

*This opinion is nonprecedential except as provided by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
A20-0027**

State of Minnesota,
Respondent,

vs.

Sheldon Emory Noel,
Appellant.

**Filed February 1, 2021
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-18-7642

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his conviction for driving while impaired (DWI) refusal to submit to chemical testing, arguing that the district court erred in instructing the jury on

the offense and committed reversible error by permitting testimony regarding how long he consulted with an attorney before the breath test was administered. Because the jury instructions accurately state the law and the length of time a driver consults with an attorney is relevant to the test-refusal offense, we affirm.

FACTS

In the early morning hours of October 13, 2017, appellant Sheldon Noel was arrested for DWI after driving the wrong way down a Minneapolis street and turning left on a red light. The arresting police officers transported Noel to a chemical-testing facility where a specially trained officer (the officer) prepared to administer a breath test. During the initial 15-minute observation period, the officer made sure Noel did not ingest anything that would interfere with the test. But he noticed Noel leaning forward as if attempting “to force himself to burp.” Because forced burping may cause vomiting, which would delay the test, the officer told Noel to stop.

The officer next read Noel the breath-test advisory. Noel said he did not understand the part about speaking to an attorney, requiring the officer to re-read that portion of the advisory. Noel again indicated he did not understand. The officer then gave Noel a phone to contact an attorney. After speaking with an attorney for approximately 45 minutes, Noel told the officer that he would take the test.

The officer handed Noel the mouthpiece to begin the first of two required breath samples. He immediately noted that Noel “was not keeping [the] minimum flow rate” of air into the machine necessary to record a sample. The officer advised Noel “several times” that he needed to provide a “strong, steady breath.” But Noel failed to do so, and did not

provide a sufficient sample by the end of the three-minute testing period. The officer determined Noel's conduct amounted to test refusal.

Noel was charged with DWI-test refusal. At trial, the officer testified that Noel's behavior during the testing process and several other factors led him to conclude that Noel refused the breath test. The other factors include the length of time Noel talked to an attorney,¹ his stated inability to understand the advisory "even after multiple readings," and his attempts "to force himself to burp." These factors also prompted the officer's decision not to attempt a second test—even though he had the discretion to do so. In addition to the officer's testimony, the jury watched a video recording of the breath-test procedure, which largely corroborated the officer's version of events.

Noel asked the district court to modify the model test-refusal jury instruction to include a definition of "intent" and state that test refusal must be a "volitional act." The district court declined both requests, ultimately instructing the jury as follows:

Fifth, the Defendant refused to submit to the test. A failure to complete the entire test is a refusal. A refusal to submit to chemical testing includes any indication of actual unwillingness to complete the testing process, as determined from the driver's words and actions in light of the totality of the circumstances. In the case of a breath test, the entire test must consist of one adequate breath sample analysis, one calibration standard analysis, and a second adequate breath sample analysis.

The jury found Noel guilty of test refusal. Noel appeals his conviction.

¹ The district court sustained defense counsel's objection to admission of the content of Noel's discussion with the attorney. But the court allowed evidence as to how long the conversation lasted because it was a factor in the officer's assessment that Noel refused to take the breath test.

DECISION

Noel argues that the district court abused its discretion by instructing the jury and by admitting evidence that Noel consulted with an attorney for 45 minutes. We review each argument in turn.

I. The district court’s instruction on test refusal was not an abuse of discretion.

A district court has discretion to fashion jury instructions. *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019). We “review the instructions in their entirety to determine whether they fairly and adequately explained the law of the case.” *State v. Kuhnau*, 622 N.W.2d 552, 555-56 (Minn. 2001). A district court abuses its “broad discretion” if its instructions “confuse, mislead, or materially misstate the law,” *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted), or if the instructions omit an element of the charged offense, *Stay*, 935 N.W.2d at 430.

“It is a crime for any person to refuse to submit to a chemical test . . . of the person’s breath” once requested to do so by a police officer who has probable cause to believe the person has been operating a motor vehicle while impaired. Minn. Stat. § 169A.20, subd. 2(1) (Supp. 2017); *see also* Minn. Stat. § 169A.51, subd. 1(b) (2016); *accord State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). If a driver’s conduct frustrates, delays, or defeats the testing process, it constitutes a refusal. *State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003); *see also State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010) (stating refusal may be done verbally or through conduct), *review denied* (Minn. Mar. 15, 2011). Test refusal may be direct or may be inferred from the totality of the circumstances. *Ferrier*, 792 N.W.2d at 101. Accordingly,

this court held in *Ferrier* that “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.

Noel first argues that the district court’s instruction misstated the law because it turned test refusal into a strict liability crime. This argument is unavailing. Although the first substantive sentence of the instruction makes no reference to intent— “[a] failure to complete the entire test is a refusal”—the remainder of the instruction accurately states the law. The second sentence states, “A refusal to submit to chemical testing includes any indication of actual unwillingness to complete the testing process, as determined from the driver’s words and actions in light of the totality of the circumstances.” This language accurately states the law on test refusal—it recites *Ferrier* almost verbatim. That Noel may disagree with our decision in *Ferrier* does not mean that the district court abused its discretion by instructing the jury accordingly.

Noel next argues the instruction is erroneous because the words “intent” or “volitional act” are necessary to properly instruct the jury on the mens rea component of test refusal. This argument is also unpersuasive. In *Ferrier*, we analyzed the language of the test-refusal statute, concluding that the statute does require a volitional act because the phrase “to refuse” plainly means “to indicate unwillingness to do, accept, give, or allow something.” *Id.* at 101 (quotation omitted). We articulated the requisite mens rea as “[a]ctual unwillingness to submit to testing.” *Id.* Because the district court’s instruction required proof of “actual unwillingness to complete the testing process,” it accurately states the law and does not constitute abuse of discretion.

II. Admission of evidence that Noel consulted an attorney for 45 minutes does not constitute reversible error.

The admission of evidence is “within the sound discretion of the district court,” and we “will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). A district court abuses its discretion if the decision is “based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Flah*, 933 N.W.2d 807, 810 (Minn. App. 2019) (quotation omitted), *review denied* (Minn. Nov. 27, 2019). But where the appellant did not object to the admission of evidence at trial, we review for plain error that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Because at trial Noel only objected to one instance of the officer’s testimony regarding Noel consulting with an attorney—while leaving prior testimony on the point unchallenged—we must consider both whether the district court abused its discretion by permitting the challenged testimony and whether the district court committed plain error by permitting the unchallenged testimony.

Persons arrested for DWI have a limited right to consult with an attorney before taking a requested chemical test. This right exists under the Minnesota Constitution, and affords the person a “reasonable opportunity to obtain legal advice” before submitting to testing. *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). But “this right is limited to the extent that it cannot unreasonably delay administration of the test.” Minn. Stat. § 169A.51, subd. 2(3) (Supp. 2017). Noel contends that the district court committed reversible error by allowing testimony that he chose to exercise this right and

that his exercise was a factor in the officer's assessment that he refused the breath test. This contention is unavailing for two reasons.

First, the constitutional protections Noel invokes do not apply in the context of chemical testing following a DWI arrest. Noel asserts his choice to avail himself of the right to counsel cannot be held against him at trial, citing *State v. Roberts*, 208 N.W.2d 744 (Minn. 1973). But the right described in *Roberts* is derived from the Fifth Amendment protection from self-incrimination. See 208 N.W.2d at 746 (citing *Miranda v. Arizona*, 384 U.S. 436, 468 n.37, 86 S. Ct. 1602, 1625 n.37 (1966)); see generally *Miranda*, 384 U.S. at 465-66, 86 S. Ct. at 1623 (discussing U.S. Const. amend V). The limited right to counsel following a DWI arrest does not fall under the umbrella of protections afforded by the Fifth Amendment. See *Friedman*, 473 N.W.2d at 835, 837 (citing Minn. Const. art I, § 6). Accordingly, “[c]hemical testing in a DWI proceeding, pursuant to the implied consent law, is not self-incrimination and does not trigger Fifth Amendment protection against self-incrimination.” *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 2000).

Second, conduct that unreasonably delays or otherwise frustrates the testing process—even conduct involving the limited right to counsel—may constitute test refusal. See *Collins*, 655 N.W.2d at 658 (driver’s belligerent speech and behavior, during which she invoked her limited right to counsel, frustrated the testing process and amounted to test refusal); *Busch*, 614 N.W.2d at 259-60 (driver’s silence during reading of breath-test advisory and conduct constituted retraction of his request for counsel and test refusal). Thus, evidence of the manner in which a person exercised his limited right to counsel may

be relevant to whether he frustrated the testing process to such an extent that he refused the test.

That is the situation here. Noel's conduct before and during the administration of the breath test are relevant to whether his conduct frustrated the testing process. The fact that he spoke to an attorney for 45 minutes is one of several circumstances that tended to show he sought to unreasonably delay or otherwise obstruct the testing process. He initially attempted to burp up stomach contents, which could delay the process; he made the officer re-read portions of the breath-test advisory; and he did not follow repeated instructions to provide sufficient airflow, causing the test to restart several times over the course of three minutes, and resulting in a deficient sample.

In sum, this record persuades us that the district court did not abuse its discretion or otherwise err by admitting the officer's testimony that Noel spoke with an attorney for 45 minutes before the officer administered the breath test.

Affirmed.