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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1495

State of Minnesota,
Respondent,

vs.

Rolando Banda,
Appellant.

Filed September 10, 2012
Reversed and remanded
Halbrooks, Judge

McLeod County District Court
File No. 43-CR-10-1797

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael K. Junge, McLeod County Attorney, Christopher D. Bates, Assistant County Attorney, Glencoe, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges his conviction of first-degree test refusal, in violation of Minn. Stat. §§ 169A.20, subd. 2, .24, subd. 2 (2010). Because the rebuttal testimony

from three police officers regarding their prior contacts with appellant constituted improper character evidence and went far beyond the purpose of rebutting appellant's claim that he did not understand English and because admission of that testimony surely had an adverse effect on the jury's verdict, we reverse and remand.

FACTS

On October 10, 2010, at approximately 12:30 a.m., two law-enforcement officers in separate vehicles were looking for a blue minivan in order to execute an "apprehension and detention order" for a specific individual in Glencoe. The person they were looking for was not appellant, but appellant was driving a blue minivan at the time that the officers observed it pulling out of a parking lot.

After checking the license plate of the minivan, McLeod County Sheriff's Deputy Craig Losure discovered that the registration was expired and that the registered owner was unknown. Deputy Losure followed the minivan for a short distance and did not observe any driving violations. Deputy Losure initiated a stop after the minivan pulled into a parking lot.

While Deputy Losure spoke with appellant, Glencoe Police Officer Jason Abbott arrived at the scene. Officer Abbott observed beer cans in the back of the minivan and an open beer container on the floor of the back seat. He told Deputy Losure that he smelled alcohol coming from appellant, but Deputy Losure admitted that he did not notice any odor until Officer Abbott brought it to his attention.

Officer Abbott administered a preliminary breath test that measured a 0.087. Officer Abbott testified that appellant admitted to having a couple of beers earlier in the

evening. Deputy Losure directed appellant to perform field sobriety tests, which appellant failed, including the horizontal gaze nystagmus, the one-legged stand, and the walk-and-turn tests. Appellant was arrested and transported to jail.

At 1:19 a.m., Deputy Losure read the implied-consent advisory to appellant in English. Deputy Losure gave appellant the option of taking a urine or blood test. Deputy Losure asked appellant 23 times to take a urine test and at least six times to take a blood test. Appellant did not respond to Deputy Losure's questions, looked down or muttered softly, and at times talked about the devil or about killing himself. Deputy Losure considered the advisory complete at 1:40 a.m., and determined that appellant had refused the test.

Appellant was charged with first-degree test refusal, under Minn. Stat. §§ 169A.20, subd. 2, .24, subd. 2. At the beginning of trial on March 2, 2011, appellant stipulated that he had four prior driving-while-impaired convictions, which established the aggravating factors necessary to convict him of a felony. The district court also ruled that evidence of a second preliminary breath test, which was given at the jail about an hour after Deputy Losure ended the implied-consent advisory and measured 0.05, would not be admitted at trial.

Deputy Losure and Officer Abbott both testified that they spoke to appellant in English and that he responded in English. But the officers agreed that appellant's English was not fluent or easily understood. The jury was allowed to view the video of the field sobriety tests, which had no accompanying audio, and the video and audio of the implied-consent advisory.

With the aid of an interpreter, appellant testified that he was born in Texas but attended school through eighth grade in Mexico. He has worked manual-labor jobs in the United States and has worked mainly with other Spanish-speaking persons. Appellant testified that he did not clearly understand the directions that he was given during the field sobriety tests and that he was confused and unable to understand the officer's references to a blood or urine test during the implied-consent advisory. Appellant acknowledged that on other occasions, he blew into a machine and no blood or urine was ever taken. Appellant testified that he thinks about suicide often and that he may have told the officer he was hearing voices and experiencing suicidal thoughts.

After the defense rested, the state was permitted to present rebuttal testimony of Deputy Losure, Officer Abbott, and a third officer, Glencoe Police Officer Wyatt Bienfang, about prior contacts they had had with appellant, during which he spoke and understood English. The three officers were allowed to testify about prior contacts each had had with appellant, that he understood English at the time of those prior contacts, and that he was extremely intoxicated and belligerent at the time of those earlier contacts. Based on the evidence presented at trial, the jury found appellant guilty of first-degree test refusal.

D E C I S I O N

A district court's evidentiary rulings will not be reversed unless clearly erroneous. *State v. Glaze*, 452 N.W.2d 655, 660 (Minn. 1990). Evidentiary errors warrant reversal if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003).

Appellant argues that the district court committed prejudicial error when it allowed the state to introduce rebuttal testimony by three officers regarding their prior contacts with appellant. Appellant argues that the evidence had minimal probative value and was improper character evidence.

Rebuttal evidence is allowed to explain or contradict the defendant's evidence under Minn. R. Crim. P. 26.03, subd. 12(g). The decision of "what constitutes proper rebuttal evidence rests almost wholly in the discretion of the trial court." *State v. Pearson*, 775 N.W.2d 155, 160 (Minn. 2009). "Proper rebuttal evidence may include evidence that might not otherwise be admissible." *State v. Gutierrez*, 667 N.W.2d 426, 435 (Minn. 2003).

During direct examination, appellant claimed at least three times that he had difficulty communicating with Officer Abbott and Deputy Losure on October 10, 2010. He explained that he speaks "street English" and does not like to speak English because it embarrasses him. The district court allowed the state, after it made an offer of proof, to call three rebuttal witnesses to contradict appellant's claim that he does not speak English well enough to have understood the officers.

In particular, the district court ruled that the officers "can testify that they encountered the defendant, they can talk about where the encounter took place, the length of the encounter, . . . what language he spoke in, whether he asked for an interpreter, whether they understood him, whether he understood them." The court also ruled that the rebuttal witnesses could "provide some context that they believe that he was under the influence, but I will not let them testify regarding a [preliminary breath test]," whether

the defendant was arrested, or whether he was ultimately charged or convicted. In a written "exhibit" distributed to counsel, the court further explained its ruling as allowing the rebuttal witnesses to "[m]ention they were investigating an incident involving the defendant," state "[t]heir observations of the defendant, including whether [he was] intoxicated," "[d]iscuss the language used during their communications with the defendant," and "[g]ive an opinion whether they understood the defendant and he understood them."

Officer Abbott testified that he had contact with appellant on two prior occasions. Officer Abbott stated that on January 1, 2010, appellant was "very intoxicated," that he and appellant communicated in English, and that appellant was "very upset and swearing and making threats in English." Officer Abbott stated that appellant spoke English well enough that he threatened to "go to the bathroom right then and there, and actually started undoing his pants to go to the bathroom right then and there, and he communicated that to me." Officer Abbott testified that he had another contact with appellant on January 30, 2010, during which appellant was "very intoxicated again," upset, and swearing in English. Officer Abbott testified that his prior contacts with appellant informed his decision on how to communicate with appellant on October 10, 2010.

Deputy Losure testified that he also had contact with appellant on January 1, 2010, during which appellant communicated in English. Deputy Losure testified that his prior contact with appellant informed his decision on how to communicate with appellant on October 10, 2010.

Officer Bienfang testified that on August 13, 2006, he was dispatched to assist another officer with appellant, who was intoxicated, handcuffed, uncooperative, and refused to follow directions. Officer Bienfang testified that appellant told the interpreter at the scene that he did not need her assistance.

Appellant argues that this testimony was an improper use of other-acts evidence under Minn. R. Evid. 404(b). At trial, appellant's objection to the rebuttal evidence focused on his claim that the prejudicial nature of the evidence outweighed its probative value. *See* Minn. R. Evid. 403 (providing that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence).

Appellant contends that the evidence had minimal probative value because it was cumulative. The issue of whether appellant understood English was thoroughly developed during the state's case-in-chief on direct and cross-examination of Officer Abbott and Deputy Losure, during appellant's testimony, and through the video of the actual interaction between Deputy Losure and appellant during the implied-consent advisory at the jail. Appellant was asked and demonstrated his English-speaking ability for the jury and did not deny that he spoke or understood English, only that he had limited command of the language and did not fully understand the advisory given to him. Thus, the state was allowed to present ample evidence during its case-in-chief to counteract appellant's defense, and the jury had sufficient evidence to determine whether appellant understood or did not understand that he was being asked to submit to a

chemical test. Therefore, we agree that the additional rebuttal evidence was merely cumulative and had minimal probative value in this case.

More importantly, we agree that the evidence was highly prejudicial and went well beyond its purpose of rebutting appellant's testimony that he did not understand the officers' directions or the implied-consent advisory given his limited English-speaking abilities. Testimony by a police officer that he or she knows a defendant from prior contacts is generally irrelevant and prejudicial. *See State v. Strommen*, 648 N.W.2d 681, 688-89 (Minn. 2002) (holding that officer's testimony that he knew defendant from prior contacts was unfairly prejudicial and irrelevant because defendant's identity was not at issue). In this case, appellant's identity was not at issue, and the testimony was prejudicial on its face: three officers were allowed to testify that they had previous contact with appellant on at least three occasions, that appellant was highly intoxicated on each of those occasions, and that appellant was upset or belligerent to varying degrees during each of those incidents.

Even with the cautionary instruction that was given in this case, it would have been difficult or impossible for the jury to resist assuming that appellant is the type of person who is habitually drunk, often in trouble with the law, and most likely guilty of this offense. *See id*. at 688. Appellant was placed in such a negative light by this rebuttal testimony that we do not believe he received a fair trial. Accordingly, his conviction is reversed and the matter is remanded for a new trial.[1]

[1] Given our decision to grant appellant a new trial, we decline to address the other issues raised by appellant involving claimed errors in the jury instructions given by the district

Appellant also filed a pro se supplemental brief in which he asserts that he was confused when he was given the preliminary breath test and generally challenges the credibility of the police officers and the sufficiency of the evidence to prove that he is guilty of test refusal. Based on our review of the record, we conclude that appellant's claims are without merit. Moreover, we acknowledge that although retrial is precluded where a conviction is set aside based on insufficient evidence, a reviewing court must consider all of the evidence, whether erroneously admitted or not. *See State v. Cox*, 779 N.W.2d 844, 853-54 (Minn. 2010) (reversing for new trial where erroneous admission of evidence in violation of Confrontation Clause rights was not harmless beyond a reasonable doubt, and noting that retrial will not violate the Double Jeopardy Clause). Here, in view of all the evidence presented by the state, including even the erroneously admitted evidence, we conclude that the evidence was legally sufficient to have submitted the matter to a jury. *See id*. Thus, retrial in this case is not precluded.

Reversed and remanded.

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court. On retrial, counsel should propose instructions that are consistent with current caselaw involving the definitions of "probable cause," "lawful arrest," and the test-refusal instruction. *See, e.g.*, *State v. Koppi*, 779 N.W.2d 562, 566-68 (Minn. App. 2010), *rev'd on other grounds*, 798 N.W.2d 358 (Minn. 2011).