STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2220

State of Minnesota,
Respondent,

vs.

Robby Lee Vaughn,
Appellant.

Filed April 8, 2008
Affirmed
Crippen, Judge*

Winona County District Court
File No. 85-CR-05-783

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Charles E. MacLean, Winona County Attorney, Steven R. Ott, Assistant County Attorney, Winona County Courthouse, 171 West Third Street, Winona, MN 55987 (for respondent)

John M. Stuart, State Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

Challenging his conviction on charges brought after investigation of a car crash, appellant Robby Vaughn contends that the district court erred in refusing to grant a mistrial following questioning by the prosecutor on appellant's prior contacts with police. Although the prosecutor's questioning was not excusable, we affirm in light of the isolated nature of the questioning and the volume of evidence of appellant's guilt.

FACTS

Following an accident investigation in October 2005, appellant was charged with second-degree driving while impaired, second-degree refusal to submit to chemical testing, obstruction of legal process, and possession of an open container of alcohol in a motor vehicle. Deputy Kate Bernatz of the Winona County Sheriff's Department responded to the accident report and testified at trial. During the prosecutor's direct examination of this witness, the following exchange occurred:

> [THE PROSECUTOR:] Deputy Bernatz, are you familiar with the Defendant in this case?
>
> [DEPUTY BERNATZ:] Yes, I am.
>
> [THE PROSECUTOR:] And how is that?
>
> [DEPUTY BERNATZ:] I've had dealings with the Defendant in previous contacts.
>
> [THE PROSECUTOR:] And what types of contacts would that be?
>
> [DEPUTY BERNATZ:] When I worked here at the courthouse as a security officer, I had many dealings with the

> Defendant when he would come to court for various things. Um, then I also had dealings with him when I worked as an officer for the Goodview Police Department, as well as in the jail when I worked as a detention deputy, he was in the jail.

At this point in Deputy Bernatz's testimony, the district court stated that "we're going to take a little break right now" and that "[w]e have a few things to discuss." After the jury was excused, the district court openly considered a mistrial. Appellant then moved for that relief, but the district court ultimately decided to issue a cautionary instruction instead. The court instructed the jury that the testimony was relevant only on identification and was not to be used as proof of character or as proof of the charged conduct.

At the conclusion of the trial, appellant requested that the court revisit the issue of a mistrial. Once again denying a mistrial, the court explained that the concern that the prosecutor's questioning of Deputy Bernatz elicited inadmissible and prejudicial information was "to some extent ameliorated" by the fact that during cross-examination of the police officers who testified prior to Deputy Bernatz, appellant asked the officers about their prior contacts with appellant. A jury found appellant not guilty of driving while impaired but guilty of refusal to submit to testing, obstructing legal process, and possession of an open bottle. The district court denied appellant's posttrial motion for a new trial.

D E C I S I O N

We will affirm the denial of a mistrial in the absence of an abuse of discretion. *See State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). The district court is in the

best position to evaluate whether prejudice has occurred warranting a mistrial. *State v. Marchbanks*, 632 N.W.2d 725, 729 (Minn. App. 2001). The district court should deny a motion for a mistrial unless there is a reasonable probability that the outcome of the trial would have been different had the event that prompted the motion not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

Appellant argues that he was denied a fair trial by the quoted testimony of Deputy Bernatz, which implied that he had a criminal record. Generally, evidence from which a jury could infer that a defendant has a criminal record is inadmissible. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But when a witness's reference to a defendant's prior criminal record "is of a 'passing nature,' or the evidence of guilt is 'overwhelming,' a new trial is not warranted because it is extremely unlikely 'that the evidence in question played a significant role in persuading the jury to convict.'" *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quoting *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978)); *see also State v. Stanifer*, 382 N.W.2d 213, 218 (Minn. App. 1986) (holding that a defendant was not denied a fair trial when a police officer's testimony, which might have implied that the defendant had a prior criminal record, amounted to a comment made in passing, the evidence of the defendant's guilt was strong, and the possibility of prejudice was slight); *State v. Stephani*, 369 N.W.2d 540, 548 (Minn. App. 1985) (holding that reversal was not warranted when testimony that implied that a defendant was involved in an unrelated criminal case was unlikely to result in substantial prejudice because the remark was made in passing and the evidence of the defendant's guilt was strong), *review denied* (Minn. Aug. 20, 1985); *State v. Farr*, 357

N.W.2d 163, 166 (Minn. App. 1984) (holding that a reversal was not necessary when testimony suggesting that a defendant may have been suspected of committing other crimes was made in passing and the evidence of the defendant's guilt was overwhelming).

The district court did not abuse its broad discretion in denying a mistrial. Although the objectionable testimony of Deputy Bernatz was not necessarily made "in passing," it was isolated and it did not reoccur, and the evidence of appellant's guilt was overwhelming. *Cf. State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007) (explaining, in a prosecutorial misconduct context, that an analysis of whether a verdict was surely unattributable to improper references to witness credibility includes considering whether the improper references were brief, whether they were emphasized or dwelled on, whether they were relevant to a central issue, and whether the evidence of guilt was overwhelming).

The elements of refusal to submit to testing are (1) probable cause to arrest for driving while impaired, (2) a request by a police officer to submit to a chemical test, and (3) refusal to submit to the requested chemical test. Minn. Stat. § 169A.52, subd. 3 (2004); 10A *Minnesota Practice*, CRIMJIG 29.28 (2005). Although appellant was acquitted on a driving offense, there was overwhelming evidence that Deputy Bernatz had probable cause to arrest appellant for driving while impaired. Appellant was found alone with a vehicle that had left the roadway, gone down an embankment, and gotten lodged among trees. The officers observed numerous indicia that appellant was under the influence of alcohol, including the odor of an alcoholic beverage, slurred speech,

bloodshot eyes, and oral and physical belligerence. Appellant also admitted to Deputy Bernatz that he had consumed two beers. On the second and third elements, Deputy Bernatz testified that she requested that appellant submit to a chemical test and that appellant refused, and there was no evidence indicating otherwise.

Obstruction of legal process requires obstruction, interference, or resistance by a defendant with a police officer engaged in the performance of official duties. *See* Minn. Stat. § 609.50, subd. 1(2) (2004). The evidence of guilt was overwhelming on this charge as well. Three Winona police officers testified that appellant refused to show them his hands and move away from the car, wrapped his arms around a tree to prevent the officers from physically pulling him away from the car, refused to lay down on the ground, and physically resisted the officers' attempts to handcuff him, which ultimately led to the officers "macing" appellant to force his compliance.

The evidence of guilt on the charge of possession of an open container of alcohol in a motor vehicle was also overwhelming. Deputy Bernatz and one of the Winona police officers both testified that they found two opened cans of beer inside a small cooler on the floor of the passenger side of the car, and there was no dispute at trial that immediately preceding the car accident, appellant's car was on a public highway. *See* Minn. Stat. § 169A.35, subd. 3 (2004) (providing that it is a crime for a person to have in his possession, while in a motor vehicle upon a public highway, any receptacle containing an alcoholic beverage, which has been opened or the contents of which have been partially removed).

Appellant contends that the district court should have explicitly stricken Deputy Bernatz's testimony. Although striking the testimony may have diminished its effects, it was not necessary in light of the brief nature of the objectionable testimony and the overwhelming evidence of guilt. Moreover, the district court gave a cautionary instruction that pointedly limited the relevancy of appellant's prior contacts with police. Jurors are presumed to follow a district court's instructions, *State v. Miller*, 573 N.W.2d 661, 675-76 (Minn. 1998), and "the giving of cautionary instructions by the [district] court is a significant factor favoring the denial of a motion for a mistrial." *State v. Caldwell*, 322 N.W.2d 574, 590 (Minn. 1982).

Appellant also contends that a mistrial was warranted in light of the willfulness of the prosecutor's questioning in circumstances when there was little need to establish the identity of appellant, and a clear appearance that the questioning was aimed at showing that appellant had prior contacts with police. *See Haglund*, 267 N.W.2d at 506 (stating that a reviewing court is more likely to reverse when the prosecutor intentionally elicited evidence suggesting that a defendant has a criminal record, knowing that such evidence is inadmissible). It is evident that the district court understood that the admissibility of the evidence was questionable but carefully weighed the choice to declare a mistrial and the alternative of giving the jury a particular limiting instruction. The court also properly weighed the fact that the defense strategy involved questioning police on prior contacts with defendant in order to explore whether appellant's behavior at the time of his arrest was consistent with behavior at times when he was sober. And, as stated earlier, our

deference to the district court's judgment is enlarged by the overwhelming evidence and the isolated occurrence of the prior-contacts evidence.

Appellant contends that the case is governed by the supreme court's decision in *State v. Strommen*, 648 N.W.2d 681, 686-9 (Minn. 2002) (finding reversible error on a similar line of questioning). Careful review of this significant precedent shows distinctions that demand a different decision in this case. In *Strommen*, the wrongful elicitation of evidence included not only police testimony but more particular and inflammatory testimony of an accomplice. Moreover, the district court in the immediate case gave a more limiting cautionary instruction than that given in the *Strommen* trial, and the evidence here was more compelling to support the jury's verdict. Unlike *Strommen*, the record here shows no reason to believe that appellant was convicted on character evidence.

Both parties allude to the significance of the jury acquitting appellant on certain charges and finding him guilty on others. The district court weighed this consideration and observed, in response to post-trial motions, that the verdict reflected a balanced, measured assessment of the evidence on the various charges. This fact is another reason why the district court did not abuse its discretion by denying appellant's motion for a mistrial. *Cf. State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990) (noting that it was extremely unlikely that a prosecutor's improper comments affected a jury when the jury acquitted a defendant of other counts).

Affirmed.