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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1559**

State of Minnesota,
Respondent,

vs.

Michael Paul Weaver,
Appellant.

**Filed August 19, 2019
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-17-17327

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, Amy J. Tripp-Steiner, Assistant City Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Peterson,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

FLOREY, Judge

Following a jury trial, appellant was convicted of misdemeanor consuming alcohol in public, and misdemeanor loitering in possession of an open bottle. *See* Minneapolis, Minn., Code of Ordinances (MCO) §§ 364.40, .45 (2017). On appeal, appellant contends that, by denying his request to subpoena a witness to testify in his defense, the district court violated his constitutional rights. We affirm.

FACTS

Minneapolis Police Officer Nicholas Wasche was on duty and conducting surveillance “addressing livability crimes along Lake Street.” Officer Wasche was aware that the police department had received numerous complaints regarding public consumption of alcohol near their offices. From his office, Officer Wasche could see, using a double-photo digital camera, two individuals openly consuming alcohol underneath the Hiawatha Bridge on Lake Street.

While recording the incident with the double-photo digital camera, Officer Wasche watched the two individuals “cheers” each other with two beer cans and observed one of the individuals, later identified as appellant Michael Paul Weaver, take a sip from the can. Officer Wasche also observed a box of beer on the ground next to the two individuals. Officer Wasche dispatched other officers to the location, and continued to surveil the area until the officers arrived on scene.

Officer Ellen Jensen and her partner responded to Officer Wasche’s call. Officer Jensen observed the two suspect individuals standing near another group of people under

the bridge. Officer Jensen activated her body camera and approached appellant while her partner spoke with the second individual.

Officer Jensen observed that appellant was wearing a red shirt, as described by Officer Wasche, and saw that appellant was holding an unopened can of “Natural Ice” beer. Appellant denied drinking. Officer Jensen observed a box of beer, as well as an open can of beer, on the ground where appellant was standing. Appellant removed the belongings from his pocket, including a partially consumed bottle of “Fireball.” Appellant denied the bottle of Fireball was open.

Officer Jensen collected evidence, including an open can of Natural Ice beer, an unopened can of Natural Ice beer, and a box of Natural Ice beer. When asked by Officer Jensen what he was drinking, appellant responded, “Natural Ice and I got a bottle.” He then denied drinking in public. Officers released appellant.

Before leaving the scene, Officer Jensen poured into a plastic container a sample from the open can of Natural Ice beer that she located on the ground where appellant had been standing. The sample was sent to the Minnesota Bureau of Criminal Apprehension (BCA) for testing.

The BCA’s toxicology report concluded, to a 95.45 percent level of confidence, that the sample “contained 5.46 plus or minus 0.21 percent ethyl alcohol by volume.” Appellant was charged with misdemeanor consuming alcohol in public, and misdemeanor loitering in possession of an open bottle. *See* MCO §§ 364.40, .45.

At a pretrial hearing on the morning of trial, appellant discharged the public defender’s office, and remained adamant that he wanted to represent himself. At the

hearing, the parties discussed the potential consequences if appellant was found guilty of the misdemeanor drinking-in-public charges. The state explained that appellant had been sentenced the day prior for an unrelated conviction and that all of his jail credit had been applied to that sentence. Consequently, the state explained, if appellant was convicted of the misdemeanor drinking-in-public charges, then he would potentially be subject to a 90-day sentence. The state offered a plea agreement to help prevent appellant from having to serve additional jail time, but appellant declined the offer.

Several times before the start of trial, appellant insisted that the district court subpoena a witness to testify in his defense. He asserted that the reason he “fired” his attorney was because his attorney “didn’t call [his] witness,” R.G.E., and the other “people that were sitting there” under the bridge when he was cited for drinking in public. He stated, “They were drinking Four Lokos and Natural Ice. And I had one too.”

The district court explained to appellant that, in order for it to give appellant permission to subpoena a witness, it had to find that the witness was relevant and material to the case. The court explained, “As I understand it, you want to call [R.G.E.] because he was doing the same thing you were doing but did not get arrested?” Appellant responded, “Well I mean he could have testified that I was just walking through and I seen them and I had a taste or whatever—I’m not going to say consume—the alcohol or beer or whatever.” The district court explained, “A taste is good enough. That’s consuming.”

The state made a motion in limine to preclude appellant from discussing before the jury the court’s denial of appellant’s request to subpoena R.G.E. The district court granted the motion. Despite the court’s order precluding appellant from discussing the subpoena

issue before the jury, in appellant's opening statement, he told the jury that he was hoping his witness, R.G.E., would be subpoenaed, and that the reason he "fired" his attorney that morning was because his "attorney didn't do it." Disregarding objections from the state and instructions from the district court, appellant stated to the jury, "Well he's my witness. He was the other partner that I was drinking with." The district court concluded appellant's opening argument and excused the jury for the day.

That afternoon, the district court, again, explained to appellant that it was not going to grant his request to subpoena R.G.E. because R.G.E. was not material and favorable to appellant's defense. Appellant insisted that R.G.E. be subpoenaed: "Well if I would've asked him questions—yeah. You know, how long seen me walking there. Yeah, I stopped and had a beer with him, but how could I be loitering when other people are sitting around there. They're loitering, not me." The district court maintained its decision.

On the second day of trial, the state called Officer Wasche, Officer Jensen, and BCA forensic scientist, Jessica Hayda to testify. The state also offered into evidence Officer Wasche's surveillance video showing appellant taking a sip from the Natural Ice beer underneath the Hiawatha Bridge on Lake Street, portions of Officer Jensen's body-camera footage showing her encounter with appellant, photographs of the evidence that Officer Jensen collected, and Hayda's toxicology report concluding that the sample from the Natural Ice can contained alcohol.

Appellant testified in his own defense. During the state's cross-examination, appellant conceded that he was the man in the surveillance video wearing the red shirt, and he did not dispute being at the location under the bridge at the time of the incident. He

conceded that he was unaware Officer Wasche was recording him, and affirmed that he was holding a can in the surveillance video. He conceded that the video showed that he “cheersed” his beer can with R.G.E., and then “brought the can . . . up to [his] mouth.” Appellant conceded he told Officer Jensen that he had been drinking Natural Ice that day, and, further, testified, “I was drinking Fireball too.”

At the conclusion of cross-examination, the district court asked if appellant had any further testimony to give, or whether he had “any other witnesses [he] [was] going to call.” Appellant responded, “Well I fired my attorney. How could I? That’s why I fired him because he didn’t call me [sic] witnesses that were around there.” The district court considered his case completed.

The jury found appellant guilty of both counts as charged. The district court sentenced appellant to serve, consecutive with his other sentence, 90 days in jail for count one, consuming alcohol in public. This appeal followed.

D E C I S I O N

Appellant argues that the district court violated his constitutional right to compulsory process when it declined to subpoena a witness to testify in his defense. *See* Minn. R. Crim. P. 22.01, subd. 3 (“A defendant not represented by an attorney may obtain a subpoena only by court order.”). Every criminal defendant must be afforded a meaningful opportunity to present a complete defense. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). This right necessarily includes “[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967). The right of the accused to have compulsory process

for obtaining witnesses in their favor is guaranteed by both the United States and Minnesota Constitution. The Sixth Amendment of the United States Constitution provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI. The same right is protected under the Minnesota Constitution. Minn. Const. art. I, § 6.

A defendant’s federal and state constitutional rights are violated when the defendant is “arbitrarily deprived of testimony that would have been relevant and material, and vital to the defense.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446 (1982) (emphasis omitted) (quotation omitted); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 1000 (1987) (“Our cases establish, at a minimum, that criminal defendants have the right to the government’s assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.”).

However, the rights afforded under the compulsory-process clause are not unlimited. “Indeed, the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses” *Valenzuela-Bernal*, 458 U.S. at 867, 102 S. Ct. at 3446. An accused cannot establish a violation of his constitutional right to compulsory process merely by showing that the district court denied a request to subpoena a witness. *See id.* Rather, the accused “must at least make some plausible showing of how [the witness’s] testimony would have been both material and favorable to his defense.” *Id.*

Thus, to prevail on appeal, appellant must show that the district court improperly excluded the testimony of R.G.E. and that the testimony would have been material and favorable to his case. See *State v. Lee*, 480 N.W.2d 668, 670 (Minn. App. 1992) (citing *Valenzuela-Bernal*, 458 U.S. at 867, 102 S. Ct. at 3446), *rev'd on other grounds*, 494 N.W.2d 475 (Minn. 1992). We review the district court's "evidentiary rulings under an abuse of discretion standard even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *Penkaty*, 708 N.W.2d at 201; see also *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) ("Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion.").

If appellant establishes that the district court's evidentiary ruling violated his constitutional right to present a complete defense, the burden shifts to the state to show that any error was harmless beyond a reasonable doubt. See *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) ("When an error implicates a constitutional right, we will award a new trial unless the error is harmless beyond a reasonable doubt."). "An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *Id.* (quotation omitted).

Appellant argues that the district court violated his constitutional rights "by improperly refusing to issue a subpoena he requested for his witness." Citing to this court's decision in *State v. Lee*, appellant asserts that, "[s]imilar to the excluded testimony in *Lee*,

[R.G.E.]’s testimony would have been material and favorable” to his defense.¹ Appellant argues that the testimony of R.G.E. would have contributed to his defense “that there were other people around, he was just passing through and briefly stopped.” He argues that R.G.E. would have testified “that other people ‘were around there too,’ and that [appellant] was ‘just walking through [] seen them and [] had a taste or whatever.’”

Because appellant failed to demonstrate in his proffers that the testimony of R.G.E. would have been material and favorable to his defense, the district court’s denial of his request to subpoena R.G.E. was not an abuse of discretion. As the district court found, appellant’s proffers suggested that the testimony of R.G.E. would have been irrelevant and unfavorable to his case. First, whether other people were also consuming alcohol in public was irrelevant to whether appellant was guilty of the charges against him. Second, the amount of time appellant had stopped to socialize was also irrelevant to the charges. Third, appellant’s indication that R.G.E. would have testified that appellant only “had a taste or whatever,” would not have been favorable to appellant’s defense. As the district court stated to appellant, “A taste is good enough. That’s consuming.”

Lastly, even if we concluded that the district court’s evidentiary ruling was error, the strong evidence against appellant, including appellant’s own concessions before the jury, make any error harmless beyond a reasonable doubt. One, Officer Wasche testified that he personally observed appellant, wearing a red shirt, standing under the Hiawatha

¹ We note that the *Lee* decision cited by appellant in support of his argument was reversed by the supreme court, which concluded that the district court’s exclusion of certain testimony was *not* prejudicial error. 494 N.W.2d at 479.

Bridge on Lake Street, holding, toasting, and taking a sip from a can of beer. Officer Wasche's footage of his observations was shown to the jury and admitted into evidence. Two, Officer Jensen testified that, when she approached appellant standing under the Hiawatha Bridge and dressed as Officer Wasche had described, appellant was standing next to an open can and box of Natural Ice beer, he was holding an unopened can of Natural Ice beer, and he had in his possession a partially consumed bottle of Fireball. Relevant portions of Officer Jensen's body-camera footage of her encounter with appellant were shown to the jury and admitted into evidence. Third, BCA forensic scientist Hayda testified that the sample of liquid collected from one of the open beer cans contained alcohol. Hayda's toxicology report was shown to the jury and admitted into evidence.

And fourth, appellant conceded, several times before the jury, that he had been drinking alcohol with R.G.E. For example, in his opening statement, appellant remarked, "[R.G.E.] was the other partner that I was drinking with," and during cross-examination by the state, appellant testified, "I was drinking Fireball too." Based on the evidence presented before the jury, the jury's verdict was "surely unattributable" to any alleged error. *See Davis*, 820 N.W.2d at 533 (quotation omitted).

Affirmed.