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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1698
A23-1811**

State of Minnesota,
Appellant (A23-1698),
Respondent (A23-1811),

vs.

Cathy Olvera Sanchez,
Respondent (A23-1698),
Appellant (A23-1811).

**Filed October 14, 2024
Affirmed
Worke, Judge**

Otter Tail County District Court
File No. 56-CR-23-205

Keith Ellison, Attorney General, Jacob Campion, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for State of Minnesota)

Cathryn Middlebrook, Chief Appellate Public Defender, Greg Scanlan, Assistant Public Defender, St. Paul, Minnesota (for Cathy Olvera Sanchez)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

In these consolidated appeals, Cathy Olvera Sanchez argues that her convictions for driving while impaired (DWI), breath-test refusal, motor-vehicle theft, and driving after cancellation must be reversed because the district court plainly erred when instructing the jury, and the prosecutor improperly elicited opinion testimony. The state argues that the district court abused its discretion by granting Sanchez’s motion for a downward dispositional departure. We affirm.

FACTS

R.T. and Cathy Olvera Sanchez have known each other since they were teenagers. R.T. has referred to Sanchez as his “sister” and Sanchez has called R.T. her “brother” because Sanchez had dated R.T.’s brother.

On January 28, 2023, R.T. borrowed his fiancée’s vehicle to pick up Sanchez. R.T. believed that Sanchez had been drinking alcohol when he picked her up. R.T. drove Sanchez to a couple places, including a liquor store. He then drove to a friend’s house to drop off tools he borrowed. R.T. was inside his friend’s house for less than ten minutes. When he returned, the vehicle was gone. R.T. walked a block but did not see the vehicle.

R.T. then began walking to Sanchez’s house, thinking that she drove home. While R.T. was walking, an officer approached him and asked his name. He told the officer his name and reported that Sanchez took his vehicle. The officer told R.T. that the vehicle had been involved in an accident. The accident was approximately 1.8 miles from where the officer found R.T.

That night, K.L. was driving home after her shift at the hospital. At one point, K.L. looked in her rearview mirror and saw headlights upside down in a ditch. K.L. pulled over and called 911.

K.L. walked to the vehicle in the ditch. Sanchez came “out of the car and was yelling . . . ‘Where’s my brother? Where’s my brother?’” K.L. assumed that another person had been involved in the accident, but she did not see other footprints or anybody else in the car. Sanchez was “[d]isoriented” and “[i]ntoxicated.” She “holler[ed] and yell[ed] at” K.L. and pushed K.L. into the snow as she tried to put a blanket around Sanchez.

An officer who responded to the scene detected the odor of an alcoholic beverage coming from Sanchez. The officer found a bottle of alcohol near the driver’s seat. Sanchez was “argumentative and aggressive” and “slapped a flashlight” out of the officer’s hand. Sanchez “was very difficult to communicate with” but indicated that R.T. was involved in the accident.

R.T. provided video surveillance from his friend’s house. The video showed R.T. exit the vehicle and enter the residence. While R.T. was inside the residence, the dome light inside the vehicle illuminated. A person appears to exit the passenger side door, walk around the vehicle, get inside the driver’s side door, and leave. About one minute later, R.T. exited the residence and looked for the vehicle.

Sanchez was arrested. At the jail, Sanchez laid down and “refused to get up.” An officer read Sanchez the breath-test advisory and asked Sanchez five times if she would take a breath test. Sanchez “had no response.” The officer considered this a refusal.

The State of Minnesota charged Sanchez with theft of a motor vehicle, breath-test refusal, DWI, and driving after cancellation—inimical to public safety. *See* Minn. Stat. §§ 609.52, subd. 2(a)(17), 169A.20, subds. 1(1), 2(1), 171.24, subd. 5 (2022). At Sanchez’s jury trial, R.T., K.L., and several officers testified about the night of the accident. The jury found Sanchez guilty as charged.

Sanchez moved for a downward dispositional departure, arguing that she was particularly amenable to probation if she received chemical-dependency treatment. Sanchez had been notified that she would be accepted in the DWI court program if the district court granted a departure.

A presentence investigation report (PSI) noted that Sanchez has a lengthy criminal history, including four previous felony DWI convictions. Sanchez was also on probation when she committed the current offense. The PSI did not support a probationary sentence based on Sanchez’s continued use of drugs and alcohol and public-safety concerns. The probation agent recommended the presumptive 75-month prison sentence.

The district court granted Sanchez’s motion, finding that with Sanchez’s participation in DWI court comes a “high degree of monitoring” and “a higher probability” that Sanchez will successfully abstain from drugs and alcohol.

The district court entered judgments of conviction for DWI, theft of a motor vehicle, and driving after cancellation. The district court sentenced Sanchez to 79 months in prison for the DWI conviction and 26 months in prison for the theft-of-a-motor-vehicle conviction. The district court stayed execution of the sentences for five years. For the driving-after-cancellation conviction, the district court sentenced Sanchez to 364 days in

jail with 312 days stayed and credit for 52 days served. The district court did not enter a judgment of conviction for the test-refusal offense as an included offense.

Sanchez appealed her convictions and the state appealed Sanchez's sentence.

DECISION

Jury instructions

Sanchez first argues that the district court plainly erred by instructing the jury on "physical control" because it failed to account for inoperability of the vehicle.

When the district court reviewed the jury instructions with the parties, Sanchez's attorney stated that the elements of the charges are "pretty much right out of the JIGS" and are "tailored to the case." Without an objection, this court reviews for plain error. *See State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012).

Sanchez must show an error that was plain and that affected her substantial rights. *See id.* Errors are plain when they are "clear or obvious." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quotation omitted). "An erroneous jury instruction is prejudicial if there is a reasonable likelihood that . . . the instruction in question had a significant effect on the jury verdict." *Carridine*, 812 N.W.2d at 143 (quotation omitted). If Sanchez establishes plain error, this court will address the error only if necessary "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 142 (quotation omitted).

A district court has "broad discretion and considerable latitude in choosing the language of jury instructions." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted). Jury instructions are proper when they "fairly and adequately" define the crime charged and identify its elements. *Id.* (quotation omitted). The challenged

instruction here followed the standard jury instructions, which fairly and adequately define the crime charged and its elements.

Sanchez was charged with DWI and breath-test refusal. It is unlawful for “any person to drive, operate, or be in physical control of any motor vehicle” while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1). “Physical control” addresses incidents when an intoxicated person “is found in a parked vehicle under circumstances where the [vehicle], without too much difficulty, might again be started and become a source of danger.” *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. 1992). “[P]hysical control” is given “the broadest possible effect.” *State, Dep’t of Pub. Safety v. Junczewski*, 308 N.W.2d 316, 319 (Minn. 1981). A person is in physical control even if the vehicle appears to be stuck in “a ditch” and the motor is not running. *State v. Duemke*, 352 N.W.2d 427, 429 (Minn. App. 1984).

Here, the district court instructed the jury, in relevant part:

whoever drives, operates, or is in physical control of a motor vehicle when the person is under the influence of alcohol is guilty of a crime. . . . A person is in physical control of a motor vehicle when the [person] is present in a vehicle and is in a position to either direct the movement of the vehicle or keep the vehicle in restraint. It is not necessary for the engine to be running in order for a person to be in physical control of a motor vehicle.

Sanchez argues that the vehicle was inoperable because of the crash, so she could not have been in physical control because it was not a vehicle that could be operated again “without too much difficulty.” But “when it appears that the defendant drove the car to

where it came to rest, this is also evidence that the defendant, when found in the parked car, was in physical control of the car while it was parked.” *Starfield*, 481 N.W.2d at 838.

The evidence shows that Sanchez drove away in the vehicle leaving R.T. behind. The vehicle was found crashed in the ditch. Sanchez was the only person found near the vehicle. The only reasonable inference is that Sanchez “drove the car to where it came to rest.” *See id.* The evidence shows that Sanchez could have been in physical control of the vehicle that she rendered inoperable by driving it into the ditch. The jury instruction fits the evidence presented to the jury. Sanchez has failed to show plain error, which concludes our analysis.

Prosecutorial misconduct

Sanchez next argues that the prosecutor committed misconduct by eliciting opinion testimony as to who was driving the vehicle. Sanchez claims that she objected to the alleged misconduct. The record shows that Sanchez initially objected, but after the questions were rephrased, she did not again object.

Unobjected-to claims of prosecutorial misconduct are reviewed under a modified plain-error standard. *State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021). Sanchez must establish plain error. *See State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). An error is plain when it violates “caselaw, a rule, or a standard of conduct.” *Id.* at 302. If Sanchez establishes plain error, the burden shifts to the state to show that the plain error did not affect her substantial rights. *See id.*

Sanchez asserts that the prosecutor committed misconduct by asking officers for an opinion regarding who was driving the vehicle. Here, an officer testified that R.T. was

found approximately 1.8 miles from the accident. The prosecutor asked the officer: “Given the weather conditions and the amount of time that had passed, do you believe that [R.T.] . . . fled the scene of the crash?” Sanchez objected. The district court sustained the objection. The prosecutor asked: “Based on your training and experience, and your observations on the scene, did you believe as part of your investigation [R.T.] had fled the scene?” The officer replied: “No.”

The prosecutor asked another officer: “[B]ased on your training and experience, everything you observed that evening, did you believe [R.T.] was involved in this accident?” Sanchez objected. The district court asked the prosecutor to rephrase the question. The prosecutor asked: “[B]ased on your training and experience, and everything you observed that evening, did you decide to pursue [R.T.] as a suspect in this crash?” The officer replied: “No.”

Sanchez argues that “[t]he evidence was presented in a manner plainly intended to invite reliance on two police sergeants’ opinions about who was driving.” But the witnesses did not give an opinion as to who was driving. One officer testified that he did not believe, based on his training and experience, that R.T. fled the scene. This could have been as a passenger in the vehicle and not the driver. And as the state notes, “evidence is generally admissible to give jurors the context for an investigation.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014); *State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998) (stating evidence was properly admitted because it explained inception of the police investigation, “was inextricably intertwined with the state’s theory of the case,” and district court cautioned state to offer evidence only to extent necessary).

Here, officers testified that the scene was confusing and chaotic. K.L. testified that when she stopped to assist, she believed that there were two victims because Sanchez was yelling for her brother. And Sanchez told an officer that R.T. was involved. Officers were looking for R.T. because if he had been in the vehicle, he could have been ejected and he could have needed medical attention. Additionally, it was a very cold evening and if R.T. had walked away from the scene, he could have suffered from the conditions. The officers explained their investigation and this evidence was helpful to the jury in understanding the circumstances. *See* Minn. R. Evid. 402 (stating unless otherwise excluded, all relevant evidence is admissible).

The prosecutor did not commit misconduct by asking the officers about their investigation of R.T.'s involvement in the matter. But even if the prosecutor committed misconduct, the state has shown that Sanchez's substantial rights were not affected. *See Ramey*, 721 N.W.2d at 302.

There was overwhelming evidence that Sanchez was driving. R.T. testified that he was not driving the vehicle when it crashed, was not in the vehicle when it crashed, and did not flee after it crashed. R.T.'s testimony supports the jury's verdict. *See State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005) (stating that assessing witness's credibility is "strictly the domain of the jury"). An officer testified that when he told R.T. about the accident, R.T. "was extremely upset" and did not appear to have been involved in an accident. And surveillance from R.T.'s friend's house corroborated R.T.'s account. Further, K.L. testified that she was positive that Sanchez was the only person in the vehicle.

The state has shown that there is no reasonable likelihood that the testimony had a significant effect on the verdict.

Cumulative error

Sanchez argues that even if the individual errors do not warrant reversal, the cumulative effect requires reversal. Because Sanchez has not established error, there is no cumulative error.

Sentence

Finally, the state argues that the district court abused its discretion by granting Sanchez a downward dispositional departure.

The Minnesota Sentencing Guidelines establish presumptive sentences for felony convictions. Minn. Stat. § 244.09, subd. 5(2) (2022). A district court may depart from the presumptive sentence only when “there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2022). This court reviews a district court’s decision to grant a motion for a dispositional departure for an abuse of discretion. *See State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). This court will rarely reverse the district court’s decision because of the district court’s considerable discretion in sentencing. *Id.* at 305, 307-08. We will affirm a district court’s decision “as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a [sentencing] determination.” *State v. Van Ruler*, 378 N.W.2d 77, 81 (Minn. App. 1985).

Here, the district court heard testimony for and against Sanchez’s motion at the sentencing hearing. The district court stated:

Ms. Sanchez has been a risk to public safety for many, many years. She's gone in and out of jail and in and out of prison -- no change. She turns around and does the same. And that is disheartening and it's upsetting and I am concerned that it's just going to happen again. . . .

[But] I am going to grant the motion, because in this situation . . . I don't know about particular amenability. . . . I don't know that she's going to be successful at treatment and stop, but I think there are substantial and compelling reasons and that one of those is she's going to be monitored very, very, very, very, very closely from DWI Court and any kind of slip-up, she's probably going to be back in front of me for a probation violation.

. . . .

[T]hings will really be scrutinized if you come back with a probation violation, because you belong in prison, according to the guidelines. And you, just by yourself, are not a person that there should be a departure.

But you with DWI Court provides a situation where you'll have exceptional monitoring, potentially monitoring for a longer period than you would if you were in prison, because the probationary period will be for a full five years. And so there's a much higher probability that you are going to be successful with probation, with the longer supervision and the accountability.

Also, that doubled with the fact that we know prison doesn't work. You've tried that twice and then come back out and posed another public safety issue.

The state argues that the district court should not have granted the departure because it did not find Sanchez particularly amenable to probation. But the district court noted that Sanchez would be very closely monitored and monitored longer than if she went to prison. *See State v. Sejnoha*, 512 N.W.2d 597, 601 (Minn. App. 1994) (stating that district court did not abuse its discretion by weighing impact of shorter prison sentence with no guarantee of treatment against treatment program and longer, highly structured probation),

rev. denied (Minn. Apr. 21, 1994). The district court is afforded great discretion, and it carefully considered the sentence.

Affirmed.