Circuit Court for Charles County
Case No.: 08-K-16-0009878

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 387

September Term, 2017

CHERYL LYNN QUADE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Beachley,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: March 20, 2018

INTRODUCTION

On August 8, 2016, Cheryl Quade (Appellant) was arrested in Charles County, Maryland, and charged with driving while under the influence of alcohol and driving while impaired by alcohol.[1] A jury in the Circuit Court for Charles County found appellant guilty of both counts and the court sentenced her to one year in jail, all but eighteen days suspended, and three years of supervised probation. She now presents us the following questions for review,[2] which we have rephrased:

1. Did the circuit court err by admitting evidence of appellant's prior bad acts?

2. Did the circuit court err by admitting evidence substantially more prejudicial than probative, pursuant to Maryland Rule 5-403?

For reasons stated below, we shall affirm the judgment of the circuit court.

BACKGROUND

On the night of August 8, 2016, Sergeant Ricky Fields of the La Plata Police Department observed appellant driving a Jeep erratically. He witnessed her crossing the double yellow line several times, driving onto the grassy median of Route 301, and swerving across multiple lanes of traffic. Consequently, Sergeant Fields initiated a traffic

[1] Appellant was also charged with failing to obey a properly placed traffic control device and driving on a suspended license, with both counts being disposed of prior to the trial involved in the present case.

[2] Appellant originally asked: "1. Did the trial court abuse its discretion by allowing the State to ask Ms. Quade about her prior experience with the Advice of Rights form because the questions elicited evidence of an inadmissible bad act?; 2. Did the trial court abuse its discretion by allowing the State to ask Ms. Quade about her previous experience with the Advice of Rights form because the evidence the questions elicited was substantially more prejudicial than probative?

stop and called for backup.[3] Officer Jeffrey Dewberry of the Charles County Police Department arrived shortly thereafter. He approached the vehicle and smelled the odor of alcohol emanating from within. After ordering appellant to exit the car, Officer Dewberry administered several field sobriety tests and determined that she was intoxicated. Appellant was then arrested, escorted to the police car, and signed a form acknowledging she had been read the following "Advice of Rights":

> You have been stopped or detained and reasonable grounds exist to believe that you have been driving or attempting to drive a motor vehicle under circumstances requiring that you be asked to submit to a test under § 16-205.1 of the Maryland Vehicle Law. In this situation, the law deems that you have consented to take a test to measure the alcohol concentration or drug or controlled dangerous substance content in your system.

She declined to take a breathalyzer and was taken to the police station for processing.

A jury trial was held on March 30, 2017, and both the State and appellant presented evidence and testimony. Appellant testified, on direct examination, that she drank "two beers" with dinner on the evening in question, "slept for a couple hours," and then drove to her boyfriend's house. She discussed being pulled over and complying with the roadside sobriety tests, noting that she "[walks] with a limp" because of an old hamstring injury. After being read the "Advice of Rights" form, appellant attested she did not understand or hear everything the officer was reading. During cross-examination, the following exchange occurred:

> **[SAO Halliday]:** And he asked you at the end if you wanted to take a test, right?

[3] Both parties agree that Sergeant Fields lacked jurisdiction to seize appellant and that he called for the assistance of a Charles County police officer. This is not at issue in the case *sub judice*.

[Appellant]: Yes.

[SAO Halliday]: You knew what he was talking about?

[Appellant]: Honestly, I didn't, because I didn't pay attention to…I heard the first couple paragraphs.

* * *

[SAO Halliday]: Okay. You knew exactly what this piece of paper was asking you if you wanted to do, didn't you?

[Appellant]: No, not at the time.

* * *

[SAO Halliday]: And you said to [appellant's counsel] on cross-examination, your attorney, "I would never have gotten in the car if I thought I wasn't good to drive," right?

[Appellant]: Right, exactly.

[SAO Halliday]: You wouldn't have gotten in if you knew you weren't good to drive? You wouldn't do that?

[Appellant]: No, I wouldn't.

* * *

[SAO Halliday]: This is not the first time that you have been read this piece of paper, is it?

[Appellant's Counsel]: Objection.

* * *

(After discussion at the bench, the judge overrules the objection and cross-examination continues)

[SAO Halliday]: Alright, ma'am, so the paper we were talking about on direct examination?

[Appellant]: Yes?

[SAO Halliday]: The Advice of Rights?

[Appellant]: Uh-hum?

[SAO Halliday]: Have you seen this before?

[Appellant]: Yes.

[SAO Halliday]: Okay, has it been read to you before?

[Appellant]: Yes.

* * *

[SAO Halliday]: I understand, I understand but you… I mean, these standard field sobriety tests, right, you've heard of them before, right?

[Appellant's Counsel]: Objection.

[Appellant]: I've heard of them.

At the close of the trial, the jury found appellant guilty of driving while under the influence of alcohol and driving while impaired by alcohol. The court sentenced her to one year in jail, all but eighteen days suspended, for driving under influence, and merged driving while impaired. Appellant, thereafter, brought this timely appeal.

ANALYSIS

1. Did the circuit court err by admitting evidence of appellant's prior bad acts?

Appellant argues the State's questions on cross-examination regarding whether she had previously been read the Advice of Rights form or was familiar with field sobriety tests, procedures used solely when "people are stopped or detained for suspected driving under the influence" were improper. She claims the questions elicited prior bad acts, in violation of Maryland Rule 5-404, "[portraying] her as having a propensity to drive while under the influence." Moreover, appellant argues the questions were not proper for purposes of impeachment as prior inconsistent statements, lacked special relevance to a contested issue, that impeachment is "not an enumerated purpose for the admission of bad acts," and the inquiry was not admissible under any of the enumerated purposes in Rule 5-404(b).

Appellee initially responds that appellant's experience with the Advice of Rights form, "without more," does not constitute a prior bad act. Even if it does, appellant testified, before the question at issue, that "she had not been listening when the Advice of Rights form was read to her and did not understand it." Her experience, therefore, with the Advice of Rights was "admissible to rebut the suggestion that she was unfamiliar" with it.

Maryland Rule 5-404(b) provides:

> Evidence of other crimes, wrongs, or acts including delinquent acts…is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Other acts or "bad acts" constitute "activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg v. State*, 355 Md. 528, 549 (1999). Although bad act evidence is "inadmissible to prove a defendant's criminal character," it may be admitted if it has a "special relevance" that is "substantially relevant to some contested issue," such as motive, intent, or knowledge. *Stevenson v. State*, 222 Md. App. 118, 149 (2015) (internal citation and quotations omitted).

Whether such evidence has special relevance is a legal question and, thus, we review this determination *de novo*. If we decide there is special relevance, "then we balance the probative value of and need for the evidence against the likelihood of undue prejudice." *Id.* (quoting *Smith v. State*, 218 Md. App. 689, 709–10 (2014)). "This segment of the analysis implicates the exercise of the trial court's discretion and we will only reverse the court's balancing determination if the court abused its discretion." *Id.*

Given the facts in the present case, we need not address whether appellant's testimony constituted bad acts evidence because assuming, *arguendo*, it was a bad act, the evidence was nevertheless admissible under Rule 404(b) because it established motive and intent, as well as knowledge. We hold appellant's admission that she had previously been read the Advice of Rights had special relevance to a contested issue and the court did not abuse its discretion in finding the probative value substantially outweighed any unfair prejudice. In trials for driving under the influence of alcohol, where the driver has refused

a breathalyzer test, the driver's state of mind has special relevance. In the case *sub judice*, the jury was instructed:[4]

> You have heard evidence that the defendant refused to submit to a test to determine her alcohol level. You must first decide whether the defendant refused to submit to a test.
>
> If you find that the defendant refused to submit to a test, you must then decide whether this refusal is evidence of guilt.
>
> Refusal to submit to a test may be based on reasons that are consistent with innocence or other reasons that are consistent with guilt.
>
> In order to decide whether the defendant refused to submit to a test, and what if any weight to give the refusal, you should consider all of the evidence in the case.

Over the course of the trial, appellant and her counsel maintained that she did not understand or fully comprehend the Advice of Rights form read to her. During opening statements, her counsel stated:

> [The arresting officer] did read the Advice of Rights form. For those of us in this profession, we see the Advice of Rights form a lot. You don't, but you will see it today.
>
> And consider this, when you see it, it's a one-page, single-spaced, small-type document. The officer reads that to her while she's in a car, in handcuffs, on her way to the Detention Center
>
> Well, at the end of that thing, if you listen to its being read on this video, if you understand it, good for you. At the end of it he says, "Now, do you want to take this test?" And she says, "No." There is nothing wrong with that. There is nothing that compels you to take this kind of a test.

Further, during her direct examination, appellant attested:

[4] Moreover, the record confirms appellant's counsel did not object to this portion of the jury instructions and informed the judge that he was satisfied with the instruction.

> **[Appellant's Counsel]:** Did you…do you recall whether he read you [the Advice of Rights form]?
>
> **[Appellant]:** Yes, he read it.
>
> **[Appellant's Counsel]:** Alright, and did you understand everything that he was reading?
>
> **[Appellant]:** No.

As we see it, the State's inquiry, on cross examination, whether appellant was familiar with the Advice of Rights form or field sobriety tests and her response were not admissible to establish her propensity to drive while intoxicated. Rather, it was admissible to elicit the "driver's state of mind at the time of refusing the breathalyzer." The questions and responses, thus, assisted the jury in determining whether appellant understood the Advice of Rights as she had prior knowledge of them, whether she had an intent or motive to avoid the breathalyzer test and, further, whether that was evidence of guilt. As such, the testimony had special relevance to a contested issue in the case.

2. Did the circuit court err by admitting evidence substantially more prejudicial than probative, in violation of Maryland Rule 5-403?

Appellant contends "the prejudice (as a result) of the fact that [appellant] had been read the Advice of Rights form before substantially outweighed its probative value," thus, violating Maryland Rule 5-403. Appellant argues the evidence "announced to the jury" that she had a prior arrest or conviction for the same charges and "this created a risk that the jury assumed" she "acted in accordance with a predisposition to drive while under the influence." She maintains the "probative value was non-existent" because there was no inconsistency in her testimony and, even if there was, "there is little probative value in a

statement that is admitted solely for impeachment purposes." Finally, appellant avers that the State "cannot show beyond a reasonable doubt that the error in allowing the introduction of bad acts evidence was harmless." Appellee, conversely, contends the probative value was appellant's "ability to understand the Advice of Rights" and that it substantially outweighed any unfair prejudicial effect.

We review the circuit court's "decision to admit relevant evidence over an objection that the evidence is unfairly prejudicial, [under] an abuse of discretion [standard]." *Collins v. State*, 164 Md. App. 582, 609 (2005) (internal citations omitted). Under Rule 5-403:

> Although 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.

Here, the court did not abuse its discretion. Clearly, there was probative value in the evidence that appellant had been read the Advice of Rights form previously. It helped rebut her testimony that she didn't understand the form, thus, tending to show that the reason she refused to take a breathalyzer test was to avoid a result showing she was intoxicated. *See Wyatt v. State*, 149 Md. App. 554, 577 n. 1 (2003) (recognizing that the Legislature, in enacting Md. Code, Courts & Judicial Proceedings § 10-309(a)(2), made evidence of a refusal to take a breathalyzer tests per se admissible in driving under the influence cases). While there may be a prejudicial effect, because the jury could infer appellant was familiar with the procedures due to the fact that she had previously been arrested, the court's ruling that this was substantially outweighed by its probative value was not an abuse of discretion.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.