

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2073**

State of Minnesota,
Respondent,

vs.

Olga Nichols,
Appellant.

**Filed January 4, 2021
Affirmed
Segal, Chief Judge**

Yellow Medicine County District Court
File No. 87-CR-19-39

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

Keith Helgeson, Yellow Medicine County Attorney, Granite Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Segal, Chief Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges her convictions of second-degree test refusal and gross misdemeanor driving while impaired (DWI), arguing that she was denied the right to a fair

trial by improper prejudicial testimony and that there is insufficient evidence to support her convictions. We affirm.

FACTS

At approximately 11:00 a.m. on January 27, 2019, S.M., her husband, and their daughter were driving in Granite Falls when another car almost hit them when the car failed to stop at an intersection. S.M.'s husband was driving and had to speed up and pull over to avoid being hit. S.M. turned around to watch the car to make sure it was driving safely, and she observed that the car was noticeably swerving and then ran a red light. At that point S.M. and her husband turned around and followed the car until it stopped at a gas station. S.M. called 911 to report what had happened and provided dispatch with a description of the car and the license plate. After S.M. called 911, she continued to watch and did not see anyone get out of the car. She called 911 again after the car abruptly backed up and left the parking lot.

A Granite Falls Police Department officer responded to the 911 call. He located the car and observed that when the driver attempted to take a left turn, the car slid to the right side of the road and appeared to bump the curb, then swerve into the center of the road. The roads were snow-packed, but the officer did not have any difficulty driving and did not observe any other vehicles sliding on the roads. The officer made a U-turn to follow the car and saw it pull into the driveway of a residence. He activated his emergency lights to stop and speak with the driver.

After the driver got out of the car, the officer attempted to stop her so that he could speak with her. She did not stop and the officer initially thought she did not see him, but

saw her look back at him. He again advised her to stop, but she continued to walk into the house. Another woman, J.G., met the officer at the door. The officer asked J.G. to have the driver come out to speak with him, and the driver, identified as appellant Olga Nichols, came to the door. The officer told Nichols that someone had called to report concerns about her driving. During the conversation, the officer could smell a “very strong odor of alcohol.”

Two officers from the Upper Sioux Police Department arrived to assist. The officers spoke with Nichols. One of the officers observed that Nichols appeared “very impaired,” her speech was slurred, and she was very argumentative. Nichols was asked to perform field sobriety tests, but refused to comply. Nichols eventually agreed to a horizontal-gaze nystagmus test, and the results indicated that she was “very impaired.”

Nichols was placed under arrest on suspicion of DWI and transported to jail. Nichols was read the breath-test advisory, which informed her that refusal to take a test is a crime and that if she wished to contact an attorney she would have the opportunity to do so. Nichols indicated that she wanted to contact an attorney and she was provided with a telephone and phone books, including phone directories with contact information for DWI attorneys in the area. Nichols was very argumentative for the first ten minutes and did not make any attempt to contact an attorney. She then stated that she had her own attorney and asked to search her purse for the attorney’s business card. The officers checked her purse for her but were unable to locate the business card. Nichols attempted to contact one attorney over the course of the next 35 minutes, but only reached an answering service. The officers then asked Nichols numerous times if she would consent to a test; she stated

that she was not refusing to take a test but never consented to one. Nichols also repeatedly claimed that she was not driving that morning. After approximately 45 minutes, Nichols's actions were deemed a refusal to consent to testing.

Respondent State of Minnesota charged Nichols with one count of second-degree test refusal and gross misdemeanor DWI. The case was tried to a jury, and the jury found Nichols guilty on both counts. The district court sentenced Nichols to 365 days for test refusal, stayed 275 days, and placed her on probation for three years.¹ This appeal follows.

DECISION

I. Nichols was not denied the right to a fair trial.

Nichols asserts prosecutorial misconduct by failing to adequately prepare and, thus, prevent allegedly improper testimony from one of the officers. When reviewing a claim of prosecutorial misconduct, “[o]ur standard of review depends on whether . . . there was an objection at trial to the claimed misconduct.” *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). Here, Nichols objected at trial to one of the challenged statements, but did not object to the other.

For objected-to prosecutorial misconduct, there are two harmless-error standards of review taken from *State v. Caron*. 218 N.W.2d 197, 200 (Minn. 1974). The harmless-error test for “unusually serious” misconduct requires an analysis of whether the misconduct was “harmless beyond a reasonable doubt.” *State v. Nissalke*, 801 N.W.2d 82,

¹ We note that the district court adjudicated convictions for both DWI counts (test refusal and driving under the influence). Nichols did not raise this as an issue on appeal and, thus, we will not address it further in this opinion.

105 (Minn. 2011) (quotation omitted). An error is harmless beyond a reasonable doubt “only if the verdict rendered was surely unattributable to the error.” *Id.* at 105-06 (quotation omitted). The harmless-error test for less serious misconduct requires an analysis of “whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.* at 105 (quotation omitted).

For allegations of prosecutorial misconduct that were not objected to during trial, we utilize a modified plain-error standard of review. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing an error that is plain, but upon doing so the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury’s verdict. *Id.*

“Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial” *Id.* at 300. And it is well established that the prosecutor has the “absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony.” *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). As such, a prosecutor may not elicit, or attempt to elicit, inadmissible evidence at trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). The state must also prepare its witnesses so that they “will not blurt out anything that might be inadmissible and prejudicial.” *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978).

Nichols argues that the prosecutor committed misconduct by failing to adequately prepare the officer to testify and that this misconduct requires reversal of her convictions and a new trial. She cites to two specific statements the officer made that she asserts

impermissibly referenced her prior criminal convictions and contacts with law enforcement. The first statement, which Nichols objected to at trial, relates to her “not being new to the system.” Nichols has two prior convictions for DWI-related offenses—one for driving with an alcohol concentration of 0.08 or higher and one for test refusal, which the state sought to admit into evidence. The district court initially reserved ruling on the issue but, during trial, determined that the evidence of Nichols’s prior convictions was inadmissible due to the “tremendous opportunity for prejudice” and comparatively little probative value.

The challenged statement made by the officer concerning Nichols’s “not being new to the system” occurred during the following exchange:

Q: All right. And in your experience as an officer, did Ms. Nichols behave in such a way that you felt that she has essentially been unreasonable to a point where you considered it a refusal?

A: Yes.

Q: And in the [breath-test advisory], are individuals warned about that?

A: Yes.

Q: All right.

A: And I mean, she’s not new to the system, as well—

Defense counsel objected and the district court ordered the jury to strike and disregard the comment.²

The state concedes that the officer’s statement that Nichols was “not new to the system” was inadmissible testimony and we agree. As such, this could be construed as a

² We note that this testimony occurred while the state’s motion was under advisement, but before the district court issued its ruling that evidence of Nichols’s prior convictions was inadmissible.

failure on the part of the prosecution to adequately prepare the officer. Thus, we will next consider whether the inadmissible statement deprived her of a fair trial. In doing so we must determine “whether the misconduct likely played a substantial part in influencing the jury to convict.” *Nissalke*, 801 N.W.2d at 105 (quotation omitted).³ We conclude that it did not.

The inadmissible statement that Nichols was “not new to the system” was brief, general, and the district court immediately instructed the jury to disregard the statement. *See State v. Atkinson*, 774 N.W.2d 584, 596 (Minn. 2009) (noting that references to appellant’s previous arrests were not unfairly prejudicial where the references were “fleeting” and “nonspecific”); *see also State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002) (stating that there is a presumption that the jury follows the district court’s instructions). Moreover, the prosecutor did not emphasize or repeat the statement, which lessens the chance of unfair prejudice. *State v. Hall*, 764 N.W.2d 837, 842-43 (Minn. 2009). Finally, the jury heard testimony about Nichols’s driving and subsequent conduct from S.M. and the three officers involved, and viewed the video that was recorded during the breath-test advisory process. This provided the jury with ample evidence on which to base its convictions. On this record, we conclude that the state satisfied its burden of demonstrating that it is not likely that the inadmissible statement played a substantial part

³ As previously discussed, this is the harmless-error test that applies to less serious claims of prosecutorial misconduct. Nichols identifies this as the appropriate standard and does not argue that the test for “unusually serious” misconduct should apply. We agree that the standard for less serious misconduct is appropriate given that the impermissible testimony was the result of a spontaneous statement by the officer, rather than an intentional attempt by the prosecutor to elicit inadmissible testimony.

in influencing the jury to convict. Consequently, Nichols is not entitled to a new trial with regard to the first statement.

The second challenged statement, which Nichols did not object to at trial, relates to the officer's testimony that he had seen Nichols driving earlier in the day. Nichols claims that this testimony also improperly suggested that she had prior contacts with law enforcement. The challenged statement arose as the officer explained that, earlier in the morning of the day of the offense, he was field training a new officer:

A. He's been a cop prior but I was training him how we do stuff in Upper Sioux. We're going into towards the casino and we saw a female driving a Honda SUV. She is sitting next to [defense counsel]. Her name is Olga Nichols and then we shortly after we were pulling into the casino, we had a driving complaint dispatched from Yellow Medicine County.

Q. All right. When you say that you saw Ms. Nichols driving, you're referring to the individual sitting next to [defense counsel]?

A. Yes.

....

Q. Okay. At the time you saw her, did anything at that time strike you as noteworthy or unusual or anything?

A. Not at that time. I mean there was a brief passing and we turned in and she was going west.

Defense counsel did not object to this testimony.

Because defense counsel did not object to this testimony, Nichols bears the burden of establishing that it constitutes plain error that affected her substantial rights. *Ramey*, 721 N.W.2d at 302. "An error is plain if it was clear or obvious." *Id.* (quotation omitted). Nichols argues that the statement suggests that the officer recognized her from prior contacts with law enforcement. But the officer did not testify that he recognized her from such contacts, he merely stated that he observed her driving earlier in the day on the date

of the offense. This statement does not clearly or obviously refer to her prior contacts with law enforcement. And as the state points out, this was potentially relevant to rebut Nichols's previous assertions that she was not driving on the date in question. Accordingly, we discern no plain error in the officer's testimony that he saw Nichols driving on the date of the offense and conclude that neither of the two challenged statements deprived Nichols of her right to a fair trial.

II. There is sufficient evidence to support the jury's verdicts.

Upon review of a claim of insufficient evidence, we review the record to determine "whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict." *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). We also

assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. We will not disturb the verdict if the jury, while acting with proper regard for the presumption of innocence and regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.

Id. at 25-26 (citations omitted).

When a conviction is based on circumstantial evidence, we use a two-step process. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved, assuming that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict. *Id.* at 598-99. Second, this court independently examines the reasonableness of the inferences the jury could draw from those circumstances. *Id.* at 599.

All circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010).

Nichols argues that the evidence is insufficient to sustain her convictions both of test refusal and DWI. We shall address each in turn.

Test Refusal

Nichols was convicted of test refusal under Minn. Stat. § 169A.20, subd. 2(1) (2018), which provides that “[i]t is a crime for any person to refuse to submit to a chemical test . . . of the person’s breath.” It is not necessary that an individual expressly and vocally refuse to take a test to sustain a conviction for test refusal. *State v. Ferrier*, 792 N.W.2d 98, 101-02 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). Rather, “refusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver’s words and actions in light of the totality of the circumstances.” *Id.* at 102. If a driver’s actions “frustrate” the testing process, then “it will amount to refusal to test.” *State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003) (citing *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 2000)), *review denied* (Minn. Mar. 26, 2003).

Nichols argues that the evidence is insufficient to support her conviction of test refusal. She acknowledges that one reasonable inference from her conduct during the testing process is that she did not intend to consent to testing. But she argues that her conduct also supports the reasonable inference that she did not intend to refuse to submit to testing, but rather was waiting to consult with an attorney before she made her decision. She emphasizes that she expressly stated that she was not refusing to take a test, and argues

that it is “significant that [she] did not act in an uncooperative manner by being belligerent, physically obstructive, or by refusing to reply to questions about testing.” She asserts that under the totality of the circumstances, there “is ample reason to believe” that she “merely wanted to consult with an attorney” before deciding whether to submit to testing, and therefore the evidence is insufficient to support her conviction of test refusal.

We disagree. The circumstances proven here are that Nichols was read the breath-test advisory; was provided with a telephone and phone books after she informed the officers that she wished to contact an attorney; was allowed 45 minutes in total to contact an attorney during which time she only called one lawyer and just reached voicemail; and after 40 minutes had passed, she was asked eight times whether she would consent to a breath test, and she did not answer.

Contrary to Nichols’s assertion that the officers did not assist her, the record indicates that they helped look for her attorney’s business card, attempted to find his contact information based on his name, showed her where in the phone book she could find DWI attorneys that served Yellow Medicine County, and helped her dial the phone.

The evidence also belies Nichols’s argument that she “did not act in an uncooperative manner by being belligerent, physically obstructive, or by refusing to reply to questions about testing.” The record shows that Nichols was consistently argumentative and obstructionist during the testing process. After she had been read the breath-test advisory, Nichols repeatedly told the officers that she had not been driving that morning, accused them of pulling her out of her friend’s house, and refused to respond to questions.

For example, after Nichols was read the breath-test advisory, the following exchange occurred:

Officer: If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test.

Nichols: You guys got me at my friend's house.

Officer: Do you understand what I have just explained to you?

Nichols: Nope. You guys got me at my friend's house.

Officer: Ok. Well then tell me what you don't understand what I just explained to you and I will explain it again.

Nichols: You got me at my friend's house. You got me at my friend's house. I was not driving at all.

Officer: Do you understand what I have just read to you?

Nichols: I do not understand.

Officer: What don't you understand so I can reexplain it to you.

Nichols: You pulled me out of the house. You pulled me out of the house.

Officer: Ok.

Nichols: Ok. And asked me to come here.

Officer: Do you wish to consult an[] attorney?

Nichols: You pulled me out of somebody's house and brought me here.

Officer: Do you wish to consult an attorney?

Nichols: You pulled me out of somebody's house because you (inaudible) about me and you pulled me out of somebody's house and thought that you could bring me here.

Officer: Are you still willing to take the additional breath test for me like you agreed to out in the Sally port?

Nichols: Did you pull me out of somebody's house?

The jury also had the opportunity to assess Nichols's explanation of what occurred and to judge her credibility because she testified at trial. They also viewed the video of the breath-test advisory process. The jury thus heard Nichols's testimony that she was not refusing to take a test, but rejected it in finding her guilty of the test-refusal count. We

defer to the jury's credibility determinations. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013).

On this record, the circumstances proven are consistent only with the inference that Nichols refused to be tested and the evidence is sufficient to support the conviction of test refusal.

DWI

Nichols was convicted of DWI under Minn. Stat. § 169A.20, subd. 1(1) (2018), which provides that it is a crime for a person to drive a motor vehicle when “the person is under the influence of alcohol.” An individual is “under the influence of alcohol” when the person “does not possess the clearness of intellect and control of [herself] that [she] otherwise would have.” *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012) (quotation omitted). As the jury was instructed, it is not unlawful for an individual to consume alcohol and then operate a motor vehicle, it is only a crime if the person's ability or capacity to drive and operate the vehicle is impaired by the consumption of alcohol.

Nichols argues that the evidence is insufficient to show that she was impaired by alcohol. She relies on *State v. Elmourabit*, in which the Minnesota Supreme Court determined that the circumstantial evidence presented was insufficient to sustain a conviction for DWI. 373 N.W.2d 290 (Minn. 1985). In *Elmourabit*, a driver was pulled over for speeding, and during the traffic stop the officer smelled the odor of alcohol and observed that the driver had slurred speech, glassy and bloodshot eyes, and an unsteady walk. *Id.* at 291. The driver also exhibited bizarre and aggressive behavior. *Id.* at 293. In determining that the evidence was insufficient to sustain the conviction, the supreme court

reasoned that although the driver was speeding, sober drivers speed as well, that the recent consumption of alcohol could lead to the odor of alcohol but not necessarily impairment, that the driver's slurred speech could be attributed to English not being his first language, and that his bloodshot and watery eyes could be explained by the fact that there was a possibility he was experiencing a medical issue. *Id.* The supreme court also observed that his work schedule and chronology of events, which was corroborated by other witnesses, did not leave a prolonged time or opportunity for the consumption of alcohol. *Id.* at 293-94. The supreme court ultimately concluded that, under these facts, it was one of the "rare exceptions" in which a jury verdict should be overturned, but noted that the opinion was "of little precedential value." *Id.* at 294.

Nichols argues that the circumstances in her case are similarly insufficient to support her conviction of DWI. Here, the relevant circumstances proven are that Nichols failed to stop at an intersection, almost t-boned another vehicle, then failed to stop at a red light, swerved repeatedly while driving, slid into the right lane and appeared to hit the curb when making a turn, had slurred speech, and smelled of alcohol. Indeed, her driving was so erratic that S.M. and her husband felt the need to turn around, follow her, and call 911 to report her dangerous driving to law enforcement. Moreover, the results of the horizontal-gaze nystagmus test indicated that Nichols was impaired. These circumstances present a stark contrast to those presented in *Elmourabit*.

Nichols attempts to explain the erratic driving by pointing out that the roads were snowy, but the first responding officer testified that he did not have any difficulty operating his vehicle, did not observe any other vehicles sliding or having difficulty driving, and

S.M. and her husband plainly singled Nichols out as driving in a particularly dangerous manner.

These circumstances do not support the rational hypothesis that Nichols had consumed alcohol but that the alcohol had not impaired her ability to operate her vehicle. The circumstances proven are inconsistent with any rational hypothesis except that of guilt, and the evidence is therefore sufficient to sustain Nichols's conviction of DWI.

Affirmed.