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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | Filed April 24, 1984 |
| vs. | ) | 318 |
| **SHELBY RAY CASON,** | ) | 4-53 / 83-638 |
| Defendant-Appellant. | ) | |

Appeal from the Iowa District Court for Linn County - August F. Honsell, Jr., Judge.

Defendant appeals from his conviction for operating a motor vehicle while intoxicated in violation of Iowa Code section 321.281 (1981) and involuntary manslaughter in violation of Iowa Code section 707.5(1) (1981). AFFIRMED.

Mark H. Rettig of Hines, Pence, Day & Powers, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

Defendant appeals from his conviction for operating a motor vehilcle while intoxicated in violation of Iowa Code section 321.281 (1981) and involuntary manslaughter in violation of Iowa Code section 707.5(1) (1981).

Defendant, Shelby Ray Cason, was driving a truck which struck and fatally injured a bicyclist at 11:35 p.m. on September 1, 1982, on a highway near Cedar Rapids. Two police officers arrived at the scene and both detected a strong odor of alcohol on defendant's breath. Officer Elder observed a can of beer in the truck. Officer Wombacher of the Alcohol Safety Action Program had defendant perform several field sobriety tests. Based on defendant's performance of the tests and his physical appearance, Officer Wombacher concluded that defendant was intoxicated. He then read to defendant an implied consent form. A breath test was made which indicated a blood alcohol level in excess of ten hundredths of one percent. The machine used for the test, an Intoxilizer 4011A, is not equipped to preserve the breath sample tested. No second breath specimen was preserved for later testing by the defendant.

Defendant was charged by information with OMVUI and was charged with involuntary manslaughter by a grand jury indictment citing Iowa Code section 707.5(1), a felony charge, but containing a description of section 707.5(2), an aggravated misdemeanor. A motion to dismiss the indictment, filed prior to the State's filing of a bill of particulars, was overruled. Over objection the grand jury foreman was permitted to testify in pretrial proceedings that the grand jury intended to charge the felony and, over objection, the State was permitted to amend the indictment to reflect that expressed intent. Over objection the charges were consolidated for trial, and are now consolidated for purposes of appeal.

At trial defendant testified that the accident resulted from factors not related to his physical condition, such as poor visibility, his distraction by another

driver behaving erratically, and inadequate time to stop. Over objection based on prejudice and lack of foundation, the trial court allowed into evidence two photographs depicting a police reconstruction of the accident scene purporting to show visibility conditions. The jury was told to disregard the reflectors on the bicycle in the photographs, which were not similar to the reflectors on the bicycle involved in the accident.

Defendant testified that the bicycle was "more or less" at an angle to him at the time of impact. Over objection that it constituted improper rebuttal, a police officer who had examined defendant's truck and photographs of the accident scene was permitted to state in rebuttal his opinion that neither the truck nor the bicycle had been turning at the time of impact.

Following the jury's return of a guilty verdict on both charges, defendant was sentenced to an indeterminate five-year prison term on the manslaughter charge with a concurrent one-year term on the drunk driving charge.

On appeal the defendant asserts numerous allegations of error which will be set forth below as they are considered. Our review of criminal cases is ordinarily on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). However, we make an independent evaluation of the totality of the circumstances on issues involving the violation of basic constitutional safeguards. Id.

I. Motion to Suppress the Results of the Breath Test.

Defendant challenges the admission into evidence of the results of his breath test on several grounds. He first argues that there was insufficient evidence that Officer Wombacher was a "peace officer" as defined in Iowa Code section 321B.2, authorized to request a test under section 321B.3. Officer Wombacher testified that he was under civil service and was, therefore, a peace officer under 321B.2(2). Furthermore, this court can take judicial notice of the population of Cedar Rapids and, if there is no evidence of noncompliance with Iowa Code chapter 400, can conclude that members of its police department are "peace officers." See State v. Proulx, 252 N.W.2d 426, 431 (Iowa 1977).

Defendant also claims that there were no "reasonable grounds" under section 321B.3 for Officer Wombacher to invoke implied consent. Reasonable grounds to arrest a suspect for OMVUI exist "where the facts and circumstances known to the officer at the time he was required to act warrant a prudent man in believing the offense has been or is being committed." Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682, 685 (Iowa 1976). The police officers testified they detected a strong odor of alcohol on defendant's breath. Defendant was required to perform several field sobriety tests which he did not complete to the satisfaction of the officers. Although defendant insists that his anxiety over having been in an accident rather than intoxication caused its unsatisfactory performance, we conclude that on these facts there were reasonable grounds to invoke the implied consent statute.

Thirdly, defendant claims that implied consent was improperly invoked because Officer Wombacher read a portion of the implied consent form to defendant rather than delivering to him a written request. This assertion is directly contrary to State v. Meissner, 315 N.W.2d 738, 740-41 (Iowa 1982), which held that there is no requirement in the statute of physical delivery of the written demand for specimens. The statute is satisfied if the officer reads from an implied consent form. Id. In this case, as in Meissner, the officer informed defendant that he was reading from a written form and there was no evidence that the form was misread.

Defendant also asserts that he should have been read his Miranda rights before implied consent was invoked. The supreme court has held, however, that the implied consent procedure does not constitute interrogation and, therefore, it need not be preceded by Miranda warnings. State v. Stroud, 314 N.W.2d 437, 438 (Iowa 1982); State v. Epperson, 264 N.W.2d 753, 755-56 (Iowa), cert. denied, 439 U.S. 913, 99 S. Ct. 285, 58 L. Ed. 2d 260 (1978).

Defendant further maintains that he was denied due process of law because he was not informed of his right to obtain an independent test. In State v. Epperson, 264 N.W.2d at 756, the supreme court held that although the statute gives the right to have an independent test, neither the statute nor caselaw requires that a defendant be advised of that right. See also Morgan v. Iowa Department of Public Safety, 227 N.W.2d 155, 157 (Iowa 1975).

The most substantial argument for suppression of the breath test results raised by defendant is that the State's failure to preserve a sample of defendant's breath for independent testing denied him due process of law. Defendant relies upon the case of State v. Brown, 337 N.W.2d 507 (Iowa 1983), in which the supreme court held that the State violated a criminal defendant's constitutional right to due process by not preserving a sample of defendant's blood after it was tested to determine its alcohol content. Relying upon Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Iowa court applied the following three-part test to determine whether a denial of due process resulted from the failure to preserve the underlying physical evidence upon which test results are based: (1) a proper defense request for the evidence; (2) a showing that the evidence would be favorable to the defendant; and (3) a showing the evidence was material. State v. Brown, 337 N.W.2d at 509. In construing the second prong of the test, the court determined "that it would be unfair to require the defense to show favorableness when it is impossible to determine the nature of the evidence." Id. at 510. Therefore, the defendant need not show that a second test would yield different results from the first test. However, the court did not completely eliminate the second prong of the test. It stated that the favorableness requirement is met if "'the evidence is material and there is the unavoidable possibility that the [evidence] might have been significantly favorable to the accused.'" Id. at 511 (quoting United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971)).

Our reading of Brown leads us to the conclusion that this "unavoidable possibility" requirement was satisfied in that case by expert testimony that the results of the blood alcohol test were inconsistent with defendant's behavior at the time of his arrest as reported by a police officer and hospital records. Id. at 509. Furthermore, the Brown court compares that case to State v. Michener, 25 Or. App. 523, 550 P.2d 449, 452 (1976), and State v. Lovato, 94 N.M. 780, 617 P.2d 169, 171 (Ct. App. 1980). Id. at 511. In Michener videotapes of the defendants showed that there was a "reasonable possibility" that the breathalyzer test results could have been erroneous. Likewise, in Lovato the test results disclosed a blood alcohol level of 0.10 percent, the minimum sufficient to invoke the presumption of intoxication. A chemist testified that there was a margin of error in the test making it possible that the presumption was inapplicable.

In the present case defendant presented no evidence of an unavoidable possibility that the results of a second test might be in his favor. On the contrary the evidence of defendant's unsatisfactory performance of several field sobriety tests supports rather than challenges the results of the breath test. Based on the record before us, defendant's assertion that a second test might be favorable isspeculation. Since we read Brown to require some minimal showing under the second prong of the Brady test, and defendant in this case has made no such showing, we hold that defendant was not denied due process when the State failed to preserve a sample of his breath for his independent testing.

II. Amendment of the Indictment. The indictment charged defendant with violating Iowa Code section 707.5(1) (involuntary manslaughter—felony type) but contained the description of the crime of 707.5(2) (involuntary manslaughter—aggravated misdemeanor type). Defendant filed a motion to dismiss the indictment alleging that this was a fatal variance. At a hearing on the motion the grand jury foreman testified that the grand jury intended to charge defendant with the felony. The trial court overruled the motion to dismiss and allowed the State to amend the indictment.

Iowa Rule of Criminal Procedure 8(a) provides:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

We believe that the trial court did not allow a wholly new and different offense to be charged, but merely allowed clarification of the indictment by the correction of a clerical error. An indictment is sufficient if it uses the name given to the offense by statute and the number of the statute in the Code. State v. Craig, 252 Iowa 290, 292, 106 N.W.2d 653, 654 (1960). Moreover, in State v. Grady, 231 N.W.2d 869, 874 (Iowa 1975), the court upheld an information in which the correct statute was cited, but the crime was improperly named. The original indictment here satisfied the requirement by properly stating that the defendant was accused of involuntary manslaughter in violation of section 707.5(1). Allowing the State to amend the description of the charge so that it conformed to the specific subsection cited did not constitute an improper amendment.

Furthermore, we cannot see how defendant was prejudiced by the amendment. The purpose of an indictment or information is to afford the person charged with an opportunity to prepare a defense. State v. Davison, 245 N.W.2d 321, 324 (Iowa 1976), cert. denied, 430 U.S. 955, 97 S. Ct. 1600, 51 L. Ed. 2d 805 (1977). In this case the indictment charged defendant with involuntary manslaughter. Defendant was at all times on notice that the State intended to rely upon the allegation that he was operating a motor vehicle while intoxicated, an offense that would support either alternative means of committing involuntary manslaughter. He cannot claim surprise since he was fully alerted at all times as to what allegations he would be required to meet. See State v. Fuhrmann, 257 N.W.2d 619, 624 (Iowa 1977).

III. Consolidation of Charges. Defendant argues that it was error for the trial court to allow the State to consolidate the involuntary manslaughter and OMVUI charges for joint trial. He claims that the consolidation was confusing to the jury because of the different elements required for proof of the separate offenses.

Iowa Rule of Criminal Procedures 6(1) provides:

> Multiple offenses. Two or more public offenses which arose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise. Where a public offense carries with it certain lesser included offenses, the latter should not be charged, and it is sufficient to charge that the accused committed the major offense.

Defendant does not dispute that the two offenses arose out of the same occurrence. He claims, however, that since he was not charged with both offenses in a "single complaint, information or indictment," the trial court should not have allowed consolidation. The supreme court has held, however, that it is not an abuse of discretion for a trial court to order consolidation of charges filed in separate informations. State v. Trudo, 253 N.W.2d 101, 104 (Iowa), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977). As long as defendant was not impermissibly prejudiced, we do not believe the trial court abused its discretion in consolidation simply because defendant was charged with one offense by information and another offense by indictment.

Defendant has the burden of showing that the prejudicial effects of consolidation were so great as to outweigh the State's interest in judicial economy. State v. Gibb, 303 N.W.2d 673, 677 (Iowa 1981). It is clear that the evidence of intoxication would have been admitted against defendant at the manslaughter trial whether or not he was charged with OMVUI. We do not see how consolidation confused the jury or injected extraneous matters into the trial when the same evidence was necessary to prove both offenses.

IV. Admission of Accident Reconstruction Photographs. At trial, the court admitted, over objection, two nighttime photographs of a police officer on a bicycle taken on part of a reconstruction of the accident. One police officer was placed on a lightweight bicycle at the point of impact. The officers were careful to duplicate the weather and lighting conditions at the time of the collision. They then checked to see at what point a bicyclist's body would have been visible to an approaching motorist. While the bicycle used differed from the victim's bicycle in that the test bicycle had fewer reflectors, this difference was explained to the jury and was actually in defendant's favor.

Admission of results of experiments is within the sound discretion of the trial court, Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983), as is the admission of photographs. State v. Hickman, 337 N.W.2d 512, 516 (Iowa 1983). We conclude that the conditions and circumstances of the experiment were similar enough to those at the time of the accident that the trial court did not abuse its discretion in admitting the photographs.

V. Sufficiency of the Evidence. In reviewing a claim of insufficient evidence to support a guilty verdict, we look at all the evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Having considered all of the evidence in this case, we conclude there was sufficient evidence from which the jury could find defendant guilty of both crimes.

VI. Rebuttal Testimony. Defendant testified that the bicyclist was "more or less" at an angle at the time of impact and that defendant was turning his vehicle at the time of the collision. In rebuttal, the State called an accident reconstruction expert who testified that, in his opinion, neither the truck nor the bicycle had been turning at the time of the accident. Defendant claims that this testimony should not have been allowed.

Rebuttal evidence is defined as that which explains, repels, controverts, or disproves evidence produced by the other side. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978). The trial court has considerable discretion in admitting rebuttal evidence. Id. In this case there was no abuse of discretion. The testimony controverted defendant's explanation of how the accident occurred.

VII. Sentencing. After reviewing defendant's argument, we conclude that the trial court did not abuse its discretion in sentencing. The record clearly shows that the court gave consideration to defendant's age, character, propensities, and chances for reform. See State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979).

AFFIRMED.