

IN THE COURT OF APPEALS OF IOWA

No. 2-765 / 11-1128
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BEN SCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGhee,
District Associate Judge.

Ben Scott appeals from his conviction for operating a vehicle while
intoxicated, second offense. **AFFIRMED.**

James S. Blackburn of Blackburn Law Firm, P.L.C., Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, John Sarcone, County Attorney, and David Porter, Assistant County
Attorney, for appellee.

Heard by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Ben Scott appeals from his conviction for operating a vehicle while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2009). He alleges misconduct by the prosecutor and abuse of discretion in several respects by the district court. We affirm.

I. Background Facts and Proceedings.

From the evidence presented at trial, the jury could have reasonably found the following facts. In the early hours of August 1, 2010, Ben Scott was involved in an automobile collision in downtown Des Moines. Officers working foot patrol happened to be nearby the scene and heard the collision. They saw Scott's car continue to drive on, and they believed Scott was attempting to leave the scene of the accident. Scott's car proceeded about two hundred feet before it stopped for traffic that was backed up waiting for a train to clear a railroad crossing.

The officers ran up to Scott's vehicle. Scott was ordered to turn off the car and put his hands on the steering wheel. Instead, Scott reached over and put the car in drive. One officer then grabbed Scott by the head. The other officer reached through the passenger window, put the car in park, and took the key out of the ignition. The car door was opened, and Scott was ordered multiple times to get out of the car. When he refused and reached towards the center of the car, an officer pulled Scott from the car and pushed him to the ground. Scott was ordered to give the officer his hands. He refused and kept his hands trapped under his body. Unable to get Scott's hands freed, the officer kned Scott in the rib area. Scott then complied, and the officer was able to obtain control of Scott's hands and handcuff him. Thereafter, the officer smelled alcohol on Scott's

breath and observed Scott's speech was slurred and his eyes bloodshot and watery. Scott was transported to the Des Moines Police Department.

At the police department, Scott was placed in its Datamaster Room. He was interviewed by an officer, and the interview was recorded by the camera in the room. The officer observed Scott's eyes to be bloodshot and watery and that Scott had the strong odor of an alcoholic beverage. During the interview, Scott was very upset, his voice cracking at times. His speech at times was slurred. Scott continually talked about the accident, vehemently telling the interviewing officer the other vehicle had struck his. The officer stated to Scott several times that Scott was there because the officers believed he had been driving under the influence, not because of the accident, and Scott acknowledged such. The officer told Scott the accident would be sorted out later. At one point, Scott volunteered, "I'm not that fucking drunk." He later stated he had not had anything to drink for a few hours. The officer asked Scott if he would consent to a field sobriety test and a preliminary breath test; Scott refused both.

Scott was ultimately charged with OWI second offense, leaving the scene of an accident, interference with official acts, and failure to have insurance. A trial date was set for all four charges, and Scott agreed to have the OWI charge tried by jury and the remaining charges tried to the bench.

A jury trial on the OWI charge was held in December 2010, and the jury returned a guilty verdict. The district court found Scott was not guilty on the remaining charges. The court thereafter granted Scott's motion for a new trial on the OWI charge, and it set aside the jury's guilty verdict because it found the

evidence contained in one of the officer's depositions taken before trial materially misled Scott's trial counsel.

At a hearing before the second trial, the State, on its own motion and without any complaint by Scott, asserted to the district court that Scott's trial counsel had been ineffective in the case. It requested the court conduct a colloquy with Scott as to his satisfaction with his trial counsel, which Scott's trial counsel resisted. The court, "in an abundance of caution," agreed to make an inquiry of Scott, and Scott stated he wanted his trial counsel to continue representing him.

Thereafter, Scott, by pretrial motion, requested he be allowed to present evidence of his acquittals in the other three charges. He explained the officers were only involved as a result of the accident, and his innocence of the leaving the scene of an accident charge¹ was necessary to explain his state of agitation at the police station, particularly since excitement and agitation were indicia of intoxication of alcohol.² The State resisted, asserting the acquittal evidence was irrelevant because Scott was not standing in judgment on the hit and run or interference with official acts charges, though it noted it was "relevant that the police believed he was involved in an accident." The court declined to rule at that time, but it stated it did not think the acquittals were relevant.

The matter proceeded to trial before a second jury. The State's opening argument stated to the jury:

¹ The "leaving the scene of an accident" charge was referred to as the "hit and run" charge by both parties throughout the trial proceedings.

² See Iowa Criminal Jury Instruction 2500.5: "A person is 'under the influence' when, by drinking liquor and/or beer, one or more of the following is true: [His] [Her] emotions are visibly excited."

On August 12, 2010, [Scott] was involved in an accident just down the street from the Court center. What happened was, according to the facts, a cab driver pulls out. [Scott] sideswipes the car. He doesn't stop. The facts will show he continues to drive down Third Street. [Two officers] observed this take place while on foot.

At the trial, the interviewing officer testified that he smelled the odor of alcohol coming from Scott. He described Scott as excited, talkative, and angry, and he stated Scott had blood shot and watery eyes, and slurred, thick, and kind of mumbled speech. He testified Scott's gait was unsteady and he had balance issues. The police video-recording from the interview was then played before the jury, showing the jury that Scott vehemently objected to being charged with a hit-and-run offense. The officer further testified he was trying to explain to Scott "that regardless of whether there was a hit and run or not, to be operating while intoxicated is illegal." He testified Scott had difficulty reading the implied consent advisory given to him. The jury ultimately found Scott guilty of the OWI as charged.

Scott filed numerous posttrial motions, including a motion for new trial. All were denied by the district court. Scott now appeals, asserting the prosecutor and the trial court erred in various respects, and as such, he is entitled to dismissal of his charge or a new trial. We address his arguments in turn.

II. Scope and Standards of Review.

We review constitutional claims de novo. *Ennenga v. State*, 812 N.W.2d 696, 700 (Iowa 2012). We review the district court's ruling on general evidentiary issues for an abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001). "An abuse of discretion occurs when the trial court exercises its discretion

'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Richards*, 809 N.W.2d 80, 90 (Iowa 2012) (citation omitted). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001). We will reverse the court's decision on admissibility of evidence only when there has been a clear abuse of discretion. *State v. Roth*, 403 N.W.2d 762, 765 (Iowa 1987).

III. Discussion.

A. Alleged Prosecutorial Misconduct.

Scott asserts the prosecutor committed misconduct in his second OWI trial, arguing the prosecutor misrepresented information and misled the trial court. Scott also argues his constitutional right to counsel of his choice was violated by the prosecutor's allegations that his trial counsel was not competent and was ineffective.

The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. Evidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith.

The second required element is proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial. "Thus, it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." In determining prejudice the court looks at several factors "within the context of the entire trial."

State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003) (internal citations omitted).

Even assuming, without deciding, that the prosecutor committed misconduct and inappropriately made disparaging remarks against Scott's trial counsel in front of Scott and the trial judge, Scott cannot establish the requisite

prejudice. Here, the prosecutor's alleged misrepresentations were corrected by trial counsel, and all of the examples cited by Scott were argued outside the presence of the jury. Similarly, the prosecutor's allegations of ineffectiveness were also argued outside the presence of the jury. Moreover, the court conducted a colloquy with Scott, and Scott stated he wished to keep his trial counsel. His trial counsel continued to represent Scott throughout his second OWI trial (and this appeal), and he consequently was not denied choice of his counsel. We find no prejudice and accordingly affirm on these issues.

B. Alleged District Court Errors or Abuse of Discretion.

1. Exclusion of Evidence of Acquittals.

Scott argues the district court erred in excluding evidence of his prior acquittals on the other three charges. In general, evidence which is relevant is admissible, while evidence that is not relevant is not admissible. Iowa R. Evid. 5.402. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401; *State v. Alberts*, 722 N.W.2d 402, 410 (Iowa 2006).

Here, Scott was on trial for OWI, second offense, not leaving the scene of an accident. His acquittal of the latter charge is not relevant to the determination in the case at hand and did not tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. "[J]udgments of acquittal are not generally relevant because they do not prove innocence; they simply show that the government did not meet its burden of proving guilt beyond

a reasonable doubt.” *Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir. 1992) (internal citations omitted). We conclude the district court did not abuse its discretion in excluding the evidence of Scott’s acquittals because they were not relevant.

However, even if the acquittal evidence was relevant, we find its omission was harmless. See *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (recognizing not all evidentiary errors require reversal); see also Iowa R. Evid. 5.103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . .”). The harmless-error analysis under Iowa Rule of Evidence 5.103(a) “accepts that error has seeped into the trial, but does not allow the error to serve as grounds for reversal of the conviction or other relief if the overall circumstances affirmatively establish the error did not affect the substantive rights of the defendant.” *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). Here, Scott’s counsel was able to suggest to the jury, both in cross-examination as well as in his closing argument, that Scott did not commit a hit-and-run. Additionally, the video of the interview played for the jury shows Scott vehemently denied he was responsible for the hit-and-run, as well as his anger and frustration with the police officers’ treatment of him. Consequently, even if the acquittal evidence should have been allowed, Scott was able to make his arguments to the jury that his behavior that night was caused by the events that had occurred that night and not because he was intoxicated. Accordingly, we affirm on this issue.

2. Exclusion of Snippets of a Deposition.

On the day of Scott's second trial, a police officer, subpoenaed to testify at trial, failed to appear. That same officer had given a deposition prior to the first trial. Scott sought to introduce three questions and answers of that deposition at trial. The State resisted, claiming Scott's request took the testimony out of context and was a mischaracterization of the testimony, but the State agreed to have the entire deposition read in. See Iowa R. Evid. 5.106(b). The district court ruled it would allow the full deposition into the record. It would not allow specific sections to be read before the jury, unless the parties could reach a compromise as to what parts would be read. Each party stood their ground, and no compromise was reached. Scott declined to read the entire deposition to the jury; so none of it was read. Scott asserts the court abused its discretion in not allowing him to read to the jury selected portions of the deposition.

When a deposition, or part thereof, is introduced by a party, any other part of the deposition "is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation." Iowa R. Evid. 5.106(a). Furthermore, upon request by an adverse party, the court may, in its discretion, require the offering party to introduce any other part of the deposition which is admissible under rule 5.106(a). Iowa R. Evid. 5.106(b); see also *State v. Austin*, 585 N.W.2d 241, 243-44 (Iowa 1998). Scott makes no substantive argument that the remaining portions of the deposition were inadmissible. We find no abuse of discretion in the district court's ruling that the entire deposition should be admitted rather than just a few snippets. Scott was afforded the opportunity to introduce the evidence he wanted into the record, and he declined to do so. He

cannot establish he was prejudiced by the district court's ruling. Accordingly, we affirm on this issue.

3. *Exclusion of Treatise.*

On cross-examination, Scott sought to ask the interviewing officer about statements contained in the National Highway Traffic Safety Administration's materials pursuant to rule 5.803(18). Scott maintained the officer was an expert witness, and he wanted to question the officer concerning statements in the treatise of studies about a police officer's subjective estimates of blood alcohol content and its accuracy, as well as a police officer's ability to even detect the odor of alcohol. The state objected, and the district court denied Scott's request to use the materials in his cross-examination. On appeal, Scott argues the district court's ruling was an abuse of discretion. We disagree.

Even assuming without deciding the officer was an expert witness, we find the district court did not abuse its discretion because the treatise content sought to be used in cross-examination was irrelevant. The district court explained that the studies in the treatise sought to be used for cross-examination purposes were not applicable to the officer's testimony because he had not estimated Scott's blood alcohol content. Indeed, there was no evidence at trial of Scott's blood alcohol content. The court did not abuse its discretion in excluding the treatise materials.

Additionally, even if the district court should have allowed the treatise materials, the omission was harmless. The information from the treatise Scott sought to use would not have diminished the State's evidence against him that he was operating under the influence of alcohol that evening. The court's ruling

did not affect Scott substantial rights and result in a miscarriage of justice. We therefore affirm on this issue.

4. *Re-enactment of Actions by Officer.*

Finally, Scott argues the district court erred when it denied his request to have one of the officers re-enact how loudly he yelled at Scott and demonstrate, in real time, how he put Scott in a headlock and how hard he knee-kicked Scott. The record reflects the court did not limit the officer's demonstration of the loudness or tone of voice he used in talking to Scott. The officer was allowed to demonstrate how he put Scott in a headlock. When asked to repeat the re-enactment in "real time," the court sustained the State's objection. The officer demonstrated how he pulled Scott from the car and how he knee-kicked Scott when he was on the ground. When asked to show how hard he applied the knee strikes, the court sustained the State's objection. The admission or exclusion of demonstrative evidence rests largely within the trial court's discretion. *State v. Thornton*, 498 N.W.2d 670, 674 (Iowa 1993). The trial court did not abuse its discretion in denying Scott's requests for repeated re-enactments by the officer. We therefore affirm on this issue.

IV. *Conclusion.*

For the foregoing reasons, we affirm Scott's judgment and sentence for OWI, second offense.

AFFIRMED.