

*This opinion is nonprecedential except as provided by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
A21-1383**

State of Minnesota,
Respondent,

vs.

Terry Lee Hower,
Appellant.

**Filed September 26, 2022
Affirmed
Wheelock, Judge**

Beltrami County District Court
File No. 04-CR-20-3118

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

David L. Hanson, Beltrami County Attorney, Wesley Van Ert, Assistant County Attorney,
Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his conviction, following a jury trial, for chemical-test refusal, arguing that it was not supported by sufficient evidence and that the district court abused its discretion by restricting his voir dire questions. Because the conviction is based on

sufficient evidence and because the district court did not abuse its discretion by restricting certain questions during voir dire, we affirm.

FACTS

Respondent State of Minnesota charged appellant Terry Lee Hower with first-degree driving while impaired (DWI) under Minn. Stat. § 169A.24, subd. 1(2) (2020), and driving after cancellation of his license under Minn. Stat. § 171.24, subd. 5 (2020). The state later amended the complaint to charge Hower solely with first-degree DWI based on his refusal to submit to chemical testing. Minn. Stat. § 169A.20, subd. 2(2) (2020). Hower's case was tried to a jury.

The following facts are from evidence presented at the jury trial. In November 2020, a law-enforcement officer responded to a call that a pickup truck had crashed in a ditch and arrived to find Hower asleep in the driver's seat. The officer questioned Hower about what happened, and Hower—who is unable to speak—reacted by motioning to his leg, which the officer interpreted to mean that Hower's leg was in pain. The responding officer testified at trial that he believed Hower was intoxicated based on the smell of alcoholic beverages, Hower's inability to stand or walk, his bloodshot, watery eyes, and empty beer cans along with an opened, partially empty bottle of liquor on the floor of the truck's passenger seat. An ambulance transported Hower to the hospital.

At the hospital, a second officer approached Hower, who was in a wheelchair in the hospital waiting room awaiting medical attention. The officer explained to Hower that he had a search warrant to collect a blood or urine sample for a chemical test, gave a copy of the warrant to Hower, and told Hower repeatedly that he could nod or shake his head in

response to the question of how he preferred to provide a sample for testing. The officer told Hower that not responding would be considered refusing the test and that refusing the test was a crime in Minnesota. The officer then asked Hower if he would provide a blood or urine sample.

At first, Hower did not respond to the officer's questions. The officer asked Hower several more times if he would provide a blood or urine sample and continued to repeat that it was a crime to refuse. After the officer repeated his questions and tried to get Hower's attention, Hower gestured to the officer, who gave Hower a pen and paper. Hower then wrote a few words, such as, "for watt," which the officer interpreted to mean Hower was asking why the officer needed a blood or urine sample; "Scott driving, not me," which the officer interpreted to mean Hower was saying someone named Scott was driving the truck when it crashed; and "hospital," to which the officer responded by telling Hower that he was in the hospital to get his leg examined. The officer then asked again how Hower would like to complete the chemical test, and Hower wrote, "P," which the officer took to mean Hower would provide a urine sample.

The officer left to retrieve a urine-testing kit. When the officer returned with the kit, he tried to get Hower's attention by repeatedly saying his name. Hower did not respond and appeared to be asleep. The officer reminded Hower that if he did not respond, it would be a refusal. Hower then appeared to wake up. The officer asked Hower if he would "pee in a cup" and told Hower that if he kept "messaging around," the officer would consider it to be a test refusal. The officer again repeated Hower's name, asked several more times if Hower was going to take the test, asked Hower to open his eyes, and told Hower to nod his

head yes or no. Hower motioned to his leg. The officer told Hower that on initial review, the medical staff had not identified anything wrong with Hower's leg. The officer yet again asked Hower whether he was going to take the test, and Hower did not respond; the officer said, "See, you stop answering me when I ask those questions." Moments later, medical staff wheeled Hower into an exam room. The officer testified at trial that he considered Hower to have refused to test once the medical-staff member came to get him; therefore, the officer did not make any additional attempts to secure a sample after that time.

The jury found Hower guilty of test refusal, and the district court sentenced him to 75 months' imprisonment. Hower appeals.

DECISION

I. Hower's conviction for test refusal was supported by sufficient evidence that he was actually unwilling to participate in the testing process.

On a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the verdict "to determine 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." *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotation omitted). We will leave the jury's verdict undisturbed if the jury acted with "due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt" and could "reasonably conclude that [the] defendant was proven guilty of the offense charged." *Id.* (quotation omitted).

In Minnesota, it is a crime for a person suspected of impaired driving to refuse to submit to a chemical test of the person's blood or urine when it is authorized by a search warrant. Minn. Stat. § 169A.20, subd. 2 (2020). “[R]efusal 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.” *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011).

Appellant argues that the evidence supporting his conviction for test refusal was insufficient, and both parties agree that the evidence of the refusal was primarily circumstantial. Appellate courts apply greater scrutiny when assessing the sufficiency of circumstantial evidence. *Hanson*, 800 N.W.2d at 622; *see also State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017) (reaffirming circumstantial-evidence standard of review). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Harris*, 895 N.W.2d at 599 (quotation omitted). “Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotation omitted). In other words, circumstantial evidence requires the jury to make an inference as to the disputed fact based on the evidence presented, while direct evidence does not. *Id.*

“To sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 598 (quotation omitted). This court first identifies the circumstances

proved, with the assumption that the jury rejected evidence in the record that is inconsistent with its verdict. *Hanson*, 800 N.W.2d at 622. Second, we examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt. *Id.* If there are no reasonable, rational inferences that are inconsistent with guilt, this court should affirm the conviction. *Id.*

Based on the evidence here, the state proved the following circumstances: (1) Hower initially did not respond to the officer's request for a chemical test; (2) Hower then appeared to agree to submit to a urine test; (3) when the officer returned with a kit to begin the process of administering the urine test, Hower appeared to be asleep; (4) after the officer reminded Hower that if he did not respond, it would be a test refusal, Hower appeared to wake up; (5) Hower then refused to communicate nonverbally as he had communicated with the officer before; and (6) Hower once again did not respond to the officer's request to complete a urine test. These circumstances are consistent with Hower indicating an actual unwillingness to submit to the test. *See Ferrier*, 792 N.W.2d at 102 (deeming that failure to produce urine for testing after verbally agreeing to test was sufficient circumstantial evidence of actual unwillingness to submit to testing).

Hower, however, argues that there are other reasonable inferences based on these circumstances, including that he was not unwilling to test but simply unable to communicate because after he wrote, "P," the pen and paper were taken away, and alternatively, that he was willing to do a urine test but did not want to do so in the public waiting area. Hower also argues that there was no requirement to consent to the test a second time after he had written, "P." Ultimately, he argues, it is a reasonable inference

that it was the officer's failure to administer the test, *not* Hower's failure to comply with the test, that frustrated the testing process.¹

Hower's proffered inferences are unreasonable based on the circumstances proved. The testimony and body-camera footage presented at trial support the inference that Hower demonstrated a clear disinterest in participating in the urine test. Hower's argument that the removal of his pen and paper meant that he could no longer participate in testing is contradicted by the officer's body-camera footage showing that Hower motioned with his head and his hands in response to other questions the officer asked. A driver's refusal to submit to testing includes indicating, through words or actions, an "actual unwillingness to participate in the testing process," even after initially consenting to a test. *Ferrier*, 792 N.W.2d at 102. In *Ferrier*, Ferrier agreed to submit to a urine test, but after more than one hour, many glasses of water, and three opportunities to urinate, she did not provide a sample. *Id.* This court determined that this was circumstantial evidence of her refusal and

¹ Hower also argues that his case is like *State, Department of Public Safety v. Presler*, in which the supreme court determined that the state had not shown that Presler refused a test when Presler agreed to a test and then later made statements that were "somewhat equivocal," because those statements were "not sufficient in the confusing circumstances" of the case to constitute refusal. 246 N.W.2d 570, 572 (Minn. 1976). In the sole opinion that cites *Presler*, *Sigfrinius v. Commissioner of Public Safety*, this court noted that as of 1985, caselaw had not defined refusal although refusal was not limited to a verbal response. 378 N.W.2d 124, 126 (Minn. App. 1985). *Sigfrinius* distinguished *Presler* by determining that the confusing circumstances present in *Presler*—specifically, Presler's confusion as to the law requiring him to take a test—led the supreme court to determine that Presler had not refused a test. Here, Hower does not argue that he was confused as to the legal requirement, and the officer repeatedly explained that refusal was a crime and that not responding was considered a refusal.

was sufficient to support a finding that Ferrier was unwilling to submit to the testing process. *Id.*

The record here includes evidence showing that after appearing to agree to a chemical test, Hower ignored the officer once he returned with the test kit and did not respond to questions about taking the test even as he responded nonverbally to other questions the officer asked. These circumstances support a reasonable, rational inference that Hower was indicating an actual unwillingness to participate in the testing process. We conclude that, when viewed in the light most favorable to the verdict, sufficient evidence exists in the record to support Hower's conviction for refusal to submit to chemical testing.

II. The district court did not abuse its discretion by stopping Hower, during voir dire, from requiring jurors to speculate about reasons why an innocent defendant might not testify on their own behalf.

The United States and Minnesota Constitutions guarantee that a criminal defendant has the right to an impartial jury, which “includes the ability to conduct an adequate voir dire to identify unqualified jurors.” *State v. Greer*, 635 N.W.2d 82, 87 (Minn. 2001) (quotation omitted). During voir dire, the district court first identifies the parties and their counsel and outlines the nature of the case, then the court questions jurors about their qualifications and may give them preliminary instructions. Minn. R. Crim. P. 26.02, subd. 4. The parties then examine the jurors to discover grounds for challenges for cause and to assist in their exercise of peremptory challenges. *Id.*

A district court “has the right and the duty to assure that the inquiries by the parties during the voir dire examination are ‘reasonable.’ The court may therefore restrict or prohibit questions that are repetitious, irrelevant, or otherwise improper.” Minn. R. Crim.

P. 26.02, subd. 4(1) cmt. But “it is an abuse of discretion for the trial court to frustrate the purposes of voir dire by preventing discovery of bases for challenge or inhibiting a defendant’s ability to make an informed exercise of peremptory challenges.” *Greer*, 635 N.W.2d at 87. District court decisions regarding the conduct of voir dire will not be overturned absent an abuse of discretion. *Id.*

Hower argues that the district court abused its discretion by restricting Hower’s voir dire questions. When giving instructions at the outset of jury selection and again after the jury was sworn, the district court stated that “[t]he defendant does not have to call witnesses, introduce evidence, ask questions, or otherwise prove his innocence.” During voir dire, Hower’s counsel told the jury that she was going to call on jurors to ask for a “reason why an innocent person would not testify at trial.” After posing this question to the jury, Hower’s counsel then called on a specific juror to answer the question, and the state requested a bench conference off the record. When voir dire resumed, Hower’s counsel began a different line of questioning. Later, during the jury’s break, Hower’s counsel put on the record that the state objected to her voir dire question, “[C]an you think of a reason why an innocent person wouldn’t testify[?]” Hower’s counsel argued that the question “goes to the jury’s ability to apply the presumption of innocence along with the right not to testify.” The district court confirmed that it had denied any further questioning of the jurors in that way.

Hower argues that he was not able to ask several questions of the jurors to determine whether they held preconceived notions about the presumption of innocence, the

defendant's right not to testify, and the state's burden of proof.² He argues that he was prohibited from asking any questions that would help him determine whether any juror disagreed with the premise of "innocent until proven guilty." However, the record shows that Hower's counsel was prevented only from asking any juror she chose to call upon if they could think of a "reason why an innocent person would not testify at trial." Indeed, earlier in voir dire, Hower's counsel asked a juror, "[Y]ou agree that as it stands right now he's innocent because you haven't heard any evidence, right?" To which the juror answered, "Correct." The state did not object to this question, and the court did not prohibit it. The record shows that Hower's counsel was able to ask a juror if they believed Hower was innocent until proven guilty, but that his counsel was not allowed to call on jurors to ask for reasons why an innocent person would not testify at trial.

The district court twice instructed the jury that it was the jury's duty to presume the defendant was innocent and that he was not required to prove his innocence. The district court's decision not to allow the specific question asking jurors to think of a "reason why an innocent person would not testify at trial" did not prevent the discovery of a basis for a challenge or otherwise inhibit Hower's ability to make an informed exercise of peremptory challenges to potential jurors. We conclude that the district court did not abuse its

² The state argues that inviting the jury to speculate as to why an innocent person would not testify violates a defendant's Fifth Amendment right. The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The state argues that, by asking the jury to speculate as to why a person might not testify against themselves, Hower's counsel invited the jury to use the defendant's silence against him. The state does not support this argument with any legal authority other than the Fifth Amendment itself, and without more, it is not clear that the Fifth Amendment prohibits this type of questioning by a defendant's attorney.

discretion by prohibiting Hower's question requiring jurors to speculate about the reasons an innocent defendant might not testify at trial.

Affirmed.