STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0291

State of Minnesota,
Respondent,

vs.

Ali Sharif Maye,
Appellant.

Filed February 10, 2014
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-11-37131

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

Andrew Small, St. Louis Park City Attorney, Jamie L. Kreuser, Assistant City Attorney, Colich & Associates, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

SCHELLHAS, Judge

In this appeal from a conviction of driving while impaired, appellant argues that (1) the district court erred by (a) denying his motion to suppress because the stop of his

vehicle was not supported by reasonable suspicion of criminal activity, (b) admitting the results of appellant's urine test, and (c) admitting an unredacted recording of appellant's implied-consent advisory; and (2) the prosecutor committed misconduct by (a) asking appellant were-they-lying questions and (b) vouching for the credibility of the state's witnesses during closing argument. We affirm.

FACTS

In the early-morning hours of September 13, 2011, while on routine patrol driving westbound on Highway 7 in St. Louis Park, St. Louis Park Police Officer Matthew Havlik noticed a blue Cadillac traveling in front of him in the right-hand lane. The officer observed the Cadillac touch the center line on its left. The Cadillac driver then signaled and turned onto the southbound ramp to Highway 100. Officer Havlik followed the Cadillac onto Highway 100 and observed the vehicle cross over the center line on its left and move left into the middle lane of three southbound traffic lanes without signaling its lane change. After the Cadillac moved back into the southbound right lane without signaling its lane change, Officer Havlik initiated a traffic stop for failure to drive within a single lane of traffic without signaling a lane change.

Officer Havlik approached the Cadillac and identified the driver by his Minnesota driver's license as appellant Ali Maye. Officer Havlik noticed a moderate odor of alcohol coming from the vehicle and noticed that Maye's eyes were glassy and his speech was mumbled. Believing that Maye might be intoxicated, Officer Havlik administered three field-sobriety tests, all of which Maye failed. Maye also submitted to a portable breath test (PBT) and failed it. Officer Havlik arrested Maye, transported him to the St. Louis

Park Police Department, and read Maye the Minnesota Implied Consent Advisory. Maye acknowledged the advisory, declined the opportunity to consult with an attorney, agreed to submit to a urine test, and provided a urine sample at about 3:00 a.m., approximately 25 minutes after Officer Havlik stopped his vehicle. Officer Havlik observed Maye provide the urine sample, received the sample from Maye, and, in Maye's presence, sealed the sample in a cup with a cap and sealing label that both he and Maye had previously signed. The sample was placed in the refrigerator in a sealed box and shipped to the Bureau of Criminal Apprehension (BCA) for analysis.

BCA forensic scientist Jason Peterson testified that, when the BCA received Maye's urine sample, the seal on the container was intact and bore Maye's and Officer Havlik's signatures. Peterson tested Maye's urine sample, which revealed an ethyl-alcohol concentration of 0.10 grams per 67 milliliters. Because Maye had two driving-while-impaired (DWI) convictions from 2006 and 2007, respondent State of Minnesota charged him with two counts of second-degree DWI, one for having an alcohol concentration of .08 or more in violation of Minn. Stat. §§ 169A.20, subd. 1(5), 169A.25 (2010), and one for driving while impaired in violation of Minn. Stat. §§ 169A.20, subd. 1(1), 169A.25 (2010).

Maye moved to suppress evidence arising from the traffic stop on the basis that the stop was illegal, and the district court denied the motion. Maye stipulated to the existence of his prior convictions. A jury found Maye guilty of both counts, and the district court sentenced him on second-degree DWI (alcohol concentration .08 or more). This appeal follows.

D E C I S I O N

Denial of Suppression Motion

The United States and Minnesota Constitutions prohibit warrantless searches and seizures, subject to limited exceptions. U.S. Const. amend. IV; Minn. Const. art I, § 10. "Generally, if an officer observes a violation of a traffic law, no matter how insignificant the traffic law, that observation forms the requisite particularized and objective basis for conducting a traffic stop," *State v. Anderson*, 683 N.W.2d 818, 823 (Minn. 2004) (citing *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997)), but a stop must not be "the product of mere whim, caprice, or idle curiosity," *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980) (quotation omitted). "Evidence resulting from an unreasonable seizure must be excluded." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012). "We review de novo a district court's determination of reasonable suspicion of illegal activity." *Id.* "[W]e accept the district court's factual findings unless they are clearly erroneous." *Id.*

Maye characterizes the following findings by the district court as clearly erroneous: that the officer "observed [Maye's] vehicle weave within its lane of travel on westbound Highway 7" and that, once on Highway 100, Maye's vehicle "cross[ed] over two lanes into the center lane of southbound Highway 100 without signaling." As to the first disputed finding, Maye contends that, because Officer Havlik did not use the word "weave" during his testimony, the court's finding that the officer "observed [Maye's] vehicle weave within its lane of travel on westbound Highway 7" is erroneous. Maye's contention lacks merit. During his direct examination, Officer Havlik testified that he saw

Maye's vehicle cross the center dashed line dividing the left and right lanes of traffic. On cross-examination, he testified that, although the tires on the left side of Maye's vehicle touched the center line for several seconds, Maye did not travel on the dashed line the entire time. That is of no consequence. The definition of "weave" includes a singular movement in and out of a lane. *See The American Heritage Dictionary of the English Language* 1949 (4th ed. 2006) (defining "weave" used intransitively as "[t]o move in and out or sway from side to side"). The movement of Maye's vehicle falls within the definition of weaving, and the district court did not err by so characterizing it based on Officer Havlik's testimony.

As to the second disputed finding, Maye contends that the record does not support the district court's finding that his vehicle "cross[ed] over two lanes into the center lane of southbound Highway 100 without signaling." Officer Havlik testified that Maye's vehicle "proceeded to turn onto the ramp and headed southbound on Highway 100 where [he] saw it cross completely the line with the left side of tires. And after it re-entered the right lane of traffic [he] initiated a traffic stop . . . ." He also testified that the basis of his stop was Maye's "inability to drive within a single lane of traffic without signaling any lane changes."

Even if the court misconstrued the officer's testimony about how many lanes Maye crossed to enter the center lane of traffic, the error is of no consequence because the officer testified that Maye did not signal his lane change, regardless of the number of lanes changed. And crossing a lane of traffic without signaling is a violation of Minnesota traffic law. Minn. Stat. § 169.19, subd. 4 (2010) ("No person shall . . . move

right or left upon a highway unless and until the movement can be made with reasonable safety after giving an appropriate signal . . . .").

The district court expressly found Officer Havlik's testimony credible. Because Officer Havlik observed Maye violate Minnesota traffic law, the officer had the reasonable suspicion necessary to stop appellant's vehicle, and we therefore affirm the district court's denial of appellant's motion to suppress.

Admission of Urine-Test Results

Relying primarily on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), Maye contends that the district court erred by admitting the test results of his urine sample because the state did not obtain a search warrant, no exigent circumstances existed, and Maye's consent to the test was not valid. After the parties submitted their briefs, the Minnesota Supreme Court issued its decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013). *Brooks* controls the resolution of this case. In *Brooks*, although the supreme court concluded that warrantless searches of blood and urine "cannot be upheld solely because of the exigency created by the dissipation of alcohol in the body," it upheld Brooks's convictions because he consented to the blood and urine tests. 838 NW.2d at 567, 570, 572–73. We therefore address the validity of Maye's consent to the urine test.

"Whether consent is voluntary is determined by examining the 'totality of the circumstances.'" *Id.* at 568 (quoting *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999)). A totality-of-the-circumstances analysis requires evaluation of "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). "[C]onsent can be voluntary even if

the circumstances of the encounter are uncomfortable for the person being questioned." *Brooks*, 838 N.W.2d at 569. "[A] driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570.

Here, after Officer Havlik read the implied-consent advisory to Maye, the following exchange occurred:

> THE OFFICER: Do you understand what I've just explained?
> THE DEFENDANT: Yes, sir.
> THE OFFICER: Do you wish to consult with an attorney?
> THE DEFENDANT: No.
> THE OFFICER: Will you take a urine test?
> THE DEFENDANT: Yes.

Nothing in the record suggests that Officer Havlik coerced Maye's consent. Moreover, Maye states in his brief that he "willingly submitted a urine sample." Based on the totality of the circumstances, we conclude that Maye's consent to the urine test was free and voluntary, and that the district court did not err by admitting Maye's urine-test results.

Admission of Unredacted Implied-Consent-Advisory Recording

"Evidentiary rulings rest within the sound discretion of the trial court, and we will not reverse such evidentiary rulings absent a clear abuse of discretion." *State v. Valtierra*, 718 N.W.2d 425, 434 (Minn. 2006) (quotations omitted). Plain-error review requires that "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*,

583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it was clear or obvious." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). Usually an error is plain if it contravenes caselaw, a rule, or a standard of conduct. *Id.*

Maye offered into evidence the recording of his implied-consent advisory, which was 9 minutes and 54 seconds in length and began with Officer Havlik's reading of the implied-consent advisory. The district court conditionally received the recording as a marked exhibit.[1] During his cross-examination of Officer Havlik, Maye's counsel played five portions of the recording. But the record is unclear as to whether Maye's counsel played the portion that included Maye's statement that he has two prior "DWIs."

Before the jury began deliberating, the district court told the jurors that they would have all exhibits received into evidence available when they retired to the jury room. Maye argues that the district court's admission of the unredacted recording constitutes plain error because he stipulated to the existence of his two prior DWIs and the admitted recording includes his statement that he has two prior DWIs. Maye claims that the jury could have listened to the recording, heard him allude to his prior DWI convictions, and been improperly influenced by it.

Generally, a defendant may stipulate to an element of an offense for which the prosecution would otherwise be required to provide substantive evidence, and a district court's refusal to permit the stipulation constitutes error. *See, e.g.*, *State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984) (concluding that it was error for the district court to

[1] The district court *conditionally* admitted the recording because Maye did not provide the court reporter with a transcript of the recording when he offered it as an exhibit.

refuse to allow defendant to stipulate to a prior DWI conviction that was an element of the charged offense). But, here, Maye is the party who offered the implied-consent-advisory recording into evidence without redaction of the prior-DWIs statement. Moreover, nothing in the record establishes that Maye's counsel played the prior-DWIs statement in the courtroom, that the jury had equipment during their deliberations with which to listen to the recording, that the jury asked to listen to the recording, or that the jury did listen to the recording.

We therefore conclude that the district court's admission into evidence of the unredacted recording, as offered by Maye, did not constitute error.

Prosecutorial Misconduct

Were-they-lying Questions

The use of improper were-they-lying questions constitutes prosecutorial misconduct. *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005). Maye argues that the district court abused its discretion and committed reversible error by allowing the prosecutor to ask Maye were-they-lying questions regarding the BCA scientist's testimony. The prosecutor asked the following questions:

> THE PROSECUTOR: And you heard the BCA scientist testify that there was no tampering on the seal [of the urine sample], correct?
> THE DEFENDANT: That's what they saying.
> THE PROSECUTOR: You heard him testify that he removed that sample from where it is securely kept, correct?
> THE DEFENDANT: That's what they saying, yes.
> THE PROSECUTOR: And you heard him testify to scientifically verifiable findings that the result was .10, correct?
> THE DEFENDANT: That's what they saying.

THE PROSECUTOR: You're saying that he's lying?
THE DEFEDANT'S COUNSEL: Objection. Badgering.
THE COURT: Overruled.
THE DEFENDANT: That's what they saying. I don't know if it's lying or not. That's what he says.
THE PROSECUTOR: Yes or no, are you saying that he's lying?
THE DEFENDANT: I don't know if he's lying or not but that's what he says.
THE PROSECUTOR: Do you know the scientist?
THE DEFENDANT: No.
THE PROSECUTOR: Have you ever met him before?
THE DEFENDANT: No, ma'am.
THE PROSECUTOR: Can you give an opinion as to why he would lie?
THE DEFENDANT: I don't know. Can I ask a question? Did he know that's my urine?
THE PROSECUTOR: That's not my question.
THE COURT: Answer the question.
THE DEFENDANT: I don't know if he's lying or not. That's what I'm saying.

We first must determine whether the district court erred by allowing the prosecutor's questions. We will not reverse a district court's evidentiary rulings absent a clear abuse of discretion. *Valtierra*, 718 N.W.2d at 434. "Generally, questions designed to elicit testimony from one witness about the credibility of another have no probative value and are considered improper and argumentative." *State v. Simion*, 745 N.W.2d 830, 843 (Minn. 2008). But were-they-lying questions are "permissible . . . when the defendant holds the issue of the credibility of the state's witnesses in central focus," *State v. Caine*, 746 N.W.2d 339, 359 (Minn. 2008) (quotations omitted), "through either an express or unmistakably implied accusation that a witness has testified falsely," *State v. Leutschaft*, 759 N.W.2d 414, 416–17 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009).

Our thorough review of Maye's cross-examination of the BCA scientist does not reveal any question or response that could reasonably be read to constitute an attack on the witness's credibility. Maye challenged the witness's assumption that the urine he tested was Maye's urine, but he does not do so to suggest that the witness was lying. Instead, Maye challenges the witness's reliance on others in the chain of custody following proper procedures. Because Maye did not attack the witness's credibility, we conclude that the prosecutor committed error by asking the were-they-lying questions, and the district court abused its discretion by overruling Maye's objection to them.

We review claims of prosecutorial misconduct that were objected to at trial under a two-tiered harmless-error test. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Cases involving claims of "unusually serious" prosecutorial misconduct are reviewed for "certainty beyond a reasonable doubt that misconduct was harmless," while claims of less-serious prosecutorial misconduct are reviewed "to determine whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* What distinguishes these two types of misconduct remains unclear. *See, e.g.*, *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (declining to reach "the issue of the continued applicability of the *Caron* test").

But even under the standard for more serious misconduct, the prosecutorial error in this case was harmless. Although the prosecutor asked Maye whether he thought the BCA scientist was lying or why he thought the witness might lie a total of three times, these questions and their responses amount to less than 1 page of transcript out of a cross-examination that spans 13 pages. And the prosecutor confined the questions to a single

line of questioning; the erroneous questions were not scattered throughout the examination. Given the length and depth of the were-they-lying questions during the prosecutor's cross-examination of Maye concerning the BCA scientist's testimony, we conclude that the erroneous admission of the questions was harmless beyond a reasonable doubt.

Vouching During Closing Argument

Maye argues that we should reverse his conviction because, during her closing statement, the prosecutor made several unobjected-to statements regarding the veracity of the state's witnesses. We review unobjected-to prosecutorial misconduct under a modified plain-error test. *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009) (citing *Ramey*, 721 N.W.2d at 302). The nonobjecting defendant must show that there was error and that it was plain. *Id.* If that occurs, the burden then shifts to the state to demonstrate lack of prejudice from the error. *Id.* "A prosecutor may not personally endorse the credibility of witnesses." *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006) (citing *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995)). Nor may a prosecutor impliedly guarantee a witness's truthfulness. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006).

Here, the prosecutor twice told the jury that "Officer Havlik truthfully testified" to the jury about what happened on the night Maye was arrested. She also stated, "[O]f course Officer Havlik is telling you the truth," and told the jury that the state presented "reliable, credible officers, in particular Matt Havlik" at trial. In each of these statements, the state directly endorsed the credibility of Officer Havlik and invaded the province of the jury to determine credibility. "A prosecutor may not personally endorse the credibility

of witnesses." *Swanson*, 707 N.W.2d at 656. We conclude that the prosecutor's statements constituted impermissible vouching.

We must determine whether the state has shown that the error was not prejudicial. "When evaluating alleged misconduct, a court will look at the closing argument as a whole." *Id.* Here, the prosecutor's remarks about Officer Havlik's credibility constituted only a small portion of the closing statement as a whole. And, exclusive of Officer Havlik's testimony, the evidence at trial against Maye was persuasive. The BCA scientist testified that the seal on Maye's urine sample was intact before he tested it and that testing revealed an alcohol concentration of 0.10. We conclude that the state has met its burden of showing that the prosecutor's impermissible vouching did not prejudice Maye. *See id.* at 656 (holding that prosecutorial misconduct did not warrant a new trial, "[g]iven the strength of the evidence against Swanson and given that the impermissible vouching constituted only a small part of the prosecutor's closing argument").

Affirmed.