

*This opinion is nonprecedential except as provided by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
A24-0460**

State of Minnesota,
Respondent,

vs.

Sara Joan Kost,
Appellant.

**Filed March 3, 2025
Reversed and remanded
Bjorkman, Judge**

Ramsey County District Court
File No. 62SU-CR-23-101

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

Heather Monnens, White Bear Lake City Attorney, Andrew D. Tiede, Robb L. Olson,
Assistant White Bear Lake City Attorneys, GDO Law, White Bear Lake, Minnesota (for
respondent)

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

Considered and decided by Wheelock, Presiding Judge; Bjorkman, Judge; and
Halbrooks, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant Sara Jean Kost challenges her conviction of second-degree driving while impaired (test refusal), arguing that (1) the district court erred in instructing the jury that a failure to provide two adequate breath samples constitutes a refusal to submit to testing, (2) the district court deprived her of the right to present a complete defense by precluding any closing argument about her offer to take a blood test, and (3) the cumulative effect of these errors deprived her of a fair trial. Because the district court's jury instruction materially misstated the law and the error was not harmless beyond a reasonable doubt, we reverse and remand for a new trial.

FACTS

In January 2023, a White Bear Lake police officer observed a vehicle drive through a stop sign without stopping. The officer initiated a traffic stop and identified the driver as Kost. While the officer was speaking with Kost, he could smell the odor of alcohol emanating from her breath and noticed that she had bloodshot, watery eyes. Kost admitted to consuming a glass of wine, and the officer administered field sobriety tests. Based on her performance during the field sobriety tests, the officer made a preliminary conclusion that Kost was impaired. He attempted to administer a preliminary breath test (PBT), but his PBT machine was unable to register an alcohol concentration. The officer believed that Kost was purposefully not breathing into the machine hard enough to provide an adequate sample. A different officer administered a PBT using a second machine, which, after several attempts, registered an alcohol concentration of 0.09.

The officer who had stopped Kost then arrested her on suspicion of driving while impaired (DWI), transported her to the police station, and read her the breath-test advisory. Kost indicated that she would like to speak with an attorney, but after being unable to contact one she agreed to take a breath test. The officer attempted to administer a breath test using a DataMaster machine, but the machine was unable to register an alcohol concentration. The officer attempted to administer the test a second time, but Kost's breath sample was again inadequate. He believed that Kost was purposefully providing inadequate breath samples. During the testing process, Kost requested multiple times that another officer be brought in to administer the test because a different officer had been able to successfully administer the PBT before she was arrested; the officer declined her requests. Kost also repeatedly stated that she was not refusing to take a test and offered to provide a blood sample; the officer declined to collect a blood sample.

Respondent State of Minnesota charged Kost with one count of second-degree DWI (test refusal) and one count of third-degree DWI. The case proceeded to a jury trial, at which the jury heard testimony from the arresting officer and from Kost herself. The jury also viewed video recordings of the field sobriety testing, PBTs, and DataMaster testing attempts. Over Kost's objections, the district court instructed the jury, consistent with the pattern jury instruction, that "[w]hen a test is administered using an infrared or other approved breath testing instrument, the failure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal." The district court also granted the state's motion to prohibit defense counsel from mentioning Kost's offer to take a blood test during closing argument. The jury found Kost guilty of test refusal but

not guilty of DWI. The district court sentenced Kost to 364 days in jail, stayed 334 days of the sentence, and placed Kost on probation for two years.

Kost appeals.

DECISION

I. The test-refusal instruction materially misstated the law.

“We review a district court’s jury instructions for an abuse of discretion.” *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). District courts have “considerable latitude” in the selection of language for jury instructions. *Id.* We view the instructions in their entirety to determine if they fairly and adequately state the law. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). An instruction is erroneous if it materially misstates the law. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

To evaluate the challenged instruction, we begin with the framework of Minnesota’s implied-consent law. Any person who drives a motor vehicle in Minnesota consents to testing of their breath, blood, or urine for the presence of alcohol. Minn. Stat. § 169A.51, subd. 1(a) (2022). Refusal to submit to properly requested chemical testing subjects a driver to the civil penalty of driver’s license revocation. Minn. Stat. § 169A.52, subd. 3 (2022). But it also is a crime to “refuse to submit” to such testing. Minn. Stat. § 169A.20, subd. 2 (2022). A conviction of test refusal requires proof of the driver’s “actual unwillingness” to test. *State v. Ferrier*, 792 N.W.2d 98, 99, 102 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011).

The district court gave the following instruction on the refusal element of the test-refusal charge:

A refusal to submit to chemical testing includes any indication of actual unwillingness to complete the testing process, as determined from the driver's words and actions, in light of the totality of the circumstances. Refusal may be shown in a number of ways, including verbal refusal, nonverbal indication of unwillingness to comply, failure to make a decision, or actions that frustrate the testing process. *When a test is administered using an infrared or other approved breath testing instrument, the failure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal.*

(Emphasis added.) The first, uncontested part of the instruction explains the actual-unwillingness standard articulated in *Ferrier*. The final sentence of the instruction—that a failure to provide two separate, adequate breath samples constitutes a refusal—is based on Minn. Stat. § 169A.51, subd. 5(c) (2022). Kost objected to this language at trial, arguing then and now on appeal that (1) this provision applies only to civil license-revocation proceedings for test refusal, and (2) its inclusion is inconsistent with caselaw concerning criminal test refusal. These arguments are persuasive.

Kost acknowledges that the challenged portion of the instruction was taken directly from Minn. Stat. § 169A.51, subd. 5(c). But she argues that the language of that statute misstates the law for criminal test refusal because it applies only to license-revocation proceedings. The statute provides in relevant part: “*For purposes of section 169A.52 (revocation of license for test failure or refusal)*, when a test is administered using an infrared or other approved breath-testing instrument, failure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal.” Minn. Stat. § 169A.51, subd. 5(c) (emphasis added). The same introductory phrase also appears in the first of the three subsequent provisions, which collectively address when a breath test (as

opposed to a sample) is deficient and when a deficient test constitutes refusal. *Id.*, subd. 5(d)-(f) (2022). Kost argues that this introductory phrase means that the failure to provide two separate, adequate breath samples constitutes refusal as a matter of law only in license-revocation cases.

This court previously addressed the applicability of Minn. Stat. § 169A.51, subd. 5(c), (d), in criminal prosecutions for test refusal in *State v. Netland*, 742 N.W.2d 207 (Minn. App. 2007) (*Netland I*), *aff'd in part and rev'd in part*, 762 N.W.2d 202 (Minn. 2009) (*Netland II*). Netland argued that her test-refusal conviction violated due process. *Netland I*, 742 N.W.2d at 215. In addressing this assertion, we considered whether she was given a meaningful opportunity to comply with the statutory requirements, and rejected the state's argument that she was because she had two chances to provide an adequate breath sample but failed to do so. *Id.* at 215-18. We explained:

Essentially, the state assumes that if (1) “[i]t is a crime for any person to refuse to submit to a chemical test of the person’s blood, breath, or urine under section 169A.51”; and (2) section 169A.51 states that “failure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal”; then it follows that (3) it is a crime for any person to fail to provide two separate, adequate breath samples in the proper sequence under section 169A.51, subdivision 5.

Id. at 217. We observed that the state’s argument ignored the phrase “[f]or purposes of section 169A.52 (revocation of license for test failure or refusal),” which is “critical qualifying language” by which the legislature “explicitly restricted these conditions to a civil implied-consent context.” *Id.* at 217-18 (citing Minn. Stat. § 169A.51, subd. 5(c), (d)). We ultimately determined that Netland was not given a meaningful opportunity to

comply with the statutory requirements and therefore her test-refusal conviction was obtained in violation of due process. *Id.* at 221.

The supreme court reversed this determination, concluding that we applied the incorrect legal standard and holding that Netland's conviction did not violate due process. *Netland II*, 762 N.W.2d at 207-10. Notably, the supreme court expressly stated that it was "not necessary for [it] to address the statutory interpretation question the court of appeals addressed," and therefore did not consider whether the application of Minn. Stat. § 169A.51, subd. 5(c), is limited to civil license-revocation cases. *Id.* at 206 n.4. The dissent, however, did address the statutory interpretation question, and similarly concluded: "Under the plain wording of the chemical tests for intoxication statute, the legislature did not extend criminal liability to 'refusals' based on inadequate breath samples or deficient breath tests." *Netland II*, 762 N.W.2d at 217 (Meyer, J., dissenting) (discussing Minn. Stat. § 169A.51, subd. 5(c), (d)).

Kost argues that, although this court's decision in *Netland I* was reversed on other grounds, its analysis of the statutory-interpretation question remains sound. We agree. The statutory provision on its face includes the qualifying language that the failure to provide two separate, adequate breath samples constitutes a refusal "[f]or purposes of section 169A.52 (revocation of license for test failure or refusal)." Minn. Stat. § 169A.51, subd. 5(c). This case is not a license-revocation proceeding under Minn. Stat. § 169A.52 (2022); it is a criminal prosecution for test refusal under Minn. Stat. §§ 169A.20, subd. 2(1), .25, subd. 1(b) (2022). Accordingly, Minn. Stat. § 169A.51, subd. 5(c), does not apply.

Kost also looks beyond *Netland I* to our more recent and undisturbed holding in *Ferrier*. In *Ferrier*, we held that a conviction of test refusal “requires proof of a volitional act that indicates unwillingness to submit to a test,” and that such “actual unwillingness” may be determined from the driver’s words and actions in light of the totality of the circumstances. *Ferrier*, 792 N.W.2d at 99, 102. Kost argues that, while the district court accurately recited the actual-unwillingness standard to the jury, it then negated that standard by instructing the jury that failure to provide two separate, adequate breath samples constitutes test refusal as a matter of law. Again, we agree. The latter instruction effectively directs a guilty verdict if a driver fails to provide two breath samples that the testing machine registers as adequate, even if other circumstances indicate that the driver was not actually unwilling to submit to testing.

In sum, because Minn. Stat. § 169A.51, subd. 5(c), does not apply in this criminal test-refusal case, and instructing the jury with that statute’s language negated the actual-unwillingness standard that does apply, we conclude that the challenged jury instruction materially misstated the law regarding criminal test refusal.¹

¹ We recognize that the district court gave this instruction in reliance on the criminal jury-instruction guideline (CRIMJIG) in 10 *Minnesota Practice*, CRIMJIG 25.10 (2023). But CRIMJIGs “are not the law.” *State v. Pierce*, 792 N.W.2d 83, 86 (Minn. App. 2010). Rather, we determine if a jury instruction correctly states the law by analyzing the applicable statute and caselaw interpreting it. *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015). If a CRIMJIG conflicts with the statute or caselaw, “the latter two control.” *Id.* Such a conflict exists here, as the CRIMJIG overlooks the qualifying language of Minn. Stat. § 169A.51, subd. 5(c), that limits the application of subdivision 5(c) to license-revocation cases.

II. The erroneous test-refusal instruction was not harmless beyond a reasonable doubt.

“An erroneous jury instruction is harmless if, beyond a reasonable doubt, the instruction had no significant impact on the verdict rendered.” *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). Kost argues that the error was not harmless because it lowered the state’s burden of proof by instructing the jury that it could find that Kost refused to take a test based solely on her failure to provide two separate, adequate breath samples without also determining that she was actually unwilling to take a test. This argument is convincing.

As we noted above, the first portion of the district court’s instruction on the refusal element accurately described the actual-unwillingness standard in *Ferrier*, but the challenged portion functionally instructed the jury that failure to provide two separate, adequate breath samples constitutes refusal as a matter of law. And the prosecutor relied heavily on the erroneous portion of the instruction during closing arguments. The prosecutor repeatedly pointed to the jury instruction as a basis for finding Kost guilty of test refusal, first stating:

And I just want to note specifically in the jury instruction questionnaire, when a test is administered using an infrared or other approved breath testing instrument, the DMT is one of those instruments. Failure of a person to provide two separate adequate breath samples in the proper sequence constitutes a refusal. Here we have two tests, and she failed to provide adequate breath samples for both of those tests. By the instructions which I just read verbatim to you which were given to you by [the district court], that constitutes a refusal.

The prosecutor later reiterated the jury instruction, asserting: “And when we get back to the station, she failed to provide two separate adequate breath samples in the proper sequence, which constitutes a refusal. I’m jabbing at the podium here, because I’m reading exactly the language that you have been instructed to follow by the Court.” Finally, the prosecutor concluded his rebuttal in closing argument by stating, “So [Kost] was not providing an adequate sample; she failed to provide two adequate samples. And according to the law and the jury instructions, failure to provide two adequate samples constitutes a refusal. . . . She failed to provide two samples. End of story.”

On this record, we cannot say that the erroneous jury instruction was harmless beyond a reasonable doubt. The erroneous instruction was the focal point of the prosecutor’s closing argument, which plainly urged the jury to find Kost guilty of test refusal based solely on the fact that she failed to provide two separate, adequate breath samples without also considering whether such conduct demonstrated her actual unwillingness to take a test. Because the erroneous instruction was not harmless beyond a reasonable doubt, Kost is entitled to a new trial.²

Reversed and remanded.

² Because Kost is entitled to a new trial, we need not reach her arguments that the district court abused its discretion in limiting the scope of defense counsel’s closing argument or that cumulative error entitles her to a new trial.