

*This opinion is nonprecedential except as provided by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
A22-0781**

State of Minnesota,
Respondent,

vs.

Jeremiah Park Hess,
Appellant.

**Filed April 17, 2023
Affirmed
Bryan, Judge**

Cass County District Court
File No. 11-CR-19-931

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

Benjamin T. Lindstrom, Cass County Attorney, Chelsea Langton, Assistant County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rebecca Ireland, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges his conviction for first-degree refusal to submit to a chemical test, arguing that the state presented insufficient circumstantial evidence to establish his guilt. We affirm.

FACTS

Respondent State of Minnesota charged appellant Jeremiah Park Hess with one count of first-degree refusal to submit to a chemical test in violation of Minnesota Statutes section 169A.20, subdivision 2(1) (2018), and two other charges relating to events that occurred on June 10, 2019. The following undisputed facts were established by the evidence presented at trial.

On June 10, 2019, D.J. reported a motor vehicle theft and subsequent assault. Cass County Deputy Sheriff Rasmus responded and met with D.J., who alleged that Hess took D.J.'s vehicle, a 2002 Subaru Forester, without permission. D.J. also reported that Hess was under the influence of alcohol. As Rasmus was speaking with D.J., she received a phone call from Hess. Rasmus testified that he overheard the conversation and described Hess's voice and demeanor: "Slurred speech, sounded intoxicated to me, upset." At some point, Rasmus learned that Hess informed D.J. that he had driven the vehicle into a swamp. Police Officer Simon Danielson and Minnesota State Trooper Dingman located a 2002 Subaru Forester in a swampy area and saw Hess between 300 and 350 meters away from the vehicle. Hess ran from the officers and did not stop when instructed to do so, but Dingman was able to apprehend Hess. Both Danielson and Dingman observed signs of impairment during their encounter with Hess, including an odor of alcohol, bloodshot and watery eyes, swaying, stumbling, slurred speech, and confusion. Dingman also described Hess as "pretty belligerent" and "kind of up and down." Dingman felt it would be unsafe to unhandcuff Hess for the purpose of conducting field sobriety tests. Dingman asked Hess

to submit to a preliminary breath test instead, but Hess refused. Hess was transported to jail for a chemical test.

Dingman read the breath test advisory to Hess, informing Hess that he had a right to consult with an attorney before deciding whether to test; a telephone and directories would be provided; and if Hess was unable to contact an attorney, he would have to make the decision of whether to test on his own and within a reasonable period of time. After reading the advisory to Hess, Dingman offered to read it a second time. Hess agreed, adding that this time he wanted Dingman to read it to him in Spanish—despite there being no indication that Hess spoke Spanish or had any difficulty speaking English. When Dingman began to reread it in English, Hess interrupted, to ask whether he was “operating . . . [or] working on this vehicle or some sh-t.” After Dingman continued, Hess interrupted again, stating “Let’s get an attorney . . . I don’t understand none of it until I have a f-cking attorney.” Dingman provided Hess with a telephone and a book of telephone numbers. Hess claimed that he could not read or write, so he did not know how to push the buttons on the telephone. Dingman said that he could help Hess dial the phone, but he could not pick an attorney for Hess. Hess repeatedly asked Dingman for advice, including asking Dingman to tell him which attorney to contact, which attorneys were good, and which ones were in the area.

Hess also repeatedly complained to Dingman, stating at one point that “none of these f-ckers are real,” and demanding that Dingman help locate an attorney in the area. Hess used the telephone for approximately thirty minutes, and during this time, Dingman took notes regarding the phone numbers Hess dialed and how many of his calls

were answered. In total, nine phone numbers were dialed, and three of those calls were answered, including, as Dingman informed Hess, “a couple in Cass [County].” Dingman asked multiple times if Hess would take a breath test, but Hess did not answer “yes” or “no.” At one point, Dingman explained that Hess had spent thirty-five minutes trying to contact an attorney, and Dingman asked again if Hess would take a test. Hess replied, “I’m waiting for a lawyer.” Dingman permitted Hess to continue using the telephone for a few more minutes. Finally, Dingman explained, “Alright so Jeremiah [this is] the last time I’m gonna ask you, will you take a breath test?” Hess responded by yelling and swearing at Dingman, complaining that Dingman gave him “bullsh-t f-cking numbers to call.”

The breath test advisory process lasted approximately 40 minutes. A test was never administered. Dingman’s notations on the breath test advisory form stated: “[w]ant attorney present. [D]oesn’t give answer.” A jury found Hess guilty of test refusal and fleeing a police officer. Hess appeals the test-refusal conviction.

DECISION

Hess argues that the circumstantial evidence on which the state relied to convict him failed to eliminate a rational hypothesis of innocence.¹ We conclude that Hess has not articulated an alternative hypothetical inference that is consistent with innocence.

Under Minnesota Statutes section 169A.20, subdivision 2(1), “[i]t is a crime for any person to refuse to submit to a chemical test . . . of the person’s breath.” To prove Hess

¹ Hess does not argue, and therefore we need not address, whether Hess’s limited right to counsel was vindicated.

guilty of first-degree refusal to submit to a chemical test, the state had to prove, among other elements, “[a]ctual unwillingness to submit to testing.” *State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011). It is not necessary that an individual expressly refuse to take a test to be found guilty of test refusal. *Id.* 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) (determining that a driver’s swearing, threats, and belligerent shouts frustrated the testing process and concluding that conduct that frustrates the testing process amounts to a refusal to test), *rev. denied* (Minn. Mar. 26, 2003).

When the state relies solely on circumstantial evidence to prove an element of the offense, we apply the rational hypothesis test to determine whether the evidence was sufficient. *State v. Griffin*, 887 N.W.2d 257, 264 (Minn. 2016). This requires a “review [of] the sufficiency of the evidence using a two-step analysis.” *State v. Barshaw*, 879 N.W.2d 356, 363 (Minn. 2016). The first step is to “identify the circumstances proved, deferring to the fact-finder’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Id.* (quotations omitted). Under the second step of the circumstantial evidence test, the reviewing court must “independently examine the reasonableness of all inferences that might be drawn from the circumstances proved to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that

of guilt.” *Id.* (quotation omitted). “Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). In the second step, no deference is given to the verdict, and appellate courts will reverse a conviction based on circumstantial evidence if the appellant identifies a rational inference consistent with innocence that is supported by the circumstances proved. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

In this case, Hess acknowledges that the evidence established that Hess insisted on having an attorney present during his chemical test. Hess also concedes that this fact is consistent with an inference that he intended to frustrate the testing process. However, Hess contends that this fact is also consistent with an alternative inference: that he intended to and was willing to take the chemical test, but he conditioned his submission to the test on having an attorney present. We are not persuaded to reverse because this identified alternative inference is not consistent with innocence.

We observe that Hess’s circumstantial evidence argument presumes that law enforcement officers are required by law to consider a driver’s conditions, requests, or counteroffers when administering a chemical test. As a legal matter, this assumption is not correct. Generally, refusal occurs when a driver’s conduct indicates unwillingness to submit to the chemical testing process. *Ferrier*, 792 N.W.2d at 101-02 (concluding refusal occurs when there is “any indication of actual unwillingness to participate in the testing process”); *Collins*, 655 N.W.2d at 658 (concluding that refusal occurs when a driver’s actions frustrate the testing process). More specifically, while law enforcement officers

are obligated to provide drivers with “a reasonable opportunity to obtain legal advice before deciding whether to submit to [warrantless] chemical testing,” *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991), a driver “has no right to have counsel present during the test itself,” *Sturgeon v. Comm’r of Pub. Safety*, 350 N.W.2d 487, 489 (Minn. App. 1984). Hess does not cite any contrary authority or any authority requiring testing officers to satisfy conditions that a driver may seek to place on their willing submission to a chemical test. We also discern no basis in the applicable statutes to support the proposition that a driver may negotiate with testing officers regarding the administration of the test or may otherwise insist that testing officers meet a driver’s preconditions. In the absence of such legal authority and given the holdings in *Friedman* and *Sturgeon*, Hess’s identified inference that he would have taken the chemical test only if a lawyer had been present, even if true, is not consistent with innocence. Dingman requested that Hess take the chemical test without a lawyer present, and Hess refused.

The state also argues that Hess’s words and actions—apart from his insistence that an attorney be present—indicate actual unwillingness to test. For example, Hess was belligerent, yelling and swearing at Dingman throughout the advisory process. Because the stated alternative inference is not consistent with innocence, we need not determine whether Hess’s other conduct indicated an actual unwillingness to test. In addition, given our determination that the identified alternative inference is not consistent with innocence, we need not consider whether the circumstances proved rule out that inference.

Affirmed.