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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1613**

State of Minnesota,
Respondent,

vs.

Jacquelyn Jeanne Libis,
Appellant.

**Filed November 24, 2025
Affirmed in part, reversed in part, and remanded
Bentley, Judge**

Hennepin County District Court
File No. 27-CR-23-6840

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

Kristyn Anderson, Minneapolis City Attorney, Michelle E. Johnson, Senior Assistant
Minneapolis City Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Bentley, Presiding Judge; Wheelock, Judge; and Larson,
Judge.

NONPRECEDENTIAL OPINION

BENTLEY, Judge

In this direct appeal from a judgment of conviction for one count of driving while
impaired (DWI) and one count of test refusal, appellant Jacquelyn Jeanne Libis argues that
her convictions must be reversed for insufficient evidence. Libis also argues, in the

alternative, that her test-refusal conviction must be vacated because it arose out of the same behavioral incident as the DWI conviction. We conclude that the evidence was sufficient to support both convictions but that the district court erred in entering convictions on both offenses because they arose from the same statutory scheme and were committed as part of the same behavioral incident. Therefore, we affirm in part, reverse in part, and remand.

FACTS

The following facts were elicited at a jury trial through testimony of the arresting officer and footage from his body-worn camera and his squad car's dashboard camera.

One evening, a state trooper pulled over a car that had been speeding up to 79 miles per hour in a 60 mile-per-hour zone and swerving within its lane and over into the lane to its left. The trooper approached the vehicle and began talking to the driver, Libis, through an open window. The trooper "was hit with a strong odor of consumed alcoholic beverage." He noticed that Libis's eyes were "bloodshot and watery," which he testified can be a "factor of impairment." The trooper told Libis that she was weaving, and Libis responded that she was "not trying to go weavin'." When asked what she had been drinking, Libis responded, "Not sure." When asked where she was coming from, Libis replied, "Not sure," but she told the trooper that she was "nervous." She told the officer she had a drink a "couple hours ago."

The trooper asked Libis to step out of the car and began to administer field sobriety tests. Libis asked the trooper many times if she could go to the bathroom, which the trooper testified "can be a possible indication of impairment." The trooper testified that Libis failed to follow directions during the horizontal gaze nystagmus (HGN) and the one-leg-stand

tests and that failing to follow instructions may indicate impairment. Libis exhibited horizontal and vertical nystagmus (involuntary jerking of the pupils); but the trooper administered the HGN test more quickly than he should have per the National Highway Traffic Safety Administration manual, which can affect the accuracy of the test. During the one-leg-stand test, Libis lost her balance. While the trooper was giving directions for the walk-and-turn test, Libis was noticeably crying, so the trooper did not finish administering the test. When the trooper approached Libis with a preliminary breath test, she backed away and did not take the test.

The trooper then arrested Libis and had her sit in his squad car while they waited for a tow truck to arrive. In the squad car, Libis talked with the officer about seemingly random topics, including horoscopes and “the cartel,” which the trooper testified may indicate impairment. Libis also asked many more times if she could go to the bathroom and the trooper replied that she could go on the side of the road or wait until they arrived at the jail. During the drive to the jail, the trooper told Libis that she was slurring her speech so much that it was hard to understand her. The trooper testified that while Libis’s speech was “deliberate and slurred at times” during the stop, she sounded “much more clear” and “even-patterned” later when she called a friend from the jail.

When they arrived at the jail, Libis was allowed to use the restroom. Then, the trooper brought Libis to a small room with a breath-test machine. The trooper twice read Libis the required breath-test advisory—which states that refusal to test is a crime and failure to make a decision about testing will be interpreted as a refusal—and Libis said she understood. Libis told the trooper repeatedly that she wanted to contact her attorney, whose

number was in her cell phone, but her cell phone was in the trooper's squad car. The trooper directed her instead to use the resources provided—a stack of attorney phone books and a phone. The trooper testified that Libis exhibited mood swings during this time—she went from “being very quiet and uncooperative and sad and not listening to being defiant and angry and going back and forth”—which contributed to his belief that she was impaired. Throughout the time that the trooper gave Libis to call an attorney, Libis repeatedly asked to speak to an attorney and the trooper repeatedly told her to use the materials provided. Libis did not attempt any phone calls for 15 minutes. Eventually, Libis gave the trooper the name of an attorney she knew, and the trooper looked up the attorney's phone number. Libis attempted to call the attorney, but she did not speak with him or leave a message. The trooper had to remind Libis “multiple times” to dial “9” before entering an outside number. The trooper warned Libis that she would have limited time to contact an attorney and gave Libis ten-minute and five-minute warnings. Libis did not end up speaking with any attorney. After about 25 minutes, the trooper asked Libis if she would take the breath test. Libis did not answer that question but continued to ask for an attorney. The trooper construed her behavior as a refusal to take the test.

Respondent State of Minnesota charged Libis with one count of test refusal, in violation of Minnesota Statutes section 169A.20, subd. 2(2) (2022),¹ (count 1), and one

¹ Libis was charged and convicted under subdivision 2(2) of Minnesota Statutes section 169A.20—refusal to submit to a blood or urine test. The state asserts that reference to subdivision 2(2) was a typographical error, as the charging description and probable cause statement both describe the charge as one under subdivision 2(1) (refusal to submit to a breath test) and the jury was instructed on subdivision 2(1). Appellant does not challenge the conviction on the basis that she was charged and convicted under subdivision 2(2) and

count of DWI, in violation of Minnesota Statutes section 169A.20, subd. 1(1) (2022), (count 2).

At trial, Libis testified in her own defense. She testified that she suffers from anxiety, post-traumatic-stress disorder, panic disorder, and attention deficit/hyperactivity disorder; that she has a history of civil commitment and has experienced physical and sexual abuse; and that she takes two medications for her anxiety. She testified that right before the traffic stop, she had left a date after the man she met “said [she] should come home with him and do lewd things” and “swooped in to . . . kiss or grope” her. This “upset” her and triggered a “fight-or-flight” response. She explained that the trooper’s “striking resemblance” to a person who had abused her in the past triggered an anxiety attack, which can cause her to have trouble thinking clearly, become disoriented, have a “brain freeze,” or need to have things repeated to her. She testified that she had one drink a couple of hours before the traffic stop. Libis explained that, at the time of the stop, she could not remember the name of the restaurant where the date occurred because she had never been there before that night. Libis said she asked to go to the bathroom many times because she was afraid the trooper would hurt her and she “was hoping [to go] to a place with indoor plumbing and people that was safer and away from him.” Libis said she was crying both before and after the traffic stop.

she refers to subdivision 2(1) throughout her brief. Despite the parties’ apparent agreement that the conviction is under subdivision 2(1), we reference subdivision 2(2) throughout this opinion because that is what appears in the complaint, the sentencing order, and the warrant of commitment.

The jury found Libis guilty of both counts. The district court convicted Libis of both counts, but sentenced Libis only on the DWI count to 364 days' imprisonment, stayed for four years.

Libis appeals.

DECISION

Libis argues that her conviction for DWI must be reversed for insufficient evidence because the state failed to prove beyond a reasonable doubt that she was under the influence of alcohol. She also argues that her test-refusal conviction must be reversed because the state failed to prove the intent element—that she was actually unwilling to take the test. Alternatively, Libis argues that the district court erred in convicting her of two offenses under the same statutory section that arose from the same behavioral incident. We address each issue in turn.

I

To support a conviction for DWI, the state must prove beyond a reasonable doubt that Libis drove her vehicle while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1). A person is “under the influence” when she does not “possess that clearness of intellect and control of [herself] that [she] otherwise would have.” *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012) (quoting *State v. Teske*, 390 N.W.2d 388, 390 (Minn. App. 1986)). “The state must show that ‘the driver had drunk enough alcohol so that the driver’s ability or capacity to drive was impaired in some way or to some degree.’” *Id.* (quoting *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992)).

“In reviewing the sufficiency of evidence for a conviction, we painstakingly review the record to determine whether that evidence, viewed in the light most favorable to the verdict, was sufficient to permit the jurors to reach the verdict that they did.” *State v. Hassan*, 977 N.W.2d 633, 639-40 (Minn. 2022). For purposes of our review here, we assume without deciding that the state relied on circumstantial evidence to prove Libis’s impairment.² When reviewing a conviction based on circumstantial evidence, appellate courts use “a heightened two-step process to review the sufficiency of the evidence.” *State v. Segura*, 2 N.W.3d 142, 155 (Minn. 2024).

The first step “requires an appellate court to winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury’s verdict, resulting in a subset of facts that constitute the circumstances proved.” *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017) (quotation omitted). “In identifying the circumstances proved, we defer to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013) (quotation omitted).

At the second step, appellate courts consider “whether a reasonable inference of guilt can be drawn from the circumstances proved, viewed as a whole, and whether a

² The state argues that the behavior witnessed by the trooper is direct evidence of impairment and that we should therefore apply the direct evidence standard of review. Because we conclude that the evidence is sufficient even under the heightened circumstantial-evidence standard of review, we need not decide whether the state relied on direct or circumstantial evidence. *See, e.g., State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013) (“We need not resolve the parties’ dispute regarding the standard of review because, even under the more favorable [circumstantial-evidence] standard . . . , the record contains sufficient evidence to support the jury’s verdict[.]”).

reasonable inference inconsistent with guilt can be drawn from the circumstances proved, again viewed as a whole.” *Harris*, 895 N.W.2d at 600. “The State’s circumstantial evidence is sufficient when the reasonable inferences are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis other than guilt.” *Segura*, 2 N.W.3d at 155 (quotation omitted). In considering whether a reasonable inference is inconsistent with any rational hypothesis other than guilt, we consider the circumstances proved as a whole, not individually, *Silvernail*, 831 N.W.2d at 599, and we “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010) (quotation omitted).

Turning to the first step, the circumstances proved on the impairment issue are as follows. The trooper noticed Libis’s vehicle because it was speeding and weaving within its lane and into the left lane. When Libis rolled down her window and began to speak with the trooper, the trooper “was hit with a strong odor of consumed alcoholic beverage” and noticed that Libis’s “eyes were bloodshot and watery.” Libis said she was “[n]ot sure” where she was coming from and what she last had to drink. Libis exhibited multiple “clues of impairment” including nystagmus, loss of balance, failure to follow directions, and repeatedly asking to use the bathroom. Libis’s speech was “thick and deliberate at times” and she was slurring her speech such that it was hard to understand her some of the time. In the squad car, Libis randomly brought up “horoscopes” and “the cartel.” Libis experienced mood swings throughout the interaction. And when Libis was attempting to contact attorneys at the jail, the trooper had to remind her “multiple times” to dial “9” before entering an outside number. Later, during a phone call that Libis made to a friend

from jail, Libis sounded “much more clear” and “even-patterned” as compared to how she sounded during the stop.

Libis argues that her testimony regarding her anxiety should be included in the circumstances proved. She argues that under *State v. Colgrove*, evidence that does not directly conflict with the jury’s verdict may be properly considered within the circumstances proved. *See State v. Colgrove*, 996 N.W.2d 145, 152 (Minn. 2023) (“[T]he evidence that Colgrove exhibited paranoid delusions the day he stabbed Swenson is not inconsistent with the jury’s conclusion that he committed first-degree intentional felony murder because the jury could accept *both* that Colgrove had paranoid delusions *and* that he intended to kill Swenson.”). But *Colgrove* also recognized that a determination of the circumstances proved “preserv[es] the jury’s credibility findings by recognizing that the jury is in a unique position to determine the credibility of the witnesses and weigh the evidence before it.” *Id.* (quotations omitted); *see also State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008) (holding that a reviewing court must “assume that the jury believed the State’s witnesses and disbelieved the defense witnesses”). Here, even if the circumstances proved include that Libis suffers from anxiety and has endured abusive experiences in the past, we must assume that the jury disbelieved Libis’s explanation that an anxiety attack caused her behavior that evening. That explanation is inconsistent with guilt, and therefore not properly included within the set of circumstances proved. Therefore, we include in the circumstances proved that she has a history of anxiety but do not include testimony about how her anxiety may have affected her conduct that evening.

Turning to step two, Libis does not dispute that the circumstances proved are consistent with guilt, so we consider only whether a reasonable inference also may be drawn from the circumstances proved that is inconsistent with guilt. *Silvernail*, 831 N.W.2d at 599-600. Libis argues that “these circumstances did not exclude the inference that Libis was not impaired, but she was instead exhibiting symptoms of anxiety.” To be sure, some of the circumstances, viewed individually, may be innocently explained. The trooper acknowledged that he may have administered the HGN too quickly and that nystagmus may be caused by strobe lights or passing traffic. It could be that Libis’s eyes were watery and bloodshot because she was crying before and during the interaction. But Libis’s alternative hypothesis—that she was experiencing an anxiety attack and was not intoxicated—does not explain why she was swerving on the road, lost her balance, slurred her speech, and smelled strongly of alcohol. Considering the totality of the circumstances proved, we conclude that Libis’s alternative hypothesis is not reasonable.

The cases that Libis cites do not persuade us otherwise. Libis cites *State v. Elmourabit*, 373 N.W.2d 290 (Minn. 1985), as an example of a case where appellant’s conviction was reversed for insufficient evidence after this court applied the circumstantial-evidence test. But we have repeatedly distinguished *Elmourabit*, which was decided in 1985, noting that *Elmourabit* was a “rare exception,” *State v. Baynes*, No. A24-1301, 2025 WL 1860367, at *5 (Minn. App. July 7, 2025) (quotation omitted), and is “fact-bound,” *State v. Kaska*, No. A24-1094, 2025 WL 1731823, at *5 (Minn. App. June 23, 2025)

(quoting *Teske*, 390 N.W.2d at 390).³ The Minnesota Supreme Court also cautioned in *Elmourabit* that the case is “of little precedential value.” *Elmourabit*, 373 N.W.2d at 293. Moreover, Elmourabit’s signs of intoxication were reasonably attributable to innocent explanations—e.g., it was reasonable for him to slur his speech because he was not a native English speaker. *Id.* at 293-94. Here, multiple signs of intoxication are not so easily explained. *Elmourabit* is inapposite.

Libis also argues that her case is analogous to *State v. Al-Naseer*, in which the supreme court reversed a conviction based on circumstantial evidence because there was evidence in the record sufficient to support a rational theory other than guilt. 788 N.W.2d 469, 480-81 (Minn. 2010). But *Al-Naseer* is also not on point. That case involved the criminal vehicular homicide statute in which the state was required to prove that the defendant *knew* he hit a person or a vehicle. *Id.* at 480. The testimony of multiple witnesses and the physical evidence suggested that Al-Naseer was asleep or unconscious at the time he hit the victim, causing him to be unaware of what he hit. *Id.* at 477-79. Here, the evidence that Libis was suffering from an anxiety attack came only from Libis’s own testimony, which must be excluded from the circumstances proved because we assume that the jury did not believe her explanation. *See Tscheu*, 758 N.W.2d at 858. Unlike *Al-Naseer*, which relied on the circumstances proved to conclude that there was a reasonable hypothesis other than guilt, a similar conclusion here would be based on “mere conjecture.” *Andersen*, 784 N.W.2d at 330.

³ Nonprecedential opinions are not binding authority but may be cited for their persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

In sum, because the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt, the evidence is sufficient to sustain the jury's guilty verdict on the DWI count.

II

Libis next argues that the state presented insufficient evidence to prove beyond a reasonable doubt that she was actually unwilling to submit to testing. Libis maintains that she was simply invoking her right to counsel prior to deciding whether to take a breath test and that her repeated requests for counsel were not made with the intent to frustrate the testing process.

A driver has a limited right to consult an attorney of her choosing prior to deciding whether to submit to a breath test, provided the consultation does not unreasonably delay the testing. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309-10 (Minn. App. 1996), *rev. denied* (Minn. Aug. 6, 1996). That right “will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel.” *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991) (quoting *Prideaux v. State, Dep't of Pub. Safety*, 247 N.W.2d 385, 394 (Minn. 1976)).

“[R]efusal 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.” *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011). “If a driver does frustrate the process, [her] conduct will amount to a refusal to test.” *Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 2000). Requesting counsel in an attempt to delay or

avoid participating in the testing process may factor into a determination that an individual is actually unwilling to take the test. *See Busch*, 614 N.W.2d at 259-60 (concluding that driver's refusal to respond to the officer's clarifying questions after invoking his right to counsel constituted test refusal).

Without a direct statement of unwillingness to take a breath test, test refusal may be proven by circumstantial evidence. *Ferrier*, 792 N.W.2d at 99, 101-02. We therefore engage again in our circumstantial-evidence standard of review and consider whether, based on the circumstances proved, the evidence is consistent with guilt and inconsistent with any rational hypothesis other than guilt.⁴ *Segura*, 2 N.W.3d at 155.

The circumstances proved on the issue of test refusal are as follows. During the stop, the trooper attempted to administer a preliminary breath test, but Libis backed away. At the jail, the trooper read the required breath-test advisory twice, stating that "refusal to take a breath test is a crime," and "[i]f you are unable to contact an attorney you must make the decision [to take a breath test] on your own." Libis confirmed that she understood the advisory. Shortly after Libis was allowed to begin contacting attorneys, the trooper asked Libis if he could help her look up a number, and Libis responded only that the lawyer in her phone was labeled "Zan." About five minutes into Libis's designated attorney time, the trooper again showed her the directories and how to use the phone. She did not attempt any phone calls in the first 15 minutes. Eventually, Libis gave the trooper the name of an

⁴ Here, the state again argues that evidence of Libis's conduct is direct evidence of test refusal, but because the evidence is sufficient to affirm Libis's conviction under the heightened circumstantial-evidence test, we assume without deciding that the circumstantial-evidence test applies.

attorney she knew, and he looked up the number; she tried to call him but did not speak with him or leave a message. The trooper warned Libis that she would have limited time to contact an attorney and gave Libis ten-minute and five-minute warnings. Libis expressed her desire to speak with an attorney over a dozen times in the approximately 25 minutes she was given to contact an attorney, but she attempted only two calls and did not leave any messages. When the trooper told her that her attorney time was over and asked whether she would take the breath test, Libis did not answer the question; instead, she repeated that she would like to speak with an attorney.

We next consider whether the circumstances proved are consistent with Libis's guilt and inconsistent with other rational hypotheses. The circumstances proved are consistent with a finding that Libis intended to frustrate the testing process. Libis asked to speak to an attorney repeatedly, but when given the opportunity, she did not contact an attorney. In the 25 minutes she had, she made only two calls and did not leave any messages. That is so despite the trooper's offers to assist her in looking up an attorney's number and his multiple warnings that she would have limited time to contact an attorney. After she failed to make a good-faith attempt to contact an attorney and the trooper asked whether she would take the breath test, she failed to respond to his question and again insisted on speaking with an attorney. These circumstances proved are consistent with the conclusion that Libis refused to test.

The circumstances proved are also inconsistent with any rational hypothesis other than guilt. Libis argues that "a reasonable inference could be drawn from the circumstances proved that Libis believed she could consult with an attorney before deciding to take the

test.” But Libis was given the breath-test advisory multiple times, which states that “[i]f you are unable to contact an attorney you must make the decision [to take a breath test] on your own,” and she said that she understood it. It is unreasonable to infer on this record that Libis believed that her repeated requests for an attorney were anything but a display of actual unwillingness to take a breath test.

We therefore conclude that the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. The evidence is sufficient to sustain the jury’s guilty verdict on the test-refusal count.

III

Finally, Libis and the state agree that the district court erred in entering convictions on both DWI and test refusal, because the convictions arose out of the same statutory section and were committed as part of the same behavioral incident. *See* Minn. Stat. § 609.04 (2022). We also agree.

Whether a conviction violates Minnesota Statutes section 609.04 is a legal question that we review de novo. *State v. Bonkowske*, 957 N.W.2d 437, 443 (Minn. App. 2021). “Section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Libis’s convictions for DWI and test refusal are based on different subparts of Minnesota Statutes section 169A.20—DWI appears in subdivision 1 and test refusal appears in subdivision 2. They also were committed as part of a single behavioral incident because they were part of a continuous course of conduct. *Bonkowske*, 957 N.W.2d at 444 (“The supreme court and numerous decisions of this court have held that DWI and

test refusal committed as part of a continuous course of conduct . . . arise out of a single behavioral incident.”). Therefore, because the convictions stem from the same statutory section and a single behavioral incident, the entry of convictions for both offenses violates section 609.04 and one of the convictions must be vacated. *Id.* The guilty verdict on the vacated conviction shall remain intact but with no formal adjudication. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).⁵

Affirmed in part, reversed in part, and remanded.

⁵ The parties maintain that the district court should vacate the test-refusal conviction, but in reaching that conclusion they apply authority involving a different statutory provision that prohibits multiple sentences, not multiple convictions, arising out of a single behavioral incident. *See* Minn. Stat. § 609.035 (2022); *see also State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (identifying the “more serious” offense and applying section 609.035 to vacate the sentence on the less serious offense); *State v. St. John*, 847 N.W.2d 704, 708-09 (Minn. App. 2014) (applying section 609.035 and identifying DWI as the “more serious” offense). As we did in *Bonkowske*, we leave it to the district court to determine on remand which conviction to vacate for purposes of section 609.04. *See Bonkowske*, 957 N.W.2d at 444 (concluding that “one of the convictions must be vacated”).