IN THE COURT OF APPEALS OF IOWA

No. 6-563 / 05-1864
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH FRANCIS ORR,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Randall J. Nigg, District Associate Judge.

Defendant appeals his conviction for operating while intoxicated, third offense. **AFFIRMED.**

Jon M. Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Fred H. McCaw, County Attorney, and Michael J. Whalen, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller, J., and Nelson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

NELSON, S.J.

I. Background Facts & Proceedings

On the afternoon of November 14, 2004, deputy sheriff Dave Riniker stopped a vehicle that was exceeding the speed limit. Deputy Riniker suspected the driver, Kenneth Orr, had been drinking.[1] Orr would not track deputy Riniker's finger with his eyes, which prevented the deputy from applying the horizontal gaze nystagmus (HGN) test. Orr stated he had back surgery the previous month, and was on new medication. Due to Orr's physical condition, deputy Riniker did not require him to perform standard field sobriety tests. The deputy asked Orr to spell the words "Dubuque" and "Mississippi," and Orr failed to spell "Mississippi" correctly. Orr failed a finger dexterity test, and was unable to recite the alphabet from E to P.

After a preliminary breath test, deputy Riniker arrested Orr and took him to the Dubuque Law Enforcement Center. Orr agreed to a breath test. The results of the breath test showed an alcohol level of .123. Orr was charged with operating while intoxicated or drugged (OWI), third offense, in violation of Iowa Code sections 321J.2(1)(a), (b), and 321J.2(2)(c) (2003).

The case was tried to a jury, which found Orr guilty of OWI. In a separate proceeding, Orr was found to have two previous convictions for OWI. On his current charge of OWI, third offense, he was sentenced to a term of imprisonment not to exceed five years. Orr appeals.

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[1] At the time of the stop, Orr presented a Wisconsin driver's license in the name of Michael Orr. It was later determined that defendant was actually Kenneth Orr.

II. Jury Instructions

Orr objected to Jury Instruction No. 9, which provided the jury could find defendant guilty if he operated a motor vehicle while (a) under the influence of alcohol, or (b) under the influence or drugs, or (c) under the influence of a combination of alcohol and drugs, or (d) had an alcohol concentration of .08 or more. Orr argued there was insufficient evidence to show that he was driving while under the influence of drugs, or a combination of alcohol and drugs. He submitted a proposed instruction that referred only to driving while intoxicated or with an alcohol concentration of .08 or more.

The district court denied Orr's objections. The court determined:

> The Court did decide on offering the jury the four theories. I believe the record is sufficient to submit under the influence of drugs or combination of drugs and alcohol based primarily on the testimony that [the prosecutor] – or the evidence [the prosecutor] referred to in the Defendant's own words as he was encountering the officer on two different occasions. Medication or medicine was discussed with the officer, and in particular, the last reference during the course of giving or attempting to give HGN the Defendant did seem to indicate that his problem tracking with the officer's instructions may have to do with the fact that he tried some new medicine. I believe that's sufficient to submit and it is clearly against Iowa law or it's contrary to Iowa law to drive under the influence of drugs when there – even if they're prescription drugs, and in particular, in combination with alcohol. But I believe both theories could be submitted under this and should be submitted under the record.

We review issues relating to jury instructions for the correction of errors at law. *State v. Shearon*, 660 N.W.2d 52, 55 (Iowa 2003). We review to determine whether jury instructions are correct statements of the law and are supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996).

"Evidence is substantial to support submission of an instruction to the jury when a reasonable mind would accept the evidence as adequate to reach a conclusion." *State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996). We will not reverse unless prejudice results from an erroneous jury instruction. *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

If jury instructions permit the jury to consider multiple theories of culpability, while some of the theories are not supported by the evidence, and a general verdict is returned, we must reverse because there is no way to determine which theories the jury relied upon in returning the verdict. *Hogrefe*, 557 N.W.2d at 880-81. There is no error, however, if there is sufficient evidence to submit all of the theories to the jury. *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004).

On appeal, Orr relies upon a provision of the implied consent procedures, section 321J.6(3), which states:

> Notwithstanding subsection 2, if the peace officer has reasonable grounds to believe that the person was under the influence of a controlled substance, a drug other than alcohol, or a combination of alcohol and another drug, a blood or urine test shall be required even after another type of test has been administered.

He asserts that because no blood or urine test was performed in this case, there is not sufficient evidence in the record to show that he was driving while under the influence of a drug or a combination of alcohol and a drug.

We question whether this issue was preserved for appeal. During the trial Orr did not base his objection to Jury Instruction No. 9 on the deputy's failure to follow section 321J.6(3). *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa

1997) (noting issues must be presented to and passed upon by the district court before they can be raised and decided on appeal). Even if the issue were preserved, however, we note section 321J.6(3) applies to implied consent procedures and the statute does not make a blood or urine test a prerequisite to a guilty verdict under section 321J.2(1)(a), where a person operates a motor vehicle while "under the influence of an alcoholic beverage or other drug or a combination of such substances."[2] A person may be found guilty under section 321J.2(1)(a) in the absence of admissible evidence from chemical tests. *See State v. Steadman*, 350 N.W.2d 172, 174 (Iowa 1984).

There was substantial evidence in the record that would permit the jury to find Orr was operating a motor vehicle while under the influence of drugs or a combination of drugs and alcohol. On the videotape, as Orr got out of his car, he mentioned that he was on medication after his back surgery. Then, during the HGN test, Orr stated the reason he may have had trouble tracking the deputy's finger was because he was on a new medication.[3] In addition, Orr's responses were very slow and sluggish. Often, deputy Riniker had to repeat his statements to Orr several times because Orr would not respond. We find no error in the submission of Jury Instruction No. 9 under the facts of this case.

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[2] Orr's arguments regarding a blood or urine test for drugs obviously do not apply to section 321J.2(1)(b), a person operates a motor vehicle "[w]hile having an alcohol concentration of .08 or more."

[3] The term "drug" under section 321J.2 may include a prescription medication. *See State v. Bond*, 493 N.W.2d 826, 828 (Iowa 1992) (defining the term "drug").

III. Ineffective Assistance

Orr claims he received ineffective assistance of trial counsel. Our review of claims regarding ineffective assistance of counsel is de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) his attorney failed to perform an essential duty and (2) prejudice resulted to the extent he was denied a fair trial. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998).

A. Orr asserts he received ineffective assistance because his trial counsel did not object to deputy Riniker's statements that he had administered a preliminary breath test (PBT). On direct examination deputy Riniker stated:

> Q. So what'd you do at that time? A. I administered a preliminary breath test.

On cross-examination he testified:

> Q. So you don't know if the test result of time at the Law Enforcement Center is actually the same blood alcohol content he had at the time he was stopped, do you? A. As far as whether it was –
> Q. Well, whether is was rising, whether it was going down. A. Generally speaking, no. With that preliminary breath test, it's just an indication of where he's at.
> Q. I'm not talking about preliminary. I'm talking about the DataMaster. A. If you're comparing the two though, which I thought you were, the preliminary breath test isn't as accurate as the DataMaster. The DataMaster is tested every time a subject provides a test. It goes through an internal set of calibrations. Preliminary breath test is calibrated once a month.

The results of a PBT "shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter." Iowa Code § 321J.5(2). The results of a preliminary breath test are inadmissible.

State v. Massick, 511 N.W.2d 384, 388 (Iowa 1994). Testimony by police officers that the result of a PBT indicated the presence of alcohol is reversible error. *State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987). However, evidence that a defendant submitted to a PBT is admissible when no reference is made to the results of the test. *Gavlock v. Coleman*, 493 N.W.2d 94, 96 (Iowa Ct. App. 1992).

Here, deputy Riniker did not specifically testify to the results of the PBT, or even whether the test indicated that Orr had been drinking alcohol. Deputy Riniker could testify that he had administered a PBT. *See id.* His general statements about the accuracy of PBTs are not statements about the results of Orr's test. We conclude trial counsel did not have a duty to object to the testimony regarding the PBT. *See State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998) (noting trial counsel does not have a duty to raise a meritless claim).

B. Orr also asserts he received ineffective assistance because his trial counsel did not object to deputy Riniker's statements that the results of Orr's DataMaster breath test, .123, exceeded the legal limit of .08. Deputy Riniker testified:

> Q. And what was the result of the Defendant's breath alcohol level? A. It was over the legal limit of .08, and I believe it was .123.
> . . .
> Q. And what was the legal limit in Iowa at that time? A. .08.
> Q. So was the test result above the legal limit? A. Yes.

Orr contends deputy Riniker improperly testified to an essential element of the charged offense.

A witness may not express an opinion on a defendant's guilt or innocence. *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994). "Thus, a witness cannot opine on a legal conclusion or whether the facts of the case meet a given legal standard." *In re Detention of Palmer*, 691 N.W.2d 413, 419 (Iowa 2005). We determine deputy Riniker did not express an opinion about Orr's guilt or innocence, and did not give an opinion on a legal conclusion. In essence, the deputy made a simple mathematical statement, that .123 was a larger number than .08. We conclude trial counsel did not have a duty to object to the testimony. *See Hochmuth*, 585 N.W.2d at 238.

C. Even if we were to determine that counsel breached an essential duty in this case, Orr would not be entitled to relief because he has not shown prejudice. Prejudice exists where there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). A defendant must show that counsel's errors had an adverse impact on the defense. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). Without proof of prejudice, a claim of ineffective assistance of counsel must fail. *State v. Leckington*, 713 N.W.2d 208, 218 (Iowa 2006). Orr has not shown the result of his trial would have been different if his trial counsel had objected to deputy Riniker's statements outlined above. We determine Orr has failed to show he received ineffective assistance of counsel.

We affirm Orr's conviction.

AFFIRMED.