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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0717**

State of Minnesota,
Respondent,

vs.

Travis Adam Westgaard,
Appellant.

**Filed March 5, 2018
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-16-13824

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this appeal from his conviction for driving while impaired (DWI), appellant argues that the circumstantial evidence was insufficient to prove that he was under the influence of alcohol. We affirm.

FACTS

On the night of May 21, 2016, an officer pulled over appellant Travis Adam Westgaard for driving with a headlight out. The officer did not observe any speeding, swerving, or suspicious driving. Upon approaching, the officer noticed that appellant smelled of alcohol and had glassy eyes. The officer asked appellant if he had been drinking, and appellant admitted to drinking two beers an hour earlier.

The officer instructed appellant to step out of the car and conducted three field sobriety tests. During the horizontal-gaze-nystagmus (HGN) test, appellant's eyes exhibited signs of intoxication, including a lack of smooth pursuit, nystagmus before maximum deviation, and nystagmus at maximum deviation. Appellant needed the instructions for the walk-and-turn test repeated numerous times, and according to the district court's findings, he seemed "unusually slow" in comprehending the instructions. Appellant was able to perform the one-legged-stand test, but only by lifting his arms for extra balance.

Appellant was arrested for DWI and transported to the police station, where he agreed to a breath test. His alcohol concentration was measured twice, first at 0.083, and

then again, almost immediately afterward, at 0.086. The mean of the two breath samples was reported as 0.0845.

Appellant was charged with two counts of first-degree DWI: one count of driving with an alcohol concentration of 0.08 or more, and one count of driving under the influence of alcohol. It was alleged that appellant had three qualified prior impaired-driving incidents.

A court trial was held. Appellant stipulated to the existence of three prior impaired-driving convictions. Appellant called a breath-test-calibration expert, who testified about the accuracy of the breath test and the uncertainty that accompanies a breath-test result. According to that testimony, with 95% confidence, appellant's actual alcohol concentration was between 0.0769 and 0.0921, and with 99% confidence, appellant's actual alcohol concentration was between 0.0745 and 0.0945.

The district court found appellant not guilty of count one, driving with an alcohol concentration of 0.08 or more. The court concluded that there was a "somewhat significant possibility that the true value of [appellant's] alcohol concentration—while at least close to exceeding the legal limit—was not actually sufficient to prove the *per se* violation for driving while intoxicated." However, regarding count two, the court concluded that appellant's alcohol concentration was "at least close to—and probably exceeding—the legal limit," and combined with the officer's observations during the field sobriety tests, there was sufficient evidence that appellant's ability to drive was impaired. This appeal followed.

DECISION

In considering a claim of insufficient evidence, this court's review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the factfinder to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the [factfinder] believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of violating Minn. Stat. § 169A.20, subd. 1(1) (2014), which criminalizes driving a motor vehicle while "under the influence of alcohol." "Under the influence" means that the driver drank enough alcohol so that his "ability or capacity to drive was impaired in some way or to some degree." *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992). "There is no set standard as to the quantity of alcohol a person must consume before a person is regarded as being 'under the influence of alcohol.'" 10A *Minnesota Practice*, CRIMJIG 29.02 (2015). "When a person is so affected by an alcoholic beverage that the person does not possess that clearness of intellect and control of [himself] as [he] otherwise would have, that person is under the influence of alcohol." *Id.*

Regarding the applicable standard for reviewing the sufficiency of the evidence, appellant asserts that a circumstantial-evidence standard applies. The state contends that a

direct-evidence standard applies. We need not determine the appropriate standard because, even under the heightened scrutiny of the circumstantial-evidence standard, the evidence is sufficient.

Under the circumstantial-evidence standard, an appellate court reviews the evidence using a two-step analysis. *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016). The appellate court first identifies the circumstances proved, deferring “to the [factfinder’s] acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate.” *Id.* (quotations omitted). Second, the reviewing court “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). “In order to sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotation omitted). The reviewing court must view not only the circumstances proved as a whole, but also must consider the inferences drawn therefrom as a whole. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017).

The circumstances proved are that (1) appellant was driving; (2) he smelled of alcohol and had glassy eyes; (3) he admitted to drinking two beers prior to driving; (4) he submitted to breath testing, which indicated a mean alcohol concentration of 0.0845; (5) the officer administered the HGN test, which indicated a lack of smooth pursuit, nystagmus before maximum deviation, and nystagmus at maximum deviation; (6) appellant needed

the instructions for the walk-and-turn test repeated numerous times; and (7) appellant used his arms for balance during the one-legged-stand test.

The reasonable inferences that might be drawn from these circumstances are consistent with appellant's guilt. The circumstances show that appellant consumed alcohol and then drove; he had alcohol in his system when he drove; his physical abilities were diminished, as evidenced by the HGN test and balance issues during the one-legged-stand test; and his clarity of thought was diminished, as evidenced by his difficulties with the instructions during the walk-and-turn test.

Appellant asserts that the circumstances allow for the reasonable inference that he was intoxicated, but below the legal limit, and his capacity to drive was not impaired. We disagree. The district court found that appellant showed "sluggish comprehension during the field sobriety tests," he needed "to raise his arms for extra balance during [the] one-leg balance test," and his "eyes lacked smooth pursuit" during the HGN test. Based on these circumstances, it is unreasonable to infer that appellant's capacity to drive was not diminished to some degree by alcohol.

Appellant likens this case to *State v. Elmourabit*, in which the supreme court concluded that there was insufficient evidence to prove that a defendant was under the influence of alcohol. 373 N.W.2d 290, 294 (Minn. 1985). However, *Elmourabit* is distinguishable. In *Elmourabit*, there was no direct proof that the defendant consumed alcohol, except for the defendant's admission that he had one beer and a few sips of a second beer. *Id.* at 293. In this case, appellant both admitted to drinking two beers and tested above the legal limit. Further, in *Elmourabit* there were explanations that accounted

for the defendant's outward manifestations of intoxication. *Id.* For example, although the defendant in *Elmourabit* had slurred speech, English was not his native language. *Id.* In this case, we are not presented with "unique facts and circumstances" to account for appellant's outward manifestations of intoxication. *Id.* at 294. We conclude that the evidence in this case is sufficient.

Affirmed.