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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1610**

State of Minnesota,
Respondent,

vs.

Gary Lee Appel,
Appellant.

**Filed June 11, 2018
Affirmed
Larkin, Judge**

Lincoln County District Court
File No. 41-CR-17-30

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

Glen Petersen, Lincoln County Attorney, Tyler, Minnesota (for respondent)

Daniel P. Repka, Repka Law, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of driving while impaired (DWI), arguing that the evidence presented at trial was insufficient to sustain the conviction. We affirm.

FACTS

Respondent State of Minnesota charged appellant Gary Lee Appel with DWI based on his refusal to submit to a chemical test. The case was tried to a jury.

At trial, former Lincoln County Sheriff's Office Deputy Dallas Cornell testified that he responded to a report of a disabled vehicle on County Road 15 near Arco on the afternoon of February 22, 2017. When Deputy Cornell arrived at the scene, he observed a gray Buick LaSabre parked in an abandoned driveway. The vehicle's trunk and hood were open, and its front passenger tire was blown out. Appel was standing by the trunk of the vehicle. There were no other individuals at the scene. Deputy Cornell testified that he asked Appel if he had been driving the Buick, and Appel answered affirmatively. Appel did not claim that any other person had driven the vehicle, and the vehicle was registered to Appel's wife.

Deputy Cornell observed an open case of Old Milwaukee beer in the vehicle's trunk, an empty Old Milwaukee beer can on the ground near the vehicle, and another empty can on the hood of the vehicle. Deputy Cornell testified that Appel was swaying from side to side, that he smelled of alcohol, and that he had bloodshot, watery eyes. Appel failed two field sobriety tests and refused additional tests. Appel also failed to provide a preliminary breath test sample by repeatedly interrupting his exhalation; he ultimately refused to

continue the preliminary breath test. Based on these circumstances, Deputy Cornell arrested Appel for DWI.

Deputy Cornell testified that he retrieved the keys to the vehicle, which were at the scene, and that he transported Appel to a local law-enforcement center. Once there, Deputy Cornell read Appel an implied-consent advisory three times and repeatedly asked Appel to take a breath test. Appel stated that he did not believe in the test. He did not respond to further inquiries, and he did not take the test.

Appel testified at trial. He told the jury that he did not drive the vehicle that day. Appel claimed that a friend drove him to a park in the vehicle to go fishing and that they purchased two cases of beer in South Dakota on the way to the park. Appel testified that he consumed two beers at the park. Appel testified that on their way home from the park, the car got a flat tire and Appel's friend got a ride into town to get his car. Appel testified that while he was waiting for his friend to return, he drank two beers. When his friend did not return within 50 minutes, Appel started trying to flag down cars. Deputy Cornell arrived on the scene soon after.

On rebuttal, Deputy Cornell reiterated that Appel told him he was the driver of the vehicle and that Appel did not tell him that anyone else had driven the vehicle to its location on County Road 15.

The jury found Appel guilty of refusing to submit to a chemical test. The district court sentenced Appel to 365 days in jail, stayed 341 days of the sentence for two years,

and placed Appel on probation. Appel appeals, challenging the sufficiency of the evidence to sustain his conviction.¹

DECISION

Appel was found guilty of refusing to submit to a chemical test under Minn. Stat. § 169A.20, subd. 2 (2016), which provides, “[i]t is a crime for any person to refuse to submit to a chemical test” under section 169A.51. Section 169A.51 provides that a chemical test “may be required of a person when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20” and “the person has been lawfully placed under arrest for violation of section 169A.20.” Minn. Stat. § 169A.51, subd. 1(a)-(b) (2016). The relevant portion of section 169A.20 provides, “[i]t is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . when: (1) the person is under the influence of alcohol.” Minn. Stat. § 169A.20, subd. 1 (2016). A person is “under the influence” when he does not “possess that clearness of intellect and control of himself that he otherwise would have.” *State v. Teske*, 390 N.W.2d 388, 390 (Minn. App. 1986) (quotation omitted).

Appel “only contests the jury’s verdict as it relates to whether Deputy Cornell had probable cause to believe [he] drove, operated, or was in physical control [of the vehicle] while under the influence of alcohol.”

Probable cause under section 169A.51, subdivision 1(b), exists whenever there are facts and circumstances known to the officer which would warrant a prudent man in believing that the individual was driving or was operating or was in physical control of a motor vehicle while impaired. The existence of

¹ The state did not submit a brief in this case.

probable cause depends on the particular circumstances, conditioned by officers' own observations and information and guided by the whole of their police experience. [Appellate courts] have recognized that the police may interpret circumstances in a way that differs from ordinary citizens. Accordingly, because an officer's training and experience is the lens through which the fact-finder must evaluate the reasonableness of an officer's determination of probable cause, probable cause incorporates the individual characteristics and intuitions of the officer to some extent.

Nonetheless, the reasonableness of the officer's actions is an *objective* inquiry, even if reasonableness is evaluated in light of an officer's training and experience. The actual, subjective beliefs of the officer are not the focus in evaluating reasonableness. Rather, the probable cause standard asks whether the totality of the facts and circumstances known would lead a reasonable officer to entertain an honest and strong suspicion that the suspect has committed a crime.

State v. Koppi, 798 N.W.2d 358, 362-63 (Minn. 2011) (quotations and citations omitted).

In considering a claim of insufficient evidence, this court's review is limited to a close analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume "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). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A heightened standard of review applies when proof of an element is based on circumstantial evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 474-75 (Minn. 2010). The circumstantial-evidence standard involves a two-step process in which we identify the circumstances proved and determine whether they are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Appel argues for relief under the circumstantial-evidence standard, asserting that the necessary probable-cause showing was based on circumstantial evidence.

Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Hokanson*, 821 N.W.2d 340, 354 n.3 (Minn. 2012) (quotation omitted). Circumstantial evidence always requires an inferential step that is not required with direct evidence. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). Direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (quotation omitted).

Deputy Cornell’s testimony regarding the following circumstances was based on his personal observations: Appel’s indicia of intoxication, Appel’s admission to drinking, Appel’s admission to driving, Appel’s proximity to the vehicle, the presence of the keys to the vehicle at the scene, and the absence of any individual other than Appel at the scene. Thus, Deputy Cornell’s testimony was direct evidence. Because we ultimately conclude that the challenged probable-cause determination can be sustained based solely on this direct evidence, we do not apply the circumstantial-evidence standard of review.

Appel “concedes that the smell of alcohol coming from his breath, his swaying, and his performance on the [field sobriety tests] contributed to Deputy Cornell’s decision to arrest [him] for driving while intoxicated.” Such indicia of intoxication are recognized grounds for probable cause to believe a person is under the influence. *See, e.g., Purnell v. Comm’r of Pub. Safety*, 410 N.W.2d 439, 441 (Minn. App. 1987) (upholding probable-cause determination based on officer’s perception of an odor of an alcoholic beverage on a driver’s breath, as well as driver’s fast, mumbled, and slurred speech, poor and unstable balance, and failure of field sobriety tests). Appel’s sufficiency challenge is based on a post-operation consumption theory. Appel essentially argues that Deputy Cornell could not have known the point at which Appel had consumed enough alcohol to be under the influence. He argues that it is impossible to know whether his “clues of impairment” resulted from the beer that he consumed before or after the vehicle was parked along County Road 15.

Appel’s sufficiency argument is unavailing because the state did not necessarily have to prove that there was probable cause to believe Appel drove or operated the motor vehicle while he was under the influence of alcohol. Instead, the necessary probable-cause determination could be based on a belief that Appel was in physical control of the vehicle while he was under the influence of alcohol. *See* Minn. Stat. § 169A.51, subd. 1 (2016) (providing that a chemical test “may be required of a person when an officer has probable cause to believe the person was driving, operating, *or in physical control of a motor vehicle* in violation of section 169A.20” (emphasis added)). Accordingly, the jury was instructed that the state needed to prove that “a peace officer had probable cause to believe that

[Appel] drove, operated, . . . or was in physical control of a motor vehicle while under the influence of alcohol.” Appel’s post-operation consumption would not preclude a determination that he was under the influence during any post-operation physical control of the vehicle.

This court has approved jury instructions defining physical control of a vehicle as follows:

[A] person [is] in physical control of a vehicle if he has the means to initiate any movement of that vehicle and he is in close proximity to the operating controls of the vehicle, and this is true whether the vehicle can be driven upon the highway at that point or not.

State v. Duemke, 352 N.W.2d 427, 432 (Minn. App. 1984). “Because Minnesota laws designed to prevent driving while intoxicated are to be broadly construed in the public’s favor, . . . the state need not prove that an automobile engine is running as an essential element of the offense of physical control of a motor vehicle while under the influence of alcohol.” *State, Dep’t Pub. Safety v. Junczewski*, 308 N.W.2d 316, 317 (Minn. 1981) (quotation omitted).

When Deputy Cornell arrived at the scene, Appel was the only person with the vehicle. Appel admitted that he had been driving the vehicle, and he did not mention another driver. The keys to the vehicle were at the scene, and Appel therefore had the means to initiate movement of the vehicle. Lastly, Appel displayed several signs of intoxication.

In *State v. Woodward*, this court concluded that similar facts were sufficient to prove that Woodward was in physical control of her motor vehicle while under the influence of

alcohol. 408 N.W.2d 927, 927 (Minn. App. 1987). A state trooper observed Woodward's vehicle stopped on the shoulder of a highway with its hazard lights flashing and trunk open. *Id.* The trooper stopped and observed that the vehicle's engine was running, its keys were in the ignition, and it had a flat tire. *Id.* Woodward was standing at the rear of the vehicle. *Id.* She exhibited several signs of intoxication, acknowledged that she had had a drink, failed several field sobriety tests, and was arrested for DWI. *Id.* Woodward never claimed to the trooper that she was not the driver of the vehicle. *Id.* at 928.

At Woodward's court trial on an ensuing DWI charge, "Woodward claimed she was being driven home by a friend who was unable to fix the flat tire" and that her friend left to get his car and told her to wait for him to return to fix the tire. *Id.* Woodward testified that she never heard from her friend again. *Id.* The district court found Woodward guilty of being in physical control of the vehicle while under the influence. This court upheld the conviction against a sufficiency challenge, relying on the definition of physical control in *Duemke* and reasoning:

That Woodward's car had a flat tire does not mean the car was incapable of movement and incapable of posing a threat to public safety. Woodward's car was not mechanically inoperable simply because it could not successfully reach her intended destination.

Woodward was found alone, exercising control over her vehicle. The keys were in the ignition and the engine running. She was fully capable of putting the car in motion. We conclude the evidence was sufficient to prove Woodward was in physical control of a motor vehicle while under the influence of alcohol

Id. (citations omitted).

The facts of *Woodward* are strikingly similar to those in this case. We recognize that in this case, the vehicle's engine was not running. But a running engine is not an essential element of the offense of being in physical control of a motor vehicle while under the influence of alcohol. *Junczewski*, 308 N.W.2d at 317. Based on this court's holding in *Woodward*, we conclude that the evidence here was sufficient to prove that Deputy Cornell had probable cause to believe that Appel was in physical control of the vehicle while under the influence of alcohol. Because the jury could have reasonably concluded that the probable-cause element was proved beyond a reasonable doubt based on Appel's physical control of the vehicle, we do not disturb the verdict.

Affirmed.