

SUPREME COURT No. 22-0624
POLK COUNTY CASE No. OWOM090721

**IN THE
SUPREME COURT OF IOWA**

STATE OF IOWA

Plaintiff-Appellee,

v.

BITA AMISI

Defendant-Appellant.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HON. CELENE GOGERTY DISTRICT COURT JUDGE*

BRIEF FOR APPELLANT

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PROOF OF SERVICE

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CERTIFICATE OF FILING

I certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on November 29, 2022.

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STATEMENT OF ISSUES

I. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN AMISI'S CONVICTIONS

State v. Hopkins, 576 N.W.2d 374 (Iowa 1998)

State v. Jorgensen, 758 N.W.2d 830 (Iowa 2008)

State v. Sanford, 814 N.W.2d 611 (Iowa 2012)

Iowa Code § 321.279(1)(a)

Iowa Code § 321J.2(1)

II. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AN EDITED, PREJUDICIAL VIDEO OF THE PRELIMINARY BREATH TEST

State v. Albrecht, 657 N.W.2d 474 (Iowa 2003)

State v. Deshaw, 404 N.W. 2d 156 (Iowa 1987)

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Iowa Code § 321J.5(2)

Iowa Rule of Evidence 5.403

ROUTING STATEMENT

Because this case involves the application of facts to existing law, transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

This appeal stems from Bitu Amisi's jury convictions for OWI 3rd offense, in violation of Iowa Code section 321J.2(c), a class D felony; and Eluding, in violation of Iowa Code section 321.279(1)(a), a serious misdemeanor. He challenges the sufficiency of the evidence on both counts, as well as the admission of an edited body cam video that improperly implied to the jury that Amisi failed the preliminary breath test.

STATEMENT OF FACTS

On August 24, 2021, Bitu Amisi was charged by criminal complaint with one count of operating while under the influence (second offense). The subsequent trial information charged Amisi with two counts: (1) Operating while intoxicated (third offense), a class D felony; and (2) Eluding, a serious misdemeanor. (App. 11). Amisi's native language is Swahili, and he was appointed an interpreter on August 24, 2021. (App. 9). An interpreter was used throughout all proceedings, including the jury trial.

Only two witnesses testified at trial. Officer Perez testified that, while on routine patrol, he observed a vehicle swerving. He activated his emergency lights,

later activated his sirens, and the vehicle eventually came to a stop in a parking lot. (Trial Tr. v. 2 at 11-14). Officer Perez ordered the driver, Bitu Amisi, out of the vehicle, and observed “unsteady balance; bloodshot, watery eyes; and alcohol on his breath,” although he could not identify the type of alcohol. (Trial Tr. v. 2 at 17, 20). Amisi was placed into custody and a second officer arrived to conduct an impairment investigation. Officer Chadwick similarly claimed to observe bloodshot, watery eyes, and scent of alcohol. (Trial Tr. v. 2 at 31). He began to administer field sobriety tests. Amisi declined to participate in the horizontal gaze nystagmus test, but he did perform the walk-and-turn test and the one-leg stand. (Trial Tr. v. 2 at 32, 37, 39). Officer Chadwick testified that Amisi failed both tests. Amisi consented to a preliminary breath test. He was then transported to the Des Moines Police Station, where he declined to submit to the Datamaster breath test. (Trial Tr. v. 2 at 42-43). Videos from the officers’ dash and body cameras were entered into evidence. (Ex. 1-5).

Amisi was found guilty of both operating and intoxicated and eluding. (App. 39). Amisi elected to have a separate trial on whether he had two qualifying OWI convictions that would enhance his sentence. On February 1, 2022, a jury found that Amisi was the same individual who had twice been convicted of OWI. (App. 40). Amisi did not file a motion for new trial. Amisi was sentenced to a period of incarceration not to exceed five years for OWI 3rd, and to a period of one

year for eluding, which were to be run consecutively. (App. 41). He timely filed a notice of appeal. (App. 47).

Additional facts will be set forth below.

ARGUMENT

I. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN AMISI'S CONVICTIONS

Preservation of Error

Amisi moved for judgment of acquittal following the close of State's evidence, which was denied. (Trial Tr. v. 2 at 56-58).

Standard of Review

Challenges to the sufficiency of the evidence are for correction of errors at law. *State v. Sanford*, 814 N.W.2d 611 (Iowa 2012). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). The court should consider all of the evidence introduced at trial, not just the evidence supporting guilt. *Hopkins* at 377.

Merits

A. Insufficient evidence to find Amisi guilty of Operating While Intoxicated

A person commits the offense of operating while intoxicated ("OWI") if the

person operates a motor vehicle in this state while under the influence of an alcoholic beverage or other drug or a combination of such substances. Iowa Code § 321J.2(1); App. 26. The jury was also instructed that a person is “under the influence” if (1) his reason or mental ability has been affected; (2) his judgment is impaired; (3) his emotions are visibly excited; or (4) he has, to any extent, lost control of bodily actions or motions. (App. 29).

Here, Amisi’s trial counsel conceded that Amisi was operating a motor vehicle. (Trial Tr. v. 2 at 67). The fighting issue was whether Amisi was under the influence while he was driving. There was no breath or chemical testing. There was no evidence that he had been consuming alcohol prior to driving. He made no admissions to law enforcement. While there was an empty can under the seat, there was no evidence that it was cold to the touch or that it had recently been consumed. (Trial Tr. v. 2 at 21, 61, 70). Amisi’s cell phone was sitting out in the open in the vehicle. Officer Perez acknowledged that cell phone use while driving could result in erratic driving. (Trial Tr. v. 2 at 21).

Amisi’s primary language is Swahili and he required an interpreter throughout these proceedings. However, there was no interpreter present when officers were investigating him for OWI, even though he requested one. (Trial Tr. v. 2 at 53). There was no interpreter to explain how to perform the field sobriety tests. As Officer Chadwick testified, part of the field sobriety tests is the ability to

listen and follow instructions. (Trial Tr. v. 2 at 32). The State failed to prove that Amisi's performance on these tests due to intoxication instead of Amisi's lack of comprehension of the English language. There was also no interpreter to explain the consequences of not consenting to a breath test. (Trial Tr. v. 2 at 42-43).

B. Insufficient evidence to find Amisi guilty of Eluding

The driver of a motor vehicle commits a serious misdemeanor if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked or unmarked official law enforcement vehicle driven by a peace officer after being given a visual and audible sign to stop. Iowa Code § 321.279(1)(a). Because Amisi did not contest that he was the driver of the vehicle, the issue is whether he *willfully* failed to bring his vehicle to a stop.

There was no evidence that Amisi was aware that an officer was attempting to stop him. Amisi did not increase his speed or change his route, and he did ultimately come to a stop by pulling into the parking lot of an apartment complex. *Cf. State v. Bruckner*, No. 20-0166, 2021 Iowa App. LEXIS 90 (Iowa Ct. App. Feb. 3, 2021) (finding sufficient evidence where the defendant admitted that he knew the deputy was in pursuit, increased his speed, and turned suddenly onto a gravel road). There was evidence that Amisi may have been using his cell phone, which could have been distracting him. For these reasons, the State failed to prove that Amisi willfully failed to stop his vehicle.

II. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AN EDITED, PREJUDICIAL VIDEO OF THE PRELIMINARY BREATH TEST

Preservation of Error

Amisi preserved error by objecting to exhibit 4, which was overruled. (Trial Tr. v. 1 at 14, 17)

Standard of Review

The district court's ruling rested on its interpretation of relevant statutes; specifically, Iowa Code section 321J.5(2). Therefore, review is for correction of errors of law. *State v. Sanders*, 623 N.W.2d 858 (Iowa 2001); *see also State v. Kaufman*, No. 08-0880, 2009 Iowa App. LEXIS 268 (Iowa Ct. App. April 8, 2009).

Merits

The results of a preliminary breath test are inadmissible. *See* Iowa Code § 321J.5(2). Testimony that the result of a preliminary breath test indicated presence of alcohol constitutes reversible error. *State v. Deshaw*, 404 N.W. 2d 156, 158 (Iowa 1987).

Iowa Rule of Evidence 5.403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by danger of . . . unfair prejudice.” “Unfairly prejudicial evidence” is evidence that “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers

other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions of the case.” *State v. Martin*, 704 N.W.2d 665, 671 (Iowa 2005) (citations omitted).

The district court erred in allowing the State to introduce an edited video from Officer Chadwick’s body cam. The edited footage showed Amisi agreeing to the preliminary breath test, then, following the test, cut straight to Amisi being arrested. (Trial Tr. v. 1 at 15; Ex. 4). The State’s edited video was a backdoor way of informing the jury that Amisi failed the preliminary breath test, since it depicted him being immediately arrested after taking it. To compound the error, during Officer Chadwick’s direct examination as exhibit 4 was being played for the jury, he explained that Amisi consented to the preliminary breath test and, following the test, was placed under arrest. (Trial Tr. v. 2 at 41). In *Deshaw*, testimony that the breath test showed a positive result violated the statute, which was enacted to guard against the test’s unreliability. *Deshaw* at 158. The State’s depiction of the preliminary breath test in this case is exactly what section 321J.5(2) was designed to protect against.

In addition to violating section 321J.5(2), the edited video was far more prejudicial than probative in violation of Iowa Rule of Evidence 5.403. It is well established that preliminary breath tests are unreliable. *See, e.g., State v. Albrecht*, 657 N.W.2d 474 (Iowa 2003). Video footage of Amisi taking the test had little to

no probative value. However, cutting immediately to his arrest signified his failure of the test, and was incredibly prejudicial. The erroneous admission of exhibit 4 warrants a new trial.

CONCLUSION

For the reasons articulated herein, Bitu Amisi requests this court reverse his convictions.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was \$0 because it was electronically submitted.

CERTIFICATE OF COMPLIANCE

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