IN THE COURT OF APPEALS OF IOWA

No. 1-597 / 10-1284
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KRISTEN DARLENE WHITSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Kim M. Riley, Judge.

Kristen Whitson appeals her conviction for operating while intoxicated. **AFFIRMED.**

Harry L. Haywood III of Haywood Law Office, Eldora, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Randall J. Tilton, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

Kristen Whitson challenges her conviction for operating while intoxicated, alleging the district court erred in denying her motion to suppress, in rejecting her entrapment defense, and in concluding she was not eligible for a deferred judgment. We affirm, finding the peace officer was justified in stopping Whitson for failing to signal her turn under Iowa Code section 321.314 (2009), the officer did not induce her to commit the drunk driving offense, and the court properly interpreted section 907.3(1)(g)(1) in sentencing her.

I. Background Facts and Proceedings

On November 15, 2009, eighteen-year-old Kristen Whitson drove with her friend Callee Vossler from LaPorte City to Eldora where they planned to watch the Packers play the Cowboys on television and then stay overnight at the home of Clancy Freese. Freese was Vossler's former paramour and worked as a jailer for the Hardin County Sheriff's Office.

Upon their arrival, Freese told Vossler and Whitson: "There's Busch Light in the fridge if you'd like to help yourself." Another guest, Jessica Olsen, recalled that Vossler and Whitson brought a case of beer with them. Olsen was Freese's neighbor and a part-time dispatcher for the Hardin County Sheriff's Office. Vossler and Whitson both drank several beers at the Freese home. At some point during that Sunday afternoon, Vossler and Whitson went to the grocery store to buy cigarettes and ingredients for a pasta salad. While they were gone, dogs owned by Freese and Olsen chased each other around the house and

knocked over Vossler's backpack, revealing a quantity of pre-packaged marijuana.

As time expired in the football game, Vossler and Freese stepped into the bedroom where they could be overheard having a heated argument. When they emerged from the bedroom, Freese told Vossler and Whitson: "I'm sorry. You guys have to go." Vossler testified that they were given no choice but to leave, so she "put the pasta in the refrigerator and left." Vossler offered to drive, but Whitson declined because Vossler did not have a license, had also been drinking, and was not covered by her insurance policy.

Olsen believed that it was her obligation as a dispatcher to "report anything that I see that is illegal in nature," so she found out who was on duty that evening for the Eldora police department. She sent text messages to Officer David Burk informing him that Vossler and Whitson left Freese's house in a Pontiac Bonneville and that they had been drinking alcohol and possessed illegal drugs.

Officer Burk located the Bonneville about one mile from Freese's home and watched the driver make a left turn without using her signal. When Burk stopped the vehicle, he noted that Whitson, who was driving, had red, watery eyes and smelled of alcohol. She admitted that she had been drinking beer. She submitted to chemical testing and registered a blood alcohol concentration (BAC) of .165. The county attorney charged Whitson with operating while intoxicated (OWI), first offense.

On January 5, 2010, Whitson filed a notice that she intended to rely on an entrapment defense at trial. Also on January 5, 2010, Whitson moved to suppress the evidence obtained as a result of the traffic stop, alleging that the officer lacked reasonable suspicion or probable cause and acted based on a mistake of law. The district court held a suppression hearing on January 26, 2010. On February 17, 2010, the court overruled the motion to suppress, finding that the officer properly stopped Whitson for violating Iowa Code section 321.314.

The defendant waived her right to a jury trial and stipulated to driving with a blood alcohol level exceeding the legal limit. The only issue for the district court to decide at the February 25, 2010 bench trial was whether Whitson presented a viable entrapment defense. In its findings of fact and conclusions of law on March 3, 2010, the court found that the State proved beyond a reasonable doubt that Whitson was not entrapped.

On July 20, 2010, the district court sentenced Whitson to two days in jail, the minimum penalty for OWI first offense, and suspended the rest of her sentence. The court determined that she was not eligible for a deferred judgment under the sentencing statutes because her BAC exceeded .15. Whitson appeals the court's denial of her motion to suppress, as well as her conviction and sentence.

II. Scope and Standards of Review

We review de novo a district court's ruling on a claim that the State violated a defendant's right to be free from unreasonable searches and seizures

under the Fourth Amendment of the federal constitution and article I, section 8 of the Iowa Constitution. *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997). "We independently review 'the totality of the circumstances as shown by the entire record.'" *State v. Louwrens*, 792 N.W.2d 649, 651 (Iowa 2010) (citation omitted). We defer to the factual findings of the district court, but are not bound by them. *Id.*

We review a challenge to the sufficiency of the evidence for errors at law. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). We review a defendant's claim that the district court erred in denying a motion for new trial based on the weight-of-the-evidence standard for an abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The defendant bears the burden of generating a fact question on the defense of entrapment. *State v. Cooper*, 248 N.W.2d 908, 910 (Iowa 1976). In deciding whether the defendant met that burden, we view the evidence in the light most favorable to the defendant. *Id.* When the defendant has met that burden, the State must disprove entrapment beyond a reasonable doubt. *Id*. On appeal, we must view the contravening evidence in the light most favorable to the State and accept all reasonable inferences tending to support the conviction. *State v. Baumann*, 236 N.W.2d 361, 364 (Iowa 1975).

Because the defendant's sentencing claim involves statutory interpretation, our review is for correction of legal error. *State v. Iowa Dist. Ct.*, 730 N.W.2d 677, 679 (Iowa 2007).

III. Merits

A. The traffic stop did not violate the defendant's constitutional right to be free of unreasonable searches and seizures.

When a peace officer has probable cause to believe that a motorist has violated any traffic law, no matter how minor, the officer's stop of the vehicle does not violate the motorist's rights under the Fourth Amendment or article 1, section 8.[1] *Louwrens*, 792 N.W.2d at 651; *see also Whren v. United States*, 517 U.S. 806, 811, 116 S. Ct. 1769, 1773, 135 L. Ed. 2d 89, 97 (1996). The question in this appeal is whether Officer Burk had probable cause to stop Whitson for a violation of Iowa Code section 321.314.

That code section, entitled "When signal required" provides as follows:

> No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

Iowa Code § 321.314.

Our court invalidated a stop based on this statute in *State v. Malloy*, 453 N.W.2d 243, 245 (Iowa Ct. App. 1990). In that case, peace officers stopped the defendant after he made a right-hand turn without using a turn signal. *Malloy*,

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[1] Although the defendant has made a parallel claim under the Iowa Constitution, she does not argue that article I, section 8 should be interpreted differently from the Fourth Amendment in regard to this stop. Accordingly, we assume for the purposes of this case that the Iowa Constitution should be interpreted in the same fashion as its federal counterpart. *See State v. Brooks*, 760 N.W.2d 197, 204 n.1 (Iowa 2009).

453 N.W.2d at 244. No other vehicles were near the intersection and the squad car was one and one-half blocks behind Malloy's car. *Id*. The decision held:

> Defendant was not required to signal his right turn unless another vehicle was affected by the turn. We find that since the police officers were far enough behind the defendant at the time of his turn, that turn did not affect the officers' vehicle. Thus, defendant was not required to use a signal. Consequently, the officers had no reasonable grounds to stop defendant's vehicle based on a violation of section 321.314.

Id. at 245.

In the instant case, Officer Burk testified that another vehicle, traveling eastward, was waiting at the stop sign to turn right when Whitson, who was westbound, turned left at the intersection without signaling. In his opinion, the eastbound vehicle was affected by Whitson's movement: "Because the other vehicle started to go and then had to stop because the defendant then turned in front of him." We find that the officer's factual belief was objectively reasonable. *See United States v. Rodriguez-Lopez*, 444 F.3d 1020, 1023 (8th Cir. 2006); *see also State v. Lloyd*, 701 N.W.2d 678, 681–82 (Iowa 2005) (upholding traffic stop when officer's mistake of fact was objectively reasonable). The statute uses the phrase "in the event any other vehicle *may be affected* by such movement" when describing the obligation to signal a turn. Iowa Code § 321.314 (emphasis added). "The word 'may' in its most usual meaning does not import certainty." *Grant v. Utah State Land Bd.*, 485 P.2d 1035, 1036 (Utah 1971). Accordingly, Officer Burk did not have to establish that the other drivers were actually affected by Whitson's turn, just that by their proximity and direction of travel they may have been affected by the movement.

The district court found that the facts in this case presented "a stark distinction" from the circumstances in *Malloy*. The court credited the officer's testimony and concluded: "Ours is a clear case in which a signal was required prior to the turn." Giving deference to the district court's ability to assess the credibility of the witnesses, but exercising our de novo review, we agree that Whitson's failure to signal her turn provided grounds for stopping her car.

Whitson contends that the officer made a mistake of law, alleging that Burk "thought section 321.314 is violated just by a turn without using a signal." This contention is contradicted by the suppression record. Unprompted, Officer Burk testified at the suppression hearing that a signal was required if the turn "affects other traffic." His stop of Whitson's vehicle was not based on a mistaken belief as to what conduct violated section 321.314. *Contra Louwrens*, 792 N.W.2d at 652 (analyzing whether mistake of law, i.e. officer's belief that the driver made an illegal U-turn despite the lack of signs outlawing the practice, could be objectively reasonable ground for an investigatory stop). Because the stop was permissible under the Fourth Amendment and article I, section 8, we affirm the denial of Whitson's motion to suppress.

B. The facts do not support the defendant's entrapment defense.

Whitson alleges she had no intent to operate while intoxicated. She insists her plan was to stay overnight at Freese's residence. She blames her offense on Olsen and Freese's knowledge that she had been drinking alcohol, Freese's demand that Vossler and Whitson leave her house, and Olsen's report of their leaving to law enforcement. She argues the district court should have

found she was not responsible for the crime under a "private entrapment" theory of defense.

"[E]ntrapment occurs when a law enforcement agent induces the commission of the offense, using persuasion or other means likely to cause normally law-abiding persons to commit it." *State v. Tomlinson*, 243 N.W.2d 551, 553 (Iowa 1976). "Conduct merely affording a person an opportunity to commit an offense is not entrapment." *Id*. Under the objective test for entrapment adopted by our supreme court in *State v. Mullen*, 216 N.W.2d 375, 382 (Iowa 1974), the focus is not on the propensities or predisposition of the defendant, but on the actions of law enforcement. *State v. Leonard*, 243 N.W.2d 75, 80 (Iowa 1976).

"[I]f a private individual puts another person up to the commission of a crime, that other person cannot successfully urge entrapment even though the private individual informs law officers that the crime is going to be committed." *State v. Ostrand*, 219 N.W.2d 509, 512 (Iowa 1974). But "[i]f law enforcement officers use an individual to help them arrange the commission of a crime by another person, the officers cannot disclaim the inducements such individual offers in the course of his efforts on behalf of the officers." *Tomlinson*, 243 N.W.2d at 554. The private entrapment theory urged by Whitson requires that she (1) tie the private individuals to the police to show they were acting for law enforcement, and (2) show the inducements employed by the individuals that would cause a normally law-abiding person to commit the offense. *State v. Gibb*, 303 N.W.2d 673, 683 (Iowa 1981).

We cannot find Whitson generated a fact question on her private entrapment defense. *See State v. Davis*, 175 N.W.2d 407, 411 (Iowa 1970). But even if a fact questioned existed, the State's evidence disproved entrapment beyond a reasonable doubt.[2]

Initially, Whitson recognizes that Freese's job as a jailer did not convert her into an agent of law enforcement. Whitson also acknowledges that Freese was not acting at the behest of Officer Burk. But Whitson argues that Olsen, another private citizen, was working on behalf of law enforcement.

While Whitson's logic is not entirely clear, her entrapment defense appears to hinge on casting Olsen as a go-between, who knew Freese asked Whitson and Vossler to leave after they had been drinking beer and who called the Eldora police officer on duty after she discovered marijuana in Vossler's backpack. While Whitson is able to tie Freese to Olsen, and Olsen to Officer Burk, those connections do not show that law enforcement used either Olsen or Freese to help them arrange the commission of a crime by Whitson. *But see Tomlinson*, 243 N.W.2d at 554–55 (finding jury question on entrapment when government used informant who in turn used his relationship with private citizen to arrange purchase of drugs). Officer Burk's only participation was the receipt of a tip from Olsen concerning illegal activity.

The criminal conduct for which Whitson was convicted did not originate in the mind of law enforcement. *See Mullen*, 216 N.W.2d at 379. Officer Burk

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[2] In concluding the facts of this case do not meet the elements of entrapment, we reject Whitson's claims concerning both the sufficiency of the evidence and the weight of the evidence for conviction.

testified that before Olsen contacted him on November 15, 2009, he played no role in persuading or enticing Whitson to consume alcohol and then drive a motor vehicle. Likewise, Olsen was not an agent of law enforcement and did nothing to urge or otherwise persuade Whitson to drive away in her Bonneville after she had been drinking beer. Olsen simply reported the drug possession and possible impaired driving to the police because she believed that her employment as a part-time dispatcher required her to do so. Her self-initiated report did not constitute entrapment. *See State v. Lamar*, 210 N.W.2d 600, 606 (Iowa 1973).

The district court did not commit legal error in rejecting Whitson's entrapment defense.

C. The defendant was not eligible for a deferred judgment under Iowa Code section 907.3(1)(g).

In her final assignment of error, Whitson alleges the sentencing court misread section 907.3(1)(g) to prohibit the granting of a deferred judgment in this first-offense OWI case. At issue is the following statutory language:

> With the consent of the defendant, the court may defer judgment and may place the defendant on probation upon conditions as it may require. . . .
>
> However, this subsection shall not apply if any of the following is true:
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> . . . .
>
> g. The offense is a violation of section 321J.2 *and the person has been convicted of a violation of that section* or the person's driver's license has been revoked under chapter 321J, and any of the following apply:
>
> (1) If the defendant's alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn in accordance with chapter 321J exceeds .15, regardless of whether or not the alcohol concentration indicated by the chemical test minus the established

> margin of error inherent in the device or method used to conduct the test equals an alcohol concentration of .15 or more.

Iowa Code § 907.3(1)(g)(1) (emphasis added).

Because Whitson had a BAC of .165, the sentencing court deemed her ineligible for a deferred judgment under section 907.3(1)(g). On appeal, Whitson contests the sentencing court's conclusion that it lacked discretion to defer judgment. She highlights the conjunctive "and" at the beginning of section 907.3(1)(g), arguing: "Not only did [Whitson's] alcohol concentration have to exceed .150, but before the *present* OWI charge, she had to have a *prior* OWI conviction *or* license suspension."

The State counters that the statutory language ("The offense is a violation of section 321J.2 and the person has been convicted of a violation of that section . . . .") refers to the current offense, not a previous one. In support of its construction, the State points to the prohibition on deferred judgments in cases where the defendant "has previously been convicted of a violation of section 321J.2." Iowa Code §§ 321J.2(3)(b)(2)(b), 907.3(1)(g)(2). The State's argument continues: "If the language at the beginning of section 907.3(1)(g) referred to a previous offense, the prohibition set forth in Iowa Code sections 907.3(1)(g)(2) and 321J.2(3)(b)(2)(b) would be duplicative."

Our goal in interpreting criminal statutes is to ascertain and give effect to the legislative intent. *State v. Finders*, 743 N.W.2d 546, 548 (Iowa 2008). We consider what lawmakers sought to accomplish and what evil they sought to

remedy.[3] *Id.* We seek a reasonable interpretation of the provision at issue that will best achieve the legislative purpose and avoid absurd results. *Id.* When a statute's language is clear, we look to its express terms for meaning. *State v. Kamber*, 737 N.W.2d 297, 298–99 (Iowa 2007). But if a criminal statute is ambiguous, we resolve any doubt in favor of the accused. *State v. Welton*, 300 N.W.2d 157, 160 (Iowa 1981). That is not to say that criminal statutes are to be construed so strictly as to defeat the legislature's obvious intent. *See Finders*, 743 N.W.2d at 548.

When we look at section 907.3(1)(g) as a whole, we detect ambiguity concerning its application to first offenders. *See State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999) (explaining that ambiguity may arise from the "general scope and meaning of a statute when all its provisions are examined"). While the introductory wording is not a model of clarity, we find that—when viewed in the context of the entire statute and in conjunction with section 321J.2(3)(b)(2)—the legislature intended persons convicted of first-offense OWI whose BAC exceeded .15 to be ineligible for a deferred judgment. *See State v. Young*, 686 N.W.2d 182, 184–85 (Iowa 2004) (reiterating the "cardinal principle" of statutory construction is looking at the provision as a whole, rather than isolated words or phrases).

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[3] When considering the object of the statutory scheme addressing OWI sentencing and the evil to be remedied, our supreme court observed that by enacting section 321J.2(3)(b)(2)(a) (previously numbered as section 321J.2(3)(a)(1)), the legislature signaled its "policy choice to enhance deterrence of a particular subset of behavior: driving after drinking a sufficient quantity of alcohol to produce an alcohol concentration in excess of .15." *State v. Iowa Dist. Ct.*, 730 N.W.2d 677, 680 (Iowa 2007).

If we read the introductory language in section 907.3(1)(g) to refer to a previous offense under chapter 321J, then the exception in subsection (g)(2) for defendants who have previously been convicted of violating section 321J.2(1) would be superfluous. "We avoid statutory construction which renders a part of the statute superfluous or redundant, and instead we presume that each part of the statute has a purpose." *State v. Graves*, 491 N.W.2d 780, 782 (Iowa 1992).

We also note that section 321J.2(3)(b)(2)—which expressly applies to first offense OWI convictions—contains the same list of circumstances rendering a person ineligible for a deferred judgment. When more than one statute is pertinent to the statutory interpretation inquiry, we consider the statutes together in an attempt to harmonize them. *Dann*, 591 N.W.2d at 638. When we view section 321J.2(3)(b)(2) in conjunction with section 907.3(1)(g), we are convinced that the legislature did not intend for persons convicted of OWI first offense to be eligible for a deferred judgment if their BAC exceeded .15. Accordingly, the sentencing court has no discretion to consider deferring Whitson's sentence.

AFFIRMED.