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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

City of Bismarck,	)	
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	
Paul King,	)	Supreme Ct. No. 20180138
	)	
Defendant-Appellant	)	District Ct. No. 08-2017-CR-02105
.....	)	

BRIEF OF PLAINTIFF-APPELLEE

Appeal from Criminal Judgment Entered on March 13, 2018

Burleigh County, North Dakota
South Central Judicial District
The Honorable Gail Hagerty, Presiding

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ISSUE 3: The Court did not err by overruling King's objection to testimony about a screening test as said testimony was not improper and did not influence the decision of the jury.

STATEMENT OF THE CASE

[¶1] Appellant Paul King (hereafter identified as King) was charged with operating a motor vehicle under the influence of alcohol/drugs and/or refusal to submit to a chemical test in violation of Bismarck City Ordinance 12-10-01(1) (Appellant App. 4; Doc. ID No.: 1). Following a trial by jury King was found guilty of refusal to submit to a chemical test (Appellant App. 12; Doc. ID No.: 30). King now appeals from that verdict and criminal judgment.

STATEMENT OF THE FACTS

[¶2] The City is satisfied with the Statement of the Facts as contained in King's Brief.

ARGUMENT

I. Standard of Review

Jury Instructions

[¶3] Jury instructions must not confuse or mislead the jury and shall correctly and adequately inform the jury of the applicable law involved in the case. *State v. Pavlicek*, 2012 ND 154, ¶ 14, 819 N.W.2d 521. The instructions must be viewed as a whole to determine if the jury has been correctly and adequately informed. *Id.* "A court errs if it refuses to instruct the jury on an issue that has been adequately raised, but the court may refuse to give an instruction that is irrelevant or inapplicable." *Id.* (quoting *State v. Zottnick,* 2011 ND 84, ¶ 6, 796 N.W.2d 666).

Evidentiary Rulings

[¶4] In regard to district court evidentiary rulings, an abuse of discretion standard is used by this Court. *State v. Cone,* 2014 ND 130, ¶ 12, 847 N.W.2d 761. A district court will be found to have abused its discretion when "its decision is arbitrary, capricious, or unreasonable, or when the court misapplies or misinterprets the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." *State v. Bird*, 2015 ND 41, ¶ 19, 858 N.W.2d 642.

II. The District Court Did Not Err in Refusing to Accept or Provide the Proposed Jury Instructions Requested by the Appellant as They Did Not Correctly State the Law or Were Duplicative (Appellant Issue 1)

[¶5] King contends he was entitled to have his jury instructions on the issue of refusal to submit to a chemical test submitted to the jury. The jury instructions provided by King are as follows:

> Defendant's Proposed Jury Instruction No. 1
>
> Withdrawing the implied consent requires an affirmative refusal to be tested. Refusal requires a conscious decision, and the statutory scheme requires communication between the law enforcement officer and the driver in which the officer requests submission to the test.
>
> The question of whether Paul King refused to take the test is a question of fact which is left solely for your determination. Moreover, whether Paul King was confused when he refused to take the test is also a question of fact which is left solely for your determination.

(Appellant App. p. 6, Doc. ID No.: 20).

Defendant's Proposed Jury Instruction No. 2

> A driver has a conditional right to refuse a chemical test. The fact that North Dakota drivers are able to refuse testing is a matter of legislative grace. Refusing to submit to the test is a legislatively granted privilege and the legislature is able to limit the extent of that privilege.

(Appellant App. p.8, Doc. ID No.: 24).

[¶6] King's proposed jury instruction No. 1 is nearly identical to an instruction that has been addressed by this Court in *State v. Keller*, 2016 ND 63, 876 N.W.2d 724. The entirety of the first paragraph of King's proposed jury instruction No. 1 is a copy of the first three sentences of the proposed instruction in *Keller*. *Id.* at ¶ 6. This Court noted the proposed jury instruction in *Keller* was an inaccurate statement of the law. *Id.* Specifically, the proposed instruction "asks the jury to find affirmative refusal in the form of communication between the driver and the law enforcement officer, which is not required by law." *Id.* at ¶ 7.

[¶7] The analysis in *Keller* focused on the same phrasing found in King's proposed instructions, which requested the jury find "the statutory scheme requires communication between the law enforcement officer and driver." *Id.* at ¶ 6; (Appellant App. p. 6, Doc. ID No.: 20). This statement is incorrect as it does not fully describe the applicable law. The missing element of King's instruction is discussed in *Grosgebauer v. North Dakota Dept. of Transp.* which states: "[f]or those able to make a conscious decision, refusal does not have to be explicitly stated; 'stubborn silence' or a 'physical failure to cooperate' may also indicate refusal." 2008 ND 75, 747 N.W.2d 510 (citing *Mayo v. Moore,*

527 N.W.2d 257, 260 (N.D.1995); *North Dakota Dept. of Transp. v. DuPaul,* 487 N.W.2d 593, 597 (N.D.1992)). King's instruction implies some actual communication is necessary which is not the case and does not explain the possibility of refusal by silence or failure to cooperate.

[¶8] As it did not fully state the applicable law, King's Proposed Jury Instruction No. 1 was properly denied. The district court did, however, provide a refusal instruction to the jury that correctly stated the law:

> Withdrawing the implied consent to submit to a chemical breath test requires an affirmative refusal to be tested. Refusal does not have to be explicitly stated. For example, stubborn silence or a physical failure to cooperate, or other action may also indicate an affirmative refusal

(Appellant App. p. 9, Doc. ID No.: 26).

[¶9] The second requested paragraph of King's proposed jury instructions No. 1 was properly denied as well. The second paragraph states whether King refused to take the test and whether King was confused is a question of fact which is left for the jury to determine. In consideration of this requested instruction, the district court indicated "I'm not going to give that because we've told the jurors that they are the judges of all questions of fact in this case." (Tr. p. 85, lines 20-22). This was in reference to an instruction already proposed by the district court which was provided to the jury stating, "[y]ou are the judges of all question of fact in this case." (Appellee App. 1; Doc. ID No.: 26, p. 4, line 2).

[¶10] The provided instructions adequately informed the jury that they were the judges of all questions of facts in the case. To parse out two specific facts

or elements, whether King refused and whether he was confused, would lead to misperception. The district court further explained, "we aren't going to say they're the judges of the questions of fact whether he was under the influence, and so we aren't going to follow each finding with an explanation that they're the judges of questions of fact." (Tr. p. 85, lines 22-25).

[¶11] King's proposed jury instruction No. 2 relates to a right to refuse testing and was also properly denied. "A defendant is entitled to a jury instruction on a defense if there is evidence to support it and it creates a reasonable doubt about an element of the charged offense." *State v. Samshal*, 2013 ND 188, ¶ 14, 838 N.W.2d 463. King did not testify or make any statements where he argued a defense that he had a right to refuse testing, neither did any other witnesses make such statements. No evidence was provided that would support King's proposed instruction No. 2.

[¶12] Even if evidence on the issue had been provided at trial, the instruction was still improper as it didn't not correctly and adequately state applicable law. While King's instruction is accurate in part by listing a driver has a conditional right to refuse a chemical test, he fails to provide the full and correct applicable law. A driver's right to refuse a chemical test is a conditional right, with one of the conditions imposed currently is a criminal penalty. *State v. Murphy, 527 N.W.2d 254, 256 (N.D.1995).* It would be in error for a court to instruct the jury there is a right to refuse chemical testing without also informing them the right is conditional and consequences exist if one chooses to exercise that right. *Id.*

III. The Court Did Not Err by Failing to Give an Opportunity For King to Object to Jury (Appellant Issue 2)

[¶13] A district court must provide the parties an opportunity to object on the record regarding the jury instructions. N.D.R.Crim.P. 30(b). A defendant must object to an instruction, or failure to give an instruction, on the record. N.D.R.Crim.P. 30(c). A failure to object to jury instruction by a defendant "operates as a waiver of the right to complain on appeal of instructions that either were or were not given." *State v. McNair*, 491 N.W.2d 397, 399 (N.D. 1992). Furthermore, "[t]o preserve a challenge to a jury instruction, an attorney must except specifically to the contested instruction, regardless of whether the attorney proposed another instruction on the same issue." *Id.*

[¶14] King was provided ample opportunity to object to the jury instructions proposed by the court. During the first interaction between the court and parties on the morning of trial at approximately 8:55 a.m., and outside the presence of the jurors, the court stated "[y]ou have proposed jury instructions." (Tr. p. 2, lines 2-7). The court proceeded to discuss the proposed jury instructions provided by counsel, including those by King, and gave decisions on those instructions. (Tr. p. 2, lines 7-18). King was afforded an opportunity to provide argument supporting his proposed instructions, after which the court again denied King's request and provided further explanation. (Tr. p. 2, line 19 through p. 3, line 13).

[¶15] Following this discussion the court asked the parties: "[a]nything else before we get started." (Tr. p. 4, line 5). King replied to this inquiry only to

discuss some evidentiary issues. (Tr. p. 4, line 17 through p. 5 line 11). The district court then once again asked the parties if they wanted to discuss "anything else" to which the defendant did not reply. (Tr. p. 6, line 3).

[¶16] Upon conclusion of testimony and outside the presence of jurors, but prior to delivery of jury instructions on the elements of the offense alleged, the district court stated to King and his counsel: "[a]ll right. I wanted to give you an opportunity to make motions to preserve the record Mr. McCabe." (Tr. p. 84, lines 16-18). After some discussion regarding a rule 29 motion, counsel for King spoke again about his proposed jury instructions and requested the court to reconsider giving them. (Tr. p. 85, lines 6-19). The district court again denied use of King's proposed instructions. (Tr. p. 86, lines 5-7). The district court concluded this dialog by stating "I assume I'll read the jury instructions and then you'll make closing arguments," to which King's counsel replied "[t]hat will be fine, Your Honor." (Tr. p. 86, lines 15-16).

[¶17] King was given multiple opportunities to object to the court's proposed jury instructions. This is evident by the fact King and the district court discussed jury instructions at two separate occasions outside the presence of the jury. At no time during those discussions did King object to the proposed instructions. King was provided sufficient opportunity to object to the district court instructions but chose not to do so.

[¶18] King also argues for the first time on appeal that the jury instruction provided by the court regarding refusal of a chemical test was improper. At no time did King object to this instruction prior to appeal. It is established that

"failure to object at trial to jury instructions when there was an opportunity to do so operates as a waiver of the right on appeal to complain of instructions that either were or were not given." *State v. Mathre*, 2004 ND 149, ¶ 21, 683 N.W.2d 918. King was provided multiple opportunities to object to the jury instruction in question, and neglected to do so. Notwithstanding the lack of objection, the instruction provided by the district court was a proper and correct statement of law. *See State v. Keller*, 2016 ND 63, 876 N.W.2d 724; *see also Grosgebauer v. North Dakota Dept. of Transp.* 2008 ND 75, 747 N.W.2d 510

IV. The Court Did Not Err by Overruling King's Objection to Testimony of a Screening Test (Appellant Issue 3)

[¶19] King contends the district court erred in allowing testimony wherein the officer mentioned the phrase "a prior screening test." A trial court has "broad discretion in determining whether to admit or exclude evidence, and its determination will be reversed on appeal only for an abuse of discretion." *State v. Chisholm,* 2012 ND 147, ¶ 10, 818 N.W.2d 707. A trial court abuses its discretion if "it acts arbitrarily, capriciously, or unreasonably, or it misinterprets or misapplies the law." *Id.*

[¶20] The officer was asked at trial to read the implied consent card language as he did to King upon his arrest. (Tr. p. 39, lines 10-19). The officer read the language directly from his implied consent card which included the sentence "[i]f you have refused the prior screening test, you may cure that refusal by completing this additional chemical test." (Tr. p. 40, lines 5-7). King objected,

and the court heard King's objection outside the presence of the jury and overruled the objection. (Tr. p. 42-44).

[¶21] As explained in *State v. Rende,* "the results of preliminary breath tests are to be excluded from evidence." 2018 ND 33, ¶ 6, 905 N.W.2d 909 (emphasis added). *Rende* further clarified "the question of whether or not a driver consented to a preliminary breath test is irrelevant and inadmissible." *Id* at ¶ 11. However, *Rende* and the cases relied upon by King are distinguishable from the facts in this matter as no results were shared with the jury, nor was there testimony on whether or not King consented to a preliminary breath test. The officer was not asked if King consented to take the screening test or not. The officer simply read the language from his implied consent card to the jury. The language in the card also noticeably included the phrase "if you have refused." (Tr. p. 40, line 5). There was no testimony provided to suggest that had been the case with King.

[¶22] This portion of the implied consent card is based upon N.D.C.C. § 39-08-01(2)(b) which states:

> Upon the individual's refusal to submit to an onsite screening test, the police officer shall inform the individual that the individual may remedy the refusal if the individual takes a chemical test under section 39-20-01 or 39-06.2-10.2 for the same incident.

There was no evidence provided at trial that King refused a screening test, as such evidence would be inadmissible. However, the advisory did not contain inadmissible information in and of itself. Based upon the facts in this case, the district court did not abuse its discretion in overruling King's objection.

CONCLUSION

[¶23] The district court did not err by denying King's proposed jury instructions as they did not properly state the full and complete applicable law. King failed to object to the court's proposed instructions despite being given the opportunity to do so and therefore waived any objection on appeal, but even if proper objection was made the provided instruction was a correct statement of law. King's objection to the mention of a "screening test" was properly overruled by the district court and was within the court's discretion.

[¶24] Based upon the foregoing, the Appellee requests that the conviction and judgment in this matter be affirmed.

Dated this 5th day of October, 2018.

/s/ Jason J. Hammes

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CERTIFICATE OF SERVICE

[¶25] I hereby certify that I made service of a true copy of the foregoing Brief of Appellee in Microsoft Word format and PDF format, by email, on October 5, 2018, to Chad McCabe, attorney for Appellant, at the following email address of crmccabe@midconetwork.com.

/s/ Jason J. Hammes

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