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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1342**

State of Minnesota,
Respondent,

vs.

Laurie Ann McIntyre,
Appellant.

**Filed July 22, 2019
Affirmed; motion granted
Cochran, Judge**

Scott County District Court
File No. 70-CR-16-8820

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Ronald Hocesvar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellant Public Defender, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Appellant Laurie Ann McIntyre challenges her convictions for two counts of driving
while impaired (DWI), arguing that there was insufficient evidence to support her

conviction on count one, that the district court plainly erred in allowing retrograde extrapolation evidence of McIntyre's alcohol concentration, and that the district court erred in telling the jury that it would end deliberations for the day at 4:20 p.m. McIntyre also submitted a pro se supplemental brief, which the state moved to strike. Because the pro se supplemental brief is based on allegations outside of the record, we grant the state's motion to strike McIntyre's pro se supplemental brief. Because there was sufficient evidence to support McIntyre's convictions, and because we find no error by the district court, we affirm.

FACTS

At approximately 9:30 p.m. on May 7, 2016, a City of Savage police officer was patrolling Highway 13, looking for speeders. The officer stopped McIntyre for driving 56 miles per hour in a 45 mile-per-hour zone. The officer asked McIntyre where she was going, and McIntyre responded that she was going to a Holiday gas station. After the officer told McIntyre that there was no Holiday gas station in the vicinity, McIntyre responded that she thought that she was on Highway 169. The officer smelled alcohol coming from the vehicle and asked McIntyre whether she had been drinking alcohol. McIntyre initially denied having consumed any alcohol, but later in the evening, after she was arrested, McIntyre admitted to consuming alcohol at around 5:30 p.m.

The officer asked McIntyre to perform field sobriety tests. The officer administered the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. McIntyre showed sufficient "clues" of impairment in all three tests to indicate that she was impaired. During the tests, McIntyre indicated that she was having panic attacks. The

officer took multiple breaks to calm her down. The officer testified that she did not believe that McIntyre was actually having panic attacks but rather was trying to avoid getting in trouble for drinking and driving. The officer arrested McIntyre for DWI.

After transporting McIntyre to the police department, the officer read McIntyre the implied-consent advisory. McIntyre called an attorney and then agreed to submit to a breath test, which the officer administered. At approximately 11:40 p.m., McIntyre provided two valid breath samples. The first breath sample showed an alcohol concentration of 0.087, and the second breath sample showed an alcohol concentration of 0.080. The state charged McIntyre with driving under the influence under Minn. Stat. § 169A.20, subd. 1(1) (2014), and driving with an alcohol concentration of 0.08 or more under Minn. Stat. § 169A.20, subd. 1(5) (2014).

The case proceeded to a jury trial. During the trial, McIntyre called a forensic scientist working for the Minnesota Bureau of Criminal Apprehension (BCA). McIntyre asked the forensic scientist about the uncertainty of measuring alcohol concentration in a breath sample. The forensic scientist testified that, to analyze the uncertainty of measurement, the BCA averages the breath samples and uses a formula to create confidence intervals. A confidence interval is a range of values that you could expect a true result to fall within. At the 99% confidence interval, the true result should fall within the range 99 times out of 100. The forensic scientist testified that the 99% confidence interval for a person providing an average breathe sample of 0.0835, as McIntyre did, would be from 0.0736 to 0.0934. According to the forensic scientist, this means that if McIntyre were tested 100 times, it is expected that 99 of the results would be within that

range, and one would show an alcohol concentration outside that range. The forensic scientist stated that 81.92% of the tests would register at 0.08 or higher.

After defense counsel concluded his direct examination, the prosecutor asked the forensic scientist whether she could determine what an average person's alcohol concentration would have been at 9:30 p.m., when the officer pulled McIntyre over, compared to the samples that McIntyre provided around 11:40 p.m. The prosecutor asked the forensic scientist to assume that the average individual had an alcohol concentration of 0.08 around 11:40 p.m. and that the individual had stopped drinking around 5:30 p.m., as McIntyre had told police that she had done. Defense counsel objected to the question based on a lack of foundation, and the district court sustained the objection.

The prosecutor then asked the forensic scientist questions establishing how she would calculate a person's alcohol concentration at a time prior to a breath test and the factors that would go into such a calculation. After establishing this foundation, the prosecutor repeated the question about an average person's alcohol concentration at 9:30 p.m. based on the other assumptions. Defense counsel did not object, and the forensic scientist answered that an average person would have had an alcohol concentration between 0.101 and 0.132 at 9:30 p.m. On redirect, the forensic scientist acknowledged that she did not personally know whether McIntyre actually stopped drinking at 5:30 p.m. and that the range she testified to was based on an average person, not McIntyre specifically.

The parties then gave closing arguments, and the district court gave its final jury instructions. During the district court's jury instructions, it stated, "Today unless you reach a verdict before then you will deliberate until 4:20 at which time I will call you back in to

give you an instruction and release you. Then you would come back tomorrow and report back at 8:45 to continue in deliberations.” The jury left to deliberate at 4:00 p.m. Outside the presence of the jury, defense counsel indicated for the record a concern that the jury might rush through deliberations to avoid being called back the next day. But defense counsel did not request that the district court provide any instruction to the jury regarding that issue or request any other remedy. The jury returned guilty verdicts on both counts, dating one verdict form, May 25 at 4:17, and the second verdict form, May 25 at 4:19. The correct date was April 25.

McIntyre appeals her convictions.

D E C I S I O N

I. The evidence was sufficient to support McIntyre’s conviction on count one.

McIntyre argues that the evidence was insufficient to support her conviction on count one, driving under the influence under Minn. Stat. § 169A.20, subd. 1(1). To convict McIntyre of driving under the influence, the state was required to prove beyond a reasonable doubt that McIntyre drove a vehicle while she was “under the influence of alcohol.” Minn. Stat. § 169A.20, subd. 1(1); *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012). A person is “under the influence” when she does not possess that clearness of intellect and control of herself that she otherwise would have. *Ards*, 816 N.W.2d at 686 (quotation omitted).

When reviewing the sufficiency of the evidence, we undertake a “painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813

N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). “[W]e 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 that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

McIntyre likens this case to *State v. Elmourabit*, 373 N.W.2d 290 (Minn. 1985). In that case, the defendant exhibited some outward manifestations of impairment from alcohol consumption, such as slurred speech, the odor of alcohol, and glassy bloodshot eyes. *Elmourabit*, 373 N.W.2d at 293. But the defendant performed normally on dexterity tests and there was no alcohol test or any other evidence establishing that the defendant had consumed alcohol beyond his own admission to drinking a single beer. *Id.* at 291-93. The defendant argued that the outward manifestations of impairment were due to the fact that he was not a native English speaker and was suffering from a medical issue. *Id.* at 293. The supreme court determined that the evidence was insufficient to prove beyond a reasonable doubt that Elmourabit was under the influence of alcohol. *Id.* at 294.

Unlike in *Elmourabit*, McIntyre took a breath test and provided two samples, each of which showed an alcohol concentration above the legal limit. McIntyre also showed signs of impairment during three field sobriety tests, and the officer testified that McIntyre was confused about what road she was driving on. A driver’s confusion can be indicative that she is under the influence. *See Steele v. Comm’r of Pub. Safety*, 439 N.W.2d 427, 430

(Minn. App. 1989) (including confusion among a list of factors that indicated an individual was under the influence).

McIntyre argues that she failed the field sobriety tests because of her panic attacks, but the officer testified that she believed the panic attacks were a ruse. Other evidence also supports the jury's verdict. The breath tests indicated that McIntyre had an alcohol concentration in excess of the legal limit. And the testimony that McIntyre was confused and failed field sobriety tests supports the jury's finding that McIntyre was under the influence. *See Ards*, 816 N.W.2d at 686 (explaining that a person is under the influence when she does not possess that clearness of intellect and control of herself that she otherwise would have). We conclude that the evidence was sufficient for a jury to find that McIntyre drove while under the influence of alcohol.

II. The district court did not plainly err by allowing the forensic scientist to testify about alcohol retrograde extrapolation.

McIntyre argues that the district court abused its discretion by allowing the forensic scientist to testify about alcohol retrograde extrapolation. Although McIntyre initially objected to the forensic scientist's testimony due to a lack of foundation, she did not object to the scientist's testimony after the prosecutor established further foundation for it. Because McIntyre did not object to the testimony after the prosecutor established further foundation, we review the admission of the testimony for plain error. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) ("In the absence of an objection, we may review the admission of evidence for plain error."). "Under the plain-error doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) the error affected substantial

rights.” *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). “An error is ‘plain’ if it is clear or obvious.” *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). “Typically, a ‘plain’ error contravenes case law, a rule, or a standard of conduct.” *Id.* “The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case.” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). The defendant bears the burden of persuasion on this prong, and it is a “heavy burden.” *Id.* If all three prongs are satisfied, the reviewing court corrects the error only if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Huber*, 877 N.W.2d at 522 (quotation omitted).

We have previously held that expert testimony using retrograde extrapolation to determine alcohol concentration is admissible. *State v. Jensen*, 482 N.W.2d 238, 238 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). McIntyre analogizes this case to *State v. Wolf*, in which a district court declined to admit alcohol extrapolation evidence after concluding that its potential for unfair prejudice outweighed its probative value. 605 N.W.2d 381, 383-84 (Minn. 2000). The supreme court affirmed the district court, concluding that the district court did not abuse its discretion under Minn. R. Evid. 403 by excluding the evidence after determining that the potential for unfair prejudice outweighed the probative value. *Id.* at 385. The supreme court noted that the record did not contain basic information such as when Wolf last consumed alcohol, the amount and type of alcohol, or Wolf’s height and weight. *Id.* The supreme court also noted that “[l]ower courts have allowed such evidence when based on a proper foundation.” *Id.* McIntyre

relies on *Wolf* to argue that there was insufficient foundation to introduce the alcohol retrograde extrapolation. We are not persuaded.

In this case, the forensic scientist acknowledged that alcohol retrograde extrapolation involves a number of variables and that the confidence-interval range she provided was for an average person, not for McIntyre specifically. The expert further stated that the range was based on an assumption that the average person stopped drinking at 5:30 p.m., as McIntyre told police she had done. As we noted in *Jensen*, variables affecting absorption and elimination rates would most likely go to the weight, rather than the admissibility of retrograde extrapolation testimony. 482 N.W.2d at 240 n.2. Knowing that the testimony about alcohol retrograde extrapolation was based on assumptions about an average person, and that McIntyre's breath samples showed that she was over the legal limit at around 11:40 p.m., the jurors were free to assign as much or as little weight to the alcohol retrograde extrapolation testimony as they felt was appropriate. We conclude that the district court did not commit error that is plain in allowing the alcohol retrograde extrapolation testimony.

Furthermore, even if the district court had committed error that is plain, we conclude that any error was not prejudicial and did not affect the outcome of the case. Besides the forensic scientist's testimony, the state presented a very strong case, including failed field sobriety tests, the officer's testimony that McIntyre was confused about which road she was on, and two breath samples that registered over the legal limit. Under these circumstances, we conclude that any error did not affect the outcome of the case and therefore did not affect McIntyre's substantial rights.

III. The district court did not abuse its discretion by telling the jury that it would break for the day at 4:20 p.m. and reconvene the next day.

McIntyre argues that the district court erred by informing the jury that unless it reached a verdict by 4:20 p.m., the court would release them for the day and the jurors would then come back the next morning. “District courts are afforded broad discretion and considerable latitude in choosing the language of jury instructions.” *State v. Thao*, 875 N.W.2d 834, 841 (Minn. 2016) (quotation omitted). A district court abuses its discretion “if the jury instructions confuse, mislead, or materially misstate the law.” *State v. Onyelobi*, 879 N.W.2d 334, 353 (Minn. 2016) (quotations omitted). “We will not reverse a [district] court’s decision on jury instructions unless the [district] court abused its discretion.” *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007).

McIntyre cites to *State v. Kelley*, in which the supreme court held that a district court erred by giving instructions that could have misled a deadlocked jury into believing that it was required to reach a verdict. 517 N.W.2d 905, 909 (Minn. 1994). The supreme court noted that the instructions “did not provide [a] careful description of the obligations of the jurors” and that “jurors were left with no sense of the limits of their duty.” *Id.*

This case is distinguishable from *Kelley*. In this case, the district court provided the jurors with an accurate description of their obligations and an accurate description of the court’s schedule. The district court instructed the jurors that they should deliberate with a view toward reaching an agreement if they could do so “without violating your individual judgment” and that the jurors “should not [surrender] your honest opinion simply because other jurors disagree or merely to reach a verdict.” The district court also instructed the

jury, “You have pledged yourself to perform your duty honestly, conscientiously, without fear or favor, putting aside any feelings of bias, prejudice, sympathy, and basing your verdict solely on the evidence in this case and the law as I have given it to you.” The district court clearly and accurately described to the jurors their duties and obligations.

The jury left to deliberate at 4:00 p.m. and returned guilty verdicts on both counts by 4:19 p.m. The verdict forms listed the date as May 25, rather than April 25. McIntyre argues that the speed of the deliberations and incorrect date on the verdict forms indicate that the jury did not fully deliberate. But a brief deliberation time does not necessarily indicate that the jury failed to fully consider the issues. *See State v. Dickson*, 209 N.W.2d 785, 787-88 (Minn. 1973) (noting that brief deliberations were a result of the strength of the state’s case).

In an unpublished opinion, we upheld a conviction in a case in which the jury deliberated for only 11 minutes before returning a guilty verdict. *State v. Latham*, Nos. A11-1930, A11-1931, 2012 WL 3792209, at *2, *6-7 (Minn. App. Sept. 4, 2012), *rev’d on other grounds* (Minn. June 17, 2014). In that case, the district court at one point told the jury that the court would have to leave at noon to attend a golf tournament. *Id.* at *2. But in its final instructions, the district court told the jury that the deliberations were in the jury’s hands and that the jury could stay as long as it wanted. *Id.* at *7. We held that the statement that the jury could stay as long as it wanted mitigated any suggestion that the jury needed to end its deliberations prematurely. *Id.* Although our unpublished opinions are not precedential, we find the reasoning of *Latham* persuasive. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (noting that unpublished opinions

of the court of appeals are not precedential but may be persuasive). In this case, the fact that the jury deliberated for 19 minutes does not suggest that the jury failed to fully consider the issues in light of the district court's instructions that the jury could return the next day and that the jury must act conscientiously.

Similarly, the fact that the foreperson wrote down the wrong date does not indicate that the jury failed to fully deliberate. The record does not indicate why the wrong date was written down, but the date of the jury verdict was not relevant to the issue before the jury, which was whether McIntyre was guilty of DWI. The fact that the foreperson wrote down the wrong date does not indicate that the jury was confused about whether McIntyre was guilty of DWI.

The district court instructed the jurors to act conscientiously and to not violate their judgment or surrender their honest opinion solely to reach a verdict. "We assume that the jury follows a court's instructions." *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998). We see no basis to conclude that the jury ignored the district court's express instructions and failed to deliberate conscientiously. In light of the strength of the state's case, the length of the jury deliberations and the incorrect dates on the verdict forms do not give rise to an inference that the jury failed to conscientiously consider the merits of the case. We find no abuse of discretion under these circumstances.

IV. McIntyre's pro se arguments are based on factual assertions outside the record.

The state moved to strike McIntyre's pro se brief because the facts and arguments in the brief are outside of the record of this case. Appellate courts may not base their

decisions on matters outside the record on appeal. *State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (granting a motion to strike portions of a brief that were unsupported by any facts in the record); *see also* Minn. R. Civ. App. P. 110.01 (stating that the record on appeal consists of papers filed in the district court, exhibits, and transcripts of the proceeding). McIntyre's pro se brief attempts to introduce evidence outside of the record and presents no citation to legal authority; for these reasons, the state's motion is granted. *See State v. DeWalt*, 757 N.W.2d 282, 290 (Minn. App. 2008) (declining to address pro se arguments that are either fully addressed in the public defender's appellate brief, are dependent on facts not in evidence, or have no apparent importance, and are not supported by any legal argument or citation to authority).

Affirmed; motion granted.