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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1322**

State of Minnesota,
Respondent,

vs.

Jerald Alan Hammann,
Appellant.

**Filed July 23, 2012
Affirmed in part, reversed in part, and remanded
Stauber, Judge**

Hennepin County District Court
File No. 27-CR-10-37162

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

Desyl L. Peterson, Minnetonka City Attorney, Rolf Sponheim, Associate City Attorney,
Minnetonka, Minnesota (for respondent)

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and
Muehlberg, Judge.*

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

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his conviction of third-degree refusal to submit to a chemical test, in violation of Minn. Stat. § 169A.20, subd. 2 (2010), and fourth-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2010), appellant argues that (1) he withdrew his refusal to the urine test; (2) his test refusal conviction must be reversed because the police did not offer him an alternative test after they deemed that he refused a urine test; (3) the district court erred in its jury instructions on the test-refusal charge; (4) the district court violated Hammann's right to a fair trial by allowing four officers to offer expert opinion testimony that Hammann was under the influence or impaired by alcohol; (5) the district court erred when it did not strike the driving-under-the-influence charge or give a corrective jury instruction when the state solicited testimony that Hammann refused to take the preliminary breath test; (6) the district court denied his right to a fair trial because of its rulings; and (7) his driving-under-the-influence conviction should be reversed because of prosecutorial misconduct. We decline to address whether appellant withdrew his refusal, but we reverse appellant's conviction for test refusal because he was not offered an alternative test and affirm all other counts.

FACTS

On the evening of August 12, 2010, Officer Dustin Stenglein pulled a car over after seeing it cross the lane-dividing lines, swerve within its lane, and swerve between lanes. Officer Stenglein approached the car and identified appellant Jerald Hammann as

the driver. The officer noticed that appellant's speech was slow, that his eyes were bloodshot and glossy, and that there was a strong smell of alcohol coming from inside the car. The officer asked appellant "if he had consumed any alcohol that evening," and appellant answered that "he had a few drinks earlier at a function." At that point, the officer advised dispatch that he would perform field-sobriety testing on appellant, and Officer Darrin Rain asked him to wait so that his trainee, Officer James Giese, could conduct the tests.

After Officer Giese arrived and approached the car, he also noticed the smell of alcohol inside the car, and he noticed that appellant's "eyes were a little bloodshot and watery." Appellant also told Officer Giese that "he had a couple of drinks." Officer Giese asked appellant to exit the vehicle for field-sobriety testing and noticed that appellant "had to use both his hands to grab ahold of the car to get himself out of the car." In response to a question about his eyes, appellant told Officer Giese that he was only wearing one contact lens. Officer Giese then administered three field-sobriety tests, and appellant exhibited impairment on all of them. Appellant was then transported to the police department.

At the police department, Officer Giese, in the presence of two other officers, read appellant the implied-consent advisory and asked him to take a urine test. Appellant consented but decided to wait to take the test. Appellant asked the officers what types of tests the department offered, and an officer responded: "[W]e're gonna offer you urine or blood. . . . If you won't do urine we're gonna ask you blood and that's it." Appellant then repeatedly asked the officers about various aspects of the implied-consent process

and unsuccessfully tried multiple times to call his brother and his attorney.

Approximately 48 minutes after the process began, an officer asked appellant multiple times within the course of one minute whether he would take a urine test, and appellant never directly responded. The officer then stated, “Jerald I will consider you to have refused the test at this point.” Appellant immediately responded, “I am totally willing to take whatever test is appropriate.” But the officer deemed appellant to have refused the test.

Respondent State of Minnesota charged appellant with fourth-degree driving while impaired, in violation of Minn. Stat. §§ 169A.20, subds. 1(1), 3, 160A.27 (2010), and with gross misdemeanor third-degree refusal to submit to a chemical test, in violation of Minn. Stat. §§ 169A.20, subds. 2–3, 169A.26, subds. 1(b), 2 (2010).

Appellant brought a pre-trial motion to suppress evidence of his refusal because he “was only offered a urine test and a refusal cannot be . . . charged against a person who refuses to take a urine test only if a blood test was offered.” The district court denied his motion.

At trial, the four officers involved in the arrest and implied-consent process testified, and three of them testified that they believed appellant was under the influence of alcohol. After the state rested, appellant’s attorney moved for acquittal on the test-refusal charge because appellant was never offered a blood test. On the record, the trial judge summarized the reasoning in the pretrial judge’s order on appellant’s suppression motion, agreed with it, and denied appellant’s motion for judgment of acquittal.

Appellant then testified in his own defense and gave multiple reasons why he failed the

sobriety tests and why he appeared intoxicated that evening. The jury found appellant guilty of operating a motor vehicle under the influence of alcohol and of refusing to submit to a chemical test.

This appeal follows.

D E C I S I O N

I. Withdrawal of refusal

Appellant argues that his immediate withdrawal of his refusal to take the urine test cured his refusal. But appellant did not raise this issue in the district court. In general, a suppression issue not raised at the omnibus hearing is considered waived. *See State v. Pederson-Maxwell*, 619 N.W.2d 777, 780 (Minn. App. 2000) (stating that constitutional challenges to evidence must be raised at an omnibus hearing for the challenges to be timely); *State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996) (noting that appellant waived right to challenge aspects of probable-cause determination by not raising those issues at the omnibus hearing). Appellant did not raise the withdrawal-of-refusal issue either in his motion to suppress or at trial. An appellate court “generally will not decide issues which were not raised before the district court.” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Therefore, we conclude that this issue is waived.

II. Failure to offer an alternative test

Appellant argues that the district court incorrectly denied his motion to suppress and motion for acquittal because the officers did not comply with the statutory requirement to offer appellant an alternative test after they deemed appellant to have refused a urine test. “When reviewing a district court’s pretrial order on a motion to

suppress evidence, we review the district court’s factual findings under a clearly erroneous standard and the district court’s legal determinations de novo.” *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted). “[T]he district court could properly deny the motion to acquit if it determined that the state’s evidence, when viewed in the light most favorable to the state, was sufficient to sustain a conviction.” *State v. Slaughter*, 691 N.W.2d 70, 75 (Minn. 2005).

“Any person who drives . . . a motor vehicle within this state . . . consents . . . to a chemical test of that person’s blood, breath, or urine for the purpose of determining the presence of alcohol,” and “[i]t is a crime for any person to refuse to submit to a chemical test of the person’s blood, breath, or urine.” Minn. Stat. §§ 169A.20, subd. 2, 169A.51, subd. 1(a) (2010).

The peace officer who requires a test pursuant to this section may direct whether the test is of blood, breath, or urine. Action may be taken against a person who refuses to take a blood test *only if an alternative test was offered* and action may be taken against a person who refuses to take a urine test *only if an alternative test was offered*.

Minn. Stat. § 169A.51, subd. 3 (2010) (emphasis added). Here, the district court reasoned that appellant knew “he could submit to either a blood or urine test” but rather “chose to delay and frustrate the process.” The court stated: “In light of [appellant]’s stalling behavior, the Court finds [appellant] constructively refused chemical testing by way of either a urine or blood test.”

Appellant argues that the officer asked him to take a urine test and that once the officer decided that appellant had refused the urine test, the officer did not offer appellant

a blood test. Appellant concedes that the officers did inform him at the beginning of the implied-consent process that they would ask him for a blood test if he refused to take a urine test, but he argues that the officers never actually offered him the blood test once they determined he had refused the urine test. Although this is a close case, we agree with appellant.

The plain language of the statute only allows action to be taken against a person if that person refuses to take a blood or urine test and an “alternative test was offered.” Minn. Stat. § 169A.51, subd. 3. Here, an officer at the beginning of the implied-consent process told appellant: “If you won’t do urine we’re gonna ask you blood and that’s it.” But that statement is not an offer for alternative testing. In the cases where this court has considered a person to have refused chemical testing, the facts suggest that an officer gave the person the option of choosing a blood or urine test. *See State v. Ferrier*, 792 N.W.2d 98, 100 (Minn. App. 2010) (“[Officer] then asked appellant if she would take a blood or urine test, and appellant chose to take a urine test.”), *review denied* (Mar. 15, 2011); *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 257 (Minn. App. 2000) (“[Officer] then asked Busch if he would take a blood, urine, or breath test, but Busch refused to reply.”); *Linde v. Comm’r of Pub. Safety*, 586 N.W.2d 807, 810 (Minn. App. 1998) (stating that officer asked final question “whether appellant would take a blood or urine test”), *review denied* (Minn. Feb. 18, 1999); *State v. Hagen*, 529 N.W.2d 712, 714 (Minn. App. 1995) (“If Hagen had refused the officer’s direction to take one test, the deputy *would then* have needed to offer an alternative test.”); *Franko v. Comm’r of Pub. Safety*, 432 N.W.2d 469, 471 (Minn. App. 1988) (“The trooper then offered appellant the

choice between a blood or urine test.”). Here, the officer’s statement that he would offer appellant blood or urine did not give appellant the option to choose a test. In the end, the officers only gave appellant the choice to take a urine test.

The state cites *Lower v. Comm’r of Pub. Safety*, No. C1-95-965, 1996 WL 118403 (Minn. App. Mar. 19, 1996), and *Holtz v. Comm’r of Pub. Safety*, 340 N.W.2d 363 (Minn. App. 1983). But in both cases, the person was not asked to submit to chemical testing. Rather, the officers stopped reading the implied-consent advisory after the person remained silent or replied with nonresponsive answers to the question of whether he understood the advisory. *Lower*, 1996 WL 118403, at *1 (nonresponsive answers); *Holtz*, 340 N.W.2d at 364–65 (remaining silent). These cases do not apply here, where appellant was actually offered a urine test.

Because appellant was not offered an alternative test, we reverse his test-refusal conviction and vacate his sentence for the test-refusal conviction. Because we are vacating appellant’s test-refusal conviction, we need not address his challenges to the district court’s jury instructions on the test-refusal charge.

III. Officers’ testimony about appellant’s intoxication

Appellant argues that the district court violated his right to a fair trial when it allowed three police officers to give expert opinion testimony about whether they believed that appellant was under the influence of alcohol. Because appellant “did not make this objection below, it is reviewed for plain error.” *State v. Valentine*, 787 N.W.2d 630, 639 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). “Under plain error analysis, we must determine whether there was error, that was plain, and that affected the

defendant's substantial rights. If each of these prongs is met, we will address the error only if it seriously affects the fairness and integrity of the judicial proceedings.” *State v. Kuhlmann*, 806 N.W.2d 844, 852–53 (Minn. 2011) (citation omitted).

Here, we need not go any further than the first prong of the analysis—whether there was error. We have recently held that a police officer's testimony regarding indicia of intoxication based on his or her own observations is not expert testimony. *State v. Ards*, ___ N.W.2d ___, ___, No. A11-1117, slip op. at 1, 9 (Minn. App. July 16, 2012). Here, three officers testified based on their own observations that they believed that appellant was under the influence. Under *Ards*, the district court did not err in allowing such testimony. Because there is no error, we need not continue with the plain-error analysis. *See Kuhlmann*, 806 N.W.2d at 853 (noting that if one prong of plain error test is not met, there is no need to consider other prongs).

IV. Testimony about refusal of preliminary breath test

In his pro se supplemental brief, appellant argues that evidence suggesting that he refused to take the preliminary breath test (PBT) is inadmissible for his driving-while-impaired charge, and therefore when the state solicited testimony on his refusal of the PBT, the trial court should have either stricken the driving-while-impaired charge or issued a corrective jury instruction. For support, appellant only cites Minn. Stat. § 169A.41, subd. 2 (2010). But that section only prohibits using the results of the PBT in certain instances. *Id.* Because the plain language of the statute only prohibits using the results of the PBT and not evidence of the refusal of the PBT, appellant's argument is without merit.

V. Right to a fair trial on the driving-under-the-influence count

In his pro se supplemental brief, appellant next argues that “the fact that the officers never offered him the opportunity to take a blood test was relevant to the determination of his guilt or innocence in the driving under the influence count.” But appellant’s argument is unpersuasive because the driving-while-impaired charge does not require proof that appellant took, or refused to take, any sort of test. *See* Minn. Stat. § 169A.20, subd. 1(1). And it is unclear how evidence that the officers failed to offer him a blood test would be relevant to the jury’s determination that appellant was driving a motor vehicle while being “under the influence of alcohol.” *Id.* Therefore, appellant’s argument is meritless.

VI. Prosecutorial misconduct

In his pro se supplemental brief, appellant finally argues that the prosecutor engaged in misconduct when he prosecuted appellant for test refusal and for driving under the influence. When there has been no objection, “the [appellant] must . . . demonstrate prosecutorial misconduct by establishing error that is obvious under current law.” *State v. Washington*, 725 N.W.2d 125, 136 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). Appellant does not cite any law that shows that the prosecutor committed an error that is obvious under current law. Therefore, appellant’s argument is without merit.

Because the trial court sentenced Hammann for his test-refusal conviction—which we have vacated—and not for his driving-under-the-influence conviction, we remand to the trial court for resentencing of Hammann’s driving-under-the-influence conviction.

Affirmed in part, reversed in part, and remanded.