 N.W.2d 562 (Minn. App. 2010) (holding that CRIMJIG 29.28 erroneously defines probable cause), *rev'd on other grounds*, 798 N.W.2d 358. But the state contends that this court's decision also failed to qualify as clear or obvious law because the supreme court had granted review prior to appellant's trial.

The state's argument is more convincing. In order to demonstrate plain error, the law on the issue must be "clear or obvious." *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008). Moreover, "an error cannot be deemed plain[] in the absence of binding precedent." *Id.* While the syllabus of this court's decision in *Koppi* unambiguously invalidated the jury instruction given by the district court in this case, the case was not

truly precedential authority due to the supreme court's grant of review. *See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988) (noting that published decisions of the court of appeals acquire legal force when the deadline for review has expired); *Sefkow v. Sefkow*, 427 N.W.2d 203, 213 (Minn. 1988) (stating that a published decision of the court of appeals becomes binding when review is denied); *State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998) (stating that this court's decisions are precedential unless the supreme court grants review and does not affirm), *review denied* (Minn. July 16, 1998). Accordingly, the error of the district court was neither plain nor obvious, and appellant fails to meet the second prong of the plain-error analysis. Consequently, the conviction need not be overturned on the grounds of erroneous jury instructions.

ICA Audio Tape

Appellant next argues that the district court committed plain error by failing to redact his references to obtaining counsel from the ICA recording. Although admission of the ICA recording was discussed at trial and portions of the tape were redacted, appellant failed to object to the admission of his references to obtaining counsel. Generally, the failure to object to the admission of evidence waives that issue on appeal. *Rairdon v. State*, 557 N.W.2d 318, 323 (Minn. 1996). But we have discretion to review the admission of evidence under the plain-error test. Minn. R. Crim. P. 31.02; *Griller*, 583 N.W.2d at 740.

Appellant claims that the district court erred by failing to redact his request for counsel from the ICA recording, arguing that the excerpts unfairly revealed a guilty

conscious. But the ICA recording, and the questioning of appellant's desire to speak with an attorney therein, was a necessary element for the state to prove in prosecuting the test-refusal charge. *See State v. Ouellette*, 740 N.W.2d 355, 359 (Minn. App. 2007) (describing a reading of the ICA as an element of criminal test-refusal), *review denied* (Minn. Dec. 19, 2007). Thus, the district court did not err in admitting the ICA recording into evidence and appellant fails to demonstrate plain error.

Continuance

Appellant also challenges the district court's denial of his request for a continuance. The decision to grant or deny a continuance is a matter within the district court's discretion. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). This court will not reverse a conviction based on the denial of a motion for a continuance absent a clear abuse of that discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). On review, we examine the circumstances before the district court at the time the motion was made to determine whether a denial of a continuance prejudiced the defendant by materially affecting the outcome of the trial. *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980).

The Fourteenth Amendment guarantees a criminal defendant the right to have the assistance of counsel in his defense, which includes a fair opportunity to secure counsel of one's own choice. *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). However, "a defendant may not demand a continuance for the purpose of delay or obtain a continuance by arbitrarily choosing to substitute counsel at the time of trial." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1997). And a motion for a continuance may

be properly denied if the defendant was not diligent in obtaining counsel or in preparing for trial. *State v. Courtney*, 696 N.W.2d 73, 82 (Minn. 2005); *see also State v. Reed*, 398 N.W.2d 614, 616 (Minn. App. 1986), *review denied* (Minn. Feb. 13, 1987) (stating that district courts may properly deny last-minute requests to substitute counsel that inevitably delay the proceedings).

Appellant first informed the district court that he wanted a continuance to investigate the Intoxilyzer despite having refused to submit to testing, and then claimed a conflict of interest with his public defender only after he was unable to obtain his desired plea agreement. The district court reasonably concluded that appellant's second continuance request was intended solely to delay the proceedings. We also note that appellant does not appear to have been prejudiced by the continuance denial; appellant was represented by a competent, prepared attorney who obtained two acquittals on his behalf. Based on the facts and circumstances surrounding appellant's request, the district court did not abuse its discretion by denying appellant's request for a continuance.

Public-Defender Copayment

Finally, appellant challenges the $75 public-defender copayment ordered by the district court. Appellant failed to raise this issue before the district court. "Generally, this court will not consider matters not argued and considered in the court bellow." *State v. Cunningham*, 663 N.W.2d 7, 10 (Minn. App. 2003). We may, however, "review any . . . matter, as the interests of justice may require," even if the matter was not raised below. Minn. R. Crim. P. 28.02, subd. 11.

Appellant first argues that the district court erred by ordering the copayment without first finding that he could afford to make it. But the district court is not required to make specific findings before ordering the copayment. *See* Minn. Stat. § 611.17(c) (2010) ("Upon disposition of the case, an individual who has received public defender services shall pay to the court a $75 co-payment for representation provided by a public defender."). Moreover, the $75 copayment is mandatory regardless of the defendant's financial state unless waived by the district court. *Cunningham*, 663 N.W.2d at 11; *see also* Minn. Stat. § 645.44, subd. 16 (2010) ("'Shall' is mandatory."). Appellant's argument is unavailing.

Appellant also contends that the court failed to adequately inform him that he owed the copayment as part of the district court's orally pronounced sentence. At sentencing, the district court did not specify that appellant was to pay the mandatory $75 copayment for public-defender services; instead, the copayment was detailed on appellant's warrant of commitment. However, section 611.17(c) states that "[t]he co-payment . . . is a civil obligation and must not be made a condition of a criminal sentence." Thus, notification of the copayment would have been inconsequential at sentencing because appellant could not have altered the obligation. Appellant's argument fails.

Affirmed.