IN THE COURT OF APPEALS OF THE STATE OF ALASKA

COLBY JAMES GRIFFETH,	)	
	)	Court of Appeals No. A-11144
Appellant,	)	Trial Court No. 3AN-11-9439 CR
	)	
v.	)	
	)	MEMORANDUM OPINION
STATE OF ALASKA,	)	
	)	
Appellee.	)	No. 6032 — March 5, 2014
	)	

Appeal from the District Court, Third Judicial District, Anchorage, Leonard M. Linton, Judge.

Appearances: David D. Reineke, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Andrew James Klugman and William Taylor, Assistant District Attorneys, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.[*]

Judge ALLARD.
Judge MANNHEIMER, concurring.

[*] Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

A jury convicted Colby J. Griffeth of reckless driving.[1] During his trial on that charge, Griffeth sought to introduce testimony by his employer that he had a reputation for good driving. The trial court ruled that, if Griffeth introduced this testimony, the prosecution could impeach the witness with evidence that Griffeth had been convicted of negligent driving twenty-two years earlier. Following this ruling, Griffeth elected not to introduce the evidence of his reputation.

Griffeth argues that the district court abused its discretion by ruling that the State could impeach this reputation evidence with evidence of his old negligent driving conviction. We conclude that we need not reach this question because, even if the district court's ruling was error, the error was harmless.

Griffeth also argues that the jury had insufficient evidence to find that he was driving the vehicle in question. We conclude that there was sufficient evidence for a fair-minded juror to find that Griffeth was driving, and we affirm his conviction.

Facts and proceedings

On August 20, 2011, Renee Weaver called the Alaska State Troopers to report a red semi-truck with a white trailer driving recklessly on the Seward Highway. Weaver reported that the truck tailed her for three miles before passing her so fast that it "drove me onto the shoulder and just about drove me off the road." Weaver was at mile 83 of the highway when she called in this report.

Janet Mullen was also driving on the Seward Highway that morning, behind a recreational vehicle. A red semi-truck with a white trailer also tried to pass her vehicle and the RV. Because the semi-truck did not have enough time to pass both vehicles

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[1] AS 28.35.400.

before oncoming traffic approached, it pulled between Mullen and the RV, forcing Mullen to brake and swerve to the right to avoid hitting the truck. After the oncoming traffic passed by, the semi-truck passed the RV, which Mullen felt was unsafe given the traffic conditions.

Trooper Michael Zweifel was at the Alaska State Trooper office at mile 90 of the Seward Highway when he received Weaver's report of a red semi-truck with a white trailer driving recklessly. Within three or four minutes Zweifel saw a semi-truck that matched that description. Zweifel used his radar to establish that the truck was traveling sixty-eight miles per hour. He then pulled the truck over and contacted the driver, Griffeth.

Griffeth was charged with reckless driving based on this conduct. At his trial, he raised a defense of mistaken identity. Griffeth sought to establish that Mullen and Weaver had observed a different semi-truck driving recklessly, not the one he was driving. He also moved to admit testimony that he had a reputation for good driving. The district court ruled that Griffeth could offer this testimony, but that if he did, the State could cross-examine the witness about Griffeth's prior conviction for negligent driving. Following this ruling, Griffeth decided not to present the reputation evidence.

The jury convicted Griffeth of reckless driving. He appeals.

Griffeth's conviction is supported by sufficient evidence

Griffeth argues that the State did not present sufficient evidence to prove that he was driving the truck Weaver and Mullen observed. He asserts that Weaver's and Mullen's descriptions of the semi-truck did not establish that it was the truck he was driving because neither witness identified the license plate number or the company logo on the side of the truck. He also points to evidence that the semi-truck he was driving

could not be operated at speeds exceeding sixty-eight miles per hour. He argues that this evidence supported his claim that Weaver must have observed a different truck, because she testified that the truck appeared to be going faster than that.

Griffeth's claims rest on viewing the evidence in the light most favorable to his case. But when we review a claim of insufficient evidence, we must view the evidence presented at trial, and the reasonable inferences from that evidence, in the light most favorable to upholding the jury's verdict.[2] Viewing the evidence in that light, the question is "whether fair-minded jurors exercising reasonable judgment could find the defendant guilty beyond a reasonable doubt."[3]

Mullen and Weaver both testified that a red semi-truck with a white trailer passed them on the Seward Highway. Weaver said the truck forced her onto the shoulder and Mullen said she had to swerve to avoid hitting the truck. Weaver saw the semi-truck at mile 83 of the Seward Highway, and Trooper Zweifel — who was at mile 90 — spotted a truck matching her description within three or four minutes of Weaver's report. Both Weaver and Mullen testified that they saw the semi-truck that Zweifel had pulled over and that they believed Zweifel had pulled over the right vehicle. Moreover, Griffeth admitted to Zweifel that he had passed a couple of vehicles on the highway, including a motor home. We conclude that there was sufficient evidence for a fair-minded juror to convict Griffeth of driving recklessly.

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[2] *State v. Greenpeace, Inc.*, 187 P.3d 499, 503 (Alaska App. 2008).

[3] *Abyo v. State*, 166 P.3d 55, 60 (Alaska App. 2007).

Any error in the court's ruling conditionally admitting Griffeth's negligent driving conviction was harmless

In district court, Griffeth's attorney sought to admit the testimony of Griffeth's boss, Rebecka Daul, that Griffeth had a reputation for good driving. Griffeth worked for Daul as a driver for "well over a year," and, according to Griffeth's offer of proof, Daul had received no complaints about Griffeth's driving during that time. Griffeth's attorney said that Daul's testimony "goes to show his reputation within the community."

The district court asked the parties whether an absence of complaints was admissible as "evidence of a trait of careful driving." The parties agreed that it was. But the State argued that, if Griffeth presented Daul's testimony, it should be permitted to rebut that testimony with evidence of Griffeth's 1989 conviction for negligent driving. The court agreed and ruled in favor of the State. Griffeth then decided not to offer Daul's testimony on this issue.

We note that Griffeth's decision to abandon the reputation evidence creates a potential forfeiture problem with regards to our ability to meaningfully review Griffeth's claim of error.[4] But we do not address this issue because the State did not raise this concern and because we conclude that the offer of proof on this well-defined evidentiary issue is sufficient to resolve the case on other grounds.

Under Evidence Rule 405(a), when a defendant offers evidence of his reputation "in any community or group in which the [defendant] habitually associated,"

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[4] *See, e.g.*, *Sam v. State*, 842 P.2d 596, 598-99 (Alaska App. 1992) (defendant's decision to abandon his diminished capacity defense precluded our review of the court's decision conditionally admitting the testimony of the State's expert — because "[a]ny attempt to divine the likely effect of the alleged error in these circumstances would amount to pure speculation").

the prosecution may inquire on cross-examination into "relevant specific instances" of the defendant's conduct. Griffeth argues that the twenty-two-year-old negligent driving conviction was too remote in time to be relevant for this purpose.

We agree with Griffeth that, given its remoteness in time, the negligent driving conviction had little probative value. But we conclude that even if the district court's ruling was error, the error was harmless in light of the questionable admissibility and limited probative value of the proposed reputation evidence.

As the concurrence explains in more detail below, it is unclear that Daul's proposed testimony that she had received "no complaints" about Griffeth's driving during the year he worked for the company qualified as reputation evidence under Evidence Rule 405(a). But even assuming that it did qualify as reputation evidence, we do not believe that this testimony, if it had been offered, would have had any effect on the jury's view of the evidence or on the outcome of this case.

We note that the State's evidence in this case was strong. Two disinterested witnesses independently observed a red semi-truck with a white trailer driving recklessly on the Seward Highway. Within minutes, Trooper Zweifel saw a truck matching that description and pulled it over. Both witnesses testified that the truck Zweifel pulled over was the same truck they had observed driving recklessly. And Griffeth admitted that he had passed several vehicles. Given this record, we conclude that even if the district court's ruling was error, the error was harmless.[5]

Conclusion

We AFFIRM the judgment of the district court.

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[5] *See Love v. State*, 457 P.2d 622, 632 (Alaska 1969).

Judge MANNHEIMER, concurring.

I write separately to address Griffeth's claim that he was improperly deterred from introducing evidence of his reputation for good driving. My analysis of this claim differs substantially from the "harmless error" analysis offered in the majority opinion — because I conclude that the "reputation" evidence that Griffeth proposed to offer in the trial court was not admissible to begin with.

Alaska Evidence Rule 404(a) declares that the defendant in a criminal case may introduce "[e]vidence of a relevant trait of [their] character". But Evidence Rule 405(a) limits the form that this evidence may take. Under Rule 405(a), Griffeth's proposed character evidence had to consist of "testimony as to [Griffeth's] reputation in [a] community or group in which [he] habitually associated".

In Griffeth's case, the defense attorney told the trial judge that he wished to offer evidence of Griffeth's reputation in the community as a good driver. But when the defense attorney made his offer of proof, the attorney described testimony that would not have been admissible as reputation evidence.

As this Court recently explained in *Hunter v. State*, 307 P.3d 8, 12-15 (Alaska App. 2013), when a litigant offers a witness to testify about someone's reputation, the foundational requirement for this testimony is proof "that the witness has sufficient familiarity *with the people in the community* so that [the witness] can make a valid attempt at assessing [the person's] reputation." *Id.* at 12-13 (emphasis added). [1] This foundational requirement stems from the law's insistence that reputation testimony must describe "the aggregate judgment of a community" — a reputation derived "from

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[1] Quoting the first paragraph of the Commentary to Alaska Evidence Rule 405(a).

the slow spreading influence of community opinion[,] growing out of [the person's] behavior in the society in which he moves and is known". *Id.* at 13. [2]

Conceivably, the proposed defense witness — Rebecka Daul — might have been sufficiently well-acquainted with the commercial trucking community, or with some other relevant community, to offer testimony concerning Griffeth's reputation within that community, either as a good driver or as a bad driver. But Griffeth's defense attorney did not assert that Daul had this type of knowledge. Instead, the defense attorney simply told the trial judge that Daul had been Griffeth's boss at the trucking company for over a year, and that no one had ever complained to her about Griffeth's driving during that time.

As this Court explained in *Hunter*, the fact that a witness has received reports of specific instances of a person's behavior (whether good or bad) does not mean that the witness is acquainted with the person's general reputation within the community. Thus, even when a witness has knowledge of particular instances of the person's behavior, this knowledge is not sufficient to establish the evidentiary foundation that would authorize the witness to offer testimony about the person's community reputation. *Id.* at 13-15.

In Griffeth's case, the defense attorney did not even assert that Daul had received reports of Griffeth's *good* driving — which, as just explained, would *not* have been adequate to establish the evidentiary foundation for her proposed reputation testimony. Instead, the defense attorney simply asserted that Daul had never received a complaint about Griffeth's *bad* driving. That offer of proof was even more inadequate.

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[2] Quoting Mason Ladd, "Techniques and Theory of Character Testimony", 24 Iowa Law Review 458, 513 (1939).

In other words, if Griffeth's attorney had actually tried to present Daul's testimony, the trial judge would have been completely justified in excluding it altogether.