STATE OF MINNESOTA
IN COURT OF APPEALS
A09-19

State of Minnesota,
Respondent,

vs.

Jodi Kaye Johnson,
Appellant.

Filed February 9, 2010
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-K3-08-001130

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

John J. Choi, St. Paul City Attorney, Maureen J. Dolan, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Shumaker, Judge; and Worke, Judge.

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

WORKE, Judge

On appeal from her conviction of driving while impaired, appellant argues that the district court abused its discretion (1) in precluding testimony from appellant's

physician regarding her mental deficiencies, and thereby preventing her from fully defending against the charge, and (2) in admitting statements appellant made, which were prejudicial but not relevant or probative. We affirm.

D E C I S I O N

Appellant Jodi Kaye Johnson was convicted of third-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2006) after officials at her daughter's school contacted St. Paul Police to report that appellant was driving her daughter home from a school function while intoxicated. Appellant now challenges two evidentiary rulings by the district court: the preclusion of her physician from testifying, and the admission of appellant's crude and sexual remarks made to officers during her field sobriety tests and booking at the police station. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

Appellant's Physician

Appellant first challenges the district court's preclusion of her primary care physician, Dr. Timothy Rumsey, from testifying. On the night of her arrest, appellant attended a function at her daughter's school. Several school officials smelled alcohol on appellant's breath and noted her slurred and nonsensical speech. At trial, appellant sought to call Dr. Rumsey as a witness. Appellant argued that Dr. Rumsey's testimony about her borderline mental retardation and communication problems would have

countered testimony from school officials intended to be introduced by the state; specifically, that her speech contained irregularities, such as slurring, and that additional time was needed to communicate with her even when she is sober.

The state argued that Dr. Rumsey's proposed testimony was not relevant and that appellant was, instead, offering the testimony in an effort to confuse the jury about the propriety and legality of prosecuting a mentally handicapped person. The district court precluded the testimony, concluding that "even if . . . the evidence is relevant, . . . the danger of unfair prejudice, confusion of the issues or misleading the jury substantially outweighs any value in permitting the testimony proposed."

Evidence is considered relevant if 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." Minn. R. Evid. 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403. Dr. Rumsey's testimony, at best, would have offered an alternative explanation as to why appellant was slurring and speaking unintelligibly when conversing with school officials and police officers. At worst, the evidence might have raised the issue of how appellant's mental deficiencies would impact her guilt and thereby confuse the jury, while having nothing to do with the salient issue of appellant's intoxication. The district court did not abuse its discretion in concluding that any relevance of the testimony was substantially outweighed by the danger of confusing the issues and misleading the jury, and therefore appropriately precluded Dr. Rumsey from testifying.

Appellant also argues that the district court's preclusion of Dr. Rumsey from testifying impaired her constitutional right to present a meaningful defense protected by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 7 of the Minnesota Constitution. *See* U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 7; *Crane v. Kentucky*, 476 U.S. 683, 687, 106 S. Ct. 2142, 2145 (1986); *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992). But the right to present a defense is not an unlimited right. *State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003). A defendant still "must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of the guilt and innocence." *Richards*, 495 N.W.2d at 195 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)). Specifically, "[e]vidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues may be excluded" over a defendant's insistence that the evidence is essential to present a meaningful defense. *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001) (quotation omitted). Because the testimony of Dr. Rumsey was properly precluded by the district court as evidence that would confuse or mislead the jury, appellant's constitutional right to present a meaningful defense was not infringed upon.

Appellant's Statements

Appellant also challenges the district court's admission of her statements that she would "piss, s**t and fart" for the officers during her field sobriety tests, her sexual remarks pertaining to the protective pat-down search conducted thereafter, and her asking officers if they wanted to "smell her fishy underwear" as she was being booked at the

police station. Appellant argues that the district court abused its discretion in admitting these statements because they were not relevant to the crimes with which she was charged. Alternatively, appellant asserts that even if these statements were relevant, the prejudicial impact substantially outweighs the probative value. The state contends that these statements were relevant because a material fact at issue was whether appellant was under the influence of alcohol, and these statements make it more probable that appellant was intoxicated.

The district court has broad discretion in relevancy determinations. *State v. Swain*, 269 N.W.2d 707, 714 (Minn. 1978). Rule 403 favors the admission of relevant evidence. *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Unfair prejudice must be more than merely the damaging potential of the evidence; the evidence must tend to persuade the jury by illegitimate means. *Id.* "Evidence that is probative, though it may arouse the passions of the jury, will still be admitted unless the tendency of the evidence to persuade by illegitimate means overwhelms its legitimate probative force." *Id.* at 478-79.

Arresting Officer Heather Kuchinka testified on direct examination as follows:

> Q: Now, did [appellant] make any statements to you while outside of your vehicle?
> A: After I placed her under arrest, she seemed to get very agitated, which is also another sign of someone who is intoxicated. We kind of coined it the drunk rollercoaster. You have to be very concerned for your and the person's safety because their moods can change very drastically, very quickly. And she seemed to get pretty upset once I placed her under arrest, and she began speaking very inappropriately to all of us officers.
> . . . .
> Q: Can you tell us what you mean by she was speaking inappropriately?

> A: She was very upset about being under arrest and the way that she had performed on the tests, and she said something to the effect of, "I can give you other tests if you would like," and then her quote was, "I can," and I'm quoting, "just piss, s**t and fart for you also." And she continued to repeat those three words over and over and over again, and was yelling them at me.

Officer Kuchinka next recalled conducting a protective pat-down search of appellant. Kuchinka testified that, as she searched around appellant's chest area, appellant remarked that the search felt good and that she liked being touched there. Kuchinka then detailed appellant registering a blood-alcohol concentration above the legal limit at the police station, and the events occurring after she informed appellant of the test results:

> Q: What was her demeanor like at this time?
> A: She was upset. She was beginning to get agitated much like she had become out on the street.
> . . . .
> Q: And did [appellant] make any statements at that point in time?
> A: She was, again, making sexual comments about her breasts . . . and how good it felt to have them touched. And then she also made a reference to asking if anybody wanted to smell her fishy underwear.

Appellant objected, arguing that the officer's recounting of appellant's statements was irrelevant and substantially more prejudicial than probative. In overruling appellant's objections, the district court did not err in its initial determination that the statements were relevant because appellant's bizarre statements evidenced agitation that was a sign of her impairment.

We must now determine whether the probative value of these statements is substantially outweighed by the prejudicial impact. Appellant argues that these

statements were prejudicial because they were crude and inflamed the passions of the jury. Although this evidence was damaging to appellant, it is unclear what, if any, illegitimate means were present in the state presenting this testimony. The probative value of her mood swings and irrational behavior evidencing impairment was not substantially outweighed by any ascertainable illegitimate means employed by the state. Accordingly, the district court did not abuse its discretion in admitting these statements into evidence.

Affirmed.