

*This opinion is nonprecedential except as provided by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
A21-1186**

State of Minnesota,
Respondent,

vs.

Frank Garrett Quentin Walter,
Appellant.

**Filed October 10, 2022
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Clay County District Court
File No. 14-CR-19-2801

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

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Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
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Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this appeal, appellant challenges the district court's judgments of conviction for first-degree physical control of a motor vehicle while impaired (DWI) under Minn. Stat. § 169A.20, subd. 1 (2018) (count 1), and first-degree refusal to submit to a chemical test

under Minn. Stat. § 169A.20, subd. 2 (2018) (count 2). Appellant argues both convictions must be reversed because the record evidence does not sufficiently prove beyond a reasonable doubt that the appellant was guilty. After a careful review of the record evidence, we affirm the guilty verdicts on both counts. But we remand with instructions for the district court to vacate one of the two convictions because both convictions are for offenses under different sections of the same criminal statute for acts committed during a single behavioral incident.

FACTS

Respondent State of Minnesota charged appellant Frank Garrett Quentin Walter with DWI and test refusal, as described above, and a jury trial was held in May 2021. The following summarizes the evidence received during the jury trial. On July 13, 2019, at around 2:00 a.m., a Clay County deputy was patrolling Interstate 94 near Moorhead. He spotted a car parked on the shoulder with the driver's door open and a leg hanging out. The deputy pulled over, approached, and saw a male—later identified as Walter—sleeping in the driver's seat and a female sleeping in the back seat. There were no keys in the ignition. The deputy woke Walter and noticed an odor of alcohol coming from the car and that Walter was not wearing any shoes, was slurring his speech, and had bloodshot, watery eyes. The deputy tried to conduct field sobriety tests, but Walter failed to follow instructions or perform the tests. Walter was arrested and placed in the back seat of the squad car.

The deputy and a second officer woke the female in the back seat, who was later identified as Walter's sister. The deputy saw car keys in the middle of the back seat behind

the center console, and, when the deputy asked, Walter's sister gave him the keys. The deputy testified at trial that someone sitting in the driver's seat could access the keys in the back seat. After an officer transported Walter to the jail and read him the breath-test advisory, Walter refused to submit to a breath test.

At trial, Walter called his sister as a witness. Walter's sister testified that Walter drove earlier in the evening, but she was driving just before they parked. Because the car was overheating, she pulled onto the freeway shoulder, took the keys out of the ignition, put the keys in her pocket, and fell asleep in the back seat. The next thing she recalled was being awakened by an officer.

The jury found Walter guilty on both counts. The district court determined that count 2 was a lesser-included offense of count 1 and orally pronounced a conviction on count 1 but not on count 2. The district court sentenced Walter to 60 months in prison on count 1 and stayed execution of the sentence for five years. The warrant of commitment shows a conviction on both counts.

Walter appeals.

DECISION

Walter makes three arguments in support of his position that his convictions must be reversed. First, he contends that the record evidence of his physical control of the car is circumstantial, and this court should apply a heightened, two-step circumstantial-evidence test. Second, Walter contends that the evidence failed to prove beyond a reasonable doubt that Walter was in physical control of the car, and therefore, the record does not support his conviction for count 1. Third, Walter argues the evidence failed to prove beyond a

reasonable doubt that the deputy had probable cause to believe Walter was in physical control of the car, and therefore, the record does not support his conviction for count 2. We consider each argument in turn.

I. The record includes direct evidence of the challenged element of physical control.

The sufficiency of the evidence for a conviction is reviewed differently based on whether direct or circumstantial evidence supports a challenged element. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist,” and it “always requires an inferential step to prove a fact.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). In contrast, direct evidence is “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumptions.” *Id.*

Walter urges this court to apply the two-step circumstantial-evidence test to the record evidence of physical control in his case.¹ His argument is unpersuasive. This record includes direct evidence of Walter’s physical control of the car, such as testimony from the

¹ When an appellate court reviews the sufficiency of circumstantial evidence, the first step “is to identify the circumstances proved.” *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). The second step is to “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved; this includes inferences consistent with a hypothesis other than guilt.” *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted). Under this second step, the court must “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable.” *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013) (quotations omitted).

deputy, the second officer, and Walter's sister² about their personal observations. The record also includes a squad-car video recording.³ Witness testimony is direct evidence "when it reflects a witness's personal observations and allows the jury to find the defendant guilty without having to draw any inferences." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). Similarly, a photograph or video recording is direct evidence of what it shows. *See State v. McCormick*, 835 N.W.2d 498, 507 (Minn. App. 2013) (stating that a reenactment video is direct evidence of a defendant's actions), *rev. denied* (Minn. Oct. 15, 2013); *but see State v. Li*, 948 N.W.2d 151, 155 (Minn. App. 2020) (stating that video evidence is not direct evidence of a fact that did not appear in the video).

We therefore apply the direct-evidence test and not the two-step circumstantial-evidence test in reviewing the sufficiency of the evidence for counts 1 and 2.

II. The record includes sufficient evidence that Walter was in physical control of the car.

Walter challenges the sufficiency of the evidence for the element of physical control and argues that we must reverse his conviction for count 1. When a disputed element is

² When reviewing the sufficiency of evidence, the appellate court's duty is "performed when it has considered all of the evidence in the light most favorable to the trial court's findings and has determined whether the findings are reasonably sustained by the evidence as a whole." *Dempsey v. Meighen*, 90 N.W.2d 178, 184 (Minn. 1958). Because we review the record as a whole, we also consider Walter's sister's testimony even though she was a defense witness.

³ While the squad video recording failed to capture the deputy's initial interaction and conversations with Walter, the recording corroborates the deputy's testimony about Walter sleeping in the driver's seat and Walter's sister sleeping in the back seat.

supported by direct evidence, the appellate court's review is limited "to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, [is] sufficient to permit the jurors to reach the verdict which they did." *Horst*, 880 N.W.2d at 40 (quotation omitted). The jury is assumed to "disbelieve[] any evidence contrary to the verdict." *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). "The question on review is whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted, giving due regard to the presumption of innocence." *Id.*

The state charged Walter with count 1, alleging Walter was in physical control of the car while under the influence of alcohol. Physical control is "more comprehensive than either 'drive' or 'operate.'" *State v. Starfield*, 481 N.W.2d 834, 836 (Minn. 1992) (quoting *State v. Harris*, 202 N.W.2d 878, 881 (Minn. 1972)). "The phrase 'physical control' means being in a position to exercise dominion or control over the vehicle." *State v. Duemke*, 352 N.W.2d 427, 432 (Minn. App. 1984). "The offense, however, is not intended to cover situations in which an intoxicated person is a passenger, having relinquished control of the vehicle to a designated driver"; "mere presence" in the car is "insufficient to show physical control." *Fleck*, 777 N.W.2d at 236. An appellate court may consider "a number of factors in determining whether a person is in physical control of a vehicle, including: the person's location in proximity to the vehicle; the location of the keys; whether the person was a passenger in the vehicle; who owned the vehicle; and the vehicle's operability." *Id.*

Walter argues the record evidence is insufficient to prove physical control because it shows that he was merely sleeping in the driver's seat, the keys were not in the ignition but next to Walter's sister, and "there was no evidence that the car was operable." We consider each of these three points in turn.

First, Walter is correct that sleeping in the driver's seat is not, by itself, sufficient evidence of physical control. In *State, City of Falcon Heights v. Pazderski*, law enforcement found the appellant "asleep in his car on the property in which he lived." 352 N.W.2d 85, 88 (Minn. App. 1984). We reversed appellant's DWI conviction and held that the record evidence of physical control was insufficient; we emphasized that appellant was sleeping in the front seat of the car in his own driveway, "[t]he key was not in the ignition, the engine was not running and there were no devices of the car operating." *Id.* at 88-89. We also noted that appellant "had arrived home, had slept for about three hours, and had no intention of restarting the vehicle and/or driving any place else." *Id.* at 88.

Pazderski, however, does not support reversal of count 1. Although the deputy found Walter sleeping in the driver's seat, that was not the only record evidence of physical control. Walter's car was parked on the shoulder of a busy interstate, not in his own driveway. Walter's sister also testified that Walter recently drove the car. As we discussed in *Pazderski*, "[o]ne who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, where his life and the lives of others hang in the balance." *Id.* (quoting *State, Dept. of Pub. Safety v. Junczewski*, 308 N.W.2d 316, 320 (Minn. 1981)). Thus, *Pazderski* does not apply to the facts in Walter's case.

Second, Walter stresses the location of the car keys, pointing out that the keys were found next to Walter's sister, the keys were not in the ignition, and the keys were not with Walter when the deputy found him. The state responds that the testimony proves someone sitting in the driver's seat could access the keys in the backseat.

This court has generally upheld DWI convictions or license revocations based on a driver's physical control when the driver had access to the vehicle keys. *See, e.g., LaBeau v. Comm'r of Pub. Safety*, 412 N.W.2d 777, 780 (Minn. App. 1987) (“[K]eys were within easy reach in the glove compartment.”); *Vivier v. Comm'r of Pub. Safety*, 406 N.W.2d 587, 589 (Minn. App. 1987) (“The keys were found in [driver's] pocket prior to the arrest.”); *Palme v. Comm'r of Pub. Safety*, 366 N.W.2d 343, 344 (Minn. App. 1985) (noting the defendant was unaware of the keys, which were on the seat next to him), *rev. denied* (Minn. June 24, 1985). Here, the deputy's testimony is sufficient to prove that Walter was in physical control of the car because he could access the keys.

Third, Walter contends “a dark stream” on the interstate shoulder near the car suggests that mechanical issues prevented its operation. This argument is unavailing. The supreme court has held that “operability of the motor vehicle is not an element of the crime of being in ‘physical control’ of a motor vehicle while under the influence of alcohol.” *Starfield*, 481 N.W.2d at 839. For example, the supreme court upheld a DWI conviction when the defendant was found sleeping “behind the steering wheel” even though the car was stuck in the ditch. *Duemke*, 352 N.W.2d at 430. And this court has upheld DWI convictions when the vehicles appeared to be inoperable. *See, e.g., Abeln v. Comm'r of Pub. Safety*, 413 N.W.2d 546, 547-48 (Minn. App. 1987) (car battery was depleted); *State*

v. Woodward, 408 N.W.2d 927, 928 (Minn. App. 1987) (car had a flat tire). The supreme court has explained that even if the car is “incapable of immediate self-propelled mobility,” it may still be a potential traffic hazard, which is “the potential harm that “the ‘physical control’ offense is meant to encompass.” *Starfield*, 481 N.W.2d at 838. We conclude that the operability of Walter’s car does not undermine the sufficiency of the record evidence of physical control.

Because record evidence established that Walter was sleeping in the driver’s seat of a car parked on the interstate shoulder and that he had access to the keys, we conclude the evidence sustains Walter’s conviction for count 1.

III. The record includes sufficient evidence that the deputy had probable cause to believe that Walter was in physical control of the car, and therefore, Walter was lawfully arrested and required to submit to a chemical test.

To sustain the conviction for test refusal in count 2, the record must include sufficient evidence that the deputy had probable cause to believe Walter was in physical control of a motor vehicle, and that a chemical test was required because Walter was lawfully arrested for DWI. Minn. Stat. §§ 169A.20, subd. 2(1), 169A.51, subd. 1(b)(1) (2018). Probable cause means that “the objective facts are such that under the circumstances a person of ordinary care and prudence [would] entertain an honest and strong suspicion that a crime has been committed.” *State, Lake Minnetonka Conservation Dist. v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000). The reasonableness of the deputy’s probable-cause determination is “an objective inquiry,” *State v. Hardy*, 577 N.W.2d 212, 216 (Minn. 1998), and we consider the totality of the facts and circumstances known, *State v. Koppi*, 798 N.W.2d 358, 363 (Minn. 2011).

Walter again challenges the sufficiency of the evidence of physical control. He argues that “[f]or much of the same reasons that the state failed to prove beyond a reasonable doubt that [Walter] was in physical control of the car, the state failed to prove beyond a reasonable doubt that [the deputy] had probable cause to believe that [Walter] was in physical control of the car.” Walter points out that the engine was not running, the keys were not in the ignition, and the keys were not with Walter when he was ordered out of the vehicle.

We are not persuaded. In *Flamang v. Commissioner of Public Safety*, we affirmed a test-refusal conviction even though the keys were not located, when the driver was found sitting “behind the steering wheel,” “the engine felt warm,” and there was an “odor of alcohol on [the driver’s] breath.” 516 N.W.2d 577, 579, 581 (Minn. App. 1994), *rev. denied* (Minn. July 27, 1994).

Similarly, the deputy found Walter sleeping behind the steering wheel in a car parked on the interstate shoulder. The deputy also found the keys in the back seat and testified that they were accessible to someone sitting in the driver’s seat. Because record evidence established that the deputy found Walter in the driver’s seat of a car parked on the interstate shoulder and observed that he had access to the keys, we conclude the evidence sustains Walter’s conviction for count 2.

IV. The convictions on counts 1 and 2 are for offenses under different sections of a criminal statute for acts committed during a single behavioral incident.

At sentencing, the district court pronounced a judgment of conviction and imposed sentence on count 1. The district court stated that count 2 was a lesser-included offense that

arose from the same behavioral incident as count 1, and therefore, no conviction would be entered on count 2. The warrant of commitment, however, shows a conviction on both counts.

While neither party discussed this issue, “an appellate court has a ‘responsibility to review the record even though the assignments of error are inadequate.’” *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994) (quoting *State v. Post*, 512 N.W.2d 99, 103 (Minn. 1994)). Whether the defendant can be lawfully convicted of a crime is a legal question that appellate courts review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2020). The supreme court has held that “section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985).

Where, as here, an appellant does not assert a lesser-included-offense argument, this court applies a two-part test to determine whether any of the multiple convictions should be vacated. *State v. Bonkowske*, 957 N.W.2d 437, 443-44 (Minn. App. 2021). First, the convictions at issue must be for offenses that arise under different sections of the same criminal statute. *Jackson*, 363 N.W.2d at 760. Second, the offenses must have been for acts committed during a single behavioral incident. *Id.*

Walter’s convictions for count 1 and count 2 were for offenses arising under different sections of the same criminal statute—Minn. Stat. § 169A.20. Also, this court has held that DWI and test refusal “committed as part of a continuous course of conduct, as

occurred here, arise out of a single behavioral incident.” *Bonkowske*, 957 N.W.2d at 444. Thus, we conclude that the district court erred by entering convictions on counts 1 and 2 on the warrant of commitment.

The supreme court has established the “proper procedure to be followed by the trial court” and the rationale for doing so:

[W]hen the defendant is convicted on more than one charge for the same act [the district court is] to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984). Because Walter was convicted on counts 1 and 2 for offenses arising out of the same behavioral incident, “one of the two formal adjudications of conviction . . . must be vacated.” *Jackson*, 363 N.W.2d at 760. Even so, “a finding of guilt with respect to those lesser included offenses,” the guilty verdict, “remains intact.” *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999).

Thus, we affirm in part the sufficiency of the evidence for counts 1 and 2, and we reverse in part and remand for the district court to vacate one of Walter’s convictions while leaving the guilty verdicts intact.

Affirmed in part, reversed in part, and remanded.