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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0960

State of Minnesota,
Respondent,

vs.

David Paul Corbine,
Appellant.

Filed April 30, 2018
Affirmed
Connolly, Judge

Clay County District Court
File No. 14-CR-16-2088

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

Brian J. Melton, Clay County Attorney, Alexander J. Stock, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellant Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of two counts of driving while intoxicated, arguing that improper testimonial evidence and prosecutorial misconduct constitute plain errors that warrant a new trial. Appellant also filed a pro se supplemental brief raising several issues. We affirm.

FACTS

On June 18, 2016, a Moorhead police officer stopped appellant David Paul Corbine for driving 66 m.p.h. in a 40 m.p.h. zone. The officer testified that appellant smelled like alcohol and had slurred speech. Appellant admitted that he had one whiskey drink. The officer asked appellant to take a field sobriety test. During the Horizontal Gaze Nystagmus (HGN) test, appellant displayed all of the clues for impairment. During the counting-backwards test, appellant became confused and asked the officer, "Why don't you just arrest me?" Because the officer believed appellant was intoxicated, he arrested appellant.

At the jail, appellant submitted to what the transcript refers to as a "DataMaster Transportable" (DMT) test, which measures the alcohol concentration in a person's breath. A Moorhead lieutenant who is certified to operate the DMT administered the test. The lieutenant first ran a diagnostic test to ensure the machine was in "proper working order." Appellant's first breath sample showed that his blood alcohol concentration was 0.192, and the second sample showed it was 0.19.

After the DMT test, the officer read appellant his *Miranda* rights, and appellant agreed to speak with him. Appellant admitted that he had been driving before being

arrested, but could not remember which street he was on. Appellant admitted that he had consumed whiskey the night before from 7:00 p.m. to approximately midnight. Appellant then admitted that he presently felt the effects of the alcohol and that his driving ability was affected by the alcohol. Appellant was charged with one count of gross misdemeanor driving while impaired (DWI)–under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1) (2016) (count 1), and one count of gross misdemeanor DWI–alcohol concentration over 0.08 within two hours of driving a motor vehicle in violation of Minn. Stat. § 169A.20, subd. 1(5) (2016) (count 2).

At trial, appellant testified that the evening before he was arrested, he and his wife had an argument that caused him to drink an entire bottle of whiskey. Appellant testified that he passed out at 3:00 a.m. on June 18, 2016, woke up approximately 12 hours later, used mouthwash, and accidentally swallowed some mouthwash. Appellant then testified that he decided to use mouthwash again right before he was pulled over, and he accidentally swallowed the mouthwash again. On direct examination, appellant testified that during his postarrest interview, he did not tell the officer that he was under the influence of alcohol; rather, he said that he was feeling "hung over." Appellant testified that at that time, he believed that he was feeling dizzy because of his diabetes. Appellant never told the officer or the lieutenant that he had diabetes. On cross-examination, appellant eventually admitted that during his postarrest interview, he had answered affirmatively when the officer asked if he was presently feeling the effects of alcohol and if the alcohol had affected his ability to drive his vehicle.

The state called the officer who initiated the traffic stop and the lieutenant who administered the DMT test to testify. The lieutenant testified extensively about his DMT certification, the DMT testing procedures, the DMT's accuracy, and appellant's test results. In response to the state's question about his opinion on the DMT's accuracy, the lieutenant testified that the machine "was operating properly and it's 100% accurate."

The district court instructed the jury on the legal standard for being under the influence of alcohol. During closing arguments, the prosecutor repeated this legal standard and explained how appellant met it by citing all the evidence. When addressing appellant's postarrest interview, the prosecutor characterized appellant's statements as a confession to driving under the influence.

The jury found appellant guilty of both counts. The district court sentenced appellant on count two to 365 days in jail with 275 days stayed for up to six years of supervised probation. This appeal follows.

D E C I S I O N

Appellant argues for the first time on appeal that two plain errors occurred at trial: (1) the lieutenant's statement that the DMT machine is 100% accurate was inadmissible evidence and (2) the prosecutor's characterizing appellant's statement as a "confession" was prosecutorial misconduct. Appellant asserts that he is entitled to a new trial because the cumulative effect of these errors affected his substantial rights.

Because appellant did not object to the lieutenant's testimonial evidence at the district court, we review its admission for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). Under our plain-error test, appellant

must prove that there was (1) error, (2) that was plain, and (3) that affected appellant's substantial rights. *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005). Additionally, even if appellant meets these three prongs, "we may correct the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation omitted).

Because appellant did not object to the prosecutor's conduct at the district court, we review the alleged misconduct for plain error under a modified test. *State v. Milton*, 821 N.W.2d 789, 802 (Minn. 2012). Under the modified plain-error test, if appellant proves that there was error that was plain, the burden then shifts to the state to prove that the error did not affect appellant's substantial rights. *Id.*

"An error is plain if it is clear or obvious." *Id.* at 807. This is typically shown "if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under the plain-error test, "[w]ith respect to the substantial-rights requirement, [the appellant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). Under the modified plain-error test, "the [s]tate must show that there is no 'reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.'" *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010) (quoting *Ramey*, 721 N.W.2d at 302).

Appellant argues that the lieutenant's statement that the DMT machine "is 100% accurate" was inadmissible and plainly erroneous for two reasons: (1) because it constitutes

statistical-probability testimony that likely had an exaggerated impact on a finding reserved for the jury and necessary to the determination of guilt and (2) because it constitutes opinion testimony to which the lieutenant was not qualified to testify. As the state concedes, it was plain error for the lieutenant to testify about his opinion of the DMT machine's accuracy:

> Regardless of whether [the lieutenant's] testimony should be characterized as vouching testimony or statistical probability testimony, it was a poorly worded question that should neither have been asked nor answered.

We agree that admitting this testimony was plain error.

Appellant also argues that the prosecutor's conduct constitutes plain error because he misstated the law during his closing arguments when he said that appellant had confessed to being under the influence. Under the modified plain-error test, we first must determine if the prosecutor committed plain error through prosecutorial misconduct. *See State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) ("A prosecutor engages in prosecutorial misconduct when he violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." (quotation omitted)).

Misleading the jury about the law is prosecutorial misconduct. *State v. Salyers*, 842 N.W.2d 28, 36 (Minn. App. 2014). The prosecutor may "argue all reasonable inferences from evidence in the record," but the prosecutor may not "intentionally . . . misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotations omitted).

A person is "under the influence" if he "does not possess that clearness of intellect and control of himself that he otherwise would have." *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012) (quotations omitted). The jury instructions stated that standard, and the state reiterated this standard during its closing argument. As appellant points out, to prove count 1, the state also had to prove that appellant "had drunk enough alcohol so that [his] ability or capacity to drive was impaired in some way or to some degree." *Id.*

Appellant argues that the prosecutor misstated the law because "[t]he state needed to prove to the jury not only that the alcohol affected [appellant's] ability to drive, it needed to prove that the alcohol *impaired* it." The state counters that the prosecutor did not misstate the law because appellant's statements were, in fact, a confession, and the prosecutor's arguments were "based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995).

During the postarrest interview, appellant admitted that he had drunk alcohol, that he presently felt the effects of alcohol, and that the alcohol had affected his driving. During closing arguments, the prosecutor said:

> However much alcohol [appellant] had consumed, he confessed that he was under the influence of alcohol that day. You heard [the officer's] testimony. He asked him, do you presently feel the effects of alcohol? [Appellant] said, "yes." He didn't say "I feel dizzy because of my diabetes." That wasn't ever mentioned until today. He says – well, [the officer] asks [appellant], "did the alcohol you consume affect your ability to drive?" He says, "yes." Not – no explanation, nothing like that, just, "yes." Ladies and gentlemen, we have a confession to Count 1 here. [Appellant] was under the influence of alcohol while he was driving his vehicle that day.

During the state's rebuttal argument, the prosecutor stated:

> Now, again, we have to base our verdicts on common sense and reason and we have a confession about the under the influence prong. We have [appellant] saying, I felt the effects of alcohol that day and it affected my ability to drive. Ladies and gentlemen, he confessed because he's guilty of driving under the influence. He wouldn't have confessed otherwise.

Through his closing-argument statements, the prosecutor urged the jury to conclude that when appellant acknowledged that the alcohol had affected his driving, he meant the alcohol had negatively affected or "impaired" his driving. This was a reasonable inference to make. No juror would reasonably believe that what appellant meant was that alcohol had positively affected his driving.

But even assuming that the prosecutor's closing-argument statements constituted misconduct, that misconduct as well as the admission of the lieutenant's testimony did not collectively affect appellant's substantial rights such that reversal is the appropriate remedy. The evidence of appellant's guilt was so overwhelming that there is no reasonable likelihood that the jury's verdict would have changed without the errors.

Plain error affects appellant's substantial rights if "there is a reasonable likelihood that the error substantially affected the verdict." *Strommen*, 648 N.W.2d at 688. Conversely, when the burden shifts to the state to prove appellant's substantial rights were not affected by the error, the state must show that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotation omitted). When there is overwhelming evidence of guilt compared to slight errors, the errors do not affect an appellant's substantial rights. *See State v. Vang*, 847 N.W.2d 248, 262 (Minn. 2014) (holding that

appellant failed to meet his burden of proving his substantial rights were affected when there was overwhelming evidence of guilt); *see also State v. Ivy*, 902 N.W.2d 652, 663 (Minn. App. 2017), *review denied* (Minn. Dec. 19, 2017) (holding that even assuming the prosecutor engaged in misconduct, it was not prejudicial because the alleged misconduct was a couple of short statements in closing argument that was outweighed by the overwhelming evidence of guilt).

Here, the evidence against appellant was overwhelming in comparison to the errors that appellant challenges. The officer testified that he arrested appellant because he smelled alcohol on appellant's breath, appellant admitted to drinking whiskey, appellant failed the HGN test and the counting-backwards test, and he believed appellant was intoxicated; the DMT test results were 0.19, which is nearly two-and-one-half times the legal limit; in his postarrest interview, appellant admitted that he had drunk whiskey, he presently felt the effects of alcohol, and the alcohol affected his driving; during trial, appellant testified that he had drunk a bottle of whiskey the night before, passed out, woke up, accidentally swallowed mouthwash before driving, then accidentally swallowed mouthwash again as he was being stopped by the officer. Moreover, appellant's trial testimony was inconsistent because he first testified that in his postarrest interview he was feeling "hung over" rather than the present effects of alcohol and that he believed he was dizzy from his diabetes rather than the present effects of alcohol, but he eventually admitted to telling the officer that he presently felt the effects of alcohol.

We therefore conclude that neither of the alleged errors affected the verdict and we decline to reverse appellant's conviction.

II.

Appellant also filed a pro se supplemental brief, which has one page of arguments, multiple letters of recommendation, and certificates showing appellant has been admitted to rehabilitation programs. All of appellant's pro se arguments are being raised for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that this court will not address issues not raised in the district court). Appellant claims that his *Miranda* rights were violated because his defense lawyer "would not let [him] see" the officer's reports or the officer's field camera. He also claims that the mouthwash he accidentally swallowed made the DMT machine malfunction because he had a previous experience with hand sanitizer causing a breathalyzer to malfunction. Finally, he claims his positive character should have been taken into account. On appeal, claims that are unsupported by either arguments or citations to legal authority are deemed forfeited. *State v. Beaulieu*, 859 N.W.2d 275, 278-79 (Minn. 2015). Because appellant raises these arguments for the first time on appeal and does not cite to any legal authority for why he should prevail, we consider his pro se arguments forfeited.

Affirmed.