Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-146

FEBRUARY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Gary Francis	}	DOCKET NO. 1051-8-07 FrCr
		Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals from his conviction, by jury, of driving under the influence, third or subsequent offense. He argues that the trial court erred in denying his motion to reopen the evidence. We affirm.

Defendant was charged with DUI in August 2007. The following evidence was presented at trial. On the evening in question, defendant and his girlfriend were traveling in a Toyota Matrix. A woman traveling behind their vehicle smelled a strange odor and observed that the rear passenger tire of the Matrix was completely flat and being driven on the rim, with smoke coming up from the tire. She saw the Matrix swerve, slow down, and then swerve again. The vehicle then pulled off the road. The witness pulled up behind the Matrix, and observed defendant exit from the driver's side door. She testified that there had been just enough time for defendant to pull over and put the car in park before he exited the vehicle. The woman saw defendant's girlfriend sitting in the front passenger seat as well as a dog sitting in the back seat of the vehicle. Defendant approached the woman's vehicle and she noticed that he appeared intoxicated. Defendant declined to use the woman's phone to call a tow truck, and shortly thereafter, the woman contacted police. When the police arrived, they found defendant's girlfriend in the front passenger seat, with the car parked on level ground. Defendant's girlfriend told police that defendant had been driving the vehicle. The officers observed signs that defendant was intoxicated, and they arrested him for DUI.

The State called defendant's girlfriend as a witness at trial, and she testified that she had been driving the vehicle that evening, not defendant. She stated that while she was driving, she smelled a strange odor, and that the car began to shake and swerve. She had difficulty controlling the vehicle. While this was going on, defendant reclined the passenger's seat all the way back and climbed into the back seat to investigate the strange smell. The girlfriend then pulled off of the road. She testified that she slid from the driver's seat to the passenger's seat at

defendant's instruction to balance out the weight of the vehicle, which was parked on an incline. Defendant then exited the vehicle from the back door on the driver's side of the car to fix the tire. Defendant requested that the jury be allowed to observe the Matrix to see how he had climbed from the front seat to the back seat. The court indicated its disinclination to grant the request, but stated that if there was a good reason for the jury to view the car, it would allow it. Defense counsel did not pursue the matter further. Defendant did not present any witnesses or evidence. He stated on the record that he understood that he had the right to testify on his own behalf and that he had decided not to do so. The court then informed the jury that the evidence was closed and that closing arguments would be presented following a lunch recess.

Outside of the presence of the jury, defendant moved for a judgment of acquittal under Vermont Rule of Criminal Procedure 29, arguing that the State failed to prove that defendant operated the vehicle on the evening in question. A dispute arose as to whether the State's first witness had testified to seeing defendant exiting from the driver's door or the "driver's side door." The court found that regardless of which phrase had been used by the witness, the State had presented sufficient evidence on the issue of operation. In denying the motion, the court remarked that the notion of defendant climbing into the back seat while the car was swerving all over the road was incredible. Following the jury charge conference and a lunch recess, defendant's attorney moved to reopen the evidence. He asked the court to allow the jury to see the Matrix and watch defendant move from the front seat into the rear. When the court asked how defendant could accomplish this without testifying, defense counsel suggested that defendant's girlfriend could testify that defendant's movements were the same as on the evening in question. The court indicated that the evidence was closed, that the State's witnesses had departed, and that it was going to leave the evidence closed. Defense counsel then asked the court to allow defendant to take the stand to demonstrate to the jury how he had moved from the passenger's seat to the rear of the car. The State responded that defendant had already waived his right to testify, and it expressed concern that if defendant were now allowed to testify, it would have no opportunity for rebuttal as all of its witnesses had departed. The court found that this latter argument tipped the scale in favor of leaving the evidence closed, and it thus denied defendant's motion. Following the jury's guilty verdict, defendant filed a motion for judgment of acquittal and for a new trial. The court denied the motions and this appeal followed.

Defendant argues that the court abused its discretion in denying his motion to reopen the evidence. Drawing largely on out-of-state cases, he asserts that in reaching its decision, the court did not properly balance his constitutional and statutory right to testify, the timeliness of his request, the relevance of the evidence, and the lack of prejudice to the State. While we acknowledge the importance of the concerns raised by defendant, we find his arguments ultimately unpersuasive. As defendant acknowledges, the trial court has broad discretion in ruling on a motion to reopen the evidence, and defendant bears the burden of demonstrating that the court exercised its discretion on clearly untenable grounds or that its decision represented a manifest abuse of discretion. State v. Fitzgerald, 141 Vt. 369, 371 (1982). Defendant fails to meet that burden here.

As recounted above, the trial court based its decision largely on the fact that the State had released all of its witnesses and thus would be unable to rebut defendant's testimony. While defendant suggests that his testimony would have been limited to a demonstration of how he crawled into the back seat, the trial court found otherwise. It concluded that even if defendant's

direct testimony was so limited, he remained subject to cross-examination on all subjects. Thus, if he were to testify as to what he said to the police, for example, the State would not have the opportunity to rebut that testimony because the police officers had departed. The State was not obligated to recall all of its witnesses; indeed, there is no suggestion in the record that defense counsel requested it to do so. This is particularly true given, as the trial court found, that defendant had made a strategic decision not to testify at trial. He apparently changed his mind after the court observed that his story was incredible. Yet, as the trial court explained, its remark to counsel in no way changed the evidence that had been presented to the jury, nor the jury's perception of that evidence. Defendant simply had a change of heart and was trying to change his trial strategy after the evidence had been closed. The court also found that defendant's demonstration would be inadmissible even if the request had been made during trial. Defendant proposed to conduct his demonstration in a parked car, but the evidence at trial showed that the car had been swerving all over the road. The court found that allowing such evidence would mislead the jury and that it was excludable on this basis alone.

The court identified numerous reasonable grounds for its decision and we find no abuse of discretion. We reject defendant's suggestion that the trial court must always grant a defendant's request to reopen the evidence, regardless of the surrounding circumstances, whenever the defendant decides after the close of evidence that he would like to testify. Cf. Ephraim v. State, 627 So.2d 1102, 1105 (Ala. Crim. App. 1993) (stating that when exercise of trial court's discretion "results in the denial of a basic constitutional right, [the court] must find that that discretion has been abused"). We note that in Ephraim, the defendant, who was charged with capital murder, sought to testify after the close of evidence, asserting that "he was the only one who could tell the jury his version of the facts and his state of mind at the time of the killings." Id. In this case, defendant's version of events had already been presented to the jury through his girlfriend. Defendant proposed to offer essentially the same testimony, apparently by physically demonstrating how one could crawl from the front seat of a Matrix into the back seat. But the trial court found that this evidence would have been inadmissible, and as we have explained, the "[r]efusal to reopen a case is not an abuse of discretion where the proffered evidence would be inadmissible, and the admission of evidence is a highly discretionary matter." State v. Potter, 148 Vt. 53, 58 (1987) (citation omitted); see also V.R.E. 403 (relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

It is true, as defendant asserts, that some courts have found the following factors relevant in considering whether to grant a motion to reopen a case for the submission of additional evidence: "(1) the timeliness of the motion, (2) the character of the evidence sought to be introduced, (3) the effect of allowing the evidence to be admitted, and . . . (4) whether the defendant has provided a reasonable explanation to justify reopening." Jones v. State, 745 So.2d 1121, 1122 (Fla. Dist. Ct. App. 1999). Yet all of these factors weigh against defendant. As previously discussed, the State's witnesses had been dismissed at the time the motion was filed, the proffered evidence would be inadmissible although it had in substance already been admitted through defendant's girlfriend, and defendant failed to provide a reason why his decision to testify could not have been made before the close of evidence. As the Jones court recognized, "a defendant should not be allowed to re-open his case merely because he changes his mind." Id. at 1123.

None of the remaining out-of-state cases cited by defendant persuade us to reach a contrary conclusion. Essentially, defendant disagrees with the way in which the trial court exercised its discretion. But as we have explained, "[t]his Court will not interfere with discretionary rulings that have a reasonable basis, even if another court might have reached a different conclusion." State v. Foy, 144 Vt. 109, 115 (1984) (citation omitted); see also State v. Parker, 149 Vt. 393, 401 (1988) ("a discretionary ruling of the trial court will not be set aside simply because a different result might have been supportable, or because another court might have reached a different conclusion" (quotation omitted)). Defendant fails to show that the court abused its discretion here.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice