

*This opinion is nonprecedential except as provided by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
A23-0327**

State of Minnesota,
Respondent,

vs.

Kelly Jenko Triebwasser,
Appellant.

**Filed July 29, 2024
Affirmed
Worke, Judge**

St. Louis County District Court
File No. 69HI-CR-19-218

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

Kimberly J. Maki, St. Louis County Attorney, Tyler Kenefick, Assistant County Attorney,
Hibbing, Minnesota (for respondent)

Samuel J. Edmunds, Sieben Edmunds Miller PLLC, Eagan, Minnesota (for appellant)

Considered and decided by Schmidt, Presiding Judge; Worke, Judge; and Harris,
Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges her convictions for driving while impaired (DWI)—test
refusal and threats of violence, arguing that (1) the district court deprived her of the right

to present her theory of the case, (2) her attorney was ineffective, (3) the district court should have dismissed the test-refusal charge for lack of probable cause, (4) the evidence was insufficient to sustain her threats-of-violence conviction, and (5) the district court erred by denying her request to reopen the omnibus hearing. We affirm.

FACTS

On March 24, 2019, a trooper responded to a dispatch to locate a specific vehicle. The trooper located the vehicle and “observed [an individual] driving on and over the fog lines,” “weaving,” and turning “without signaling.” The trooper initiated a traffic stop and approached the driver, appellant Kelly Jenko Triebwasser.

The trooper observed that Triebwasser’s eyes were watery and glossy, and her speech was “deliberate.” The trooper told Triebwasser that she could smell the odor of alcohol on her breath and asked Triebwasser if she had been drinking. Triebwasser replied, “[N]ot much.” Triebwasser performed one field sobriety test, and the trooper observed indications that Triebwasser was under the influence of alcohol or a controlled substance. When the trooper administered a preliminary breath test, Triebwasser sucked on the straw instead of blowing into the straw as the trooper directed.

The trooper placed Triebwasser in handcuffs and in the back of her squad car. Triebwasser removed the handcuffs, “smash[ed] them into the plexiglass” divider, and kicked the caged windows. When they arrived at the police station, the trooper read Triebwasser the breath test advisory. Triebwasser asked to contact an attorney. After “over an hour” of attorney time, Triebwasser agreed to take a breath test. She then went to the bathroom and drank water, which restarted the 15-minute observation time.

The trooper asked Triebwasser several times if she would take a test when the machine was ready. Triebwasser said yes but then refused many times. Triebwasser was argumentative and uncooperative. Triebwasser told the trooper that she “was going to kill [her],” “blow [her] f*ng head off,” and “slaughter” her face “on the outside.” Triebwasser stated that “it was going to be her life mission to stab [the trooper,] . . . put [the trooper] out on her acres, cuff [the trooper] and not provide any water.”

Respondent State of Minnesota charged Triebwasser with threats of violence, DWI, and DWI—test refusal. *See* Minn. Stat. §§ 609.713, subd. 1, 169A.20, subds. 1, 2 (2018). Triebwasser moved to dismiss for lack of probable cause. Following an omnibus hearing, the district court denied Triebwasser’s motion.

Triebwasser retained a new attorney and again moved to dismiss, claiming that the state had failed to turn over evidence showing that law enforcement was biased because of past interactions related to domestic-disturbance calls involving her husband. Triebwasser asserted that on the night she was stopped, she went to check on her husband (they were living separately). Triebwasser’s father-in-law intervened and called 911 to report that Triebwasser smelled of alcohol. Triebwasser claimed that there was evidence showing that law enforcement only presumed that she was intoxicated and evidence showing that she was not intoxicated. Triebwasser requested that the district court consider nondisclosed evidence, including a video from the police station.

In January 2021, the district court held a hearing to address Triebwasser’s claim that nondisclosed evidence would show bias. On March 16, 2021, the district court denied Triebwasser’s motion to dismiss, concluding that, even if officers laid in wait to arrest her,

the evidence was not favorable to Triebwasser because Triebwasser was stopped based on the trooper's observations of Triebwasser's driving conduct, and the evidence showed that officers were performing proper law-enforcement functions.

But the district court determined that it would reopen the omnibus hearing to consider the video from the police station because it was relevant to whether Triebwasser refused a breath test. The district court held a hearing in June 2021. Triebwasser played the video and testified that she agreed to take a breath test. The district court was not persuaded and denied Triebwasser's motion to dismiss.

In November 2021, as the parties prepared for trial, Triebwasser requested that she be allowed to call law enforcement "who had been interacting with her [days before her arrest] to demonstrate their personal biases and how that reflected on the . . . officers during her arrest." Triebwasser argued that because she was charged with threats of violence, her state of mind was relevant and this evidence was necessary because "[a]t the time she was pulled over . . . she felt hunted by law enforcement and scared for her safety, which affected her state of mind." The district court ruled that the evidence was irrelevant and confusing, but stated that if Triebwasser testified about alleged harassment, it would decide the parameters of the evidence at that time.

In December 2021, Triebwasser discharged her attorney. She retained new counsel in June 2022. On November 14, 2022, the parties appeared for trial. Triebwasser's attorney indicated that Triebwasser wanted to discharge him. The district court asked the attorney if he was prepared to proceed. He replied that he could try the case from his "perspective based on what [he thinks] is important." But noted that he believed that he

was being set up “for an ethical violation” because, although he was prepared to try the case, he did not understand Triebwasser’s strategy. Triebwasser’s attorney asked for one day to meet with Triebwasser to prepare for trial. The district court noted that the case had been set for trial for months and the attorney had the case for “at least three months,” but agreed to proceed the next day.

On November 15, 2022, Triebwasser’s jury trial began. The trooper testified about the circumstances surrounding the stop. Videos from the trooper’s squad car were played for the jury. The trooper testified that Triebwasser refused to submit to a breath test many times. Audio from the advisory was played for the jury. The trooper testified about Triebwasser’s conduct and threats. The trooper testified that when Triebwasser stated that she was going to “slaughter” the trooper’s face “on the outside,” she believed that “outside” meant when the trooper was not working. The trooper testified that she felt threatened by the comment.

On cross-examination, the trooper testified that she had heard references by other officers that Triebwasser was intoxicated and had been uncooperative in prior interactions. But the trooper testified that she did not rely on those references to stop Triebwasser; rather, she stopped her based on her driving conduct.

Triebwasser testified about her activity on the day of the stop. She denied drinking alcohol that day. She claimed that she was paranoid and in shock.

On November 18, 2022, the jury found Triebwasser guilty of threats of violence and test refusal.¹ On December 5, 2022, Triebwasser, acting pro se, moved for a new trial. The district court denied Triebwasser’s motion because it was untimely, pursuant to Minn. R. Crim. P. 34.02. The district court sentenced Triebwasser to one year and one day in prison, stayed for three years. This appeal followed.

DECISION

Appellant’s theory of the case

Triebwasser first argues that the district court denied her the right to present her theory of the case—that she was stopped because law enforcement was predisposed to believe that she would be intoxicated and uncooperative.

A defendant has a right to a meaningful opportunity to present a complete defense, but this right generally “yields to the application of . . . evidentiary rule[s].” *State v. Pass*, 832 N.W.2d 836, 841-42 (Minn. 2013). “A district court’s evidentiary rulings will not be reversed absent a clear abuse of discretion.” *State v. Robertson*, 884 N.W.2d 864, 872 (Minn. 2016). Triebwasser bears the burden to show that the district court abused its discretion and that she was prejudiced. *See State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015).

Triebwasser had sought on several occasions to admit evidence of bias. The district court considered Triebwasser’s arguments but ruled that the evidence was irrelevant because the trooper stopped Triebwasser based on her driving conduct. The trooper

¹ The state had dismissed the DWI charge.

testified that she stopped the vehicle after she “observed [Triebwasser] driving on and over the fog lines,” “weaving,” and turning “without signaling.”

“Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle.” *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997); *see State v. Driscoll*, 427 N.W.2d 263, 265 (Minn. App. 1988) (stating erratic driving and failure to observe traffic laws can be indicia of intoxication). Crossing over the fog line and failing to signal before turning provide an officer with reasonable suspicion to initiate a stop. *Kruse v. Comm’r of Pub. Safety*, 906 N.W.2d 554, 560 (Minn. App. 2018) (officer had reasonable suspicion of traffic violation when officer observed driver driving on the fog line); *Otto v. Comm’r of Pub. Safety*, 924 N.W.2d 658, 660-61 (Minn. App. 2019) (officer had reasonable suspicion to stop vehicle he observed drive outside traffic lane and fail to signal 100 feet before turning).

Triebwasser’s driving conduct provided the trooper with reasonable suspicion to stop her. Any evidence that the trooper was potentially biased before the stop was irrelevant, especially because the trooper testified that she had heard from other officers that Triebwasser was intoxicated and had been uncooperative in prior interactions but stopped her solely because of her driving conduct. Because there was an objective basis for stopping Triebwasser, any subjective motivation was irrelevant. The district court did not abuse its discretion in its evidentiary rulings and did not deny Triebwasser an opportunity to present her theory of the case.

Assistance of counsel

Triebwasser also argues that she was denied effective assistance of counsel. Generally, an ineffective-assistance-of-counsel claim should be raised in a petition for postconviction relief because an evidentiary hearing, if granted, provides the district court with additional facts to explain counsel's decisions. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). But "[w]hen a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Because Triebwasser's claim is raised on direct appeal, we review the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id.*

To prevail on an ineffective-assistance-of-counsel claim, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by the deficient performance. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Triebwasser must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *See Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). If Triebwasser fails to prove either prong, her claim fails. *See State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Triebwasser claims that trial counsel was (1) not prepared, (2) not familiar with the evidence and argument, (3) failed to present evidence, (4) failed to subpoena witnesses, (5) failed to raise a transitory anger defense, (6) failed to object to a "second-degree" reference, and (7) failed to timely file a motion for a new trial.

Most of Triebwasser's claims relate to trial strategy. Appellate courts give particular deference to counsel's decisions regarding trial strategy. *Carney v. State*, 692 N.W.2d 888, 892 (Minn. 2005). Trial preparation, whether to call and which witnesses to call, what evidence to present, and whether to raise a defense are matters of trial strategy "within the proper discretion of trial counsel [that] will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (counsel's failure to file motion, call certain witnesses, and cross-examine certain witnesses represented matters of trial strategy); *see also Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (counsel's statements to jury "during closing argument, and his request that . . . jury have . . . transcripts of [his client]'s statements during its deliberations, were part of counsel's [trial] strategy"); *Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007) (counsel's failure to call alibi witness was within counsel's discretion as trial strategy to decide which witnesses to call and what evidence to present); *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (counsel's decision to focus on other defenses instead of investigating alternative suspects and failure to present certain evidence were matters of trial strategy).

Additionally, Triebwasser's attorney explained why he might not be prepared to proceed with *her* strategy. Triebwasser retained and discharged several attorneys throughout the proceedings. On the day of trial, her attorney stated that Triebwasser wanted to discharge him. The standard of review is an "objective standard" defined as "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v.*

Gassler, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). Counsel’s performance was objectively reasonable under the circumstances.

As far as Triebwasser’s claim that her attorney was ineffective for failing to file a new trial motion, we do not have the information to review a claim that a postconviction record might reveal. Based on this record, it is unknown if counsel was ineffective for failing to file a timely motion. Triebwasser fails to meet her burden to show that she received ineffective assistance of counsel.

Sufficiency of the evidence

Triebwasser argues that the district court erred when it denied her motion to dismiss the test-refusal charge for lack of probable cause. A probable-cause challenge is irrelevant on appeal from a final judgment of conviction because the standard of review for sufficiency of the evidence to support the conviction is much higher than probable cause. *State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995), *rev. denied* (Minn. Mar. 21, 1995).

When considering a challenge to the sufficiency of the evidence, appellate courts “review . . . the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *State v. Hohenwald*, 815 N.W.2d 823, 832 (Minn. 2012) (quotation omitted). Appellate courts must “assume that the jury believed the state’s witnesses and disbelieved contrary evidence.” *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We will not disturb a guilty verdict when “the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt,

could reasonably conclude that [the] defendant was proven guilty of the offense charged.” *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010) (quotation omitted).

It is a crime for a person to refuse to submit to a breath test. Minn. Stat. § 169A.20, subd. 2(1). The evidence shows that when the trooper asked Triebwasser to submit to the breath test, Triebwasser stated that she “would not blow into anything.” The trooper asked Triebwasser again if she would blow into the machine. Triebwasser responded, “No.” This evidence supports the jury verdict that Triebwasser refused to submit to the breath test.

Triebwasser also argues that the evidence does not support her threats-of-violence conviction. “Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror” has committed the offense of threats of violence. Minn. Stat. § 609.713, subd. 1.

The evidence shows that Triebwasser told the trooper that she “was going to kill [her],” and “blow [her] f’ng head off when she is out of here.” The trooper testified that Triebwasser stated that “it was going to be her life mission to stab [the trooper,] . . . put [the trooper] out on her acres, cuff [the trooper] and not provide any water.” Triebwasser told the trooper that she was going to “slaughter” her face “on the outside.” The trooper understood the “outside” to mean when the trooper was not working.

Triebwasser argues that she did not intend to terrorize. A victim’s reaction to a threat can be relevant circumstantial evidence to the element of intent. *State v. Schweppe*, 237 N.W.2d 609, 614 (Minn. 1975). The trooper testified that she felt threatened and concerned because Triebwasser threatened her multiple times and indicated that she would commit the acts against the trooper when the trooper was not working. The jury believed

that the trooper was threatened. We defer to the jury's credibility finding. The evidence sufficiently supports the verdict.

Omnibus hearing

Finally, Triebwasser argues that the district court erred when it denied her request to reopen the omnibus hearing because she was not provided “a full and fair opportunity to challenge the validity of the stop or probable cause to arrest.”

Whether to reopen an omnibus hearing is reviewed for an abuse of discretion. *See State v. Papadakis*, 643 N.W.2d 349, 356-57 (Minn. App. 2002). Here, the district court granted Triebwasser's request to reopen the omnibus hearing as it related to the refusal charge because of discovery that was disclosed late. However, the district court did not reopen the omnibus hearing to hear additional evidence of a “pretextual” stop because there was evidence of a legitimate reason for the stop. Because the evidence was irrelevant, the district court declined to consider it. The district court did not abuse its discretion.

Affirmed.