STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0050

State of Minnesota,
Respondent,

vs.

Christopher Lee Manska,
Appellant.

Filed April 21, 2014
Affirmed in part, reversed in part, and remanded
Ross, Judge

St. Louis County District Court
File No. 69HI-CR-11-888

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Smith, Judge.

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

ROSS, Judge

A Hibbing police officer stopped a pickup truck driven by appellant Christopher Manska, suspecting, based on an eyewitness's report of Manska's behavior and on the

officer's observations of Manska's driving, that Manska was driving drunk. The officer arrested Manska after his personal interaction with Manska justified the suspicion, and he found what appeared to be marijuana in Manska's pocket. Following his conviction of multiple offenses, Manska challenges the district court's pretrial order denying his motion to suppress evidence. He also contends that the district court erred by holding a trial in his absence, that the prosecutor committed prejudicial misconduct, that the evidence is insufficient to support his conviction of possession of marijuana in a vehicle, and that the test refusal statute is unconstitutional. Manska raises additional arguments in pro se supplemental briefs. We reverse in part because the officer's nonexpert personal opinion that a leafy substance is marijuana alone cannot support the conviction of possession of a controlled substance, but we otherwise affirm.

FACTS

D.J. and her pregnant daughter had just left a bowling alley in Hibbing on a late night in November 2011 when they encountered a man police later identified as Christopher Manska. Manska first harassed them as they walked through the parking lot by mockingly mimicking their conversation. After D.J. and her daughter got into D.J.'s truck, they saw Manska struggle to unlock his pickup truck parked in a nearby alley, enter the truck, and then operate the truck erratically. He first drove directly at D.J.'s vehicle, barely avoiding contact, then he stopped and began revving his engine. D.J. dialed 9-1-1 and reported the episode to the dispatcher and described Manska's grayish-green truck. Manska then drove at D.J.'s vehicle a second time, again barely avoiding contact.

Police officer Jeremiah Nutzhorn, who was nearby, heard D.J.'s report relayed by the dispatcher, and he saw a pickup truck matching the description stopped at an intersection. The truck's headlights were off and it rolled over the curb as it turned. Officer Nutzhorn activated his squad car's emergency lights to initiate a traffic stop, but the pickup continued down the block, turned again, and then stopped in the lane of traffic despite having room to pull over to the right.

Officer Nutzhorn asked the driver if he knew why he was stopped. Manska mumbled, "No." Manska's mannerism was odd to Officer Nutzhorn; he later said, "[I]t made me feel like the driver was guarding his mouth or trying to release as little breath possible . . . for me to detect anything." Officer Nutzhorn nonetheless smelled the odor of alcoholic beverages emanating from inside the truck. And he noticed that Manska's speech was slurred and his eyes were bloodshot and watery. Manska admitted he had been drinking.

The officer asked Manska to perform field sobriety tests. Manska tried to get out, but he fell back, needing the truck door and seat for balance. He stumbled to the sidewalk, where he announced, "I ain't taking none of your f--king tests."

Officer Nutzhorn arrested Manska and found what he believed to be marijuana in Manska's pocket. The state charged Manska with first-degree driving while impaired, driving after cancelation, obstructing legal process, first-degree test refusal, possession of more than 1.4 grams of marijuana in a vehicle, possession of drug paraphernalia, failure to display headlights, two counts of second-degree assault, and driving without insurance.

Manska represented himself. He unsuccessfully challenged the legality of the traffic stop. The district court granted Manska at least three continuances so that he could obtain or review evidence. The district court held three other hearings before trial. In each one, Manska claimed that he was unprepared, sought continuances, or objected to the district court's procedure.

Just before jury selection on the scheduled trial date, Manska claimed that he was not prepared for trial. The district court found that there had been sufficient time for Manska to prepare and asked him several times whether he would be present at trial. Manska answered that he was unprepared and that he did not know how to respond. The district court told Manska that he could sit at trial and that the court would explain to the jury that he elected to be present but not participate, but it refused Manska's request to instruct the jury that Manska was unprepared. After the prosecutor gave an opening statement, Manska (outside the jury's presence) told the district court that he intended to tell the jury that he was being compelled to participate in the trial but was unprepared. The district court prohibited Manska from so advising the jury, prompting Manska to complain, "You're not being fair," and then immediately to assert, "I'm not feeling well." He claimed that he had an upset stomach and felt nauseated. The district court found Manska to be attempting a delay tactic but allowed Manska to return temporarily to his cell.

After fifteen minutes, a deputy reported to the court that Manska refused his offer of nonprescription antacids and sat on his cot with his blanket around him. Manska said

that he was too sick to return. The district court declared that the trial would go on without Manska and gave the following reasons:

> [P]ursuant to Minnesota Rule of Criminal Procedure 26.03, Subd. 1(2), the Court is going to continue the trial without the presence of the defendant. In particular, the rule states that the trial may proceed to verdict without the defendant's presence if the defendant is absent without justification after the trial starts. The Court doesn't believe that [Manska] is ill. He, in the courtroom after the Court had made some rulings adverse to his position on what he wanted to address the jury about, then said he was feeling ill and didn't want . . . to continue with the trial, wanted to withdraw because he wasn't feeling well. The Court didn't observe anything in [Manska's] appearance or demeanor which indicated at all that he was ill.
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> . . . .
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> I do think that this is part of [Manska's] continued efforts here to continue the trial and not have the trial continue, and that's been evident last week and yesterday and today that [Manska] simply does not want to have the trial commence for the reasons he has already stated on the record here and the Court has made rulings against [Manska] in that regard.

The district court then asked the deputy to tell Manska that the trial would proceed and that he could participate at any time. Manska never returned for trial.

D.J. testified at the one-day trial that she feared Manska. Officer Nutzhorn opined that because of D.J.'s fear, he had to contact her three times before she agreed to be interviewed.

Officer Nutzhorn also testified that he searched Manska after arresting him and found a container of a green leafy substance that smelled like marijuana. It weighed 2.83 grams. He also testified that he read Manska the implied consent advisory and offered Manska a blood, breath, or urine test, but Manska refused them all.

After a midtrial lunch break, the deputy told the district judge that he had spoken with Manska and that Manska understood that he could participate. Manska persisted in claiming illness, but he ate his lunch and sat on his bed without appearing to be sick. The district court again asked whether Manska would participate and Manska again relayed through the deputy, no.

The prosecutor's closing argument included, among other things, the elements of second-degree assault and a reminder that D.J. said she feared retaliation by Manska.

The jury deliberated the next day. The district court invited Manska to be present when the jury returned its verdict, and again Manska declined to attend the proceedings, claiming illness. The jury found Manska guilty of all charges except assault and driving without insurance.

Manska persisted in his nonparticipation at his sentencing hearing two weeks later. The deputy informed the district court that Manska did not wish to be present and that he would claim assault if the officers touched him. The district court sent Manska a copy of the presentence investigation report through the deputy with a message that the sentencing hearing would proceed and that the state would seek an 84-month prison sentence. According to the deputy, Manska responded by throwing the report on the floor, refusing to attend, and reminding the deputy that he would claim assault if anyone tried to force him to court. He responded to the deputy's final invitation to attend the sentencing hearing with, "Have a nice day."

The district court found Manska to be absent from the hearing without cause and sentenced him to 80 months' imprisonment for the test refusal conviction. It sentenced him to concurrent imprisonment terms for the remaining convictions. Manska appeals.

D E C I S I O N

I

Manska argues that the district court erroneously denied his motion to suppress the evidence obtained during and after the traffic stop. We review as a matter of law a pretrial order refusing to suppress evidence when the facts are not in dispute. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). Manska rests his challenge on his constitutional rights. The United States and Minnesota Constitutions guarantee the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. We examine the reasonableness of a traffic stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). We must determine "whether the stop was justified at its inception" and whether the police action "during the stop [was] reasonably related to and justified by the circumstances that gave rise to the stop." *Id.* at 364.

An officer may conduct a limited investigatory traffic stop if he has a particularized and objective basis for suspecting criminal activity. *State v. Anderson*, 683 N.W.2d 818, 822–23 (Minn. 2004). An officer who observes a traffic violation has an objective basis for stopping the vehicle. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Officer Nutzhorn responded to the report of a possible drunk driver in a pickup

truck that matched the description of the truck he immediately saw operating without headlights and rolling over a curb. Any of these circumstances, and certainly the totality of them, easily justified the traffic stop.

Manska argues that the officer impermissibly expanded the scope of the stop beyond its justification by ordering him out to perform field sobriety tests. The argument is flawed. Officer Nutzhorn did not stop Manska to cite him for his driving infractions, he stopped him because the witness's report and Manska's driving led him to suspect that Manska was intoxicated. His ordering Manska out of the truck to perform sobriety tests did not expand the scope of the stop; it fell squarely within the scope of the stop. We add that even if the officer had stopped Manska only to cite him for violating traffic laws, Manska's odor of alcoholic beverages, his slurred speech, his odd behavior, and his admission to having consumed alcohol, would together justify expanding the scope of the stop to investigate for drunk driving. Either way, the district court did not err by denying Manska's motion to suppress evidence arising from the stop.

II

Manska challenges the district court's decision to try him in his absence. Criminal defendants have a Sixth Amendment "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *State v. Worthy*, 583 N.W.2d 270, 277 (Minn. 1998) (quotation omitted). But a defendant waives the right by being absent without justification. Minn. R. Crim. P. 26.03, subd. 1(2)(1); *State v. Finnegan*, 784 N.W.2d 243, 247–48 (Minn. 2010). We review a district court's decision to hold a trial *in absentia* for an abuse of discretion. *Worthy*, 583 N.W.2d at 277. A district court

"must "make sufficient inquiry into the circumstances of a defendant's disappearances to justify a finding whether the absence was voluntary[,] . . . make a preliminary finding of voluntariness," and afford the defendant "an adequate opportunity to explain his absence . . . before sentence is imposed." *Finnegan*, 784 N.W. at 250 (quotation omitted). A defendant on appeal bears the heavy burden of showing that his absence from trial was involuntary, *State v. Cassidy*, 567 N.W.2d 707, 710 (Minn. 1997), and Manska does not come close to shouldering that burden.

We reject as unfounded Manska's contention that the district court failed to sufficiently inquire about the circumstances of his absence and his assertion that the district court needed a medical examination before making its finding that Manska was merely feigning sickness. No statute or rule or case obligates the district court to direct a medical investigation into a defendant's apparently fictional illness in any situation, and certainly not here, when the pretrial circumstances and direct courtroom observation inform the district court that the defendant is engaging in a ruse. The district court sufficiently inquired into the circumstances of Manska's absence to find voluntariness.

We are also satisfied that the district court made a sufficient, circumstantially supported finding that Manska was voluntarily absent. The district court found that Manska was absent without cause because it did not believe his illness claim. The district court judge is in a much better position than this court to assess a defendant's credibility, and none of the facts give us any reason to second-guess the finding that Manska's nausea claim was a sham. Among other circumstances, the district court noticed the close temporal relationship between Manska's final urging for a continuance because of his

unpreparedness, the district court's refusal to order that requested continuance, and the sudden onset of Manska's claimed nausea (nausea allegedly too severe to attend trial but not severe enough to require medicine or prevent lunch). The finding is not clearly erroneous.

And on the final factor, the district court plainly gave Manska an adequate opportunity to explain his absence before sentencing. The district court did not abuse its discretion by conducting the trial without Manska.

III

Manska contends that the prosecutor engaged in prejudicial misconduct. Because Manska was not present at trial and waived his right to an attorney, we review this unobjected-to alleged prosecutorial misconduct only for plain error. *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006). Manska complains that the prosecutor elicited testimony and highlighted in opening and closing remarks that D.J. feared retaliation by Manska. We do not reverse for plain error if the error caused no prejudice. *Id*. No prejudice resulted here. The only charges on which D.J.'s alleged fear might have had some practical effect on the jury's assessment were the assault charges, but the jury acquitted Manska of those charges. The testimony and the prosecutor's comments about D.J.'s fear do not prompt reversal.

IV

Manska contends that the evidence is insufficient to support his conviction for possession of more than 1.4 grams of marijuana while in a vehicle under Minnesota Statutes section 152.027, subdivision 3 (2010). We review claims of insufficiency of

evidence by carefully analyzing the record to determine whether the evidence, viewed in the light most favorable to conviction, supports the guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury believed the evidence supporting the verdict and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Manska contends that the circumstances are insufficient to prove that the substance the officer found was marijuana and that it weighed more than 1.4 grams.

Based on the verdict, we know that the state proved that Officer Nutzhorn—a nonexpert with no claimed special ability to identify marijuana—found Manska possessing 2.83 grams of a crushed, green, leafy substance that, to Officer Nutzhorn, looked and smelled like marijuana. But the state never introduced scientific evidence to prove that the substance was in fact marijuana. In two drug-possession cases, the supreme court deemed insufficient the nonscientific evidence of the identity and weight of a controlled substance. *See State v. Robinson*, 517 N.W.2d 336, 339 (Minn. 1994) ("[T]here seems to be no good reason why a sufficient quantity of the mixture should not be scientifically tested so as to establish beyond a reasonable doubt an essential element of the crime charged."); *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979) ("Because the trial court found that the scientific evidence was inadequate to prove beyond a reasonable doubt that the substance was *Cannabis sativa L.*, and because four additional factors were impermissibly used to sustain the state's burden of proof, we have found, in effect, that the evidence was insufficient to sustain the verdict.").

In a situation unlike this one, the supreme court distinguished those two cases to sustain a drug-possession conviction on nonscientific evidence alone. Specifically, the supreme court reasoned in *State v. Olhausen* that "[t]he nonscientific evidence presented at trial relating to the identity and weight of a controlled substance was sufficient to sustain respondent's first-degree controlled substance crime conviction where the defendant prevented scientific testing by disposing of the alleged controlled substance." 681 N.W.2d 21, 22 (Minn. 2004). The *Olhausen* court expressly distinguished *Vail* and *Robinson*, explaining that in those cases "the state had possession of the entire amount of controlled substance at issue but failed to use adequate procedures to scientifically test [the] substance." *Id.* at 28. And this court also affirmed a conviction of marijuana possession despite *Vail*, but we did so expressly because of the minor nature of the offense and penalty. *In re Welfare of J.R.M.*, 653 N.W.2d 207, 210 (Minn. App. 2002) ("Appellant cites no authority requiring that a petty misdemeanor possession of a small amount of marijuana be supported by laboratory tests."). One other possible exception is implied in *Robinson*'s dicta. Justice Simonett opined that when only some but not all of the controlled substance has been scientifically tested, "[t]here may be instances where the seized material consists of pills or tablets where the individual items are so alike and the risk of benign substitutes so unlikely that random testing may legitimately permit an inference beyond a reasonable doubt" even as to the untested pills. 517 N.W.2d at 340.

The state relies only on *Olhausen* and *J.R.M.* for the proposition that evidence of laboratory testing was not required to prove the identity and weight of the drugs in this case. But in this case, the offense is more than a petty misdemeanor (unlike in *J.R.M.*)

and the defendant did nothing to dispose of the evidence and prevent it from being evaluated scientifically (unlike in *Olhausen*). Neither those cases nor *Robinson*'s dicta help the state avoid the rationale and holding in *Robinson*. The state possessed the entire amount of the alleged controlled substance but failed to scientifically test it to establish that it was in fact marijuana. Applying the caselaw to these facts, we hold that Officer Nutzhorn's merely seeing and smelling the substance and believing it to be marijuana is not sufficient evidence to support the drug-possession conviction. We vacate that conviction and remand for the district court to modify Manska's sentence in light of our holding.

V

Manska also challenges the constitutionality of the test refusal statute, which criminalizes a suspected drunk driver's refusal to submit to testing authorized under the implied consent law. Minn. Stat. § 169A.20, subd. 2 (2010). He maintains that, under the combined reasoning of the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), and our decision in *State v. Wiseman*, 816 N.W.2d 689 (Minn. App. 2012), *cert. denied*, 133 S. Ct. 1585 (2013), the state is constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a breath test. But we have recently rejected this argument, holding that even when the Fourth Amendment would not permit an officer to force a driver to submit to a warrantless blood draw, it does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test when the circumstances established a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test by securing

and executing a warrant. *State v. Bernard*, ___ N.W.2d ___ (Minn. App. Mar. 17, 2014). And in *McNeely*, the Supreme Court supported its holding by emphasizing approvingly, without any hint of a constitutional concern, that "all 50 States have adopted implied consent laws that require motorists . . . to consent to . . . testing if they are arrested . . . on suspicion of a drunk-driving offense," that "[s]uch laws impose significant consequences when a motorist withdraws consent," and that "most States allow the motorist's refusal to take a [chemical] test to be used as evidence against him in a subsequent criminal prosecution." 133 S. Ct. at 1566.

Manska insists that individual due process rights prohibit the state from punishing a driver's exercise of his right to say "no" to a requested breath test. The argument overlooks but draws our attention to the fact that judicial treatment of a suspected drunk driver's right to decline a lawful police request that the driver engage in chemical testing is fundamentally different from a person's right to decline a police officer's request that he waive his constitutional rights in the non-impaired-driving setting. As Manska points out, our supreme court has repeatedly emphasized that "an officer has a right to ask to search and an individual has a right to say no." *George*, 557 N.W.2d at 579 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). As Manska urges, "The right to say no is so sacrosanct that '[i]t is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search,'" quoting *State v. Jones*, 753 N.W.2d 677, 687 (Minn. 2008).

The argument is reasonable as far is it goes, but it cannot go far enough to make Manska's point. That is, it cannot go so far as to say that a suspected drunk driver's right to say no to an officer's request for a warrantless breath test is constitutionally protected from punishment. It cannot go this far because, unlike the general proposition that a prosecutor's negative inference violates a defendant's constitutional right to say no to the warrantless search of his home or his car, the Supreme Court has reemphasized as recently as the *McNeely* decision itself that a prosecutor can indeed use a suspected drunk driver's refusal to take a chemical test as negative inferential evidence against the driver in a criminal prosecution for drunk driving without violating the defendant's constitutional right against self-incrimination. *McNeely*, 133 S. Ct. at 1566 (citing *South Dakota v. Neville*, 459 U.S. 553, 554, 563–64, 103 S. Ct. 916, 917–18, 922–23 (1983)). Manska's argument is appealing on its face only because it ignores the difference between cases like *Neville*, which deems constitutional a prosecutor's negative inference from a driver's refusal to consent to a warrantless chemical test, 459 U.S. at 554, 563–64, 103 S. Ct. at 917–18, 922–23, and *Camara v. Municipal Court of San Francisco*, which deems unconstitutional a municipality's criminalizing an apartment lessee's refusal to consent to a warrantless inspection of his home, 387 U.S. 523, 540–41, 87 S. Ct. 1727, 1736–37 (1967).We reject Manska's constitutional argument.

VI

We have carefully reviewed Manska's arguments in his pro se supplemental briefs. Some are waived because they are not supported by legal argument or citation or were not presented to the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn.

1996); *State v. Ahmed*, 708 N.W.2d 574, 585 (Minn. App. 2006). Manska's remaining arguments duplicate those in his principal brief.

Affirmed in part, reversed in part, and remanded.