IN THE COURT OF APPEALS OF IOWA

No. 1-122 / 00-0880
Filed April 27, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEE ROY HUM,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Osceola County, Patrick M. Carr, Judge.

Defendant Lee Hum appeals the district court's conviction and sentence, following a jury verdict convicting him of operating while intoxicated. **AFFIRMED.**

Pamela Wingert of Stoller & Wingert, Spirit Lake, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, and Robert Hansen, County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Defendant Lee Hum appeals his convictions following a jury trial of operating while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2 and 902.8 (1999); operating a motor vehicle while license suspended, in violation of sections 321.210A and 321.218(1); and operating a motor vehicle while license revoked, in violation of sections 321J.4(4) and 321J.21. Defendant was also charged and sentenced as a habitual offender. He claims there is insufficient evidence in the record to support his conviction for OWI. He also claims the district court should have granted his motion for a mistrial. We affirm.

On April 25, 1999, Don and Melissa Lindgren were driving west on Highway 9 in Osceola County, shortly after noon, when they noticed the car in front of them was weaving back and forth across the road. They called 911 from a cell telephone and reported the incident.

Deputy Rick Bos responded to the call. His brother-in-law, Wes Ver Meer, was riding in the car with him. As deputy Bos was coming east on Highway 9, a pickup came into his lane of travel. He turned around and stopped the vehicle. The Lindgrens saw deputy Bos stop the vehicle they reported was weaving. State trooper Duane Leach soon came on the scene and activated the video camera in his car.

The driver of the stopped vehicle was defendant Hum. The officers were to later testify defendant had problems with balance and his speech was slurred. Deputy Bos and Ver Meer were to testify defendant smelled of alcohol. Leach's video shows the following exchange:

Bos: How much you had to drink? Hum: 'Bout six beers.

* * *

Bos: Alright. How much have you had to drink. Hum: Go ahead and take me to jail.
Bos: How much have you had to drink? Hum: I've had enough.

An open can of beer was found in defendant's car. Defendant refused field sobriety tests, stating he had leg, ankle, and hip problems. He was arrested and taken in. Bos and Ver Meer testified during the trip defendant admitted he was intoxicated but was coherent and able to engage in conversation.

Defendant was cooperative throughout the booking process, but refused to take a breath test. He again told deputy Bos he had six drinks that day, and was feeling the effects of the alcohol. When defendant was changing into a jail-issued jump suit, he asked for a cigarette. He became irate when told smoking was not allowed in the jail. He said he had a psychiatric condition and nicotine might help him calm down.

After Defendant was put in a cell he began pounding on the door and demanding a telephone. He had refused to make a call when the opportunity was presented to him earlier. Defendant was then placed in a cell with a telephone, but he began pounding the receiver on the wall and injured his hand. Deputy Seth Hofman brought defendant a sandwich and a cigarette. Deputy Hofman smelled alcohol on defendant. Defendant exercised for awhile, stating he wanted to burn off some energy. Eventually, he asked to be restrained. He was polite and cooperative while officers put him in a restraint chair.

Defendant presented a defense of insanity or diminished responsibility. Dr. Dan Rogers, a licensed psychiatrist, testified defendant had been diagnosed with bipolar affective disorder. He testified defendant's problems with driving, as

well as his conduct in the jail, could have been caused by his psychiatric condition. Rogers also pointed out defendant had diabetes, and low blood sugar could have caused his problems with maintaining his balance, his slurred speech, and his problems in driving within his own lane of travel. Rogers further testified that as a result of defendant's psychiatric condition, on April 25, 1999, he may not have been able to tell right from wrong.

The State called Dr. Romula Lara, a psychiatrist, as a rebuttal witness.[1] Lara reviewed the videotapes of defendant while he was in jail. Lara testified defendant did not show signs of delusions or loss of contact with reality. He further testified defendant understood right from wrong and understood the nature and quality of his actions.

Defendant was sentenced to a term of imprisonment not to exceed fifteen years on the OWI charge and habitual offender. He was sentenced to thirty days in jail and a term of imprisonment not to exceed one year, respectively, on the other two charges. These sentences are to be served concurrently.

Defendant contends on appeal that the State did not present sufficient evidence to show he was driving while intoxicated. Defendant argues the symptoms the officers believed were the result of him being intoxicated were actually the result of his bipolar disorder and diabetes. He advances his conduct was more consistent with someone who was suffering from a bipolar condition, than someone who was intoxicated.

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[1] Court documents in this case refer to the State's expert as Dr. R.T. Lara. The transcript, however, refers to him as Dr. Lata.

We review challenges to the sufficiency of the evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* Substantial evidence is evidence upon which a rational trier of fact could find a defendant guilty beyond a reasonable doubt. *Id.* We view the evidence in the light most favorable to the State, but consider all of the evidence, not just the evidence which supports the verdict. *State v. Jacobs,* 607 N.W.2d 679, 682 (Iowa 2000). Circumstantial and direct evidence are equally probative. *State v. Boley,* 456 N.W.2d 674, 679 (Iowa 1990).

There is substantial evidence to prove beyond a reasonable doubt that defendant was driving while intoxicated. There was testimony that defendant smelled of alcohol. Defendant admitted he had been drinking and was intoxicated.

Defendant also contends he proved his defense of insanity by a preponderance of the evidence. A defendant may be acquitted by reason of insanity if he shows by a preponderance of the evidence he was either: (1) incapable of knowing the nature and quality of the act, or (2) incapable of distinguishing between right and wrong in relation to the act. Iowa Code § 701.4; *State v. Fetters,* 562 N.W.2d 770, 774 (Iowa Ct. App. 1997).

When there is conflicting psychiatric testimony, sanity is "clearly an issue for the jury to decide." *Id.* at 775 (quoting *State v. Hahn,* 259 N.W.2d 753, 758 (Iowa 1977)). A jury is not obligated to accept opinion evidence, even from experts, as conclusive. *Jacobs,* 607 N.W.2d at 685. We, as the reviewing court, defer to the jury's judgment as the jury is in a better position to weigh the

credibility of the witnesses. See *State v. Speaks*, 576 N.W.2d 629, 632 (Iowa Ct. App. 1998).

The jury apparently found Lara more credible than Rogers. Lara testified defendant did not show any signs of delusions or loss of contact with reality. He stated defendant understood right from wrong and understood the nature and quality of his actions. There was sufficient evidence in the record to show defendant was not insane at the time of the offense.

Defendant next contends that the district court should have ordered a mistrial. During cross-examination of Dr. Rogers, in discussing defendant's psychiatric evaluation, the following exchange occurred:

> Q. Wouldn't that be logical thinking? A. Well, I have to respond to that in the context of the entire statement you quoted, not just the last part. The statement that I made there, first of all, was a response to one of the comments in a psychiatric evaluation that he had while he was in prison where the psychiatrist had said that hypomanic state does not usually continue uninterrupted. . . .

Based on this reference to the fact he had been in prison, defendant moved for a mistrial. The district court in responding to the motion said:

> [T]he doctor did refer to a report generated in prison or something to that effect. It was the only reference made.
>
> I didn't observe any particular reaction from the jury or counsel. I was looking for it and I didn't see any, particularly in light of the fact that the prosecution did nothing to elicit that, and I don't know what cautions, if any, were given to Dr. Rogers before he took the stand, but that single slip of the tounge [sic] is not, in the opinion of the court, so prejudicial that is requires a mistrial. The contrary is true. Your motion is overruled.

We review a district court's ruling on a motion for mistrial for an abuse of discretion. *State v. Hardin*, 569 N.W.2d 517, 522 (Iowa Ct. App. 1997). District

courts have considerable discretion in ruling on contentions in this area. *State v. Fryer,* 243 N.W.2d 1, 7 (Iowa 1976).

The district court did not abuse its discretion in denying the motion for a mistrial. The court specifically found the jury did not have any apparent reaction to the statement. Rogers only mentioned defendant had a psychiatric evaluation in prison, and no mention was made of any previous convictions. The district court did not abuse its discretion in denying defendant's motion for a mistrial. We affirm defendant's convictions.

AFFIRMED.