STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2073

State of Minnesota,
Respondent,

vs.

Oscar Danny Donahue,
Appellant.

Filed September 23, 2013
Affirmed
Bjorkman, Judge

Winona County District Court
File No. 85-CR-11-2380

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

Karin L. Sonneman, Winona County Attorney, Christina M. Davenport, Assistant County Attorney, Winona, Minnesota (for respondent)

Liz Kramer, Ryan M. Sugden, Special Assistant State Public Defenders, Leonard, Street and Deinard, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Smith, Judge.

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

BJORKMAN, Judge

Appellant challenges his convictions of fifth-degree possession of a controlled substance and refusal to submit to chemical testing, arguing that (1) the district court

erred by denying his motion to suppress and (2) the prosecutor committed prejudicial misconduct during closing argument. Appellant also asserts several pro se arguments. We affirm.

FACTS

Early on October 28, 2011, Winona Police Officer Brad Barrientos observed a vehicle drift out of its lane, then correct back to its original lane. Officer Barrientos pursued the vehicle and also observed that one of its brake lights was malfunctioning. The vehicle made several turns, then parked along the side of the road. Officer Barrientos activated his emergency lights and parked behind the vehicle.

Officer Barrientos identified the driver as appellant Oscar Donahue. Officer Barrientos observed that Donahue's eyes were bloodshot and that Donahue smelled of alcohol. Donahue denied consuming alcohol but exhibited indicia of intoxication during field sobriety tests. Officer Barrientos arrested Donahue for driving while impaired (DWI) and searched Donahue's person, including his outerwear, his wallet, and some of his pockets. Officer Barrientos found a matchbook, pieces of loose gum, and a lighter, but no contraband. Officer Barrientos handcuffed Donahue and placed him in the back of Winona Police Officer Derek Lanning's squad car to transport him to the police station.

During the one-minute drive, Officer Lanning observed that Donahue became "fidgety," arched his back, and placed his hands by his backside. Officer Lanning asked him what he was doing and said, "Don't be opening s--t." Donahue responded, "What am I going to open?" When they arrived at the police station, Officer Lanning asked Donahue, "You're not trying to hide anything or ditch anything, are you?" Donahue

responded, "Why would I? What are you-- You guys searched me." Officer Lanning then observed a folded piece of tinfoil on the floor of the vehicle below where Donahue was seated and said, "He didn't do too good of a job, though. You just ditched this." Donahue did not respond. The tinfoil contained a white powdery substance that scientific testing revealed to be methamphetamine.

Officer Barrientos met Officer Lanning and Donahue at the police station and read Donahue the implied-consent advisory. Donahue admitted to Officer Barrientos that he had been consuming alcohol but denied that the tinfoil in Officer Lanning's squad car was his. Officer Barrientos asked Donahue if he would take a urine test. Donahue initially agreed, but when he approached the toilet he put the sample container on a ledge and declared that he "had submitted enough tests for tonight and . . . was not going to submit to a urine test." Officer Barrientos then asked Donahue if he would take a blood test, and Donahue refused.

Donahue was charged with fifth-degree possession of a controlled substance, refusal to submit to chemical testing, and DWI. Donahue moved the district court to suppress evidence obtained as a result of the traffic stop, arguing that Officer Barrientos lacked a valid basis for the stop. The district court denied the motion. At his jury trial, Donahue testified that the drugs Officer Lanning found were not his. Donahue asserted that he was moving around in Officer Lanning's squad car because his hands were cuffed tightly behind him, which exacerbated a previous back injury; that he did not "ditch" anything in the car and denied Officer Lanning's suggestion that he had done so; and that he tried to ask Officer Lanning about the item he found on the floor of the car but was

rebuffed. The jury acquitted Donahue of DWI but found him guilty of the other two offenses. The district court imposed a stayed 19-month sentence and placed Donahue on probation for five years. This appeal follows.

D E C I S I O N

I. The district court did not err by denying Donahue's motion to suppress.

When reviewing a pretrial suppression order, we independently review the facts to determine whether, as a matter of law, the district court erred in not suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's factual findings for clear error and defer to its credibility determinations. *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012). But we review legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

Police may "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *State v. Timberlake*, 744, N.W.2d 390, 393 (Minn. 2008) (quotation omitted). The reasonable-suspicion standard is not high but requires more than a mere "hunch of criminal activity." *Id.* (quotation omitted). Observation of a traffic violation, no matter how insignificant the traffic law, generally forms the requisite particularized and objective basis for conducting a traffic stop. *State v. Anderson*, 683 N.W.2d 818, 823 (Minn. 2004).

Donahue challenges the district court's determination that the stop was valid because Donahue veered out of his lane without signaling and had a malfunctioning brake light. Donahue first contends that veering out of his lane only once was insufficient to justify a traffic stop. We are not persuaded. Donahue is correct that a

single instance of swerving or veering *within* a lane, which does not constitute a violation of a traffic law, is insufficient to establish reasonable suspicion of criminal activity. *See State v. Brechler*, 412 N.W.2d 367, 368-69 (Minn. App. 1987). But the record amply supports the district court's finding that Donahue drifted between lanes without signaling, which is a traffic violation. *See* Minn. Stat. §§ 169.18, subd. 7(a) (requiring a vehicle to stay within a single lane), .19, subd. 4 (requiring signal before moving "right or left upon a highway") (2010). Donahue next asks us to discredit Officer Barrientos's testimony that he observed a faulty brake light on Donohue's vehicle because the brake lights are not visible in Officer Barrientos's dash-camera video. But credibility determinations are the province of the district court; we will not second-guess them on appeal. *See Klamar*, 823 N.W.2d at 691. Accordingly, Officer Barrientos's observation of a faulty brake light provided an additional valid basis for the stop. *See State v. Beall*, 771 N.W.2d 41, 45 (Minn. App. 2009) (holding that failure to have all available brake lights operable justifies traffic stop). Because the traffic stop was valid, the district court did not err by denying Donahue's motion to suppress evidence obtained as a result of the stop.

II. The prosecutor did not commit prejudicial misconduct.

When, as here, an appellant claims prosecutorial misconduct based on unobjected-to arguments, we review under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 299-300, 302 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02. Under this standard, an appellant must demonstrate that the prosecutor's unobjected-to conduct was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302. The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.* We

consider closing arguments in their entirety to determine whether prejudicial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Donahue contends that the prosecutor improperly urged the jury to consider as substantive evidence of guilt Donahue's silence in response to Officer Lanning's assertion that he "ditched" the methamphetamine in the back seat of the squad car. We disagree. The state may, under certain circumstances, use evidence of a defendant's post-arrest silence to impeach his trial testimony. *See Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S. Ct. 2124, 2129 (1980) (holding that when a defendant chooses to testify "the Fifth Amendment is not violated by the use of prearrest silence to impeach [the] defendant's credibility"); *see also State v. Dobbins*, 725 N.W.2d 492, 509-10 (Minn. 2006) (discussing parameters of impeachment by silence); *State v. Darveaux*, 318 N.W.2d 44, 49 (Minn. 1982) (holding that a defendant "has no right to remain silent selectively"). Because this record presents at least a question whether the state's reference to Donahue's silence fell within those parameters, it is doubtful that any error is plain. But our principal concern is whether the asserted prosecutorial misconduct deprived the defendant of a fair trial. *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008); *see also State v. McDonough*, 631 N.W.2d 373, 389 (Minn. 2001) (declining to address claim of unobjected-to prosecutorial misconduct because alleged misconduct was harmless in light of substantial evidence of guilt). Accordingly, we turn our focus to the issue of prejudice.

Our careful review of the record reveals that any impropriety in referencing Donahue's silence during closing argument did not affect Donahue's substantial rights. First, the district court properly instructed the jury that closing arguments are not

evidence. *See State v. Johnson*, 679 N.W.2d 378, 389 (Minn. App. 2004) (noting that district court instructed the jury that counsel's arguments are not evidence in concluding no prejudicial misconduct occurred), *review denied* (Minn. Aug. 17, 2004). Second, the state presented overwhelming evidence establishing the elements of the offense. Officer Barrientos searched Donahue but did not delve into all of his pockets and did not search Donahue's wallet pocket beyond searching the wallet. Officer Barrientos noticed that Donahue appeared tense while being searched but relieved when Officer Barrientos returned the wallet to Donahue without discovering contraband. Officer Lanning searched the backseat of his car before he began his shift, and Donahue was the first person in the back of his car that night. Donahue began moving around almost immediately after being placed in the back of the car. And Officer Lanning observed the tinfoil below where Donahue had been sitting as he removed Donahue from the car. This evidence leaves virtually no room for a finding other than guilt. Accordingly, we conclude that the prosecutor's reference to Donahue's post-arrest silence did not impact the jury's verdict and Donahue is not entitled to relief on this basis.

III. Donahue's pro se arguments lack merit.

In a pro se supplemental brief, Donahue argues that (1) the police failed to follow proper chain-of-custody procedure in collecting and processing the drug evidence and (2) the evidence does not establish that he refused chemical testing.[1] We address each of these arguments in turn.

[1] Donahue also argues that the traffic stop was invalid. Because that argument is duplicative of his primary brief, we decline to restate our analysis of that issue here.

Chain of custody

The chain-of-custody rule requires the state to account for the physical evidence obtained in connection with a crime from when it was seized to the time it was offered at trial, ensuring that "(1) the evidence offered is the same as that seized, and (2) it is in substantially the same condition." *State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976). The state need not eliminate all possibility of alteration, substitution, or change of condition but must present evidence sufficient to support a finding that the item in question is what the state claims. *State v. Hollins*, 789 N.W.2d 244, 252 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010); *see also* Minn. R. Evid. 901(a) (permitting authentication or identification "by evidence sufficient to support a finding that the matter in question is what its proponent claims"). Because Donahue did not object to the admission of the drug evidence on this basis, we review for plain error. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011).

The state presented substantial evidence establishing the chain of custody. Both Officer Barrientos and Officer Lanning testified to the discovery, collection, and preliminary testing of the drug evidence. The police officer responsible for sending the evidence to the bureau of criminal apprehension (BCA) for testing testified extensively about that process and the measures taken to ensure proper handling of the evidence. And the BCA scientist who conducted the testing testified similarly about handling the evidence. On this record, we conclude the district court did not plainly err by admitting the drug evidence.

Sufficiency of evidence to prove test refusal

When reviewing a sufficiency-of-the-evidence challenge, we carefully analyze the record to determine whether the jury could reasonably find the defendant guilty of the offense charged based on the facts in the record and the legitimate inferences that can be drawn from them. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). In doing so, we view the evidence in the light most favorable to the conviction, presuming the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999).

Officer Barrientos testified that he observed multiple indicia of intoxication while administering the field sobriety tests and arrested Donahue on that basis. He read Donahue the implied-consent advisory and asked Donahue to take a urine test. Donahue admitted to consuming alcohol and initially agreed to a urine test but then put the sample container on a ledge and declared that he "had submitted enough tests for tonight and . . . was not going to submit to a urine test." Officer Barrientos then asked Donahue if he would take a blood test, and Donahue refused. Donahue's arguments about the lack of corroborative evidence or the improbability of Officer Barrientos's testimony were considerations for the jury, and we will not second-guess the jury's determination that Officer Barrientos was credible. *See Buckingham*, 772 N.W.2d at 71. On this record, we conclude that ample evidence establishes that Donahue was arrested based on probable cause to believe he was driving while impaired but refused to submit to a chemical test of his blood, breath, or urine. *See* Minn. Stat. §§ 169A.20, subd. 2, .51, subd. 1 (2010).

Affirmed.