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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0509**

State of Minnesota,
Respondent,

vs.

Heather Elaine Kube,
Appellant.

**Filed February 5, 2018
Affirmed
Peterson, Judge**

Carver County District Court
File No. 10-CR-16-31

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

Mark Metz, Carver County Attorney, Christopher James Filipski, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from her conviction of third-degree driving while impaired (test-refusal), appellant argues that the evidence was insufficient to prove that she refused to submit to testing. We affirm.

FACTS

On December 24, 2015, a Carver County 911 dispatcher received two citizen calls reporting an impaired driver on Highway 212. Both callers were concerned enough that they followed the car until Carver County Sheriff's Deputy Steven Dascher stopped it. Dascher's squad-car video recorded the car crossing the center and fog lines several times. Dascher activated his squad-car lights, but the car did not stop; after about 35 seconds, Dascher activated his siren. The car did not stop for another seven seconds.

Dascher identified the driver as appellant Heather Elaine Kube, and, as he spoke with her, he could smell alcohol. Dascher asked Kube to perform three field sobriety tests, which Kube was unable to complete successfully. Kube agreed to take a preliminary breath test (PBT). Kube did not provide a deep breath as instructed, and the deficient breath sample she provided showed a 0.118 alcohol concentration. Dascher arrested Kube, and she "immediately became argumentative and vulgar." Kube admitted that she had two drinks on December 23 and denied consuming alcohol after that, but she made comments in the squad car that suggested that she consumed alcohol on December 24.

At the Carver County jail, Dascher read Kube the implied-consent advisory. Kube was emotional and distraught throughout the advisory process. Dascher provided Kube

with telephone books to call an attorney, and she insisted that, because she has Asperger's syndrome, which is an autism spectrum disorder, she needed an attorney who represents disabled people. Kube eventually contacted an attorney's answering service. When she hung up, she remarked that her cell phone "only works [] half of the time," so Dascher advised her to call back and leave the jail telephone number. Kube became "emotionally overwrought." Dascher advised her that failing to make a decision would be considered a test refusal. Instead of calling the answering service again, Kube threatened to kill herself, demanded to be taken to the hospital, and asked if she could go to the psych ward. Dascher terminated the implied-consent advisory, and Kube was charged with test refusal.

At her court trial, Kube argued that she had reasonably refused testing and offered multiple medical reports that support her claim that she is legally disabled with Asperger's syndrome and other physical and emotional ailments. Kube testified that the arrest caused a sensory overload that made her unable to process the information that Dascher was providing. Kube graduated from the University of Minnesota with honors, but has been on social security disability since 2012. While acknowledging the extent of Kube's ailments, the district court found that Kube was "fully capable of using a phone and phone books to call an attorney for assistance. Alcohol intoxication, as opposed to [Kube's] disabilities, predominately contributed to [Kube's] actions that led to her refusing the test." The district court reviewed all of the relevant audio and video recordings and found that "it is clear from [Kube's] conduct that she was . . . intoxicated by alcohol." The district court also found that Dascher had "observed several objective indicia of intoxication, including the odor of an alcoholic beverage coming from [Kube], and [Kube's] performance on the

[horizontal gaze nystagmus (HGN)] test, slurred speech, and watery, glossy eyes.” The district court concluded that Kube had not reasonably refused testing. On appeal, Kube argues that the evidence was not sufficient to prove that she was actually unwilling to submit to testing.

D E C I S I O N

“When an appellant challenges the sufficiency of the evidence presented at trial, we review the evidence to determine whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a [fact-finder] could reasonably conclude that the defendant was guilty of the offense charged.” *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016) (quotation omitted). We view the evidence in the light most favorable to the verdict and assume that the fact-finder disbelieved any evidence contrary to the verdict. *Id.*

Under Minn. Stat. § 169A.20, subd. 2 (2014), it is a crime for any person who drives a motor vehicle in Minnesota to refuse to submit to chemical testing. When a person does not make an explicit verbal refusal to submit to chemical testing, the state must rely on circumstantial evidence to establish the person’s intent. *See State v. Ferrier*, 792 N.W.2d 98, 101-02 (Minn. App. 2010) (recognizing the legitimacy of circumstantial evidence to establish intent in a test-refusal case), *review denied* (Minn. Mar. 15, 2011). “[R]efusal 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.” *Id.* at 102.

Appellate review of circumstantial evidence involves a two-step process: first, the appellate court identifies the circumstances proved, deferring to the fact-finder's acceptance of proof supporting the circumstances and rejection of conflicting evidence. *Robertson*, 884 N.W.2d at 871. Second, the appellate court, without deferring to the fact-finder's conclusions, "independently examine[s] the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt." *Id.* (quotations omitted). To sustain a guilty verdict, the reasonable inferences must be consistent with guilt and inconsistent with any rational hypothesis except guilt. *Id.*

The district court, as fact-finder, made the following findings: (1) civilian witnesses and Dascher observed Kube's erratic driving, which was also recorded by the squad-car camera; (2) Kube had visible indicia of alcohol consumption; (3) Kube performed the field sobriety tests poorly; (4) using a deficient breath sample, a PBT showed a 0.118 alcohol concentration; (5) Kube admitted to consuming some alcohol; (6) Kube became emotional and abusive immediately after her arrest; (7) Dascher read Kube the implied-consent advisory several times and provided her with telephone books; (8) Kube repeatedly told Dascher that she is autistic and that he was required to locate an attorney for her who specializes in representing people with autism spectrum disorder, and Dascher explained to Kube that she could discuss her disabilities with an attorney; (9) Dascher advised Kube to call the attorney service she had reached to give them the jail telephone number because he thought the jail might not have cell-phone service; (10) at that point, Kube became overwrought, demanded that Dascher bring her to the hospital, and asked if she could go

to the psych ward; (11) “Dascher maintained a high-level of professionalism” throughout the encounter; (12) Kube’s roommate testified that he served Kube four to six drinks during the late evening and early morning hours of December 23 and 24, and the last drink was made around 2:00 a.m.; (13) Kube exhibited indicia of intoxication, including the odor of an alcoholic beverage, her performance on the HGN test, slurred speech, and watery, glossy eyes; (14) Kube’s explanation that her behavior was due to her disability was not credible; and (15) Kube was an honors graduate of the University of Minnesota who had the ability to use a telephone and telephone books. These findings represent the circumstances found. *See id.*

This court must “independently examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Id.* (quotations omitted). The inference that Kube was refusing to submit to testing when she demanded that Dascher bring her to the hospital and asked if she could go to the psych ward may be drawn from the circumstances proved. This reasonable inference is consistent with guilt and inconsistent with any rational hypothesis except guilt. Kube argues, however, that other reasonable inferences that may be drawn from the circumstances proved are that (1) she reasonably refused testing because of her disabilities and (2) Dascher abruptly ended the advisory process before she demonstrated that she was actually unwilling to submit to testing.

The inference that Kube refused testing because of her disabilities is not reasonable. Kube called an attorney’s answering service and repeatedly told Dascher that he was required to locate an attorney for her who specializes in representing people with autism

spectrum disorder. These circumstances demonstrate that Kube was capable of making a telephone call to speak with an attorney before making a decision about testing and that she recognized that her disabilities could affect her decision. It is not reasonable to infer that Kube's disabilities prevented her from making a reasoned decision about testing or caused her to act as she did.

The inference that Dascher ended the advisory process before Kube demonstrated her actual unwillingness to submit to testing is also unreasonable. Dascher advised Kube that she could discuss her disabilities with an attorney and that she could use the jail telephone number to receive a return call, but, rather than making another call to reach an attorney, Kube asked to be taken to a psych ward. That conduct indicated an actual unwillingness to participate in the testing process, and Dascher ended the advisory process only after he observed the conduct.

Affirmed.