STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1430

State of Minnesota,
Respondent,

vs.

John Alvin Street,
Appellant.

Filed August 10, 2010
Affirmed
Lansing, Judge

Olmsted County District Court
File No. 55-CR-09-1043

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

Terry L. Adkins, Rochester City Attorney, J. Christiaan Phillips, Assistant City Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Lansing, Judge; and Stauber, Judge.

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

LANSING, Judge

A jury found John Street guilty of second-degree test refusal and not guilty of second-degree driving while impaired. On appeal, Street argues that a new trial is required because the exclusion of Street's testimony that he suffered from a traumatic brain injury prevented him from presenting a reasonable-refusal defense and from explaining his demeanor to the jury. Because Street understood that he was being asked to take a breath test when he refused and because the district court acted within its discretion in excluding evidence that could cause unfair prejudice and confusion, we affirm.

F A C T S

The facts underlying John Street's February 2009 arrest on an alcohol-related driving offense are essentially undisputed. An Olmsted County deputy stopped Street in Rochester at 1:40 a.m. for speeding. The deputy detected the smell of alcohol on Street's breath, observed that Street was having trouble balancing, and noticed that he was "not very coherent" in responding to questions. The deputy asked Street if he had been drinking and Street first said, "I'm working on it," and then, "[O]f course I have."

When the deputy told Street that he believed that Street had too much to drink to be driving, Street responded, "probably, probably, probably." The deputy then asked if he would take field sobriety tests and a preliminary breath test and Street replied, "probably not." The deputy told Street that he would have to take him into custody, and Street tried to hug him. Before Street was arrested, he told the deputy and the other

officers present that he suffered from a traumatic brain injury. At the detention center, the deputy read the implied-consent advisory to Street and gave him a telephone and a directory to contact an attorney. Street became agitated and antagonistic and, after a few minutes, told the deputy that he was finished using the phone. The deputy then asked Street if he would take a breath test. Instead of answering the question, Street called the deputy an offensive name. The deputy repeated the question and Street said, "probably not." Street was charged with second-degree driving while impaired and second-degree test refusal.

Before trial on the two charges, the state filed a motion in limine to preclude the defense from presenting nonexpert testimony or arguments on the characteristics of people who have suffered traumatic brain injuries. At that point, Street had not provided notice of an affirmative defense. Street was seeking to subpoena the coordinator of an electronic-home-monitoring program to testify about Street's physical capacity to provide a breath sample. The district court denied the request for a subpoena after explaining to Street that caselaw does not allow an affirmative defense of inability to blow unless the driver makes an attempt to blow into the breath-testing machine.

After further discussion about potential testimony, the district court ruled that neither Street nor the coordinator of the monitoring program was qualified to testify about the typical mannerisms of a person with traumatic brain injury. Street does not appeal the ruling excluding the testimony of the coordinator of the monitoring program. At the same motion hearing, the state expressed concern that Street would argue that his refusal was reasonable because his injury required that he be given more time to

understand the implied-consent advisory. The court explained that a person's inability to fully understand the implied-consent advisory is not a basis for an affirmative defense so long as the person understands that he is being offered a chemical test.

On the first day of trial, the state and the defense again discussed whether Street would attempt to present an affirmative defense, and the state took the position that the issue of Street's traumatic brain injury was not relevant to any affirmative defense and, therefore, evidence relative to the injury should not be admitted because it would improperly influence the jury. The state also noted that no notice of an affirmative defense had been provided. The district court referred to the previous discussion on the motion in limine and again stated that the existence of traumatic brain injury would not establish an affirmative defense of reasonable refusal.

On the second day of trial, Street formally notified the state that he intended to present a defense of reasonable grounds for refusal. The district court repeated its ruling that so long as the person understands that he is being offered a test, "[t]here is no defense to refusal that [a person] does not understand the consequences of refusal or is not able to make a reasonable judgment as to what course of action to take. . . . [T]here's . . . no [mental incapacity] defense, [so] the thought process that is going on is irrelevant."

The arresting officer testified for the state, and Street testified in his own defense. Street's testimony was frequently interrupted by the prosecutor and the district court, who were attempting to enforce the court's ruling and prevent Street from referring to his

traumatic brain injury or its symptoms. Street's testimony, even when it was not interrupted, was at times confused and disjointed.

The district court's instructions to the jury at the end of the trial included an instruction that "[a] refusal need not be indicated by express language but can be indicated by both conduct as well as failure to directly respond to an officer's request to take a test." The district court did not instruct the jury on an affirmative defense to test refusal. The jury returned a verdict of guilty on the charge of second-degree test refusal and not guilty on the charge of second-degree driving while impaired. Street appeals his conviction of second-degree test refusal.

D E C I S I O N

I

The district court determined as a matter of law that Street's testimony describing his traumatic brain injury was not relevant because a general lack of comprehension or an individual's thought process does not provide a sufficient basis for an affirmative defense of reasonable refusal to submit to chemical testing under the DWI code. We turn first to the question of whether lack of understanding caused by a traumatic brain injury can constitute a defense to the crime of test refusal. Our inquiry is guided by four principles.

First, "Any person who drives . . . a motor vehicle within [Minnesota] or on any boundary water of [Minnesota] consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." Minn. Stat. § 169A.51, subd. 1 (2008). It is a crime for any person to refuse to submit to a chemical test of the person's

blood, breath, or urine. Minn. Stat. § 169A.20, subd. 2 (2008). The district court and the parties assumed that refusal based on "reasonable grounds" constitutes an affirmative defense to civil and criminal penalties for test refusal. Whether the affirmative defense is available to the criminal charge of test refusal has not been squarely addressed by reviewing courts. This issue was not raised during the proceedings and, for purposes of our review, we assume the defense is available. *See* Minn. Stat. § 169A.53, subd. 3(c) (2008) (discussing defense in administrative revocation proceedings); *State v. Johnson*, 672 N.W.2d 235, 242 (Minn. App. 2003) (holding that jury instructions including affirmative defense of reasonable refusal was "substantially correct statement of the law"), *review denied* (Minn. Mar. 16, 2004).

Second, every criminal defendant has the right to be treated with fundamental fairness and "afforded a meaningful opportunity to present a complete defense" under the Minnesota and U.S. Constitutions. *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)). If exclusion of evidence violates a defendant's constitutional right to present a defense, the decision will be reversed unless it is harmless beyond a reasonable doubt. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). A ruling is prejudicial and therefore reversible if there is a reasonable possibility the error may have contributed to the conviction. *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986).

Third, evidence must be relevant to be admitted. Minn. R. Evid. 402. We review district court determinations of the relevancy of evidence for abuse of discretion. *State v. Horning*, 535 N.W.2d 296, 298 (Minn. 1995). To be relevant, the evidence must

"logically or reasonably tend[] to prove or disprove a material fact in issue, or tend[] to make such a fact more or less probable, or afford[] the basis for or support[] a reasonable inference or presumption regarding the existence of a material fact." *Horning*, 535 N.W.2d at 298; *see* Minn. R. Evid. 401, comm. cmt. (stating that fact to be established must be "of some consequence to the disposition of the litigation").

Finally, the state is not required to prove a particular mental state when a person is charged with refusing to take a chemical test for impairment. Minn. Stat. § 169A.20, subd. 2; *see also* 10A *Minnesota Practice*, CRIMJIG 29.28 (2006) (listing elements of crime). "[A] driver of a motor vehicle in Minnesota is deemed to have consented to the testing procedures" through the process of applying for and receiving a Minnesota driver's license. *State, Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 418 (Minn. 1979). There is a statutory right to revoke this consent by refusing a test, but a person's physical or mental incapacity to make this choice or understand its consequences does not negate his consent. *Id.* at 419 (stating that implied consent of unconscious driver unable to refuse test continued and permitted use of blood sample in implied-consent proceeding); *State, Dep't of Pub. Safety v. Hauge*, 286 N.W.2d 727, 728 (Minn. 1979). "Under the implied[-]consent statute, any inquiry into the driver's capacity to make a knowing, voluntary, or intelligent choice is immaterial." *Hauge*, 286 N.W.2d at 728. Whether a driver's incapacity to make a knowing choice to revoke his consent is voluntary or involuntary does not change this rule. *Casci v. Comm'r of Pub. Safety*, 360 N.W.2d 443, 445 (Minn. App. 1985). Creating an exception that allows for a defense of

involuntary incapacitation would be "inconsistent with a primary purpose of the statute, that is, to promote public safety on the highway." *Id.*

Street contends that he refused to take the chemical test because he did not understand the advisory as a result of his brain injury and that this refusal was reasonable. But a defendant's lack of understanding or confusion is a reasonable ground for refusing to take a chemical test only if the police have contributed to the confusion. *See State v. Beckey*, 291 Minn. 483, 485-87, 192 N.W.2d 441, 444-45 (1971) (holding refusal was reasonable when police did not distinguish between *Miranda* rights and implied-consent advisory and defendant reasonably believed he had right to remain silent and speak to attorney before taking test); *State, Dep't of Pub. Safety v. Lauzon*, 302 Minn. 276, 277, 224 N.W.2d 156, 157 (1974) (stating that refusal based on attorney's advice could only be affirmative defense if police misled the driver into believing that refusal on this basis was reasonable or failed to explain to confused driver that failure to test would result in loss of license); *Maietta v. Comm'r of Pub. Safety*, 663 N.W.2d 595, 599 (Minn. App. 2003) (stating that Minnesota caselaw "does not impose an affirmative duty on the part of the police officer to clear up any and all confusion on the part of a driver"), *review denied* (Minn. Aug. 19, 2003).

Under Minnesota law, the critical inquiry is only whether the driver understood he was being asked to take a chemical test. *Yokoyama v. Comm'r of Pub. Safety*, 356 N.W.2d 830, 831 (Minn. App. 1984) (addressing driver's understanding in context of language barrier). "[T]he only understanding required by the licensee is an understanding that he has been asked to take a test." *Id.* The inability of the driver to

understand the consequences of refusal or to make a reasonable judgment on what course of action to take is not a defense to refusal. *Id.* Authorization to drive is conditioned on consenting to chemical testing for impairment or being subject to criminal and civil penalties for refusal. An exception for confusion due to cognitive impairment would undermine the structure and purpose of the statute.

Street testified that he understood he was asked to take a breath test and the recording of the implied-consent advisory confirms that understanding. Although the symptoms of Street's traumatic brain injury were involuntary and may have impaired his ability to fully understand the implied-consent advisory, Street's incapacity to understand the consequence of refusal or make a reasoned decision is not a reasonable ground for refusal. *Hauge*, 286 N.W.2d at 728; *Casci*, 360 N.W.2d at 445; *Yokoyama*, 356 N.W.2d at 831.

In his final argument on this issue, Street contends that even if evidence of his traumatic brain injury was irrelevant to test refusal, it was relevant to whether he was driving while impaired (DWI). He contends that this evidence could explain why he was slurring his words, responding incoherently, and had difficulty balancing. We agree that a description of his traumatic brain injury may have been relevant to this question. Actual impairment, however, is an element of Street's second-degree DWI charge only. The jury found him not guilty of that offense and thus the potential prejudice to his ability to defend that charge is not at issue in this appeal.

II

We turn now to Street's second issue—that even if his traumatic brain injury was not relevant as an affirmative defense, exclusion of this evidence violated his constitutional right to explain to the jury his conduct at the time of his offense. He also argues that he has a right to explain to the jury his demeanor on the stand.

A defendant's constitutional right to give testimony about his intent and motivation is very broad, but "this right is not without limitation . . . and must be balanced against interests served by imposing strict relevancy requirements on the defendant's testimony." *State v. Buchanan*, 431 N.W.2d 542, 550 (Minn. 1988) (citing *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 2711 (1987)). Rule 403 of the Minnesota Rules of Evidence excludes relevant evidence if the probative value of that evidence is "substantially outweighed by the danger of unfair prejudice, confusion, undue delay and waste of time, or needless presentation of cumulative evidence." *Id.* at 551. To cause unfair prejudice, the evidence must persuade by illegitimate means. *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). A district court's determination that evidence is more prejudicial than probative is reviewed for abuse of discretion, and we will only reverse a district court's decision if the defendant was actually prejudiced. *State v. Pearson*, 775 N.W.2d 155, 160 (Minn. 2009).

Street's impairment was evident in his testimony, and the prosecutor noted before trial that Street's cognitive disability was apparent from his appearance and mannerisms. The jury was likely aware of Street's cognitive limitations. But further evidence about Street's injury and its effects may have communicated to the jury that he was unable to

understand his obligation under the implied-consent statute and should not be subject to criminal penalties, despite the structure and purpose of the law. The degree to which a witness's testimony must be restricted to avoid the threat of confusion is committed to the discretion of the district court. *Buchanan*, 431 N.W.2d at 550-51 (stating that district court's conclusion that balance of interests favored exclusion did not violate defendant's constitutional right to present testimony on intent and motivation). Although it is difficult to strike a balance between the harm to Street's case that would be caused by excluding the evidence against the potential to mislead the jury on the limits of a permissible defense, we conclude that the district court did not exceed the bounds of its discretion by excluding the evidence.

In a pro se supplemental brief, Street provides further explanation of his comments to the arresting officer and argues that he should have been offered an alternative chemical test because of his alleged inability to provide a breath sample. The meaning of Street's statements to the police was an issue for jury determination—not for appellate review. *See State v. Sanchez-Diaz*, 683 N.W.2d 824, 833 (Minn. 2004) (deferring to jury's resolution of defendant's ambiguous statement). And Street's right to an alternative test was not presented at trial and may not be considered for the first time on review. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Even if this issue had been raised in the district court, Street was not entitled to alternative chemical tests. *Smith v. Comm'r of Pub. Safety*, 401 N.W.2d 414, 416 (Minn. App. 1987) (stating that offer of additional test is not required when driver does not demonstrate physical inability to provide breath sample), *review denied* (Minn. Apr. 29, 1987); *see also* Minn. Stat.

§ 169A.51, subd. 3 (2008) (requiring offer of alternative test only in cases of refusal of blood or urine testing).

Affirmed.