STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0015

State of Minnesota,
Respondent,

vs.

Adam Joseph Cooper,
Appellant.

Filed November 26, 2012
Affirmed
Worke, Judge

Blue Earth County District Court
File No. 07-CR-11-415

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Ross E. Arneson, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Benjamin E. Gurstelle, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, 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

WORKE, Judge

Appellant challenges his convictions of and sentences for theft of a motor vehicle, first-degree driving while impaired (DWI), and chemical-test refusal, arguing that (1) retrial was barred by double jeopardy when his first trial ended in a mistrial because of prosecutorial misconduct; (2) the evidence is insufficient to sustain the convictions; and (3) the district court erred by using prior DWI convictions to enhance the charges and to increase his sentence, and by treating the charges as separate behavioral incidents for sentencing purposes. We affirm.

FACTS

Appellant Adam Joseph Cooper's first trial on theft-of-a-motor-vehicle, first-degree DWI, and chemical-test-refusal charges ended in a mistrial after the prosecutor asked him if he was a convicted felon without obtaining a ruling on whether he could impeach appellant with his felony convictions. The district court subsequently ruled that the attempted impeachment was negligent, rather than intentional, prosecutorial misconduct, concluding that double jeopardy therefore did not bar a second trial.

According to trial testimony, appellant and R.R. attended a party at W.W.'s house in Mankato. Appellant did not know any of the other six guests at the party. While there, appellant and R.R. drank at least a couple alcoholic drinks. When appellant and R.R. decided to leave, R.R. called a taxi but was unable to find appellant when the taxi arrived. R.R. waited in the taxi for appellant, who did not appear. Instead, the other party guests opened the taxi door, pulled R.R. out, and began punching him and shouting that

appellant had stolen W.W.'s car and had driven away in it. W.W. called the police. R.R. called appellant's cell phone and asked where he was; he told appellant that he was accused of stealing a car and that the police had arrived. Appellant abruptly terminated the phone call.

W.W. testified that he was not acquainted with either R.R. or appellant. He observed appellant drinking alcoholic drinks. When the taxi arrived, W.W.'s roommate looked out to make sure that the gate was shut. He told W.W. that someone was driving away in W.W.'s car. W.W. ran to the window and saw appellant driving away in W.W.'s car. W.W. positively identified appellant as the driver; he also said that although he could not clearly see the driver's face, he was wearing appellant's clothing, a black pea coat and black scarf. Further, appellant was the only absent party guest. Although it was dark, W.W. testified that there were streetlights that permitted him to see the driver.

Mankato police officer Adam Kruger obtained appellant's name and a description of the street where he lived from R.R. Kruger drove to that street, and observed a passenger getting out of a taxi. Kruger asked the man if he was Adam and appellant admitted that was his name. Kruger stated that he was investigating the theft of a motor vehicle, but appellant denied any knowledge of the incident.

Kruger questioned appellant further and appellant gave evasive answers, changing his story about where he was going several times. Kruger concluded that appellant was under the influence of alcohol. He took appellant to the police station, where appellant performed a series of field-sobriety tests. Appellant failed the field-sobriety tests; based on his performance, Kruger opined that appellant probably had an alcohol concentration

of greater than .08. Appellant refused chemical testing, because he claimed he had not been driving.

Appellant testified on his own behalf. He denied driving or taking the car. He admitted that he was wearing a black coat and scarf. He stated that he left the party because people were doing drugs; he denied that he discussed leaving the party with R.R. He said that he had been evasive with Kruger because he had been drinking, which was a violation of his probation. He testified that Kruger made him do field-sobriety tests in an icy alley, which was why he had such difficulty performing them. On rebuttal, W.W. testified that no one possessed or used drugs at his house, and Kruger testified that all the field sobriety tests had been done at the police station. The jury convicted appellant of all charges. This appeal followed.

D E C I S I O N

Double jeopardy

We review claims involving the constitutional protection against double jeopardy de novo, as a question of law. *State v. Gouleed*, 720 N.W.2d 794, 800 (Minn. 2006); *see* U.S. Const. amend. V; Minn. Const. art. 1, § 7. Generally, once a jury is sworn, jeopardy attaches; but if a mistrial is declared at the defendant's request, the Double Jeopardy Clause does not bar retrial unless the mistrial was caused by prosecutorial misconduct intended to provoke the defendant into requesting a mistrial. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985); *see Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 2089 (1982) (holding that when a defendant invokes double-jeopardy protection after a

successful motion for a mistrial, he must show prosecutorial misconduct intended to provoke a mistrial).

Appellant makes two arguments in support of his contention that retrial is barred by double jeopardy. First, he asserts that the district court erred by concluding that the prosecutor was merely negligent and did not attempt to intentionally provoke appellant into requesting a mistrial. Second, appellant contends that the Minnesota Constitution offers broader protection against double jeopardy than the United States Constitution.

1. Findings

Appellant first challenges the district court's findings of fact, which we review for clear error. *State v. Hunter*, 815 N.W.2d 518, 522 (Minn. App. 2012). The district court found that the prosecutor committed misconduct by (1) failing to give proper notice of his intent to impeach appellant with his prior convictions; (2) circumventing the district court's gatekeeping role by failing to seek "a ruling on the admission of evidence whose inadmissibility was reasonably foreseeable;" and (3) referring to an unspecified criminal conviction, rather than identifying the specific conviction.[1] The district court further found that although the prosecutor committed misconduct, he did not intend to goad appellant into requesting a mistrial because (1) although the state's case had weaknesses, there was substantial evidence of appellant's guilt, at least in part because of appellant's lack of credibility; (2) the entire course of the trial did not "support a conclusion that [the

[1] As to this last finding, shortly after the district court issued its order, the Minnesota Supreme Court issued *State v. Hill*, 801 N.W.2d 646 (Minn. 2011), in which it held that a witness may be impeached with evidence of an unspecified felony conviction. *Id.* at 652.

prosecutor] intended to cause a mistrial to evade acquittal"; and (3) the prosecutor expressed genuine regret for his mistake. This led the district court to conclude that the misconduct was not intentional, but rather was negligent.

A finding is clearly erroneous if it is not supported by facts in the record. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). An appellate court may not substitute its findings for that of the district court, if the district court's findings are reasonably supported by the record. *See Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999). Although the prosecutor made an obvious error on a well-settled issue, the district court, who observed the first trial, nevertheless concluded that his actions were negligent rather than intentional. Because there is support in the record for the district court's findings, they are not clearly erroneous.

2. Minnesota Constitution

Appellant argues that the Minnesota Constitution offers greater protection against double jeopardy than the United States Constitution. In *Fuller*, a double-jeopardy case, the Minnesota Supreme Court declined to consider whether the state constitution offered greater protection. 374 N.W.2d at 727. This court had applied a stricter standard than the federal standard: instead of the standard of intentionally provoking the defendant into moving for a mistrial, this court concluded that under the Minnesota Constitution, it was sufficient to show the prosecutor's gross negligence amounting to bad faith. *State v. Fuller*, 350 N.W.2d 382, 386 (Minn. App. 1984). In reversing this court, the supreme court noted that "It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal

constitution." *Id.* at 726. It also noted the similarity between the federal and state constitutions. *Id.* at 726-27. The supreme court rejected this court's decision that the standard should be gross negligence constituting bad faith, concluding that the case before it was not appropriate for making that determination. The supreme court and this court have continued to decline to consider whether there are broader protections under the Minnesota Double Jeopardy Clause. *See, e.g.*, *Gouleed*, 720 N.W.2d at 800 n.7; *State v. Large*, 607 N.W.2d 774, 778 n.2 (Minn. 2000); *State v. Schroepfer*, 416 N.W.2d 491, 494 (Minn. App. 1987). Once again, this is not an appropriate case in which to consider whether there are broader protections under the Minnesota Constitution, given the district court's conclusion that the prosecutor was merely negligent, and not grossly negligent.

Sufficiency of the evidence

Appellant challenges the sufficiency of the evidence that he was driving W.W.'s car; driving is an element of all of the charges against appellant. Appellant does not challenge the state's proof of the other elements of the charges. In assessing a challenge to the sufficiency of the evidence, we review the record to determine whether the facts and legitimate inferences drawn from the facts could permit a jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt. *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010). We view the evidence in the light most favorable to the verdict and assume that the jury believed the state's witnesses and did not find the defendant's witnesses credible. *Id.*

The state correctly points out that the evidence that appellant was driving is not solely circumstantial, as appellant appears to argue. "Circumstantial evidence" is

"[e]vidence based on inference and not on personal knowledge or observation." *Id.* "Direct evidence" is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Black's Law Dictionary* 636 (9th ed. 2009). W.W.'s testimony is based on personal observation; W.W. testified that he saw appellant driving and he identified him by his clothing. Although he was unable to see appellant's face clearly, this affects the weight or reliability of the evidence, but does not change its character. W.W. testified that the person driving his car must have been appellant because "he was the only one missing;" this is circumstantial evidence, because it is based on inference. But W.W. also testified that he saw appellant driving and that he was sure of his identification. The jury believed W.W.'s testimony and rejected that of appellant. Further, when proof of an element of an offense is based on both direct and circumstantial evidence of a fact, we apply the direct evidence standard. *See Flowers*, 788 N.W.2d at 133 n.2 (stating that when direct evidence of an element of an offense is offered together with circumstantial evidence, the stricter standard of review for circumstantial evidence does not apply).

Other circumstantial evidence corroborates W.W.'s direct evidence: (1) appellant was the only absent guest; (2) there were very few other people in the area or on the street at that time; (3) appellant hung up on R.R. when R.R. asked him where he was and informed him that the police were looking for him because he had stolen a car; (4) appellant was evasive when approached by Officer Kruger and changed his story several times; and (5) appellant was heavily intoxicated, and was confused or lied about various matters, including where the field sobriety tests were given, whether there were drugs at

the party, and whether he had spoken to R.R. about leaving the party. Some of these circumstances suggest guilt and others cast doubt on appellant's general credibility.

We do not re-weigh the evidence but view it in the light most favorable to the verdict. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009). If we assume that the jury believed W.W.'s direct evidence identifying appellant as the person who was driving the car, there is sufficient evidence to sustain the verdict.

Sentencing

Appellant challenges his sentence for chemical-test refusal[2] on two grounds: first, appellant argues that the district court erred by including his prior DWI felony convictions in his criminal history score because the two convictions were also used to enhance the charge to a felony; and second, the district court erred by imposing two sentences for conduct that arose out of a single behavioral incident.

1. Criminal history score

We review the district court's interpretation of the sentencing guidelines de novo, as a question of law. *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012). According to the sentencing guidelines, prior misdemeanor or gross misdemeanor convictions that serve as a basis for enhancement of an offense to a felony may not be used to calculate an offender's criminal history score, except to determine custody status. Minn. Sent. Guidelines 2, subd. B(6) (2011). But "[p]rior felony offenses used for enhancement shall always be used in calculating the offender's criminal history score." *Id.*

[2] The district court did not sentence appellant on the first-degree DWI conviction, reasoning that this conviction and the chemical-test-refusal conviction were part of the same behavioral incident.

> If the current offense is a felony DWI offense and the offender has a prior felony DWI offense, the prior felony DWI shall be used in computing the criminal history score, but the prior misdemeanor and gross misdemeanor offenses used to enhance the prior felony DWI cannot be used in the offender's criminal history.

Id.; s*ee also* cmt. 2.B.602 (2011).

Appellant's criminal history score was calculated by including one point for custody status, because he was on probation, and 1.5 points for each for his two prior felony DWI convictions, for purposes of sentencing the theft conviction, with an additional point for the conviction for theft of a motor vehicle for purposes of sentencing the chemical-test-refusal conviction. His criminal history score did not include points for his prior gross misdemeanor DWI conviction.

Appellant's reliance on *State v. Zeimet*, 696 N.W.2d 791 (Minn. 2005) is misplaced. In *Zeimet*, the supreme court limited the use of predicate misdemeanor and gross misdemeanor driving convictions used for enhancement, concluding that if a charge is enhanced based on prior misdemeanor or gross misdemeanor offenses, those same charges could not be used to calculate the offender's criminal history score, but any similar charges not used to enhance the current charge could be used as a part of the criminal history score calculation. *Id.* at 797. This reasoning applies, however, only to the use of misdemeanor and gross misdemeanor convictions, and not to the use of prior felony convictions. *See* Minn. Sent. Guidelines 2, subd. B(6). Appellant's criminal history score was properly calculated.

2. Single behavioral incident

Appellant also argues that the district court erred by imposing sentences on both the theft-of-a-motor-vehicle conviction and the chemical-test-refusal conviction, contending that because there was a unity of time and place, multiple sentences are prohibited by Minn. Stat. § 609.035 (2010) (stating that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.") This statute has been interpreted to bar multiple sentences for crimes that arise out of a single behavioral incident. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011).

Theft of a motor vehicle is an intentional crime and chemical test refusal is not. *See State v. Sailor*, 257 N.W.2d 349, 353 (Minn. 1977) (noting that unauthorized use of a motor vehicle and DWI charges involved both intentional and unintentional crimes). When multiple acts include both intentional and unintentional crimes, the court determines if the conduct constitutes a single behavioral incident by deciding if (1) the offenses occurred at the same time and place; and (2) if the offenses arose out of a continuous and uninterrupted course of conduct, "manifesting an indivisible state of mind or coincident errors of judgment." *State v. Johnson*, 273 Minn. 394, 405, 141 N.W.2d 517, 525 (1966). As the supreme court stated in *Bauer*, there must be a single criminal objective; there is no single criminal objective, when the crimes "simply [take] place as an idea came into [a defendant's] head." 792 N.W.2d at 829 (quotation omitted).

While there was a unity of time and place here, appellant's course of conduct was not motivated by a single criminal objective. There are no overlapping elements: theft of

a motor vehicle is "tak[ing] or driv[ing] a motor vehicle without the consent of the owner," and chemical test refusal occurs when a person is "driv[ing], operat[ing], or . . . in physical control of any motor vehicle [while] under the influence of alcohol" and refuses to submit to chemical testing. Minn. Stat. §§ 609.52, subd. 17; 169A.20, subd. 2; .51 (2010). *But see State v. Bookwalter*, 541 N.W.2d 290, 295-96 (Minn. 1995) (stating that focus should be on defendant's conduct, not elements of crimes committed, when determining if acts constitute a single behavioral incident). While both charges mention "driving," a conviction of either one can be premised on something other than driving. Appellant could have been convicted of chemical test refusal if he sat in W.W.'s car with the keys in the ignition: he would have been in physical control of the vehicle, but he would not be guilty of theft, which requires intent to deprive the owner of the vehicle. He could have driven away with W.W.'s permission; he would not be guilty of theft, but he would be guilty of DWI and test refusal. Likewise, had he driven the car without W.W.'s permission, but sober, he would be guilty of theft, but not DWI or chemical test refusal. In short, there is not a single criminal objective. *See Sailor*, 257 N.W.2d at 353 (concluding that motivations underlying crime of unauthorized use of a motor vehicle and DWI are different and, therefore, the two charges are not part of a single behavioral incident). The district court's decision to sentence appellant for both convictions was not erroneous.

Affirmed.