IN THE COURT OF APPEALS OF IOWA

No. 7-904 / 07-0345
Filed January 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICKY LEE CASHATT,
Defendant-Appellant.

Appeal from the Iowa District Court for Butler County, Peter B. Newell, District Associate Judge.

Ricky Lee Cashatt appeals from his convictions following a jury trial for operating while intoxicated and assault on a peace officer. **AFFIRMED.**

Andrew Abbott of Abbott Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Gregory M. Lievens, County Attorney, and Jill Dashner, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Ricky Lee Cashatt appeals from his convictions following a jury trial for operating while intoxicated in violation of Iowa Code section 321J.2 (2005) and assault on a peace officer in violation of section 708.3A. Cashatt raises five claims on appeal: (1) his counsel's health at the time of trial resulted in ineffective assistance of counsel, (2) officers did not have probable cause to approach him or later arrest him and charge him with operating while intoxicated and assault on a peace officer, (3) the court erred by not granting his motion for a mistrial, (4) the court's limitation of evidence regarding relationships between witnesses contravened his right to a fair trial, and (5) the court abused its discretion by improperly considering convictions currently under appeal when determining an appropriate sentence in this matter. We affirm.

I. Background Facts and Proceedings.

The jury could have found the following facts. On the evening of September 5, 2005, Dean Timmer, the former president of Beaver Meadows Golf Course, and Allen Schrage, the greens keeper, were both at the golf course when they heard "screeching tires" in the parking lot. Timmer witnessed Cashatt yelling at Allen Schrage's son, Clay. Timmer watched Cashatt get into his truck and start "spinning around" in the parking lot. Timmer and Schrage both observed Cashatt get out of his truck and start yelling at Schrage about his son. Cashatt got back in his truck, drove closer to the men, and "[d]id a couple donuts in the parking lot." Timmer heard Cashatt attempt to intimidate Allen Schrage so Schrage would not call the police on his cell phone. When Schrage called the police, Cashatt drove off.

Around 10:00 p.m., Deputy Justin Trees of the Butler County Sheriff's Office was dispatched to the golf course based on Schrage's report that Cashatt was "doing donuts" and "tearing around" in the parking lot. When Deputy Trees arrived at the scene he observed a number of spin marks both on the gravel and the paved sections of the parking lot. Deputy Kiley Winterberg next arrived at the scene.[1]

After learning that Cashatt was still on the property, Deputy Trees and Deputy Winterberg drove to another part of the golf course and then walked down a dirt path in order to locate Cashatt. As they walked down the path, the deputies heard loud music and they heard a vehicle start up. They continued down the path and found Cashatt sitting in the driver's seat of his pickup truck. When the deputies arrived at the truck, the truck was running and Cashatt was depressing the brake pedal.

The two deputies identified themselves, and they ordered Cashatt to turn off the vehicle and put his arms out the window. Cashatt put his head out the window and yelled, "What the fuck do you guys want?" The deputies informed Cashatt of the complaint they had received about him driving recklessly at the golf course. Cashatt told the deputies he had contacted the Butler County Dispatch and the Iowa State Patrol after he saw an individual driving who he did not believe had a license.[2] Cashatt began cursing at the officers for their failure

[1] When Deputy Winterberg arrived, he informed Deputy Trees that Officer Christopher Luhring was on the opposite side of the golf course, sitting along the river. Officer Luhring had observed Cashatt's vehicle still on or near the golf course property.

[2] Deputy Winterberg testified that he was aware Cashatt had called law enforcement several times to report that he believed Clay Schrage was driving without a license.

to respond to his calls to dispatch in a timely manner. At this time, Deputy Trees noticed an open bottle of beer between Cashatt's legs. The deputies did a brief search for weapons and found none. However, they observed a six-pack of beer bottles in the vehicle. Most of the bottles were empty, but Cashatt was drinking from a bottle that was half-full.

During the encounter with Cashatt, the deputies noticed the smell of alcohol on Cashatt. They observed that Cashatt's eyes were watery and bloodshot, and his speech was slurred. When Cashatt exited his truck, Deputy Trees observed that Cashatt was having difficulty standing, and Deputy Winterberg noticed that Cashatt's coordination was slow.

After Cashatt exited the truck, he indicated his desire to the fight the deputies. As he advanced toward the deputies, he taunted them making statements such as, "You want a piece of the title? Come and get the title." He also threatened to kick the deputies' "asses." While the deputies and Cashatt spoke, Cashatt threw his arms up in the air multiple times. Cashatt also began punching dents in the side of his truck, and he eventually broke one of the driver's side windows out of his truck.

The deputies called for assistance, and Officer Luhring arrived at their location several minutes later.[3] Officer Luhring observed that Cashatt's eyes were red and bloodshot, his mannerisms were shaky, and his voice was slurred. He concluded that Cashatt was extremely intoxicated.

[3] Prior to his arriving, Officer Luhring heard loud music, yelling, and revving of an engine coming from where he had seen Cashatt's vehicle. He also heard punching or kicking of a truck or something metal. Additionally, he heard one or two gunshots coming from the direction of Cashatt's vehicle.

Upon Officer Luhring's arrival, Cashatt made some crude comments to the officer and then demanded to make a statement about the individual he had seen driving earlier that day without his license. Officer Luhring got a piece of paper and a pen, and Cashatt started writing down his statement. Cashatt then asked Deputy Trees "if he wanted to take his badge off" and if he "wanted to take a shot at the title." When Officer Luhring commented that he was not aware Cashatt held any "title," Cashatt became angry. From within his truck, Cashatt lunged at Officer Luhring through the window. As Cashatt lunged through the window, Deputy Trees pulled his tazer and shot two probes into Cashatt. Cashatt fell to the ground and was then handcuffed. As the officers helped Cashatt up, Cashatt thanked them for "straightening him out."

Officer Luhring then transported Cashatt to the Butler County Sheriff's Department. Cashatt was offered three separate sobriety tests, but he refused all three tests. He was also read the implied consent advisory and offered an intoxilyzer test; however, he refused that test as well. After refusing the tests, Cashatt told Deputy Trees "he could have pulled a weapon and shot [him] between the eyes" at any time when he was being tazered.

The State filed a trial information accusing Cashatt of operating while intoxicated and assault on a peace officer. The case proceeded to trial, and a jury found Cashatt guilty of both offenses. On February 14, 2007, the district court sentenced Cashatt to 365 days in jail on each offense, but suspended all but thirty days on each offense. The court ordered the sentences to run consecutive to each other. The court further ordered Cashatt to pay a $1000 fine, court costs, and a ten-dollar D.A.R.E. charge for his operating while

intoxicated conviction. The court also ordered Cashatt to pay a $250 fine and court costs for his assault on a peace officer conviction. Cashatt was placed on one to two years of probation and ordered to pay a $300 enrollment fee. Cashatt now appeals.

II. Discussion.

We will address each of Cashatt's five appellate claims in turn.

A. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Oetken,* 613 N.W.2d 679, 683 (Iowa 2000). To establish ineffective assistance of counsel, Cashatt must prove: (1) his attorney's performance fell below "an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish breach of duty, Cashatt must overcome the presumption that counsel was competent and prove that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Cashatt may establish prejudice by showing a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Cashatt's ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Cashatt asserts that because trial counsel was ill when the trial began he rendered ineffective assistance. At the outset of the trial, counsel notified the court that he had suffered from a migraine during the three days preceding trial

and that the migraine had prevented him from any meaningful sleep during that period. Counsel informed the court that he felt he was still capable of conducting the trial and that his client wished to proceed with trial notwithstanding his counsel's health.[4]

In his brief on appeal, Cashatt does not specifically identify any breach of duty that occurred during his trial. He simply states his counsel "failed to perform essential duties." He further contends "prejudice resulted in the Defendant not being adequately represented nor evidence being submitted on behalf of the Defendant." He does not identify evidence that should have been submitted during his trial. Because Cashatt has failed to state any specific ways in which his counsel's performance was inadequate, and has failed to identify how competent representation would have changed the outcome of his case, we find his claim is too general for us to address on appeal. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).[5] Moreover, we find nothing in the record that reveals a breach of counsel's duties or obligations in representing Cashatt. Therefore, we reject Cashatt's claim of ineffective assistance of counsel.

B. Probable Cause.

Cashatt contends that no probable cause existed to approach him or to later arrest him and charge him with operating while intoxicated and assault on a peace officer. However, Cashatt did not file a motion to suppress allegedly

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[4] Cashatt insisted that his right to be brought to trial within one year after his arraignment be honored. *See* Iowa R. Crim. P. 2.33(2)(*c*).

[5] Additionally, when we assess Cashatt's claim of ineffective counsel, we take into consideration the defendant's conduct. *State v. Rice*, 543 N.W.2d 884, 888-89 (Iowa 1996). In doing so, we consider the fact that Cashatt elected to have the trial go forward after he learned of his counsel's health issue.

illegally obtained evidence prior to trial. Iowa R. Crim. P. 2.11(2)(*c*); *see also State v. Milner*, 571 N.W.2d 7, 11 (Iowa 1997). Failure to properly and timely file such a motion constitutes a waiver of the defense. Iowa R. Crim. P. 2.11(3). Accordingly, this claim has not been preserved for review.

Even if Cashatt had not waived this issue, we find his claim to be without merit. Three different police officers testified that they found Cashatt in a running vehicle with an open bottle of beer between his legs and five other empty beer bottles in the truck. The officers noticed that Cashatt's eyes were watery and his speech was slurred. They also noticed his lack of coordination. Deputy Winterberg noted that Cashatt was excited and talkative. The officers observed Cashatt punch and kick the side of his truck. They also saw him punch out a window on his truck. Cashatt advanced towards the officers, talking about his "title," and attempted to fight them. Cashatt then lunged through his window at Officer Luhring, forcing Deputy Trees to tazer Cashatt in order to subdue him. The evidence in this case overwhelmingly supports the conclusion that the officers possessed probable cause to arrest the defendant for operating a vehicle while intoxicated and assault. *See State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990) ("Probable cause exists if the totality of the circumstances as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee committed or is committing it.").

C. Motion for Mistrial.

We generally review a court's decision to grant or deny a motion for mistrial for abuse of discretion. *State v. Tyler*, 512 N.W.2d 552, 557 (Iowa 1994).

We allow trial courts broad discretion in making the determination to grant or deny a mistrial. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). We will not find an abuse of discretion unless Cashatt shows the court exercised its discretion on grounds clearly untenable or clearly unreasonable. *Id.* Clearly untenable or unreasonable grounds lack substantial evidentiary support or rest on erroneous application of the law. *Id.* A mistrial is appropriate when the jury cannot reach an impartial verdict or if we would have to reverse the verdict on appeal due to an obvious procedural error in the trial. *Id.* at 902.

1. Statements About Gun.

Cashatt contends the court erred by not granting a mistrial when the State elicited irrelevant and prejudicial testimony. After two officers testified that Cashatt commented to one of the officers that Cashatt could have pulled a gun and shot Deputy Trees between the eyes at any time, Cashatt's counsel objected to the testimony. The court overruled the objection. Cashatt's counsel then moved for a mistrial, which the court denied. Cashatt now asserts the court abused its discretion in allowing this testimony.

Generally, relevant evidence is admissible and irrelevant evidence in not admissible. Iowa R. Evid. 5.402. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Even when evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. In this case, Cashatt refused all sobriety tests so the State was left in the position of proving his operating while

intoxicated charge by showing that he had consumed alcohol and that consumption had impaired his judgment. One of the factors the jury was to consider in deciding whether Cashatt was "under the influence" was if his emotions were "visibly excited."[6] Behavior that is inconsistent with ordinary expectations can be evidence of impaired judgment and therefore evidence of intoxication.[7] *See State v. Walker*, 499 N.W.2d 323, 325 (Iowa Ct. App. 1993). Cashatt's profanity, his aggressive behavior, and his threatening statements were all relevant to prove he was intoxicated at the time of his arrest. Accordingly, we conclude the court did not abuse its discretion in overruling Cashatt's motion for mistrial based on the statement he made about a gun around the time he was offered the sobriety tests.

2. Closing Argument.

Cashatt's second allegation asserting that a mistrial should have been granted hinges on the prosecution's closing argument. During her closing argument, the prosecutor stated, "Nothing the State put into evidence was refuted." After noting that Cashatt took the stand but only testified to three pictures that were offered into evidence, the prosecutor added, "[Cashatt] didn't refute any of the State's evidence." Cashatt contends this was an improper

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[6] In this case, Jury Instruction No. 14 stated:

> A person is "under the influence" when, by drinking liquor and/or beer, one or more of the following is true:
> 1. His reason or mental ability has been affected.
> 2. His judgment is impaired.
> 3. His emotions are visibly excited.
> 4. He has, to any extent, lost control of bodily actions or motions.

See Iowa Criminal Jury Instruction 2500.5.

[7] Officer Luhring testified that he had spoken with Cashatt previously when Cashatt was sober and that his behavior on the night of September 5 was not "normal, sober behavior."

comment on his refusal to testify and violated his Fifth Amendment privilege to not incriminate himself. He further contends the court erred when it "refused to submit a curative instruction to the jury regarding the Defendant's right against self-incrimination and the comments made by the State in its closing."

Generally, a prosecutor may not comment on an accused's failure to testify. *Schertz v. State*, 380 N.W.2d 404, 410 (Iowa 1985). However, in this case, Cashatt took the stand and testified. During his direct examination, Cashatt identified three photographs of the area where he was arrested, which were entered into evidence. The defendant testified that the area depicted in the photographs was privately owned. The defense apparently offered the pictures as evidence under the theory that if Cashatt's conduct took place on private property, he was innocent of the crimes charged even if the State's witnesses were truthful and credible. Although offered to establish his innocence, Cashatt's testimony did not refute any of the State's evidence. Under the circumstances presented here, we find the district did not abuse its discretion in failing to submit an instruction to the jury regarding Cashatt's right against self-incrimination and the prosecutor's remarks during closing arguments.

D. Evidence Ruling.

We review evidentiary rulings for an abuse of discretion. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003). "Even if an abuse of discretion is found, reversal is not required unless prejudice is shown." *Id*. Cashatt contends the court's limitation of evidence regarding the relationship between Officer Luhring and one of the sons of Allen Schrage during cross-examination contravened his right to a fair trial. Where the defendant has not been denied the

right to cross-examine entirely, the questions we ask to determine whether exclusion of this evidence constituted error prejudicial to the defendant are "1) whether the witness was an important one or whether his testimony was incidental to the issue, and 2) whether the volume of direct evidence was so overwhelming that it was sufficient apart from the testimony of the witness sought to be cross examined." *State v. Carney*, 236 N.W.2d 44, 46 (Iowa 1975).

On cross-examination, defense counsel attempted to ask Officer Luhring about his relationship with Sergeant Scott Schrage, who is the son of Allen Schrage and is the brother of Clay Schrage. The State objected to this line of questioning on relevance grounds, and following an off-the-record discussion the court sustained the objection.

During an offer of proof, defense counsel explained that Officer Luhring supervised and socialized with Sergeant Schrage. The evident purpose of the attempted cross-examination was to show bias in the sense that Officer Luhring was motivated to substantiate the testimony offered by his friend's father and protect his friend's brother from more harassment by the defendant. "A witness may be cross-examined to show his bias 'by reason of emotional influences such as kinship for one party or hostility to another . . . .'" *Id.* (citation omitted). For that reason, a limited exploration of this relationship may have been relevant on cross-examination. In this case, however, neither Sergeant Schrage nor his brother Clay testified at trial. Although Allen Schrage did testify, his testimony was regarding Cashatt's behavior in the parking lot. Schrage's testimony was corroborated by Dean Timmer, who also observed Cashatt spinning in circles in the parking lot and yelling at Schrage. Based on defense counsel's offer of

proof,[8] we do not believe the evidence of Officer Luhring's relationship with Sergeant Schrage would have had an effect on the outcome of this case.

Moreover, two other law enforcement witnesses, Deputy Trees and Deputy Winterberg, testified to substantially the same information as Officer Luhring. Because Officer Luhring's testimony was corroborated by the two other officers, he was not a critical witness for the State. *See State v. Campbell*, 714 N.W.2d 622, 631 (Iowa 2006). Accordingly, because Cashatt is unable to prove prejudice, we reject this assignment of error.

E. Sentencing.

We review sentencing for the correction of errors at law. Iowa R. App. P. 6.4. Where a challenged sentence does not fall outside statutory limits, we review the trial court's decision for abuse of discretion; reversal on this ground is warranted only if the court's discretion has been exercised "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). An abuse of discretion is rarely found when sentence is imposed within the statutory maximum unless the trial court failed to exercise its discretion or it considered inappropriate matters in determining what sentence to impose. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983).

In his last assignment of error, Cashatt contends the court abused its discretion by improperly considering convictions on appeal at the time of

[8] The offer of proof fails to establish that there was a close social relationship between Luhring and Scott Schrage and whether that relationship extended to other members of the Schrage family.

sentencing when determining an appropriate sentence in this matter. For the following reasons, we disagree.

The trial court "should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform." *State v. Bragg*, 388 N.W.2d 187, 191 (Iowa Ct. App. 1986). Iowa Code section 901.2 states "the court shall receive from the state, from the judicial district department of correctional services, and from the defendant any information which may be offered which is relevant to the question of sentencing." Specifically included in the information to be received is the defendant's criminal record. Iowa Code §§ 901.2(2), 901.3(2).

Cashatt does not cite any authority that states the trial court cannot rely upon convictions that are subject to appeal when considering what sentence to impose in the case before it. However, as the State points out, there is some authority to suggest that considering a conviction that is on appeal during the time of sentencing is improper. In *Schilling v. Iowa Department of Transportation*, 646 N.W.2d 69, 73 (Iowa 2002), our supreme court held that there was no "final conviction" until the right of appeal has been waived or exhausted. Therefore, in *Schilling*, the court held that the defendant's deferred judgment, from which he could not appeal, was a final conviction for purposes of the driver's license revocation statute. *Id*. However, as the State also points out, in *State v. Brodene*, 493 N.W.2d 793, 796-97 (Iowa 1992), the court found that a defendant's guilty plea without judgment was a prior conviction for purposes of Iowa Rule of Evidence 5.609.

In *State v. Messer*, 306 N.W.2d 731, 732-33 (Iowa 1981), our supreme court held that it was impermissible for a court to rely upon prior unprosecuted offenses in imposing sentence, unless they are admitted to by the defendant, or the facts before the court show the accused committed the crime. We agree with the State that it would be incongruous to allow the State to prove the commission of crimes upon which no conviction had been entered, but preclude the court's consideration of crimes that had been proven during a trial which had been afforded all procedural and substantive due process because the defendant had filed a notice of appeal.

Moreover, we have previously held that the fact that a sentencing judge was merely aware of an uncharged offense was not sufficient to overcome the presumption that his discretion was properly exercised. *State v. Hansen*, 344 N.W.2d 725, 730 (Iowa Ct. App. 1983). In *Hansen*, we held that in order to overcome the presumption of the proper exercise of the court's discretion, there must be an affirmative showing that the trial judge relied on the uncharged offenses. *Id*.

During the sentencing hearing in this case, the prosecutor listed the defendant's criminal history, which included assault in 1986, two operating while intoxicating convictions in 1986 and 1987, escape in 1987, disorderly conduct in 1991, eluding in 1992, simple assault in 1999, and assault causing bodily injury and false imprisonment in 2006. The court then asked what the sentences were for each conviction. The prosecutor listed all of the sentences except for the 2006 assault charge; for that charge she stated she was not positive what the

sentence was.[9] Defense counsel then explained that the 2006 assault charge occurred after the offense for which Cashatt was being sentenced and was currently on appeal, and thus it was improper for the court to consider the charge. The court then stated, "Okay. Well, I would think that that would have some impact on what sentence would be imposed here; if he's going to be on probation and he's got a jail sentence." It appears the court felt that if the judgment had been entered and executed it would have to be considered. However, the court then asked defense counsel if the defendant had either served a jail sentence or signed up for probation. Counsel informed the court he had not. Following this discussion, the court did not refer to the 2006 assault conviction on appeal.

In imposing sentence, the court stated that Cashatt has "had two prior convictions for operating while intoxicated" and his behavior was endangering people's lives. The court then stated,

> Now, I think, again, that you have a long history. You have got a number of convictions. You have got a couple of convictions for assault prior to this. You have the one charge of disorderly conduct. I think that you have shown a pattern of being intoxicated and of being combative, and the officers knew that when they encountered you that night.

The court did not make any reference to the 2006 assault when discussing the defendant's "long history." Although the court states Cashatt had "a couple of convictions for assault prior to this," the record reveals Cashatt had two assault convictions, one in 1986 and one in 1999. Therefore, we do not believe the

[9] She stated she believed he had received 180 days, with ninety suspended and ninety to be served at a residential facility. However, she also stated that defense counsel could correct her statement.

court's statements during sentencing, including the reference to the prior assaults, demonstrates that the court relied upon the more recent assault conviction that was on appeal.

The sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and until the contrary appears, the presumption is that the discretion of the trial court was rightfully exercised. *Pappas*, 337 N.W.2d at 494. To overcome this presumption of regularity requires an affirmative showing of abuse, and the burden of so showing rests upon the party complaining. *Id*. Cashatt has failed to meet his burden to show the sentencing court improperly considered a conviction that was currently on appeal.

III. Conclusion.

Because we find no merit in any of Cashatt's appellate claims, we affirm his convictions of operating while intoxicated and assault on a peace officer.

AFFIRMED.