

IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0624

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BITA AMISI,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE CELENE GOGERTY, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Therefore, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal by the defendant Bitá Amisi from his conviction of operating while intoxicated, third offense.

Course of Proceedings/Facts

The State accepts the defendant's course of proceedings and statement of the facts as adequate and essentially correct. Iowa R. App. P. 6.903(3).

ARGUMENT

I. The Evidence Sufficiently Supports Amisi's Convictions for Operating While Intoxicated, Third Offense, and Eluding.

Preservation of Error

The State does not contest error preservation. A defendant challenging the sufficiency of the evidence need not raise that claim in the district court. *State v. Crawford*, 972 N.W.2d 189, 202 (Iowa 2022) ("We ... hold Iowa's appellate courts can review a defendant's challenge to the sufficiency of the evidence raised on direct appeal

without regard to whether the defendant filed a motion for judgment of acquittal. A defendant's trial and the imposition of sentence following a guilty verdict are sufficient to preserve error with respect to any challenge to the sufficiency of the evidence raised on direct appeal.”); *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997) (A defendant may challenge the sufficiency of the evidence of a bench trial whether or not a motion for judgment of acquittal was made in the trial court.).

Standard of Review

The Court reviews a challenge to the sufficiency of the evidence for correction of errors of law. If the verdict is supported by substantial evidence, the Court will uphold a finding of guilt.

“Substantial evidence” is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. In conducting its review, the Court considers all the evidence, that which detracts from the verdict, as well as that supporting the verdict. The Court views the evidence in the light most favorable to the State. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005); *State v. Hagedorn*, 679 N.W.2d 666, 668-69 (Iowa 2004).

Merits

Bitá Amisi challenges the sufficiency of the evidence to support his convictions for operating while intoxicated, third offense, and eluding. Because those convictions are supported by substantial evidence, his challenge should be rejected.

The test for whether the evidence is sufficient to withstand appellate scrutiny and support a verdict is whether the evidence is "substantial." *State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981). In making that determination, the Court reviews the record in the light most favorable to the State. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). This "favorable light" includes the making of any legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. *State v. Bass*, 349 N.W.2d 498 (Iowa 1984). The findings of the factfinder are to be broadly and liberally construed, rather than narrowly or technically. In cases of ambiguity, they will be construed to uphold, rather than defeat, the verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa Ct. App. 1985). Evidence meets the threshold criterion of substantiality if it would convince a rational factfinder that the defendant is guilty

beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984).

A. The evidence is sufficient to support Amisi's Conviction for operating a motor vehicle while intoxicated, third offense.

First, Amisi challenges the sufficiency of the evidence to support his conviction for operating while intoxicated, third offense. Amisi limits his challenge to proof of the element of intoxication. The record sufficiently establishes that Amisi was intoxicated. That evidence is summarized as follows.

On August 23, 2021, Des Moines Police Officer Angel Perez was on patrol just north of the intersection of 30th and Hickman. Tr. p. 10, line 9 – p. 11, line 23. Officer Perez observed Amisi's white sport utility vehicle headed north on 30th Street, swerving in and out of traffic and driving into the oncoming lane of traffic. Tr. p. 11, line 25 – p. 12, line 9; Exh. 1 (dash camera video); App. --.

When he attempted to stop Amisi, Officer Perez was driving an official, marked, law enforcement vehicle and was in in full uniform. Tr. p. 12, lines 10-20. The officer caught up with Amisi's vehicle and turned on his squad car's siren and emergency red and blue flashing lights. Amisi did not pull over. Tr. p. 12, line 21 – p. 13, line 19; Exh. 1;

App. --. Officer Perez continued to follow Amisi with lights and siren going. Amisi finally pulled into the parking lot of an apartment complex. Officer Perez pulled in behind Amisi and got out of his squad car. Amisi attempted to back out of the parking space. When the officer walked over and told Amisi to stop and get out his vehicle, Amisi's vehicle finally stopped. Tr. p. 13, line 20 – p. 15, line 9; Exh. 1; App. - -.

Officer Perez got Amisi out of his vehicle. He noted that Amisi had unsteady balance, bloodshot and watery eyes, and slurred speech. The officer smelled alcohol on Amisi's breath. He believed that Amisi was intoxicated. Tr. p. 17, lines 2-10; p. 19, lines 2-6. The officer observed an open container of alcohol inside the vehicle. Officer Perez was wearing a body camera. Video from his camera were admitted at trial. Tr. p. 17, lines 11-15; p. 18, lines 2-17; Exhs. 2, 3 (video from body cameras); App. - -.

Officer Perez requested backup assistance. Tr. p. 17, lines 16-23. Des Moines Police Officer James Chadwick answered the request for backup. Tr. p. 26, line 9 – p. 27, lines 3-4; p. 29, line 2 – p. 30, line 4. When Officer Chadwick first made contact with Amisi, he noted “off the bat” that Amisi's eyes were bloodshot and watery, his speech was

slurred, and he smelled strongly of an alcoholic beverage. Tr. p. 31, lines 11-17.

Officer Chadwick requested that Amisi take a horizontal gaze nystagmus field test (HGN). The officer tried three times to administer that test to Amisi, but Amisi did not hold his head still so that the officer could administer the test. The officer deemed that a refusal to test. Tr. p. 31, line 18 – p. 32, line 24; p. 34, lines 11-22. Although the officer was unable to administer the HGN, he observed signs of intoxication while he attempted to administer the test; Amisi's gait was unsteady, and he had difficulty standing with his feet together. Tr. p. 34, line 6 – p. 35, line 7.

Officer Chadwick next administered the walk-and-turn field test. Amisi exhibited seven out of a possible eight signs of intoxication; two clues is considered failing. Officer Perez was standing nearby when Amisi performed this field test. Both officers' cameras captured Amisi's performance. Tr. p. 35, line 8 – p. 38, line 25; Exhs. 4, 3 (video); App. --.

Officer Chadwick administered a third field sobriety test, the one-leg-stand test. That test has four possible clues of intoxication;

exhibiting two clues is considered a failure. Amisi exhibited all four clues. Tr. p. 38, line 24 – p. 40, line 15.

Officer Chadwick believed that Amisi was intoxicated and he requested that Amisi take a preliminary breath test. Amisi consented to testing. Tr. p. 41, lines 6-18. The result of his test was not offered at trial.

Officer Chadwick was wearing a body camera. Video from his camera was admitted at trial. Tr. p. 30, lines 9-25; Exhs. 4, 5 (video); App. --.

Officer Chadwick arrested Amisi for operating while intoxicated. Tr. p. 41, lines 19-22. The officer transported Amisi to the Des Moines police station, where the officer invoked implied consent and requested a Datamaster breath test. Amisi refused that test. Tr. p. 42, line 2 – p. 43, line 2. When the officer made the request for a breath specimen, Amisi got “very irritable, upset, incoherent” and claimed that he had not been driving. Tr. p. 50, line 17 – p. 51, line 4.

The evidence of Amisi’s field test failures supports the verdict. Amisi points out that English is not his first language, and that no interpreter was present to assist in explaining how to do the field tests. However, Officer Chadwick was aware that there was a language

barrier with Amisi, so he gave Amisi several opportunities to perform the field sobriety tests. Tr. p. 53, lines 4-23. In addition, the video of the field sobriety testing shows that the language barrier was not the reason Amisi failed those tests.

With or without the evidence of Amisi's failure of field sobriety tests, there is overwhelming evidence to support the jury's determination that Amisi was intoxicated. The testimony of Officer Perez, and the video from the officer's dash camera, show that Amisi was driving very erratically, even driving into the oncoming lane. In addition, the testimony of Officer Perez and Officer Chadwick describing Amisi's actions and statements, and the video of the stop, show that Amisi was intoxicated. The video shows that Amisi was unable to perform field sobriety tests and, even when he was not attempting the tests, had difficulty maintaining his balance and walking. He also gave nonsensical answers to officers' questions. Exhs, 1-4; App. --. For example, Amisi denied that he had been driving and even denied that he was in the car, despite the fact that an officer followed Amisi's vehicle, stopped him, and watched him get out of the driver's seat, and the fact that there was no one else in Amisi's vehicle. Exhs. 1, 4; App. --. That evidence is sufficient to

establish that Amisi was intoxicated. Amisi's challenge to the sufficiency of the evidence to support his conviction for operating while intoxicated, third offense, should be rejected.

B. The evidence is sufficient to support Amisi's conviction for eluding.

Next, Amisi challenges his conviction for eluding on the ground that the evidence did not prove that he willfully failed to bring his vehicle to a stop. His challenge should be rejected as the evidence amply establishes that element.

In order to prove that Amisi committed the crime of eluding, the State was required to prove that Amisi was driving a motor vehicle and that he,

willfully failed to bring the motor vehicle to a stop or otherwise eluded or attempted to elude a marked law enforcement vehicle driven by a uniformed peace officer after being given a visual and audible signal to stop.

Jury Instruction No. 18; App. 31. Amisi does not contest the proof that he was driving, he challenges only the evidence of eluding.

When he attempted to stop Amisi, Officer Perez was driving an official, marked, law enforcement vehicle and was in in full uniform. Tr. p. 12, lines 10-20. The dash camera on Officer Perez's squad car captured the officer's pursuit of Amisi. The lights and siren on the

squad car were on and the officer was directly behind Amisi's car. Drivers of oncoming cars noticed the flashing lights and siren and pulled over to permit the officer to pass by. Exh. 1; App. --. Amisi, however, continued to drive. He drove past four intersections and numerous driveways where he could have pulled over. He drove on for approximately forty seconds while the officer followed with lights flashing and siren wailing. Amisi then turned into the parking lot of an apartment building and pulled into a parking spot. Even then, Amisi attempted to pull back out of the parking spot and leave. The officer had to get out of his squad car and order Amisi to stop his car. Exh. 1 at 1:27 -2:50; App. --.

That evidence was sufficient to prove that Amisi's failure to stop was willful. *Cf. State v. Evenson*, 2015 WL 1848719, at *3 (Iowa Ct. App. Apr. 22, 2015) (To establish eluding, the State must prove the defendant willfully failed to stop his or her car or otherwise eluded or attempted to elude a marked squad car driven by a uniformed officer after being signaled to stop with lights and sirens. "The critical act is continuing to drive away or taking evasive action after receiving obvious direction to stop from law enforcement. The statute does not

require proof the defendant intended to do some further act or to achieve some additional consequence.”).

Amisi argues that he did not increase his speed or change his route when the officer attempted to stop him and that he ultimately pulled into the parking lot of an apartment complex and stopped. Appellant’s Brief at 10. However, a reasonable jury could have found that Amisi was eluding the officer based on Amisi’s act of continuing to drive for forty seconds after the officer activated the lights and siren on his car. *State v. Turner*, 2017 WL 4049455, at *1-2, *4-5 (Iowa Ct. App. Sept 13, 2017) (finding sufficient evidence of eluding where the defendant drove away after officer attempted to stop him, then continued on for a time before stopping at a bar).

The evidence sufficiently proved that Amisi willfully failed to bring his vehicle to a stop after being signaled to stop by a uniformed officer who was driving a marked squad car and who was following Amisi with lights flashing and siren blaring. Amisi’s challenge to his conviction for eluding should be rejected.

II. **The Court Did Not Err in Admitting A Video Showing Amisi Consenting to a Preliminary Breath Test.**

Preservation of Error

The State does not challenge error preservation. Prior to the start of trial, defense counsel objected to admission of Exhibit 4, a clip from the arresting officer's body camera. The clip shows the arresting officer offer Amisi a preliminary breath test and Amisi consenting. Then, the testing itself is edited out and the video resumes with the arrest of Amisi. Tr. I, p. 13, line 15 – p. 17, line 2; Exh. 4 (video); App. --. The district court overruled Amisi's objection. Tr. I, p. 18, lines 11-24, finding that the issue was controlled by an unpublished opinion of our Court of Appeals and finding that it was bound by that opinion. Tr. I, p. 17, lines 11-19. The court's ruling was a final one and preserved error. *State v. Thoren*, 970 N.W.2d 611, 621 (Iowa 2022) ("If the district court's ruling on a motion in limine reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial.").

In addition, just prior to testimony by the foundation witness for that exhibit, defense counsel advised the district court that he expected that during the State's next witness the State would

introduce Exhibit 4. Counsel stated that, “[s]ince we dealt with my objection to Exhibit 4 yesterday, I don’t intend to object at the time it’s introduced. I just wanted to make clear for the record that we are not waiving my prior objection for future review by any higher court. Tr. p. 24, lines 12-19. The district court stated that counsel’s objection would be “noted in the record.” Tr. p. 24, lines 18-19. That was sufficient to preserve error.

Scope and Standard of Review

Amisi asserts that review is for error at law. The Court does review at law when the issue raised is one of statutory interpretation. Thus, Amisi’s claim that admission of the challenged portion of the video violated Iowa Code section 321J.5(2) is reviewed at law. *See, State v. Bloomer*, 618 N.W.2d 550, 552 (Iowa 2000) (Bloomer contends the court misinterpreted the implied-consent provisions of Iowa Code sections 321J.6(2) and 321J.11 when it overruled his motion to suppress the State's proof that he refused a breath test. When a determination of admissibility of evidence turns on statutory interpretation, our review is for the correction of errors at law.).

However, Amisi also challenges the district court’s ruling on the basis that the evidence in question was inadmissible under Iowa Rule

of Evidence 5.403, arguing that the evidence was more prejudicial than probative. A Decision to admit or exclude evidence under rule 5.403 is reviewed for abuse of discretion. “The moving party has the burden to establish that the district court abused its discretion in making its decision on admissibility.” *State v. Liggins*, 978 N.W.2d 406, 418 (Iowa 2022) (cleaned up).

Merits

Finally, Amisi contends that the district court erred in admitting video footage that showed Amisi agreeing to take a preliminary breath test. The recording does not show the test being administered and does not show the result of the test. That portion of the video was edited out and was not shown to the jury. Evidence that Amisi agreed to testing is admissible under Iowa Code section 321J.5. Nonetheless, Amisi argues that the court erred in admitting the video because, he believes, admission of evidence that he consented to testing, paired with video showing his arrest, was “a backdoor way of informing the jury that Amisi failed the preliminary breath test.” He contends that the evidence was therefore inadmissible under Iowa Code section 321J.5(2) and was also inadmissible under Iowa Rule of Evidence 5.403 on the basis that

evidence of his test consent and subsequent arrest was more prejudicial than probative. Amisi's arguments should be rejected.

Iowa Code section 321J.5 provides,

1. When a peace officer has reasonable grounds to believe that either of the following have occurred, the peace officer may request that the operator provide a sample of the operator's breath for a preliminary screening test using a device approved by the commissioner of public safety for that purpose:

a. A motor vehicle operator may be violating or has violated section 321J.2 or 321J.2A.

b. The operator has been involved in a motor vehicle collision resulting in injury or death.

2. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code section § 321J.5 (2021). The results of the preliminary screening test are inadmissible. *Id.*; and see, *State v. Zell*, 491 N.W.2d 196, 197–98 (Iowa Ct. App. 1992); *State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987); *State v. Thompson*, 357 N.W.2d 591, 593 (Iowa 1984).

The district court did not err in admitting under section 321J.5 video footage showing Amisi consenting to a preliminary breath test. *Gavlock v. Coleman*, 493 N.W.2d 94, 96 (Iowa Ct. App. 1992) (The

district court did not err in denying Gavlock's objection to an officer's testimony that he asked Gavlock to take a preliminary breath test. The basis of defendant's objection was Allen's statement revealed Coleman took a P.B.T. and failed it. The trial court did not err in overruled defendant's objection because the officer's statement made no reference to the results of the P.B.T.); and *cf. State v. Zell*, 491 N.W.2d 196, 198 (Iowa Ct. App. 1992) (The district court did not abuse its discretion in denying a mistrial where the prosecutor asked whether a preliminary breath test had been administered but the results of the test were not admitted.); *State v. Smidl*, 2014 WL 69751 (Iowa Ct. App. Jan. 9, 2014) (trial counsel trial counsel did not have a duty to object to the testimony regarding Smidl's refusal to submit to a preliminary breath test because the refusal was admissible under Iowa Code section 321J.5(2)). The district court did not err in admitting that portion of the videotape that showed Amisi agree to take a preliminary breath test. No evidence was admitted regarding the result of the breath test. Admission of evidence that Amisi consented to testing did not violate Iowa Code section 321J.5.

Neither did the district court abuse its discretion in admitting under Rule 5.403 evidence that Amisi consented to preliminary breath testing. That rule provides:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Iowa R. Evid. 5.403. Amisi contends that admission of evidence that he consented to take a preliminary breath test should have been excluded under Rule 5.403 on the basis that it was unfairly prejudicial.

Rule 5.403 “requires the trial court to weigh the probative value of relevant evidence against the danger of unfair prejudice. The probative value of evidence is measured by its tendency to make a material fact more or less probable. Unfairly prejudicial evidence is evidence that

“appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.”

State v. Reynolds, 670 N.W.2d 405, 414 (Iowa 2003) (quoting *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988)).

The challenged evidence consists of a very brief section of the videotape admitted at trial. That section of the video depicts the officer asking Amisi to take a preliminary breath test and shows Amisi consenting. *See*, Exh. 4 at 13:06-13:25; App. --. The video evidence was probative of Amisi's intoxication or lack thereof. Like all Amisi's statements and actions, the request for a breath test and Amisi's response bore on the central issue of intoxication. The probative value of the video footage is not based upon the content of Amisi's consent, but of his physical manifestations of intoxication, i.e. his movements and manner of speech, during the process of obtaining his consent to test.

Further, the danger of unfair prejudice was nearly non-existent under the facts of this case. The test request and consent were conducted in a matter-of-fact manner and depict what the jury would understand was routine part of an OWI stop. *See*, Exh. 4 at 13:06-13:25; App. --. The fact that Amisi cooperated with the investigating officers by agreeing to take a breath test would not have aroused the jury's sense of horror, provoked its instinct to punish, or otherwise triggered the jury to base its verdict on something other than the overwhelming evidence of Amisi's intoxication. Likewise, even

accepting for the sake of argument that the jury might have speculated that Amisi failed the test, that would not have led the jury to convict on the basis of something other than the evidence admitted at trial. The district court did not err in overruling Amisi's objection under Rule 5.403.

Moreover, even if the district court erred in admitting evidence that Amisi consented to a preliminary breath test, any error would be harmless. In reviewing trial court error on appeal, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...." *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008) (quoting Iowa R. Evid. 5.103(a)). Thus, error in an evidentiary ruling that is harmless may not be a basis for relief on appeal. The Court presumes prejudice unless the contrary is affirmatively established. *Id.* When, as here, the defendant claims a nonconstitutional error, the test is whether the rights of the objecting party have been "injuriously affected by the error" or whether the party has "suffered a miscarriage of justice." *Id.* (cleaned up). The Court considers a variety of circumstances in determining the existence of harmless error, including the existence of overwhelming evidence of guilt. *Id.*

Here, there was overwhelming evidence that Amisi operated a motor vehicle while intoxicated. The video evidence admitted at trial shows egregiously impaired driving and Amisi exhibits very obvious indications of impairment during his interactions with officers. Further, as noted, the challenged evidence is brief, non-inflammatory, and would have had no bearing on the jury's verdict.

Amisi argues that the jury would have inferred from his consent to testing and subsequent arrest that he must have failed the test and convicted him on that basis. To the contrary, given the overwhelming evidence of Amisi's intoxication, the jury would have expected Amisi to be arrested no matter whether he took a PBT and no matter what the test results were. Amisi was convicted based upon the evidence of his extremely impaired driving and his physical manifestations of impairment; admission of evidence that Amisi agreed to testing did not affect the verdict. Thus, even if the district court had erred in admitting evidence that Amisi agreed to take a preliminary breath test, any error would be harmless.

Further, to the extent that the State would be required to show that any error in admission of the challenged evidence did not prejudice Amisi's trial on the charge of eluding, the evidence would

show that any error was harmless. There was overwhelming evidence of Amisi's guilt on the eluding charge. The same video evidence that showed Amisi's impaired driving also showed Amisi failing to stop when he was being pursued by a marked squad car with lights flashing and siren blaring and even attempting to leave again after the he pulled into the parking lot and the officer was approaching his vehicle on foot. Exh. 1; App. --. Evidence that Amisi consented to a preliminary breath test was just not material to the eluding charge and would not have affected the outcome of his trial on that count.

The district court did not err in admitting under Iowa Code section 321J.5 evidence that Amisi consented to preliminary breath testing. Neither did the court abuse its discretion in overruling Amisi's objection that this evidence was inadmissible under Iowa Rule of Evidence 5.403 on the basis that the probative value of the evidence was outweighed by the danger of unfair prejudice. But, even if the district court had erred in overruling Amisi's objections to admission of evidence that he consented to testing, any error would be harmless. This Court should reject Amisi's challenge to his conviction.

CONCLUSION

The Court should affirm Bitu Amisi's convictions for operating a motor vehicle while intoxicated, third offense, and eluding.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unlikely to assist the Court in deciding the issue raised on appeal. Therefore, the State waives oral argument. However, if appellant is granted oral argument, counsel for appellee desires to be heard in oral argument, as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **4,400** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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