IN THE COURT OF APPEALS OF IOWA

No. 3-637 / 12-1269
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTEN DANIEL HUFFEY JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

A defendant appeals his conviction challenging a jury instruction. **AFFIRMED.**

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and Brendan E. Greiner, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Marten Huffey appeals his conviction, following a jury trial, for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2011). Huffey claims the district court erred in submitting an instruction to the jury over his objection. Huffey claims the instruction improperly emphasized one piece of evidence, was cumulative, and improperly directed the jury to consider his driving for one particular purpose. We affirm Huffey's conviction as we find the instruction was properly submitted.

I. BACKGROUND FACTS AND PROCEEDINGS.

At 11:00 p.m. on January 12, 2012, Huffey lost control of his motor vehicle and crashed through three residential yards, taking out two trees and a mailbox and narrowly missing a light pole. One of the neighbors observed him getting out of the vehicle and attempting to move it. The neighbor then watched as Huffey walked away leaving his vehicle behind. The police were called, and Huffey was located three blocks south of the accident walking through residential yards. He was transported back to the scene where he failed one field sobriety test.[1] Huffey admitted to drinking a few beers but claimed he hit a patch of ice and lost control of his vehicle.

The State charged Huffey with operating while intoxicated. The case proceeded to a jury trial on May 23, 2012. Huffey's attorney objected to the court's proposed jury instruction which stated, "The State does not need to prove

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[1] The officer testified Huffey failed the horizontal gaze nystagmus test, but the officer did not attempt a one-leg-stand test or a walk-and-turn test as the conditions were cold, windy, and icy.

how the defendant was driving. However, you may consider his manner of driving in deciding if he was under the influence of alcohol." Counsel asserted the instruction improperly highlighted one piece of evidence over another "in a way that directs the jury to consider that piece of evidence as it pertains to a particular element of the offense." He also asserted the jury had already been instructed to consider any evidence presented in court and the court should not be specifically instructing the jury to consider one piece of evidence as it pertains to him being under the influence. The court overruled the objection and submitted the instruction to the jury, who found Huffey guilty as charged.

Huffey filed a motion for a new trial asserting the instructional challenge again. The court denied the motion stating the instruction was substantively based on the instruction approved of in *State v. Hepburn*, 270 N.W.2d 629 (Iowa 1978). The court stated the instruction "merely emphasized his manner of driving, it was the only instruction addressing [the] operation of a motor vehicle, and it referred to evidence in general." The court also noted the appellate courts have twice before considered and approved of the instruction.

Huffey appeals asserting it was error to submit the instruction.

II. SCOPE OF REVIEW.

Challenges to jury instructions are reviewed for correction of errors at law. *State v. Frei*, 831 N.W.2d 70, 73 (Iowa 2013). Error in giving a particular instruction warrants a reversal unless the record shows the absence of prejudice. *Id*.

> When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the

> complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. When the alleged instructional error is of constitutional magnitude, the burden is on the State to prove lack of prejudice beyond a reasonable doubt.

Id. (internal quotation marks and citations omitted).

III. JURY INSTRUCTION.

The jury instruction in question in this case is the uniform criminal jury instruction 2500.8: "The State does not need to prove how the defendant was driving. However, you may consider [his] [her] manner of driving in deciding if [he] [she] was under the influence of alcohol." We are reluctant to disapprove uniform instructions. *State v. Hopkins*, 576 N.W.2d 374, 379 (Iowa 1998). The jury instruction cites as its authority *Hepburn*, 270 N.W.2d at 630, where the supreme court approved of a jury instruction in an OWI case, which stated:

> Instruction # 9. You are instructed that it is not necessary for the State to establish how or in what manner the defendant was operating a motor vehicle; all that is necessary in this respect is to establish beyond a reasonable doubt that the defendant operated a motor vehicle on a public highway or street in the State of Iowa while under the influence of an alcoholic beverage.
>
> On the other hand, the fact, if it be a fact, that the defendant was operating a motor vehicle in an irregular manner or contrary to any regulation for the operation of motor vehicles on the highway, would not be sufficient to establish that he was under the influence of an alcoholic beverage, but the evidence introduced concerning the manner in which he operated such motor vehicle should be given such weight, if any, as you think it should be given, together with all the other facts and circumstances as disclosed by the evidence in determining whether or not the defendant was under the influence of an alcoholic beverage.

The court in *Hepburn* rejected the defendant's challenge that this instruction unduly emphasized his manner of driving. 270 N.W.2d at 630. It found the defendant would not be prejudiced by an emphasis on his manner of

driving as opposed to an emphasis on the odor of liquor on his breath as was found to be improper in *State v. Milliken*, 240 N.W.2d 594, 595–97 (Iowa 1973). *Id.* The *Hepburn* court also distinguished itself from *Milliken* by noting there was no other instruction regarding the manner of driving, whereas in *Milliken* there was a second instruction on the consumption of alcohol and a general instruction to consider all evidence. *Hepburn*, 270 N.W.2d at 630 (citing *Milliken*, 240 N.W.2d at 596–97). The *Hepburn* court approved of the manner of driving instruction because it did not refer to the testimony of any particular witness or refer to any particular item of evidence, but referenced evidence that was general in nature, i.e. manner of driving as opposed to odor of alcohol on the defendant's breath. *Id*. Finally, the *Hepburn* court approved of the instruction because it informed the jury on an important standard of proof it needed to know that was crucial to the State's prosecution. *Id*.

Huffey distinguishes the jury instruction given in his case from the instruction in *Hepburn* by pointing out the jury in his case had already been informed on the definition of operation.[2] He claims the instruction given in his case was clearly slanted in favor of the State because it explained what the State did not have to prove while not stating what it did have to prove. Huffey also claims the *Hepburn* instruction made it clear that the manner of driving was not enough to convict and should be considered with all other evidence—a critical direction left out of his instruction. *See id*. He thus claims on appeal that the instruction given in his case places undue emphasis on one piece of evidence,

[2] The jury was instructed, "The term 'operate' means the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running."

was unduly cumulative of other instructions, and improperly directed the jury to consider his driving for a specific purpose—that he was under the influence of alcohol.

A. Improper Emphasis. Jury instructions should state the applicable law but should not "marshal the evidence or give undue prominence to certain evidence involved in the case." *State v. Massick*, 511 N.W.2d 384, 386 (Iowa 1994). The judge in crafting the instructions should "'walk a middle course and avoid arguing the case for either side in the instructions.'" *Id*. (citing *State v. Marsh*, 392 N.W.2d 132, 133 (Iowa 1986)). This is to avoid invading the province of the jury. *Id*.

While we agree that pointing out one piece of evidence in the jury instructions should be avoided, we find the instruction here referred more to a category of evidence rather than a specific piece of evidence. *Compare Hepburn*, 270 N.W.2d at 630 (approving of an instruction which referenced the manner of the defendant's driving), *with Milliken*, 240 N.W.2d at 596–97 (disapproving of an instruction which referenced the odor of alcohol on the defendant's breath). The instruction complained of referenced Huffey's general "manner of driving"; it did not reference specifically the fact Huffey crashed through three residential yards destroying trees and a mailbox. As the court in *Hepburn* noted with regard to a similar, yet more exhaustive, version of the jury instruction at issue here, the instruction "does not refer to the testimony of particular witnesses. Neither does it refer to any particular item of evidence. Rather, in discussing the element of the offense, reference is to evidence that is

general in nature." 270 N.W.2d at 630; *see also Massick*, 511 N.W.2d at 387 (finding the jury instruction regarding the defendant's refusal to provide a breath sample did not invade the province of the jury because it did not direct the jury on the factual issue—the reason for the refusal).

Huffey also complains that this instruction is improper because of what it left out. He points out the instruction in *Hepburn* told the jury that the manner of driving alone was not sufficient to establish he was under the influence and to consider the manner of driving together with all the other facts and circumstances as disclosed by the evidence. 270 N.W.2d at 630. We note the jury had been instructed in this case they were to determine Huffey's guilt from the evidence and law in the instructions, no one instruction contained all the applicable law, and they must consider all the instructions together. The court instructed that the evidence included testimony, exhibits, stipulations, and any other matter admitted and that facts may be proven by direct and circumstantial evidence. The jury was also told several times that the State had the burden of proof and they are to consider all the evidence. The additional information contained in the *Hepburn* instruction, which was omitted from the instruction at issue here, was adequately contained in the other instructions given to the jury.

The manner of driving instruction did not unduly emphasize the evidence.

B. Cumulative. Huffey next claims the instruction was duplicative of other instructions properly submitted. Specifically, he claims the jury was already given an instruction on the definition of "operate" under the law—"the immediate actual physical control over a motor vehicle that is in motion and/or has its engine

running." Huffey argues that it was abundantly clear what the State had to prove to establish operation and the State did not need to prove manner of operation in order to prove that element of the offense. He also maintains that the jury had been instructed on what evidence consisted of and therefore did not need another instruction giving them permission to consider evidence surrounding the manner of driving.

We note that the instruction directed the jury to consider the manner of driving in determining whether Huffey was under the influence of alcohol, not in determining whether he was operating the vehicle. Thus, this instruction did not duplicate the operation instruction as Huffey contends. We also find it did not unnecessarily duplicate the other instructions. The elements of operating while intoxicated included only two elements: operating a vehicle and being under the influence. The instruction simply directed the jury where to apply the manner-of-driving evidence, but left the jury to decide whether the particular manner of driving in this was case was proof of operating under the influence of alcohol. It also made clear that the manner of driving was not an element of the OWI offense as it is in other driving offenses. *See* Iowa Code §§ 321.277 (reckless driving), 321.277A (careless driving), 707.6A(1) (homicide by vehicle caused by operating while intoxicated). The manner-of-driving instruction was not cumulative.

C. One purpose. Finally, Huffey claims the court erred in submitting the instruction because it improperly provided specific judicial direction to consider a specific piece of evidence for one particular purpose and thereby invaded the

province of the jury. As stated above, Huffey's "manner of driving" was not referring to a specific piece of evidence but a category of evidence. *See Hepburn*, 270 N.W.2d at 630. The State argued the crash was the result of Huffey's intoxication, while Huffey claimed the crash was the result of the icy road conditions. As in *Massick*, the court did not direct the jury what conclusion to draw from the evidence but simply instructed that the jury was permitted to consider the manner of driving in deciding if he was under the influence of alcohol. *See* 511 N.W.2d at 387 (finding the instruction proper because it did not direct the jury to consider the refusal to give a breath sample as evidence the defendant knew he was intoxicated but merely told the jury to consider it in reaching its verdict).

This case is distinguishable from *Massick* because here the jury was instructed that it "may consider" the evidence in deciding if Huffey was "under the influence" rather than to consider the evidence "in reaching your verdict." *See* 511 N.W.2d at 387. However, language substantially similar to the language here was approved of in *Hepburn*—the manner-of-driving evidence should be considered "in determining whether or not the defendant was under the influence of an alcoholic beverage." 270 N.W.2d at 630. We find no error in the court directing the jury that it may consider the evidence in deciding if Huffey was "under the influence" rather than "in reaching the verdict." As the State points out, this case was only prosecuted under the "under the influence" alternative of the OWI statute, so considering the evidence in determining whether Huffey was

"under the influence" is the functional equivalent of considering the evidence "in reaching your verdict."

D. Prejudice. The State argues that even if we were to find the jury instruction was in error, Huffey suffered no prejudice due to the overwhelming evidence of his guilt including his admission to consuming alcohol and the testimony of several witnesses that the roads were not icy that night. Moreover, Huffey admitted to the officer that he was the driver of the motor vehicle. *See State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996) ("Error in giving or refusing jury instructions does not merit reversal unless it results in prejudice to the defendant."). Because we find no error in the court's submission of the manner-of-driving jury instruction in this case, we need not address whether or not there was prejudice.

AFFIRMED.