

IN THE COURT OF APPEALS OF IOWA

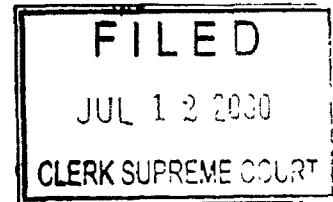
No. 0-204 / 98-1356

Filed July 12, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRAD MOORE,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Todd A Geer,
Judge.

Defendant appeals his conviction for second-offense operating while
intoxicated. **AFFIRMED.**

Dennis A. Bjorklund, Coralville, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Anthony Janney, Assistant
County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

Defendant Brad Moore appeals his conviction for operating while intoxicated, second-offense. We affirm.

On June 6, 1997, Moore drove into town from his farm and went to a tavern. Between 11:00 p.m. and 12:45 a.m., he drank beer with friends. Around 12:45 a.m., Moore decided to drive home. At approximately 1:00 a.m., Officer Jeremy Severtsgaard observed Moore's vehicle traveling north in LaPorte City. He began following Moore but nothing aroused his suspicions until he saw the vehicle drift over the center line. Severtsgaard activated his video equipment and his lights. He witnessed Moore again swerve and make a swift over-correction to the right. The vehicle came to an abrupt stop, halfway on the shoulder and halfway on the road.

Severtsgaard approached the vehicle. He detected an odor of alcohol on the driver, observed his speech was slightly slurred, and his eyes were watery and bloodshot. Severtsgaard then required Moore to perform field sobriety tests, which he failed. Moore was placed under arrest for OWI and transported to the LaPorte City Police Department. Moore consented to a breath test, however, the machine malfunctioned. Severtsgaard took Moore to the Black Hawk County Sheriff's Department and again invoked implied consent. Moore grew angry because the machine had malfunctioned and refused to provide any more breath specimens for testing.

Moore was charged with operating while intoxicated (OWI) in violation of Iowa Code section 321J.2 (1995). On July 22, 1997, the State filed a trial information charged him with OWI, second offense. A jury trial commenced on

May 5, 1998. The jury returned a guilty verdict. Moore was sentenced on June 26, 1998.

Moore appeals. He claims: (1) Officer Severtsgaard lacked probable cause for the arrest; (2) the district court erred in denying his motion for judgment of acquittal; and (3) the district court abused its discretion by excluding testimony of a handwriting expert who would have testified Moore's signature was forged on the implied consent form.

1. Probable Cause to Arrest. Moore contends Officer Severtsgaard lacked probable cause to believe he was under the influence of alcohol at the time of the arrest and lacked reasonable suspicion to stop his vehicle. To the extent Moore raises a Fourth Amendment violation, he raises a constitutional question. We review such challenges de novo. *State v. Ceron*, 573 N.W.2d 587, 589 (Iowa 1997).

Moore has not properly preserved error. The record does not indicate he filed a motion to suppress based on these claims. He claims error was preserved by his pre-trial motion in limine. In full, it reads:

COMES NOW the Defendant, by and through counsel, and for his motion in limine states:

1. That in the video tape [sic] of the Defendant taken at the LaPorte City Police Department references are made to an OWI 2nd which are inadmissible herein; those audio portions of the video should be prohibited from being played during trial.

2. In the same video tape [sic] taken at the LaPorte City Police Department [sic] there is discussion of the Defendant's preliminary breath test. Such evidence is inadmissible at trial and should be prohibited.

WHEREFORE, Defendant requests that the above referenced [sic] portions of the video tape [sic] be excluded at trial.

We question whether a motion in limine suffices to preserve an issue more properly raised in a motion to suppress. However, even if it sufficed, the motion

in limine makes no mention of the absence of reasonable suspicion for the stop or probable cause for the arrest.

When a party fails to alert the district court to its contentions, that party cannot thereafter rely on those contentions to seek a reversal on appeal. *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995) (citation omitted); *State v. Boer*, 224 N.W.2d 217, 221 (Iowa 1974) (holding challenge to evidence on ground it was product of illegal search could not be raised for first time on appeal). Moore did not raise below the lack of probable cause by motion. Furthermore, the evidence which formed the basis for probable cause to arrest was not objected to at trial. Because Moore failed to challenge the constitutionality of the stop and his arrest below, we do not consider those issues on appeal.

II. Sufficiency of the Evidence. Moore contends the State failed to prove his intoxication.

Our scope of review in this context is for correction of errors at law. See Iowa R. App. P. 4; *State v. Boleyn*, 547 N.W.2d 202, 204 (Iowa 1996). In our review of a ruling on a motion for judgment of acquittal, we view the evidence in the light most favorable to the State. *Boleyn*, 547 N.W.2d at 204. We accept any legitimate inferences that may reasonably be deduced from the evidence. *Id.* We uphold the denial of a motion for judgment of acquittal if there is any substantial evidence in the record supporting the charges. *Id.* Substantial evidence is evidence which would convince a rational trier of fact the defendant is guilty of the crimes charged beyond a reasonable doubt. *Id.* On the other hand, we cannot make a substantial evidence determination if we consider only the evidence supporting guilt. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa

1998). Therefore, we consider all the record evidence, not just the evidence supporting guilt. *Id.* However, when the evidence is in conflict, the fact finder may resolve those conflicts in accordance with its own views as to the credibility of the witnesses. *Id.*

We conclude substantial evidence supported the jury's verdict. To prove Moore was intoxicated, the State relied on the testimony of Officer Severtsgaard and the videotape of the stop. Moore's driving behavior gives some indication he was under the influence. Severtsgaard testified he observed Moore's truck cross the center line, so that half of the vehicle was in each lane of travel, a significant deviation. It was late at night and Moore admitted he had consumed three beers within a short period of time. Moore drifted into the opposite lane a second time before Severtsgaard activated his video equipment. After noting it was normal for a driver to drift a little *within* the lane of travel, the officer characterized Moore's drift as abnormal because he went outside his own lane. After the Severtsgaard turned on his lights, the vehicle made an abrupt stop and parked half on the shoulder and half on the road, despite the presence of a normal-sized shoulder on the roadside.

Moore's behavior after the stop also provides support for the jury's verdict. The officer observed the odor of alcohol, slightly slurred speech, and watery, bloodshot eyes. When Moore exited the vehicle to perform field sobriety tests, Severtsgaard characterized his balance as poor. Moore failed the field sobriety tests. Severtsgaard noted the fact Moore never stood still during the stop. Moore also became verbally abusive during administration of the breath test.

These facts constitute substantial evidence Moore was operating while under the influence.

Moore's testimony conflicted with some of Severtsgaard's statements. Moore points out evidence that undermined the officer's testimony. On the cross-examination of Severtsgaard, defense counsel elicited the fact Moore wore contacts and had been spraying chemicals that day, which could have explained his red, watery eyes. Moore also claimed he had injured his knee a few days before, potentially affecting his ability to perform two of the field sobriety tests. The issue was really one of credibility between Moore and Severtsgaard. While we examine all of the evidence to determine whether there is support for the verdict, we do not reassess credibility of witnesses. We find substantial evidence to convict. We affirm the denial of the motion for judgment of acquittal.

III. Excluding Testimony of Handwriting Expert. Prior to trial, the State filed a motion in limine seeking to prevent Moore from introducing the testimony of a handwriting expert. Moore's offer of proof consisted of the expert's report, which concluded the signature on the Black Hawk County implied consent form did not belong to Moore. The expert could not render an opinion whether the signature on the form belonged to Severtsgaard. In his deposition, Severtsgaard denied he signed Moore's name to the form. The record reveals the State had its own expert who was prepared to testify Moore had signed the form. The district court granted the State's motion, finding Moore's test refusal was not a disputed issue and, therefore, the evidence went to impeach Severtsgaard on a collateral issue. On evidentiary issues, we review for an abuse of discretion. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998) (citation omitted). In order to show

an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

On appeal, Moore contends he offered the expert's opinion to contradict Severtsgaard's testimony that Moore had signed the implied consent form in his presence. He also claims the State's case rested on the officer's credibility and he should have been allowed to impeach on this issue. The State contends Moore's offer of proof did not preserve error under Iowa Rule of Evidence 608. Alternatively, the State argues the expert's opinion falls under rule 608(b) and is inadmissible.

The State's arguments miss the mark. Rule 608 governs the admissibility of evidence concerning the character or conduct of a witness as it reflects on the witness's credibility.¹ See Iowa R. Evid. 608; *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). While rule 608(b) forbids attacking credibility by proving specific instances of a witness's conduct through extrinsic evidence, it does not prevent the ordinary contradiction of a witness's testimony regarding the facts of the particular case. See, e.g., *United States v. Blake*, 941 F.2d 334, 338 (5th Cir. 1991) (stating that federal rule 608(b) does not bar admission of evidence

¹ Iowa Rule of Evidence 608(b) provides:

(b) Specific Instances of Conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Iowa Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Subsection (a) of rule 608 does not apply here. It governs attacks on witness credibility via opinions on the witness's character for truthfulness. See *Greene*, 592 N.W.2d at 28 (emphasis in original) (citations omitted). Moore's expert rendered no such opinion.

introduced to contradict or disprove witness testimony as to a material issue). Showing material testimonial error by a witness is a recognized impeaching tool. *State v. Roth*, 403 N.W.2d 762, 767 (Iowa 1987) (noting party may contradict adverse witness by showing facts were other than as indicated by the witness's testimony); *State v. Walker*, 218 N.W.2d 915, 918 (Iowa 1974). Rule 608(b) does not apply here. See *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999) (stating impeachment by contradiction is not governed by 608(b)).

While a party may ordinarily contradict and discredit an adverse witness by showing the facts were other than as testified to by the witness, the admissibility of this type of impeachment evidence is not without limits:

To be admissible, impeachment evidence must have been admissible for some proper purpose independent of the contradiction. [] Otherwise the impeachment evidence goes only to a collateral issue and is inadmissible. Evidence of two types is admissible independent of contradiction. First, the evidence may be admitted if relevant to some legitimate issue in the case. Second, the evidence is admissible if it is relevant to establishing or undermining the general credibility of the witness being impeached.

Roth, 403 N.W.2d at 767. Thus the real issue in this appeal is whether the expert's opinion went to a collateral matter.

The district court concluded it was collateral. We agree. Whether Moore refused the breath test may be an issue in a driver's license revocation proceeding. However, the fighting issue at trial was whether Moore was intoxicated at the time he was driving. Moore concedes that whether he had refused the breath test was not a 'legitimate issue' in the case. The expert's opinion that it was not Moore's signature on the Black Hawk County implied consent form was not relevant to any issue involving the merits of the criminal charge against the defendant.

Impeachment by contradiction is subject to considerations that arise under rule of evidence 403. See *Castillo*, 181 F.3d at 1133 (citation omitted). The trial court found delving into this issue would mislead the jury, involve delay, and potentially be more prejudicial than probative. See Iowa R. Evid. 403. We find no abuse of discretion in the trial court's decision to exclude this evidence.

Furthermore, even if we were to conclude there was an abuse of discretion and the evidence were admissible for some proper purpose independent of contradiction, Moore suffered no prejudice from the district court's refusal to admit the evidence. See *Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396, 401 (Iowa 1991) (noting exclusion of relevant evidence must be prejudicial to warrant reversal). While the expert opined it was not Moore's signature on the implied consent form, he was *not* able to say the writing belonged to Severtsgaard. We fail to see the impeachment value in such evidence. Moore's attorney was able to conduct an extensive cross-examination of Severtsgaard so the jury was given information regarding Severtsgaard's credibility in other respects. The addition of this one item of questionable impeachment value would not have changed the outcome of Moore's trial. See *State v. Clark*, 325 N.W.2d 381, 383 (Iowa 1982) (concluding no prejudice resulted from trial court's refusal to permit cross-examination of witness's specific misconduct where jurors were given enough information to understand what kind of person witness was); *State v. Berry*, 549 N.W.2d 316, 319 (Iowa App. 1996) (finding no prejudice from refusing to permit impeachment on certain subject

when jury was given other information to determine witness's credibility). We find no prejudice resulted from the trial court's exclusion of the expert's opinion.

AFFIRMED.