STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2238

State of Minnesota,
Respondent,

vs.

William David Alger,
Appellant.

Filed March 11, 2008
Affirmed in part and reversed in part
Kalitowski, Judge

Itasca County District Court
File No. CR-06-1731

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

John J. Muhar, Itasca County Attorney, David S. Schmit, Assistant County Attorney, 123 Northeast Fourth Street, Grand Rapids, MN 55744 (for respondent)

John M. Stuart, State Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Collins, 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.

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

KALITOWSKI, Judge

On appeal following his convictions of second-degree test refusal, driving after revocation, and failure to provide proof of insurance, appellant William David Alger argues that the district court (1) erred by denying his motion for a directed verdict on the driving-after-revocation charge; (2) erred by denying his request for a reasonable-refusal instruction; and (3) committed plain error by failing to identify all the elements of the test-refusal offense in its instructions to the jury. We affirm in part and reverse in part.

D E C I S I O N

I.

Appellant argues that the district court erred by denying his motion for a directed verdict on his driving-after-revocation charge because the state presented no evidence that appellant had notice of or reasonably should have known that his driver's license was revoked. We agree and reverse.

A motion for a directed verdict is procedurally equivalent to a motion for acquittal. *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005).[1] The district court's task in assessing a motion for judgment of acquittal is to determine "whether the evidence is sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state." *Id*. at 74-75 (citation omitted). Accordingly, a district court may grant a motion for a directed verdict if it determines that

[1] Minn. R. Crim. P. 26.03, subd. 17(1) abolishes motions for directed verdict and states that motions for judgment of acquittal should be used in their place. But since appellant moved for a "directed verdict" at trial, we will refer to it as such throughout this opinion.

the state's evidence, when viewed in the light most favorable to the state, is insufficient to sustain a conviction. *Id.* at 75. A reviewing court must determine whether "the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

Appellant moved for a directed verdict on all charges, but appeals only the denial of his motion for directed verdict on the driving-after-revocation offense. A person is guilty of driving after revocation when:

> (1) [his] driver's license or driving privilege has been revoked; (2) [he] has been given notice of or reasonably should know of the revocation; and (3) [he] disobeys the order by operating in this state any motor vehicle, the operation of which requires a driver's license, while [his] license or privilege is revoked.

Minn. Stat. § 171.24, subd. 2 (2004). The state must prove each element of this offense beyond a reasonable doubt. *State v. Montgomery*, 707 N.W.2d 392, 400 (Minn. App. 2005) (citation omitted).

Appellant argues that the state presented no evidence of the notice element. Under Minnesota law, notice "is sufficient if personally served, or if mailed by first class mail to the person's last known address or to the address listed on the person's driver's license." Minn. Stat. § 171.24, subd. 7(a) (2004). Respondent did not offer proof that appellant was mailed notice. But a jury may make inferences that reasonably flow from proven facts and are not the product of mere conjecture or speculation. *State v. DeRosier*, 695

N.W.2d 97, 108 (Minn. 2005). Respondent argues that testimony by the arresting officer provided three bases for an inference that appellant had notice that his license was revoked: (1) the fact that the deputy knew that appellant's license was revoked; (2) appellant's initial refusal to respond to the question of why he was driving; and (3) appellant's subsequent response that he was driving "because he wanted to drive." We disagree.

The state has the burden of proving every element of a criminal offense. *Montgomery*, 707 N.W.2d at 400. Here, the officer's testimony does not support an inference that appellant had notice of revocation. Because we conclude that the state failed to meet its burden of proving every element of the driving-after-revocation crime beyond a reasonable doubt, we reverse appellant's conviction of and sentence for this charge.

II.

Appellant argues that the district court erred by denying his request for a reasonable-refusal instruction on the test-refusal charge. We disagree.

Minnesota law provides that, in an implied-consent proceeding, "[i]t is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner's refusal to permit the test was based upon reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c) (2004). A defendant is "entitled to a jury instruction on his theory of the case if there is evidence to support the theory." *State v. Yang*, 644 N.W.2d 808, 818 (Minn. 2002). But the district court has the discretion to refuse to give a requested jury instruction. *State v. Daniels*, 361 N.W.2d 819, 831 (Minn. 1985). And the district

court need only give an instruction if it is warranted by the facts or by the relevant law. *State v. Holmberg*, 527 N.W.2d 100, 106 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995).

Appellant argues that the district court should have granted his request for a reasonable-refusal instruction because his testimony indicated that he was confused about what test the arresting officer sought to administer. But a refusal is not reasonable due to confusion as to the difference between a PBT and a breath test unless the officer failed to explain the difference between the tests. *State Dep't Pub. Safety v. Held,* 246 N.W.2d 863, 864 (Minn. 1976). And here, the officer testified that he read appellant the implied-consent advisory. Appellant initially claimed that he did not remember hearing the advisory, but on cross-examination he admitted that he probably told the officer that he would not take a breath test and that he probably refused to take it: "Basically, yeah, I wasn't going to take another test. I would take it for anybody else. I wouldn't take it for that little jerk." Thus, appellant's own testimony indicated that he did not refuse the test out of confusion, but rather because he disliked the officer. We conclude that the district court did not err in denying appellant's request for a reasonable-refusal instruction.

III.

Appellant contends that his test-refusal conviction must be reversed because the district court erred by failing to instruct the jury on all the elements. We disagree. The district court has significant discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). A jury instruction is error if it materially misstates the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). "[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) (citation omitted).

When a party does not object to a jury instruction at trial, this court may consider the issue only if the challenged instruction amounts to "plain error affecting substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To affect substantial rights, the error must be prejudicial; that is, there must be a "reasonable likelihood" that giving the instruction would have had a significant effect on the verdict. *Id.* at 741. If the error was prejudicial, this court must assess whether it should remedy the error "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740.

The district court followed the pattern jury instruction and instructed the jury on the elements of criminal test-refusal:

> First, a peace officer had probable cause to believe that [appellant] drove a motor vehicle while under the influence of alcohol . . . Second, [appellant] was requested by a peace officer to submit to a chemical test of [appellant's] breath. Third, [appellant] refused to submit to the test. Fourth, [appellant's] act took place on or about April 23, 2006, in Itasca County.

Appellant argues that this instruction is inadequate because it fails to include the procedural prerequisites of the implied-consent statute. A recent decision of this court confirmed that a jury instruction for test-refusal must incorporate both the criminal test-refusal statute and the implied-consent statute. *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007).

The implied-consent statute provides that a chemical test of a person's breath may be required when an officer has probable cause to believe that the person was driving,

operating, or in physical control of a motor vehicle in violation of Minn. Stat. § 169A.20 and if one of the following conditions exist:

> (1) the person has been lawfully placed under arrest for violation of section 169A.20 . . . ;
> (2) the person has been involved in a motor vehicle accident . . . ;
> (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or
> (4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.51, subd. 1(b) (2004). The person must also be informed of specific information that is set out in the statute and included in the implied-consent advisory form. Minn. Stat. § 169A.51, subd. 2 (2004). In *Ouellette*, we held that, because an officer can request a test only when a condition exists under the implied-consent statute, and because the implied-consent advisory must be given when the test is requested, those prerequisites are incorporated into the criminal-refusal statute. 740 N.W.2d at 360. Accordingly, a jury must be instructed on those elements. *Id*. Here, because the jury instructions did not include these procedural prerequisites, the district court committed plain error.

But we will not reverse a conviction or grant a new trial unless the error prejudiced appellant. Here, we conclude that the deficient instruction did not have a significant effect on the verdict. Although the jury was not asked to find that one of the other conditions listed in the implied-consent statute existed, there was unchallenged evidence that appellant was placed under lawful arrest for DWI, satisfying the first condition. And the jury could have found another condition satisfied on the basis of the

arresting officer's testimony that appellant took a preliminary breath test that resulted in a reading in excess of .08. Moreover, there is no serious dispute that the officer read appellant the implied-consent advisory, as required by the statute. The officer testified that he read appellant the advisory, as is his standard practice, and the document that contained appellant's responses to the advisory's questions was received into evidence.

Because there was ample evidence that the procedural prerequisites contained in the implied-consent statute were met, there is no reasonable likelihood that the district court's omission affected the verdict. Accordingly, we affirm appellant's test-refusal conviction.

Affirmed in part and reversed in part.