STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0194

State of Minnesota,
Respondent,

vs.

Paul Scott Seeman,
Appellant.

Filed December 9, 2013
Affirmed in part and reversed in part
Hudson, Judge

Hennepin County District Court
File No. 27-CR-11-32970

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

Steven M. Tallen, Maple Grove City Attorney, Tallen and Baertschi, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Hudson, Judge; and Chutich, Judge.

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

HUDSON, Judge

Appellant challenges his convictions of chemical-test refusal; fourth-degree driving-while-impaired (DWI); and careless driving. Because reading the implied-

consent advisory is an essential element of the test-refusal offense, and police never read, or attempted to read, the implied-consent advisory to appellant, we reverse the conviction of chemical-test refusal. We affirm appellant's conviction of fourth-degree DWI and careless driving.

FACTS

A Maple Grove police officer arrested appellant Paul Scott Seeman following a motor-vehicle stop, and the state charged appellant with third-degree DWI, chemical–test refusal, in violation of Minn. Stat. §§ 169A.20, subd. 2, .26, subd. 1(b) (2010); fourth-degree DWI, in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .27 (2010); and careless driving, in violation of Minn. Stat. § 169.13, subd. 2 (2010). At appellant's jury trial, the arresting officer testified that he observed a truck driven by appellant traveling at a greater-than-posted speed on the on-ramp going east on I-94 from Weaver Lake Road and also crossing over the right white fog line. The officer, who followed the truck in his squad car, testified that he saw it drift over into the left lane of traffic and speed up to about 68 miles per hour as clocked on radar. He observed the truck make a full turn while staying over the fog line and then drift into another travel lane going south on I-494. The officer did not recall if there were other vehicles in the immediate vicinity and did not see the truck come close to hitting another vehicle.

The officer testified that when he initiated the stop and approached the truck, he noticed a strong odor of an alcoholic beverage coming from its interior and that appellant had glassy, watery eyes and slurred speech. When he asked appellant whether he had been drinking, appellant replied that he had consumed three beers. The officer testified

that he asked appellant if he would perform field sobriety tests, and appellant refused, stating that he would just give a breath test. The officer testified that he requested that appellant open his mouth to check for any objects and appellant opened it very briefly, making a swallowing motion, and that appellant then twice refused to take a preliminary breath test. The officer arrested appellant for DWI and transported him to the Maple Grove police station.

When they arrived in the police station garage, the officer asked appellant to walk into the sally port and read an inmate questionnaire explaining the booking process, including medical screening questions. According to the officer, appellant refused to look at the questionnaire, stated that he wanted an attorney and a blood test, and became angry and verbally abusive. The officer testified that he told appellant that he could not yet talk to an attorney and that if he would not complete the booking process, "basically he would be refusing any type of test because for his safety and our safety, and the jail integrity, that we need to perform these." The officer testified that it would have been a violation of departmental procedure to allow appellant into the lockup area without going through medical screening and other procedures. He again told appellant that if he refused the booking process, he would be refusing to talk to an attorney or to take a chemical test, and he would be taken directly to the Hennepin County Detention Center. Appellant declined to complete the process. He was then transported to the detention center.

The arresting officer testified that he never read appellant the implied-consent advisory and that he did not know if appellant was read the advisory at the detention

center. Another officer, who assisted at the police station, testified that appellant did not get to take a urine or breath test because he was agitated and hostile and would have presented a threat if he had been removed from handcuffs. That officer testified that appellant was never asked to take a chemical test and to his knowledge was not read the advisory, but that he "felt that [appellant's] demeanor was a refusal."

Appellant testified that when he was stopped, he was driving with his phone in his hand, had a few phone calls, and may have been adjusting his MP3 player. He testified that he was not read the implied-consent advisory and would have taken a blood or urine test, but that he "wasn't going to read their rules."

The jury convicted appellant of all three counts. The district court sentenced him to 365 days in the Hennepin County workhouse, with 360 days stayed, and conditions of probation. This appeal follows.

D E C I S I O N

I

Appellant argues that the evidence is insufficient to sustain his conviction of chemical-test refusal. An appellate court reviews the sufficiency of the evidence to support a conviction by determining whether legitimate inferences drawn from the record evidence would allow a factfinder to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). "Essential elements of a crime must be decided by the factfinder and by proof beyond a reasonable doubt." *State v. Ouellette*, 740 N.W.2d 355, 358 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007).

The implied-consent statute provides that "[i]t is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." Minn. Stat. § 169A.20, subd. 2. When a chemical test is requested for the purpose of determining the presence of alcohol, controlled substances, or hazardous substances, a person must be informed of specific information required by statute. Minn. Stat. § 169A.51, subd. 2(1)-(4). "This information is contained in the commonly used implied-consent advisory form." *Ouellette*, 740 N.W.2d at 359. We have held that giving the implied-consent advisory is an element of the crime of test refusal, which requires proof beyond a reasonable doubt. *Id*. at 360; *see also State v. Olmscheid*, 492 N.W.2d 263, 265 (Minn. App. 1992) (stating that "a driver must have been read the implied consent advisory in order to have criminally refused chemical testing.")

The state argues that appellant's test-refusal conviction must be upheld because his conduct frustrated the testing process by demonstrating an "actual unwillingness to participate" in testing. *See State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010) (holding that a defendant's "refusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver's words and actions in light of the totality of the circumstances"), *review denied* (Minn. Mar. 15, 2011); *see also State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003) (concluding that a defendant's disruptive conduct when an officer attempted to read her the implied-consent advisory frustrated the testing process and amounted to a retraction of her request to contact an attorney), *review denied* (Minn. Mar. 26, 2003).

But in both *Ferrier* and *Collins*, the defendant's conduct deemed to be a refusal occurred after the police read, or attempted to read, the implied-consent advisory. *Ferrier*, 792 N.W.2d at 100; *Collins*, 655 N.W.2d at 658. Here, in contrast, the record contains no evidence that appellant was ever read the implied-consent advisory or that police even attempted to do so. Both officers testified that they did not read the advisory to appellant and that they were not aware that it was later read to appellant at the detention center. Therefore, because no record proof exists on an essential element of the offense, the evidence is insufficient to sustain appellant's conviction of chemical-test refusal. *See Ouellette*, 740 N.W.2d at 360. Because we reverse appellant's conviction on that ground, we do not consider his additional challenge to the district court's jury instructions on that offense.

II

Appellant challenges the sufficiency of the evidence to support his conviction of DWI, which requires that a person drive, operate, or have physical control of a motor vehicle while under the influence of alcohol or a controlled substance. Minn. Stat. § 169A.20, subd. 1. "The state must show that the driver had drunk enough alcohol so that the driver's ability or capacity to drive was impaired in some way or to some degree." *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012) (quotation omitted).

Appellant argues that the evidence shows that he was not intoxicated, citing *State v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985). In *Elmourabit*, the supreme court reversed a DWI conviction, noting "unique facts and circumstances," including that the defendant, who had slurred speech, did not speak English as his first language, and that

he admitted to drinking only one bottle of beer. *Id*. at 293–94. The supreme court, however, reiterated in *Elmourabit* that, save for the "rare exception," jury verdicts would generally not be set aside. *Id.*

This case does not present the "rare exception" noted in *Elmourabit*. *Id.* Appellant argues that the in-squad and police-station videos introduced in evidence contradict the arresting officer's testimony of his impaired driving conduct and appearance of intoxication. He also argues that he testified plausibly that he had other distractions when the officer observed his driving. But in weighing a challenge to the sufficiency of the evidence, this court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Because the jury is in the best position to evaluate the credibility of witnesses and weigh evidence, we accord deference to its verdict. *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). The arresting officer testified that the in-squad video did not accurately capture the position of appellant's truck because the squad's angle changed during the time he was following the vehicle. The jury was entitled to believe the officer's testimony regarding appellant's driving behavior and indicia of intoxication and to draw the inference that appellant's ability to drive was impaired because of intoxication. We conclude that the evidence is sufficient to sustain the DWI conviction.

III

Appellant argues that the evidence is insufficient to sustain his conviction of careless driving. *See* Minn. Stat. § 169.13, subd. 2 (stating requirement for that offense that a person operates a vehicle "carelessly or heedlessly in disregard of the rights of

others, or in a manner that endangers or is likely to endanger" a person or property). Appellant maintains that because he did not cause any near collisions or hazards, he cannot be convicted of careless driving. But a conviction of careless driving requires only that a vehicle must be operated in a manner likely to endanger others; it is not necessary to show that other persons were actually placed in danger. *State v. Teske*, 390 N.W.2d 388, 391 (Minn. App. 1986). Based on the officer's testimony that appellant's truck was weaving into an adjoining lane of traffic, the jury could reasonably have found that appellant's conduct met the requirements for a conviction of careless driving, and we affirm that conviction.

Affirmed in part and reversed in part.