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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1552**

State of Minnesota,
Respondent,

vs.

David Brandyn Earley,
Appellant.

**Filed August 14, 2017
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CR-15-22922

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Schellhas, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

CLEARY, Chief Judge

On appeal from his conviction of two first-degree driving-while-impaired (DWI) offenses, appellant David Brandyn Earley argues that the district court erred by restricting his closing argument and by formally adjudicating him guilty of both DWI counts. Because the restriction of Earley's closing argument was not reversible error, we affirm the closing-argument restriction. But because the district court erroneously convicted Earley of both DWI counts, we reverse and remand for correction of the warrant of commitment.

FACTS

Earley was charged with two counts of first-degree DWI after a police officer stopped the vehicle he was driving on August 16, 2015. Count 1 alleged that Earley drove a motor vehicle while having an alcohol concentration of 0.08 or more at that time, or as measured within two hours of the time of driving, in violation of Minn. Stat. § 169A.20, subd. 1(5) (2014). Count 2 alleged that Earley drove a motor vehicle while under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1) (2014). Earley stipulated that he had three prior qualified driving offenses from 2011, 2012, and 2014.

A jury trial commenced in June 2016. The state called Officer Heckert as its only witness. Officer Heckert testified that he was on patrol in Edina during the early morning hours of August 16, 2015, when he saw a vehicle swerving within its own lane. He followed the vehicle and observed it signal to make a right turn into a parking lot. When the vehicle slowed down to make the turn, Officer Heckert noticed that the driver-side

brake light did not illuminate. The vehicle turned into the parking lot, and Officer Heckert activated his emergency lights and conducted a traffic stop.

Officer Heckert testified that he approached the front, driver-side window and noticed a “strong consumed alcoholic beverage odor” coming from the vehicle, but could not tell from whom the odor was coming. He identified the male driver as Earley and asked him to produce his driver’s license. As Earley retrieved his license, Officer Heckert observed that Earley had reserved movements and had difficulty getting the license out of his wallet. He also noticed that Earley had red, bloodshot, watery, glassy-looking eyes and slurred speech. Earley admitted that he had consumed alcoholic beverages earlier in the night.

Officer Heckert testified that he confirmed Earley’s identity and asked Earley to step out of the vehicle. Earley complied and, while Earley was outside of the vehicle, Officer Heckert noticed a “strong consumed alcoholic beverage odor” coming from Earley. He again observed that Earley had red, glassy, watery eyes and mumbling, slurred speech. Officer Heckert explained that he decided to conduct field sobriety tests because of his observations of Earley.

Officer Heckert testified that Earley’s performance on the horizontal-gaze-nystagmus test increased his suspicion that Earley was impaired by alcohol because he observed six out of six indications of possible impairment. Officer Heckert testified that his suspicion that Earley was impaired also increased based upon Earley’s performance on the walk-and-turn test because Earley broke the starting position, missed heel-to-toe multiple times, and failed to complete the turn as instructed. Finally, Officer Heckert

testified that Earley completed the one-legged-stand test without showing any indications of impairment. A video showing the traffic stop and Earley's performance on the field sobriety tests was published and played for the jury.

Officer Heckert explained that he suspected that Earley might be impaired by alcohol, arrested him, and transported him to the Edina police station to conduct a breath test. At the station, he read Earley the implied-consent advisory, and Earley indicated that he understood his rights. Earley stated that he wished to exercise his right to speak with an attorney and was given access to the police department's phone, his own cell phone, and multiple phone directories. After about 45 minutes, Earley stopped seeking an attorney. Officer Heckert asked Earley if he would take a breath test and Earley consented. Officer Heckert testified that Earley's breath test was performed using the DataMaster DMT (DataMaster) and that the results of the test indicated that Earley had an alcohol concentration of 0.11 grams of alcohol per 210 liters of breath.

Officer Heckert testified about the DataMaster training he underwent, how the DataMaster operates, and how he administered Earley's breath test. He testified that the DataMaster has both infrared and fuel-cell technology, but that the fuel-cell technology was disabled after the Minnesota Bureau of Criminal Apprehension (BCA) decided that infrared testing was sufficient and instructed law enforcement across the state to turn off the fuel-cell technology. During cross-examination, Earley's counsel elicited the following testimony:

COUNSEL: But you were trained that the fuel cell option is highly sensitive and specific to alcohols, correct?

OFFICER HECKERT: Yes.

COUNSEL: And you were specifically trained when it's used along with the infrared technology, it allows for better interferent detection, correct?

OFFICER HECKERT: Correct.

....

COUNSEL: . . . [O]n this machine used with Mr. Earley, that second technology that when used together with the infrared technology is a better detector of alcohol deterrents was turned off, correct?

OFFICER HECKERT: Correct.

Portions of a video taken at the Edina police station were published for the jury and showed where the DataMaster was located.

After Officer Heckert's testimony, the state and defense both rested. During the defense's closing argument, Earley's counsel argued that the BCA trained law enforcement officers that using infrared technology and fuel-cell technology in combination better detects alcohol as opposed to other potential interference. The state objected to the statement and argued that it cited to facts that were not in evidence. The court sustained the objection and ordered the jury to disregard defense counsel's statement.

On June 23, 2016, the jury returned a guilty verdict, finding Earley guilty of both DWI counts. On June 29, 2016, the district court orally pronounced Earley's sentence and committed Earley to the custody of the commissioner of corrections for 46 months for his conviction of count 2, driving while under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1). The following day, the district court filed a warrant of commitment, which indicated that the district court entered a judgment of conviction on both DWI counts, but imposed only one 46-month sentence for count 2. Earley now appeals.

DECISION

I. Restriction of the Defense's Closing Argument

We first address Earley's argument that the district court erred by restricting his closing argument. When a defendant has objected to the limitations placed on his closing argument, an appellate court reviews those limitations under the harmless-error standard. *State v. Bustos*, 861 N.W.2d 655, 660 n.1 (Minn. 2015). Minnesota appellate courts have applied two different harmless-error tests depending on whether the alleged error implicates a constitutional right. *State v. Morrow*, 834 N.W.2d 715, 729 n.7 (Minn. 2013). If the alleged "error implicates a constitutional right, a new trial is required unless the State shows beyond a reasonable doubt that the error was harmless." *Id.* But, when the alleged "error does not implicate a constitutional right, a new trial is required only when the error substantially influenced the jury's verdict." *Id.* Earley argues that the error in restricting the scope of his closing argument deprived him of his constitutional rights to present a complete defense and to the effective assistance of counsel. The state disagrees and argues that the alleged error does not implicate any constitutional right. Because we conclude that the alleged error was harmless beyond a reasonable doubt, we do not determine which harmless-error standard applies or whether the district court erred by restricting Earley's closing argument.

"An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). When applying the constitutional harmless-error standard, we must determine not whether a jury would have convicted the defendant without the error, but whether the error reasonably

could have impacted the jury's decision. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). For the reasons explained below, we conclude that the jury's verdict was surely unattributable to the alleged error in restricting Earley's closing argument.

At the beginning of the trial, the district court properly instructed the jury that it must reach its verdict by considering the evidence and explained that the attorneys' statements and arguments are not evidence. *See State v. McDaniel*, 777 N.W.2d 739, 749-50 (Minn. 2010) (considering appellant's assertion that the prosecutor argued facts not in evidence and concluding that there was no prejudicial error where the district court instructed the jury that lawyers' opening statements and closing arguments are not evidence). Between the close of the evidence and the parties' closing arguments, the district court again instructed the jury that the attorneys' arguments were not evidence. Because the district court clearly and repeatedly instructed the jury that it was not to consider the parties' closing arguments as evidence upon which the verdict was to be decided, the alleged error in restricting Earley's closing argument did not affect the jury's consideration of the evidence.

During the trial, the district court allowed Earley to present evidence that attempted to call into question the accuracy of his breath test. Earley's counsel thoroughly cross-examined Officer Heckert regarding his DataMaster training and the manner in which the DataMaster operates. During cross examination, the officer admitted that he had no training in computer science, forensic testing, forensic science, or engineering, that the DataMaster did all of the analyzing and testing of the breath sample, and that he "essentially . . . rel[ied] entirely on that machine." He explained that the breath test could be affected

by chemical and radio frequency interference, but that he would not know whether anything had interfered with the test absent the DataMaster's report of such interference. Officer Heckert further testified that the DataMaster includes fuel-cell technology, which is highly sensitive to alcohols and allows for better interferent detection when used along with infrared technology. And, during recross, Officer Heckert admitted that he did not know why the BCA chose to use the DataMaster to conduct breath tests or why the BCA instructed law enforcement to turn off the fuel-cell technology.

The district court also allowed Earley to continue this theme in his closing argument by permitting defense counsel to argue that: (1) the BCA instructed law enforcement to turn off the fuel-cell technology; and (2) Officer Heckert could not provide any reason why the BCA chose to forego the use of the fuel-cell technology.

In sum, the district court allowed Earley to present considerable evidence and argument tending to call into question the accuracy of his breath test. The jury's decision to render a guilty verdict shows that the jury rejected evidence tending to show that the breath test was unreliable and found the evidence presented sufficient to establish, beyond a reasonable doubt, that Earley had an alcohol concentration equal to or above 0.08 and drove a vehicle while impaired.

The jury's verdict was supported by overwhelming evidence. Officer Heckert testified that Earley appeared to be intoxicated, smelled of alcohol, and admitted that he had been drinking. The jury also viewed a video of Earley performing the field sobriety tests and heard the officer's testimony explaining that Earley's performance on the tests indicated that he was likely impaired. Finally, the jury heard considerable testimony from

the officer regarding his DataMaster training and the DataMaster's internal checks, which ensure that the machine's measurements are accurate and unaffected by interference.

Here, the alleged error in sustaining the state's objection resulted in the striking of a single statement from Earley's closing argument. The alleged error had no effect on the presentation of the evidence and did not prejudice Earley because the state presented overwhelming evidence of Earley's guilt and the district court properly instructed the jury to base its verdict on the evidence and not on either attorney's statements or arguments. Because the jury's verdict was surely unattributable to any error in restricting Earley's closing argument, we deny Earley's request for a new trial.

II. Entering Convictions on Both DWI Counts

We next address Earley's argument that the district court violated Minn. Stat. § 609.04 (2014) by entering convictions on both DWI counts. Whether section 609.04 has been violated presents a legal question that appellate courts review de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013). Section 609.04 provides that, “[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1. An included offense includes “[a] lesser degree of the same crime” and “[a] crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(1), (4). The Minnesota Supreme Court has interpreted section 609.04 to “bar[] multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985).

The conviction prohibited by section 609.04 is not a guilty verdict, but rather a formal adjudication of guilt. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999). When a jury finds a defendant guilty of more than one charge under the same statute for the same act, the district court should formally adjudicate the defendant guilty of, and impose a sentence for, only one count. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007); *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

At the sentencing hearing, the district court stated that Earley was convicted of first-degree DWI, operating a motor vehicle under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1), and ordered that Earley be committed to the custody of the commissioner of corrections for 46 months. The district court's oral pronouncement makes clear that Earley was formally adjudicated guilty of, and sentenced for, count 2. But because the district court did not address count 1 in its oral pronouncement, it is unclear whether the district court also adjudicated Earley guilty of count 1.

Appellate courts “look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated.” *Spann*, 740 N.W.2d at 573 (quotations omitted). Here, the warrant of commitment provides that Earley was formally convicted of both DWI counts. Because the DWI counts alleged violations within the same criminal statute for acts committed during a single behavioral incident, the district court erred by entering convictions on both counts. *See State v. Clark*, 486 N.W.2d 166, 170-71 (Minn. App. 1992) (holding that Minn. Stat. § 609.04 prohibited convicting appellant of both a driving-while-under-the-influence charge and a blood-alcohol-concentration charge where the charges arose from one behavioral incident). We reverse

and remand with instructions to correct the warrant of commitment to reflect judgment of conviction of one count of first-degree DWI.

Affirmed in part, reversed in part, and remanded.