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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-970**

State of Minnesota,
Respondent,

vs.

Joseph George Therrien,
Appellant.

**Filed February 13, 2012
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-CR-08-12998

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Elizabeth Lamin, Assistant
County Attorneys, Sonja B. Beddow (certified student attorney), St. Paul, Minnesota (for
respondent)

Jennifer M. Macaulay, Macaulay Law Offices, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and
Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing ineffective assistance of counsel and that the jury instruction on probable cause constituted plain error. Because appellant's counsel provided effective assistance and the jury instruction did not affect appellant's substantial rights, we affirm.

FACTS

About 2:00 a.m. on October 4, 2008, two police officers answered a call from a Ramsey County resident who reported that a male, driving a Jeep that was leaking fluid, had hit two parked cars and a yard sign, driven onto a lawn, and then driven away. The officers came to the caller's residence and followed the trail of fluid, which led to the garage of the residence of the mother of appellant Joseph Therrien. A Jeep with fluid collected underneath it was inside the garage. The officers knocked at the house door, which was answered by appellant's mother. In response to the officers' questions, she said appellant was home and in the basement and that the officers could enter and speak to him.

In the basement, the officers found appellant asleep, next to a pistol. He did not wake when the pistol was moved, but woke when officers grabbed him and put him in handcuffs and lifted him up. They noticed that his eyes were red and watery, his speech was slurred, and he was agitated and noncompliant. The officers discovered that appellant did not have a valid driver's license, arrested him, and took him to jail. Appellant called his attorney and refused a breath test, giving no reason for doing so.

Appellant was charged with two misdemeanor license violations and felony test refusal. His motion to suppress the evidence was denied, and a jury found him guilty of felony test refusal. His petition for postconviction relief was denied. He challenges that denial, arguing that he was denied the effective assistance of counsel and that the jury's instruction on probable cause was plain error.

D E C I S I O N

I. Ineffective Assistance of Counsel

A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). The test for ineffective assistance has two prongs: a deficiency in counsel's performance and prejudice to the defendant. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Appellant alleges ineffective assistance because his counsel failed "to timely disclose photographs," "to raise any available defenses," "to call rebuttal witnesses," and "to object to [a] jury instruction." The first three were strategic or tactical decisions. "What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *Id.*; see also *Opsahl*, 677 N.W.2d at 421 (noting that courts are reluctant to second-guess counsel's strategic decisions and thereby diminish counsel's flexibility in representing clients).

A. Photographs

The relevant photographs allegedly show that appellant's mother's house had two separate doorbells and would support the argument that she lacked authority to let officers enter the basement, where appellant lived. The photographs were not timely submitted.

Appellant claims his counsel was ineffective because the photographs were not timely submitted. But, at the postconviction hearing, appellant's counsel explained that the issue had not been whether appellant's mother had authority to permit the police to enter but whether she had given them permission to enter. The photographs would have been irrelevant to that issue.¹ In any event, appellant's mother testified as to the layout of the house and could have provided testimony on any details deemed relevant. Thus, even if appellant can meet the deficiency prong because some photographs were not timely submitted, he cannot meet the prejudice prong by showing that, but for those photographs, a different outcome would have resulted at trial. *See id.*

B. Unasserted Defenses

Failure to present a meritless defense is not ineffective assistance of counsel. *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004). Appellant argues that his counsel

¹ Appellant's attorney agreed to withdraw them in response to the district court's suggestion that, if appellant withdrew the untimely photographs, the state would withdraw its untimely motion to amend the complaint by adding an additional count of felony damage to property. It would seem that appellant got the better of that bargain.

should have presented the defense of a reasonable refusal to test because of appellant's asthmatic condition.² But, as the district court noted,

the facts of this case do not support the defense of reasonable refusal/physical inability. There was no failed attempt to complete the test or offer of any explanation by [appellant] as to why he was physically unable to complete the test. [Appellant] simply refused to submit to a breath test.

Appellant also argues that, to oppose the state's claim of probable cause, counsel should have introduced the defense of post-incident consumption of alcohol. But he does not refute the district court's conclusion that "[u]nder the facts of this case, evidence of [appellant's] conduct prior to his arrival at his home was sufficient to establish probable cause that [appellant] was driving while under the influence." In fact, appellant concedes that "[b]ecause of the weight of evidence indicating that [he] had been involved in a motor vehicle accident, it would be almost impossible to prove that police did not have probable cause to request the test." Neither of the unasserted defenses could have altered the outcome of the trial.

C. Rebuttal Witnesses

Appellant's 85-year-old mother was called as a witness and, in contrast to what she had told appellant's counsel's investigator, testified that she had allowed the police to come into her home to talk to appellant. Appellant argues that it was ineffective

² About a year before this incident, counsel had represented appellant on another refusal-to-test charge and argued, unsuccessfully, that the refusal was reasonable because of appellant's asthmatic condition.

assistance not to call him as a witness so he could rebut this testimony.³ As a threshold matter, we note that the record does not reflect that appellant ever told counsel he wanted to testify, and appellant does not argue that counsel deprived him of his right to testify. *See State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980) (“[T]he right of a criminal defendant to testify is a personal right and the decision whether to testify is ultimately for the defendant, not counsel.”).

Appellant’s counsel explained that he did not call appellant because appellant was then an “unrepentant alcoholic” who “wouldn’t hesitate to try to lie on the stand” and would thereby “put himself in more trouble.”

Deciding which witnesses to call is a matter of trial tactics “within the proper discretion of trial counsel and will not be reviewed later for competence.” *Voorhees*, 596 N.W.2d at 255. Appellant does not refute his counsel’s opinions, and, while he claims counsel’s strategy in not calling him was “entirely irrational,” he concedes that “counsel should not consider suborning perjury as a trial strategy.”

Appellant’s counsel’s decisions not to submit certain photographs, not to raise certain defenses, and not to call appellant as a witness to rebut his mother’s testimony were strategic decisions within counsel’s authority and were not ineffective assistance. *See id.*

³ Because appellant was sleeping very soundly in the basement while his mother was talking to the police, it is not clear how he would have rebutted her testimony.

D. Failure to Object to Jury Instruction

The jury was instructed that “[p]robable cause’ means that the officer can explain the reason the officer believes it was more likely than not that the defendant drove, operated or was in physical control of a motor vehicle while under the influence of alcohol.” *See* 10A *Minnesota Practice*, CRIMJIG 29.28 (2008).

This version of the instruction was current at the time of trial in March 2009, and appellant raised no objection to its use. This court has since held that “CRIMJIG 29.28 misstates the law of probable cause” *State v. Koppi*, 779 N.W.2d 562, 568 (Minn. App. 2010), *rev’d on other grounds*, 798 N.W.2d 358, 364 (Minn. 2011). Appellant argues that his counsel was ineffective for not foreseeing *Koppi* and objecting to the instruction, but offers no legal support for this argument. Appellant implies that, to avoid a charge of ineffectiveness, counsel is obliged to challenge every jury instruction on which the appellate courts have not yet ruled. But the expert whom appellant brought in to testify as to his counsel’s ineffectiveness answered “No” when asked if the expert himself had brought up this instruction in all the test-refusal cases he had defended.

Appellant was not denied the effective assistance of counsel.

II. Erroneous Jury Instruction

Because appellant did not object to the jury instruction at trial, it is reviewed under the plain-error standard. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007). That standard requires (1) an error (2) that was plain, (3) that affected the defendant’s substantial rights, and (4) that must be corrected to ensure fairness and the integrity of the judicial proceedings. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). The

determination of whether the error affected the defendant's substantial rights is the equivalent of a harmless-error determination. *Id.* at 584 n.4. It is undisputed that, because this case was pending when *Koppi* was decided, there was a plain error in the use of the instruction. *See, e.g., State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002) (noting that its holding, *i.e.*, that plea agreement is not sufficient basis to depart from sentencing guidelines, applied to pending cases).

Koppi concluded that the erroneous instruction affected the defendant's substantial rights and was therefore not harmless error "because of the equivocal nature of the evidence presented at trial with respect to the probable cause element of test refusal" *Koppi*, 798 N.W.2d at 366. That evidence included the arresting officer's statements that the defendant's eyes were glossy and bloodshot, that he emitted a slight odor of alcoholic beverage, that he swayed from side to side a little bit, that he refused to perform field sobriety tests, that he became upset, and that the officer believed him to be under the influence of alcohol, but also the officer's statements that he had not seen the defendant's truck cross the center or fog lines of the highway, that in 95% of cases a defendant emits a strong odor rather than a slight odor of alcohol, and that the defendant's speech was not slurred. *Id.* at 365. *Koppi* is distinguishable because the evidence here was not equivocal. Appellant offers no evidence refuting the conclusion that the police had probable cause and states that "[b]ecause of the weight of evidence indicating that [he] had been involved in a motor vehicle accident, it would be almost impossible to prove that police did not have probable cause to request the test." Thus, appellant cannot meet

the third prong of the plain-error test by showing that the use of the instruction affected his substantial rights.⁴

Because appellant's counsel's assistance was not ineffective and because the use of an improper jury instruction did not affect appellant's substantial rights, we affirm.

Affirmed.

⁴ Similarly, in *State v. Edstrom*, No. A10-1191, 2011 WL 4008149 (Minn. App. Sept. 12, 2011), *review denied* (Minn. Nov. 22, 2011), on which appellant relied at oral argument, "the evidence point[ed] so overwhelmingly in favor of probable cause that we can say beyond a reasonable doubt that the instructional error had no significant effect on the verdict." *Id.* at *7 (quoting and distinguishing *Koppi*, 798 N.W.2d at 365, on the ground that the evidence of probable cause in *Koppi* was not overwhelming). Thus, appellant's reliance was misplaced.