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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0441**

State of Minnesota,
Respondent,

vs.

Vantavian Levell Duckworth,
Appellant.

**Filed February 24, 2020
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-18-22711

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Vantavian Duckworth challenges his conviction of chemical-test refusal, arguing that the evidence is insufficient to prove that he actually refused testing. We affirm because

the only reasonable inference derived from the circumstances of Duckworth's repeatedly refusing to plainly answer whether he would submit to the requested test is that he was unwilling to take the test.

FACTS

Shortly after a midnight in September 2018, Minnesota State Trooper Jonathan Lehman saw a car behind him on the interstate not using its headlights. The trooper slowed, but the car would not pass. Trooper Lehman pulled the car over. Before the trooper approached the car, he watched the driver, whom he later identified as Vantavian Duckworth, crawl from the front seat into the back seat. By the time the trooper reached Duckworth's car, Duckworth was sitting in the back seat, feigning sleep.

Trooper Lehman coaxed Duckworth from the car. But Duckworth bolted, attempting to flee down the shoulder. Trooper Lehman and another trooper caught Duckworth, who briefly resisted arrest. The troopers could not immediately identify Duckworth, who possessed no driver's license, refused to say his name, and clenched his fists to defeat fingerprint-identification technology. Duckworth turned away when Trooper Lehman tried to administer a preliminary breath test. Trooper Lehman told Duckworth he was under arrest for driving under the influence and obstruction, and he took him to jail.

Before removing Duckworth from his squad car, the trooper read the implied-consent advisory informing Duckworth that the law required him to submit to a breath test, that he had the right to speak with an attorney before deciding whether to submit, and that test refusal is a crime. Duckworth said he understood. He initially said he wanted to consult with an attorney, but when the trooper handed him a telephone and phone

book, Duckworth asked unrelated questions and then said that he did not want to talk with an attorney. Trooper Lehman asked if Duckworth would agree to take a breath test, and Duckworth said yes. But when he tried to remove Duckworth from the squad car for testing, Duckworth hesitated and engaged the trooper in the following Abbott-and-Costello-esque exchange about the breath-test question:

TROOPER: Okay, so attorney time stopped at 0152 hours. Will you take a breath test?

DUCKWORTH: Yes.

TROOPER: Okay. [Implied consent] date completed on 09-09-18, time completed is 0152 hours. Okay, he wants to take a breath test.

[Brief exchange with jailer.]

TROOPER: Okay, sir, you gonna be cool with me and everything?

DUCKWORTH: I didn't tell y'all—see how you was switching up words, you said I said I wanna take a breath [test], I never said I want to.

TROOPER: I said will you take a breath test? I read it ex—exactly from this.

DUCKWORTH: I'm not gonna refuse a breath test. If you're asking me to take a breath test I won't refuse one.

TROOPER: I said will you take a breath test and you said yes.

DUCKWORTH: If I don't have to, I don't have to—if I don't have to I won't, but . . .

TROOPER: Okay, so you don't want to?

DUCKWORTH: But if you tell me to, if you tell me to I will, I won't refuse one.

TROOPER: I can't give legal advice, sir.

DUCKWORTH: That's not legal advice.

TROOPER: Yes, it is legal advice.

DUCKWORTH: I'm not gonna refuse a breath test.

TROOPER: Okay, so you wanna take one?

DUCKWORTH: I'm not gonna refuse a breath test.

TROOPER: Okay, so will you—all right, we're gonna go—

DUCKWORTH: I will not refuse a breath test. I will not refuse a breath test. I'm not saying I want—

TROOPER: Okay, John Doe wants to revisit his [implied consent]. I'm gonna begin back where it says, will you take a breath test?

DUCKWORTH: Do you want me to take a breath test?

TROOPER: I'm asking you the question from the breath-test advisory. Will you take the breath test?

DUCKWORTH: If that's what you want me to do.

TROOPER: I can't give legal advice, sir.

DUCKWORTH: That's not legal advice, I'm saying if you want me to I will.

TROOPER: No, I can't tell you that.

DUCKWORTH: I'm not gonna—I'm not gonna just take one unless I have to, but if you want me to I will.

TROOPER: Okay. I'm gonna ask again, will you take a breath test?

DUCKWORTH: I won't refuse a breath test.

TROOPER: I'm gonna ask you one more time, will you take a breath test?

DUCKWORTH: I will not refuse a breath test.

TROOPER: Okay, so your reason for refusing is you will not refuse a breath test, is that correct?

DUCKWORTH: That don't make sense what you just said to me.

TROOPER: Okay. What is your reason for refusing then?

DUCKWORTH: I'm not refusing.

TROOPER: Okay, you're not refusing.

DUCKWORTH: No, I'm not refusing.

TROOPER: Okay. So I'm gonna ask you again, will you take a breath test?

DUCKWORTH: If you want me to.

TROOPER: That's not—I'm asking you a question, will—

DUCKWORTH: If you want me to. If you want me to take it— if you tell me I have to take a breath test then I—

TROOPER: I can't tell you anything.

DUCKWORTH: You can—

TROOPER: I can't give legal advice.

DUCKWORTH: You—you—

TROOPER: Okay, so I'm gonna ask you one more time, will you take a breath test?

DUCKWORTH: I'm confused.

TROOPER: What are you confused about?

DUCKWORTH: I'm confused about your question.

TROOPER: Will you take a breath test? That's what you're confused about?

DUCKWORTH: Do you want me to take one?

TROOPER: I can't answer that, sir.

DUCKWORTH: What you mean you can't answer that?

TROOPER: Because . . .

DUCKWORTH: Do you want me to take a breath test? If you want me to take a breath test will—I will take one if you want me to take one.

TROOPER: I'm gonna ask you one more time, will you take the breath test?

DUCKWORTH: They can—why they can't come and see and listen to this conversation?

TROOPER: It's all being recorded.

DUCKWORTH: So they can't listen to our conversation? So if you say—I never refused a breath test. I never refused—you just said . . .

TROOPER: [Inaudible].

DUCKWORTH: You just said on that thing that I refused a breath test, I never refused a breath test.

TROOPER: [Inaudible] take a breath test.

DUCKWORTH: That's what you said. That's what you said, I refused a breath test and when did I refuse it? I never refused a breath test. You never even gave me a breath test to refuse.

TROOPER: So you said um you're give—and—and do you want me to answer, do you want—want me to take a breath test? And I can't give you legal advice. Okay?

DUCKWORTH: Are you—are you make—are you—are you—are you ordering me to take a breath test?

TROOPER: No, I'm not ordering you at all.

DUCKWORTH: So how did I refuse it?

TROOPER: Okay, so . . .

DUCKWORTH: How did I refuse it?

TROOPER: So sub—subject continues to ask questions, so I've read him um, will you take a breath test eight times and he refuses to answer.

DUCKWORTH: How—how . . .

TROOPER: [Implied consent] is ended at 0156 hours.

Trooper Lehman concluded that Duckworth had refused to take a breath test. The state charged Duckworth with driving under the influence of alcohol, test refusal, and driving after license cancellation. A jury heard a recording of the exchange between Duckworth and the trooper. It found Duckworth guilty of test refusal and driving after cancellation. Duckworth appeals only his test-refusal conviction.

D E C I S I O N

Duckworth argues that the state's evidence was insufficient to support his conviction for test refusal. The state had the burden to prove that Duckworth “refuse[d] to submit to a chemical test” of his breath. Minn. Stat. § 169A.20, subd. 2(1) (2018). The only element that Duckworth challenges is that he in fact refused to submit to testing. Refusal

is “[a]ctual unwillingness to submit to testing.” *State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). When a defendant does not expressly “refuse,” his intent to refuse can be proved by circumstantial evidence comprising “the driver’s words and actions in light of the totality of the circumstances.” *Id.* at 102. Refusal occurs when the driver’s conduct frustrates the testing process. *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 259–60 (Minn. App. 2000).

Because the state’s case rested on circumstantial evidence of Duckworth’s unwillingness to test, we will apply heightened scrutiny to review the sufficiency of the evidence. *See Ferrier*, 792 N.W.2d at 102. We first identify the circumstances proved by the state, deferring to the jury’s acceptance of proof of the circumstances and its rejection of conflicting evidence. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). We then consider whether the circumstances proved are consistent with any reasonable hypothesis other than the defendant’s guilt. *Id.* The state proved the following circumstances:

- Duckworth drove his car on the interstate in the dark without headlights;
- Duckworth intentionally avoided passing the trooper’s car;
- Duckworth leapt into his back seat immediately after being stopped to feign having been sleeping rather than driving;
- Duckworth initially ignored orders to leave the car;
- Duckworth attempted to flee as he exited the car;
- Duckworth resisted arrest;
- Duckworth refused to disclose his identity;
- Duckworth refused to allow a preliminary breath test;
- Duckworth heard and understood the implied-consent advisory, understood his duty to take a breath test, and understood the criminal consequences of refusing;
- Duckworth understood that he could speak with an attorney before deciding whether to take a breath test;
- Duckworth initially requested but then declined to speak with an attorney;

- Duckworth said “yes,” he would take a breath test, followed by a lengthy exchange during which he denied having said he would take a breath test, would not recommit his answer agreeing to test, and refused to answer the frequently repeated request, “Will you take a breath test?”; and
- Duckworth repeatedly said that he would take a breath test if the trooper wanted him to and that he would not refuse a breath test, but he never agreed to actually take the test.

These circumstances support only one reasonable conclusion, which is that Duckworth was unwilling to take a breath test. His verbal equivocation and wordplay about the breath test paralleled the evasive, uncooperative, and resistant conduct he engaged in from the moment he realized the trooper sought to stop him. His behavior can be interpreted only as reflecting his attempt to fabricate a reality other than the objectively obvious one. His oral exchange about the breath test immediately followed his other conduct, which provided the context for it; he had just tried to avoid being stopped, to avoid being recognized as the driver, to avoid being identified at all, to avoid speaking with the trooper, to avoid participating in field sobriety tests, and to avoid being arrested. Duckworth’s effort to avoid the criminal consequences of refusing the chemical test by *saying* he was not refusing while actually refusing is as transparent (and unconvincing) as his feigned back-seat nap.

We are not persuaded otherwise by cases in which we inferred refusal from conduct. In *Busch v. Commissioner of Public Safety*, we held that a driver was frustrating the testing process when he would not respond after the officer read him the implied-consent advisory multiple times. 614 N.W.2d at 257, 260. We also upheld a test-refusal conviction when a driver began screaming and swearing during an officer’s attempt to read the implied-consent advisory. *State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003),

review denied (Minn. Mar. 26, 2003). That Duckworth's defiance was more calculating than belligerent does not prevent our holding that the jury had ample circumstantial evidence to infer that he was being intentionally uncooperative in the process and therefore actually refused to provide a breath sample for chemical testing.

Duckworth offers one circumstantial-evidence hypothesis other than guilt, which is that he was merely confused by the questions and was seeking to clarify his legal duties. None of the circumstances, let alone all of them in totality, support this hypothesis. The advisory informed Duckworth directly that "Minnesota law require[d]" the test and that refusing it was a crime. Duckworth's clear statement that he understood the advisory and his initially explicit agreement to take the breath test belie his claim of confusion. And nothing in the nature of the exchange indicates that he was confused about what he was being asked to decide. The record implies only that Duckworth sought to confuse the discussion obstructively, not that he was confused by it.

Duckworth loosely suggests that the jury's verdict may have been improperly influenced by misleading testimony and the prosecutor's supposedly improper closing argument. We need not address these issues on their merits. This is because the issues are at most merely suggested; Duckworth never expressly raises the issue of prosecutorial misconduct, and he does not develop any argument in support of the proposition. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (observing that allegations on appeal are deemed forfeited when they contain no argument or citation to supporting legal authority). We will not consider the suggestion further.

Affirmed.