

*This opinion is nonprecedential except as provided by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
A22-0816**

State of Minnesota,
Respondent,

vs.

Tess Elizabeth Dornfeld,
Appellant.

**Filed February 13, 2023
Affirmed; motion granted
Connolly, Judge**

Hennepin County District Court
File No. 27-CR-20-24462

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

Kristyn M. Anderson, Minneapolis City Attorney, Amy J. Tripp-Steiner, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Claire Nicole Glenn, Line 3 Legal Defense Project of the Civil Liberties Defense Center & Water Protector Legal Collective, Park Rapids, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges her petty-misdemeanor conviction of being a pedestrian on a controlled-access highway, arguing that the circumstantial evidence was insufficient to convict her, her right to present a complete defense was violated, the statute under which

she was convicted violates the First Amendment, she was singled out for discriminatory prosecution, and her prosecution was barred by government estoppel. Respondent State of Minnesota moves to strike from appellant's addendum certain items that were not part of the record before the district court. We affirm the district court's decision and grant the motion.

FACTS

In November 2021, appellant Tess Dornfeld was charged with a petty misdemeanor for being a pedestrian on a controlled-access highway in November 2020, when she was participating in a demonstration as part of a group of about 600 people who walked onto I-94, a controlled access highway. Prior to her May 2022 bench trial, she filed notice of her intent to call M.G. as an expert witness; respondent State of Minnesota moved to exclude M.G. as a witness, and the district court granted the motion.

At trial, appellant moved for a judgment of acquittal on the ground that the state failed to demonstrate that she was not one of the demonstrators who entered I-94 in a vehicle; this motion was also denied. The district court then found appellant guilty and sentenced her to a fine of \$100 and a surcharge of \$78. The district court also denied her motion to dismiss the charge against her based on the defenses she had raised at trial. She challenges her conviction on the grounds that: (1) the evidence was insufficient, (2) the exclusion of her expert witness violated her right to present a complete defense, (3) her prosecution violated her right to free speech, (4) she was selectively prosecuted in violation

of her rights to due process and equal protection, and (5) her prosecution was barred by government estoppel.¹

DECISION

I. Sufficiency of the Evidence

[I]f the state relied on circumstantial evidence to prove an element of an offense, an appellate court applies a heightened standard of review. Under the circumstantial-evidence standard of review, an appellate court first determines the circumstances proved, disregarding evidence inconsistent with the verdict. Next, the appellate court determines whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. The appellate court does not defer to the fact-finder's choice between reasonable inferences. But an appellate court will not reverse a conviction based on circumstantial evidence unless there is a reasonable inference other than guilt.

An appellate court uses the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence. The appellate court does so even if a guilty verdict was based on circumstantial evidence.

State v. Olson, 982 N.W.2d 491, 496 (Minn. App. 2022) (quotations and citations omitted).

Olson affirmed the finding of a defendant's guilt of petty-misdemeanor use of a controlled-access highway by a pedestrian after rejecting her argument that the state's evidence was insufficient. *Id.* at 497-99.

¹ The district court said at trial that the third, fourth, and fifth issues "frankly . . . should have been brought as a motion to dismiss rather than mid-trial. It's hard to argue that the defendant didn't have abundant opportunity to bring a motion to dismiss when this is the second to the last case [in this matter] coming to trial."

A few of the approximately 600 people arrested on I-94 arrived there in vehicles; they were ordered out of the vehicles prior to their arrests. Appellant argues that the state failed to prove she was not one of these few and that the evidence was therefore insufficient to sustain her conviction of use of a controlled-access highway by a pedestrian. This court rejected that argument in *Olson*:

[Olson] posits that she could have been a passenger in one of the vehicles that blocked traffic and [was] “herded” to the arrest location on the I-94 pavement.

. . . .

. . . [T]here is no circumstance proved connecting Olson with any vehicle, let alone a vehicle at the arrest scene on I-94. Thus, Olson’s theor[y] of innocence [is] based on mere conjecture, and . . . unreasonable in light of the circumstances proved as a whole. We therefore hold that the circumstantial evidence was sufficient to prove beyond a reasonable doubt that Olson used a paved portion of I-94 as a pedestrian and to sustain the district court’s finding of guilt.

Id. at 499-500. “Possibilities of innocence do not require reversal so long as the evidence taken as a whole makes such theories seem unreasonable.” *Id.* at 499 (quotation omitted); *see also State v. Boucher*, No. A22-0289, 2022 WL 17574694, at *6 (Minn. App. Dec. 12, 2022) (distinguishing *Olson* because Boucher’s citation indicated that he was detained while in a vehicle and reversing the finding of guilt of petty-misdemeanor use of a controlled access highway by a pedestrian on the ground that the state’s evidence was insufficient to support a finding of guilt). Appellant, like Olson and unlike Boucher, presented no evidence connecting herself to any vehicle and no witnesses who testified that

she was in a vehicle. Thus, the fact that appellant might have been in a vehicle is insufficient to warrant reversal of her conviction.

II. Exclusion of Evidence

Appellant's attorney attempted to call M.G., the President of Communities United Against Police Brutality, to testify as an expert witness, asserting that she "has been involved in planning and leading protests for forty years, the last thirty years in the Twin Cities."

The state moved to exclude M.G.'s testimony on the ground that, because "this is a pedestrian on the highway charge and not a charge of unlawful assembly or public nuisance, . . . [M.G.'s] testimony would not be relevant." The district court granted the state's motion, stating that:

[Appellant] [must] meet the requirement for [Minn. R. Evid.] 702 to introduce an expert witness, which is that the expert witness must have foundational reliability and that the testimony will assist the trier of fact. And based on the proffer so far, the Court does not find that [M.G.] has foundational reliability as to highway protests in Minnesota, past arrests, or statistical information in her testimony as to the POST policy, as the policy was enacted in 2021 which post-dates the events in this case, which occurred in November 2020.

And so I conclude that [M.G.'s] testimony will not assist the trier of fact to understand the evidence in this case based on applicable law, particularly as it relates to government estoppel and selective prosecution.

Appellant argues on appeal that M.G.'s testimony would have "provided the crux of the factual basis for [a]ppellant's defenses" and that the district court's exclusion of M.G.'s evidence deprived appellant of her right to present a complete defense. We disagree.

This court reviews a claim that district court's exclusion of evidence deprived a defendant of the right to present a complete defense for an abuse of discretion. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

Appellant concedes that “[a]lthough the lone charge was a petty misdemeanor, [she] filed expert witness notices and disclosures and proffered [M.G.’s] expertise and the relevance to [appellant’s] defenses” and seeks either a reversal and vacation of her conviction or a remand with instructions, presumably to admit M.G.’s testimony. But appellant does not refute the fact that the district court was well aware of the law relevant to whether appellant’s first-amendment rights had been violated. An expert witness may not offer an opinion on a legal issue. *See State v. Dao Xiong*, 829 N.W.2d 391, 396 (Minn. 2013). Nor does appellant refute the fact that a state trooper with 24 years of experience in handling protests had already testified that the police did not handle this protest as they handled previous protests on highways because the resources needed to deal with large highway protests had not previously been available, so M.G.’s testimony that this event was handled differently would have been cumulative. Appellant did not indicate what testimony M.G. could offer that would pertain to appellant’s government-estoppel defense.

We agree with the district court that M.G.’s testimony would not have assisted the trier of fact to make its decision. Consequently, the district court’s exclusion of M.G.’s testimony was not an abuse of discretion.

III. Violation of the Right to Free Speech

This court reviews de novo a decision as to how the law applies to undisputed facts. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

Appellant argues that “her arrest, prosecution, and conviction violate her constitutional right to freedom of speech” because: (1) her conduct on I-94, a controlled access highway, was protected speech; (2) Minn. Stat. § 169.305, subd. 1(c) (2022), providing that the commissioner of transportation may prohibit or regulate the use of any controlled access highway by pedestrians if that use is incompatible with the normal and safe flow of traffic, is a state regulation of free speech; (3) the constitutionality of such regulations is subject to intermediate scrutiny, meaning that the regulation must be narrowly tailored to serve a significant governmental interest and must leave open ample alternative channels for communication, and (4) the action of the police in arresting appellant was not narrowly tailored to serve the government’s interest because the police did not permit protesters to leave I-94. But appellant does not explain her implicit view that her right to free speech supersedes the rights of those travelling on a controlled-access highway to travel in safety, nor does she explain why her arrest deprived her of alternative channels of communication. She has not shown that her right to free speech was violated by the commissioner’s right to regulate pedestrians’ use of a controlled-access highway or by the police’s activity to enforce that regulation.

IV. Selective Prosecution

This court reviews de novo a decision as to how the law applies to undisputed facts.

Id.

Appellant argues that her “arrest, prosecution, and conviction amount to a selective prosecution in violation of her constitutional rights to due process and equal protection.”

A claim of selective prosecution requires a claimant to make a prima facie case by showing,

by a clear preponderance of the evidence, that (1) the claimant has been singled out for prosecution while others have not been prosecuted and (2) the government's discriminatory enforcement was invidious or in bad faith, based upon such considerations as race, religion, or a desire to prevent a person's exercise of a constitutional right. *State v. Russell*, 343 N.W.2d 36, 37-38 (Minn. 1984). The defendant bears a "heavy burden" of establishing these criteria. *State v. Hyland*, 431 N.W.2d 868, 872-73 (Minn. App. 1988).

The district court concluded that appellant

did not set forth a prima facie case of selective prosecution. She has not established that other protesters similar to her were not charged and that she was singled out. Nor has she shown that the prosecution of this case is in bad faith or based on impermissible considerations, including a desire to prevent her exercise of a constitutional right.

Appellant does not refute this conclusion.

Instead, she argues on appeal that the alleged selective prosecution resulted from the fact that she and the other protesters "were singled out for arrest . . . in a way that no other peaceful marchers had previously experienced." As mentioned earlier, the testimony of an experienced state trooper dealt with this argument, explaining that, for the first time, sufficient resources were available to issue citations to all the participants in a large protest. Appellant does not make a prima facie case for a selective-prosecution claim vis-à-vis either her fellow-protesters or those who engaged in previous protests.

V. Governmental Estoppel

The application of equitable estoppel is a question of law, subject to de novo review. *State v. Ramirez*, 597 N.W.2d 575, 577 (Minn. App. 1999). Estoppel "should be used only

sparingly against the government,” *id.* at 578, and “will be invoked only if the government has affirmatively misled a party, knowing the representation was false.” *Naegele Outdoor Advert. Inc. v. Minneapolis Cmty. Dev. Agency*, 551 N.W.2d 235, 237 (Minn. App. 1996).²

Appellant made two arguments to support her governmental-estoppel claim: first, that other protesters in previous protests were not prosecuted and she relied on the government’s inaction in those cases, and second, that the governor, the attorney general, and the mayor had encouraged peaceful protests in May 2020. In a well written opinion, the district court stated that it could conclude neither “that a failure to cite every highway protester in recent Minnesota history amounts to an affirmative government action that now renders Minn. Stat. § 169.305 unenforceable” nor “that public statements made in May 2020 by state and local officials to encourage protesters to demonstrate peacefully . . . are affirmative and false misrepresentations that led protesters reasonably to believe they were free to march onto I-94 six months later in protest of the November 2020 election.”

Appellant now argues that “[a]s a result of the government’s advisement and knowing acquiescence indicating that a peaceful march on a public thoroughfare is lawful, this prosecution must be estopped.” She supports her argument only with her views of what M.G. would have testified to and the claim that this testimony would have “amounted to a government advisement, or at least knowing acquiescence, of the legality of peaceful marches on public thoroughfares” and that therefore, “the state must be estopped from

²Appellant candidly concedes that “case law has traditionally required an affirmative representation by a government official.”

prosecution.” But appellant does not present any facts showing that the government officials, knowing that pedestrian protests on controlled-access highways were not permitted, affirmatively mislead protesters into believing they were permitted.

Finally, the state moved to strike from appellant’s addendum (1) an email exchange between appellant’s attorney and the state and the district court, (2) M.G.’s curriculum vitae, and (3) the Minnesota Peace Officer Standards and Training Board, Best Practices Model Policy: Public Assembly and First Amendment Activity. Appellant concedes in her opposition to the motion to strike that these items “were not introduced as exhibits at trial.” An appellate court may not consider matters not produced and received in evidence below. *State v. Roy*, 928 N.W.2d 341, 347 n. 2 (Minn. 2019). We therefore grant the state’s motion to strike.

Affirmed; motion granted.