DIVISION ONE
FILED: 07-27-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0199
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
CRISTIAN BOTOS,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-136224-001 DT

The Honorable Carolyn K. Passamonte, Judge *Pro Tem*

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Cristian Botos challenges his convictions and sentences for two counts of aggravated DUI. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 At approximately 12:30 a.m. on June 11, 2008, Officer Cuthbertson saw a vehicle quickly enter Bell Road, squealing its tires and "fishtail[ing]" over two lanes. The vehicle stopped in front of a gated condominium complex, and Cuthbertson pulled in behind it. Botos exited the vehicle and exhibited signs of alcohol impairment, including watery, bloodshot eyes; walking slowly and leaning on his vehicle for support; and smelling of alcohol. Botos refused to submit to field sobriety tests and was argumentative; Cuthbertson transported him to the local precinct office. Over Botos's physical resistance, Cuthbertson and four other officers executed a warrant around 2:08 a.m. to draw his blood. Subsequent testing revealed that Botos's blood alcohol concentration ("BAC") exceeded .15.

¶3 Because Botos's driver's license was suspended, he was charged with two counts of aggravated DUI: Count 1 (impaired to the slightest degree) and Count 2 (blood alcohol level). A jury found Botos guilty as charged, and he was sentenced to

[1] "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

concurrent four-month jail terms followed by two years of probation. Botos timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

1. The Officer's Testimony

¶4 The defense wanted to elicit testimony from Officer Cuthbertson about prior contacts he had with Botos, claiming such evidence would show that the officer was biased or prejudiced against him. The State moved to preclude the evidence, but argued in the alternative that allowing such testimony would open the door to inquiry on re-direct about the specific nature of the prior contacts (which were apparently arrests leading to DUI convictions). The trial court ruled that the defense could cross-examine the officer in the manner requested, but doing so would open the door for the State to inquire about the nature of the prior contacts. Specifically, the court stated:

> [Y]ou are free to cross-examine this witness about his contact with the defendant but if you go into an area where the State is entitled to go in redirect to the nature of those contacts and what happened at those contacts, then you're opening the door for the State to get into the defendant's prior history regarding DUI.

. . . .

> You may cross-examine this witness about his feelings which would indicate bias or prejudice towards the defendant, but if you talk to this witness about his prior contacts with the defendant, then the State's going to be able to go into the substance of that contact if they need to get a fuller story of what relationship existed between those two individuals at a prior contact. So simply saying you're going to only ask this officer if he had contact with the defendant on previous occasions, and then move on, that's not relevant unless there's something about that contact that's relevant to demonstrate bias or prejudice, and you haven't told me anything that was relevant about it. Simply that it occurred and you're going to infer from the fact that it occurred that there's a bias or prejudice.
>
> . . . .
>
> I'm saying you can't invite or inject error into the trial by asking about a prior contact but then limit[] the State's ability to discuss that contact to fully flush out what the relationship was between those two individuals at that prior contact. So either it all comes in or you don't ask the question and invite the error.[2]

Defendant did not cross-examine the officer.

¶5 Botos contends that the evidence about prior contacts with Officer Cuthbertson "tended to provide context, as it is more readily believable that ill will built up between the two

[2] The court alternatively ruled the proposed testimony inadmissible under Arizona Rule of Evidence 403. Botos does not challenge this ruling on appeal.

men over time and several contacts than in one interaction on one night."[3] As evidence of purported "ill will," Botos points to the officer's alleged statement, "[Y]ou might think about not drinking and driving," when Botos asked whether he could do anything "to get out of jail tonight."

¶6 A trial court has considerable discretion in ruling on the relevancy and admissibility of evidence, and we will not reverse such a ruling absent a clear abuse of discretion. *State v. Hensley*, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984) (citations omitted). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. Amer. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982) (citation omitted). All relevant evidence is admissible as long as it is not specifically excluded by statute, rule or constitution. Ariz. R. Evid. 402. "Evidence which is not relevant is not admissible." *Id.* Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

[3] Botos also argues that the ruling "inhibited a full presentation of facts and the presentation of a defense." As the State notes, though, the court did not preclude testimony about the prior contacts. Rather, it ruled that the proposed cross-examination would open the door to inquiry by the State about the specific circumstances of those contacts. To the extent there was any "preclusion," Botos invited it by choosing not to cross-examine Cuthbertson.

less probable than it would be without the evidence." Ariz. R. Evid. 401.

¶7 We find no abuse of the trial court's considerable discretion. Botos does not explain how mere contacts with the arresting officer--without explanation as to the nature of those contacts--would have any tendency to show that the officer harbored some antagonism toward him.[4] Indeed, the jury would need to know the nature of those prior contacts to infer that the officer's alleged comment that Botos "might want to stop drinking and driving" reflected ill will towards him. Mere references to prior contacts absent further explanation would have been irrelevant, and the court therefore acted within its discretion in ruling as it did.

2. Defendant's Mother's Testimony

¶8 Before trial, Botos moved to dismiss the charges, arguing that his right to counsel had been violated. The trial court denied the motion after holding an evidentiary hearing at which Cuthbertson, Botos, and defendant's mother, V.F., testified.[5] The evidence at that hearing established that forty-six minutes after the blood draw, Botos requested a telephone call to V.F. to obtain contact information for an attorney.

[4] Even if Cuthbertson was biased or antagonistic toward Botos, his feelings would be irrelevant to Count 2, which is based solely on Botos' BAC.

[5] Defendant does not challenge the denial of his motion to dismiss.

Cuthbertson testified that he personally placed the call, but V.F. stated she did not want to talk to Botos and hung up. V.F., however, testified she did in fact want to talk with her son and that Cuthbertson hung up on her.

¶9 Botos wanted V.F. to testify at trial, as she did at the evidentiary hearing, in order to prove Cuthbertson's bias and prejudice against him. The State objected. The trial court precluded V.F.'s testimony, finding, "Mom's phone call after the investigation concluded [is] not relevant to the proceedings."

¶10 Botos argues the court should have allowed his mother's testimony because, "[i]f the jury determined that the testimony of [Botos] and [V.F.] was more credible than that of Officer Cuthbertson on this point, the discrediting of the officer may have extended to other parts of his investigation." Botos does not explain what "parts of [the] investigation" might have been "discredit[ed]" by V.F.'s testimony, but we assume he refers to Cuthbertson's testimony about his observations of impairment, which were relevant to Count 1.

¶11 Even if we were to conclude that the court erred in precluding V.F.'s testimony, "any error was harmless beyond a reasonable doubt." *State v. Armstrong,* 218 Ariz. 451, 458, 460, ¶¶ 20, 33, 189 P.3d 378, 385, 387 (2008) (reviewing evidentiary rulings under harmless error standard); *State v. Krone,* 182 Ariz. 319, 321, 897 P.2d 621, 623 (1995) ("For error to be

harmless, and therefore not prejudicial, we must be able to say 'beyond a reasonable doubt, that the error did not contribute to or affect the verdict.'" (quoting *State v. Bible,* 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993))).

¶12 Substantial evidence about impairment was presented to the jury besides Cuthbertson's testimony. Officer Best, for example, testified that he and three other officers had to assist Cuthbertson in restraining Botos during the blood-draw because he was struggling, "jerked his arm away[], laughed," and said, "You missed," when Cuthbertson initially attempted to draw blood. A criminalist testified that *all* drivers are impaired at a BAC of .08, and Botos's BAC exceeded .15. The criminalist also testified that a person impaired by alcohol "may say something they [sic] normally would not say or do something they [sic] normally would not do[.]" Based on the evidence presented, no reasonable probability exists that the jury would have found Botos not guilty on Count 1 had it discounted Cuthbertson's impairment testimony based on V.F.'s proffered statements about the telephone call. *See State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994) (to find reversible error, "we must . . . find that there is a reasonable probability the jury would have found [defendant] innocent had the error not occurred.").

CONCLUSION

¶13 For the foregoing reasons, we affirm Botos's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge