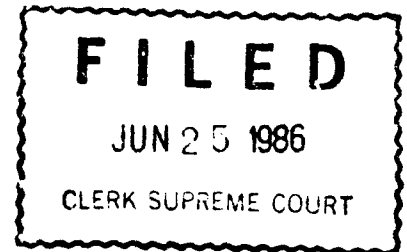


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed June 25, 1986

vs.

)

166

RICHARD J. BUNDA,

)

6-153
85-1039

Defendant-Appellant.

)

Appeal from the Iowa District Court for Clay County (No. 4727) - Cameron
B. Arnold, Judge.

Defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of operating a motor vehicle while intoxicated, first offense, in violation of Iowa Code section 321.281, asserting that the trial court erred in unduly restricting the direct examination of defendant. **AFFIRMED.**

Robert J. Kromminga, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Michael L. Zenor, County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

PER CURIAM**167**

Defendant Richard J. Bunda was arrested for operating a motor vehicle while intoxicated after a highway patrolman observed his vehicle weaving on a public highway on February 17, 1984. Upon stopping Bunda and detecting the odor of an alcoholic beverage, the patrolman requested that he perform several sobriety tests. The results of an intoxilyzer test showed Bunda's blood alcohol level to be 0.192, which constitutes operating while under the influence pursuant to Iowa Code section 321.281(1)(b). Bunda performed poorly on the other sobriety tests as well.

At a pretrial suppression hearing Bunda testified regarding his recollection of the night of his arrest. Although he admitted that he had about five drinks over a four-hour period that evening, he denied that he was intoxicated. Bunda also testified that the intoxilyzer malfunctioned on the night of his arrest. He stated that when he was blowing into it, air was blowing back into his face. He also recalled that the intoxilyzer "sounded like an air horn" or "a truck horn" when it went off. His motion to suppress evidence concerning the test results of the intoxilyzer was denied.

After a change in defense counsel, trial commenced on April 11, 1985. At the conclusion of the State's case, Bunda filed a motion in limine which attempted to restrict the scope of the cross-examination of him by the prosecutor concerning testimony he gave at the pretrial suppression hearing. The trial court indicated that such impeaching testimony would probably not be admissible if Bunda did not deny his intoxication during his direct examination. The trial court did not expressly grant or deny the motion and expressed some confusion itself regarding the nature of its ruling. Pursuant to that ruling, Bunda testified on his own behalf at his trial and did not deny the charge of intoxication.

At the conclusion of the trial the prosecutor stated in substance that

there were other matters in the case not in evidence which he knew of, but which would be improper for him to talk about. This was said in response to defense counsel's closing statement that there were other things about the intoxilyzer which could have been gone into at trial. Defense counsel objected to the prosecutor's comment. The court sustained the objection and instructed the jury to disregard it.

As a result of the guilty verdict and the denial of Bunda's motion for a new trial, the trial court sentenced him to pay a fine of \$500.00 and to serve a term of two days in the county jail.

On appeal, Bunda contends that the trial court erred in unduly restricting his direct examination by conditioning the grant of his motion in limine on Bunda's not denying his intoxication on the night in question. Bunda also asserts that his motion for new trial should have been granted because of the prosecution's misconduct during closing statements.

Motion in Limine. The motion in limine filed by Bunda sought to restrict the prosecution from offering any testimony given by Bunda at the prior July 16, 1984, suppression hearing. Bunda's specific concern was that if the use of the Intoxilyzer 4011A was not mentioned during his direct examination, the prosecution should be restrained from questioning him concerning his recollection and perception of the intoxilyzer test on the night of his arrest. Bunda feared the prosecution would present not only Bunda's testimony from the suppression hearing, but also expert rebuttal witnesses to testify that the intoxilyzer could not possibly make loud noises or blow air back at the person using it. The court ruled on Bunda's motion in limine as follows:

First of all, pursuant to Rule 611, the Court would follow that Rule limiting cross-examination to the subject matter — and by that, the Court understands that to be the facts as elicited on direct.

The more troublesome area for the Court is — and obviously the bottom line of this whole thing — comes down to where the defendant would — takes the stand and denies intoxication. Then is the — is that testimony which, I think, it does, extends through the area that we're talking about, and which would then allow the State to bring in evidence and elicit such on cross-examination as would tend to show that the defendant is — it was, in fact, intoxicated where the defendant's testimony is that he is not. That seems to be the essence of Salvitti, and it seems to be the essence of Rule 611.

And, I guess, at this point then, the Ruling becomes sort of an advisory opinion, that as far as we're — we are dealing only with facts, and by facts, I mean, the defendant taking the stand, testifying what he had to drink, thus and such and thus and such, and — and I think the defendant has the right at that point to surgically excise this area, I think that's not a problem. What — What appears to be the Rule is that then when the defendant makes the denial of the ultimate fact of intoxication, if he does that, then — then the — the authority seems to be that the gate is then open.

And I realize that that's not a very specific Ruling, but it's kind of an advisory thing, I guess, at this point. And so to try to tie all that up, the Ruling is that the State's cross-examination will be limited to the facts as testified to by the defendant. And I guess the Court is advising counsel at this point that if there is — and obviously I assume there's going to be a denial of intoxication on the part of the defendant — if the evidence as sought to be elicited by the State tends to refute that testimony on the part of the defendant, then it's permissible, otherwise, it's not.

Ordinarily the granting or rejecting of a motion in limine is not reversible error. State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). The error occurs, if at all, when the matter is presented at trial and the evidence is then admitted or refused, as the case may be. Id. Until this time, the objectionable material has not reached the jury's ears. State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971). It may never reach the jury. Id. For reasons of its own the opposition may elect not to offer objectionable material. Id. An objection needs to be made when the material is offered in the jury's presence in order to preserve error. Harlow, 325 N.W.2d at 91.

Recently, in Luce v. United States, 469 U.S. ____, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), the United States Supreme Court reviewed an alleged error in a trial court's ruling on a motion in limine. The petitioner in Luce had been charged with conspiracy and possession of cocaine with intent to deliver. Id. at ____, 105 S. Ct. at 462, 83 L. Ed. 2d at 446. He failed to take the stand because of the trial court's pretrial ruling permitting the State to impeach him with evidence of a prior conviction, pursuant to Fed. R. Evid. 609(a). Id. Petitioner was subsequently convicted as charged. Id.

On appeal, the Supreme Court found petitioner had waived error because: (1) there was no way of knowing whether the government would have sought to impeach petitioner; (2) the reviewing court could not assume the adverse ruling motivated petitioner's decision not to testify; and (3) requiring a defendant to testify would enable the reviewing court to determine the impact of any erroneous impeachment in light of the record as a whole in a concrete factual context. Id. at ____, 105 S. Ct. at 463-64, 83 L. Ed. 2d at 448. The Court concluded:

Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling. On a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction.

Id. at ____, 105 S. Ct. at 463, 83 L. Ed. 2d at 447-48.

The Iowa Supreme Court has also determined that a defendant must take the stand and testify to demonstrate prejudice, and the prosecutor must use a prior incriminating statement to impeach, before the defendant can voice

a claim that the statement should not have been used for impeachment because it was involuntary. State v. Davis, 328 N.W.2d 301, 306 (Iowa 1982) (defendant did not testify based on trial court's pretrial ruling allowing incriminating statement to be used against him in rebuttal).

In the present case, Bunda took the stand to testify on his own behalf, but chose not to deny his intoxication on the night of his arrest because of the trial court's ruling on his motion in limine. That ruling essentially indicated that as Bunda's testimony unfolded at trial, the prosecution would be permitted to impeach Bunda with evidence tending to refute his testimony. The prosecution during Bunda's cross-examination did not attempt to impeach Bunda by use of his testimony at the suppression hearing. No mention of the intoxilyzer test was made, nor Bunda's perception thereof. Under these circumstances, we cannot speculate as to what would have happened if Bunda had denied intoxication, whether the prosecution would have sought to impeach Bunda and mention his perception of the intoxilyzer test and what the trial court's ruling regarding such impeachment would have been in a factual context. We conclude that Bunda's contention that the trial court unduly restricted his direct examination is without merit.

Prosecutorial Misconduct. The closing arguments in Bunda's trial were not transcribed. Applications for Bills of Exception were presented to the court after trial and a hearing was held and transcribed thereon. Both counsel and the court recalled that during closing arguments defense counsel mentioned something to the effect that there was a lot of information regarding the operation of the intoxilyzer which was not placed into evidence at trial and therefore could not be brought up. The prosecutor in his rebuttal argument stated that there were other things about the case which were not placed into evidence and could not properly be discussed.

"Prosecutorial misconduct does not require a new trial unless it appears to have been so prejudicial as to deprive the defendant of a fair trial." State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982); State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981). Trial courts are vested with broad discretion in determining whether prejudice results from prosecutorial misconduct. Williams, 315 N.W.2d at 55; Wright, 309 N.W.2d at 893. This discretion stems from the trial court's proximity to the trial itself and its familiarity with the importance and effect of the various happenings at trial. State v. Moreland, 201 N.W.2d 713, 715 (Iowa 1972). On review, this court intervenes only when the trial court abuses this discretion. Williams, 315 N.W.2d 55; Wright, 309 N.W.2d at 893.

As a general rule, lawyers should avoid making statements before a jury which tend to prejudice a defendant's right to a fair trial. State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). "Ordinarily a finding of prejudice results from persistent efforts to inject prejudicial matter before the jury." Id. When a prosecutor's remarks during closing arguments are provoked and offered in retaliation to arguments for the accused, some additional leeway is given. Wright, 309 N.W.2d at 893.

In the present case, the trial court itself found that the prosecutor's statement during closing argument was given in reference to defense counsel's comments in closing. It stated:

The Court further remembers the comment of the County Attorney. And my recollection of that is that he did say there were things about the case, but there was a lead-in to that. And I remember that, because I felt it coming.

* * *

And I think the lead-in was something to the effect that it was a reiteration of the Kromminga comment by the State.

In other words, the — while the specific wording was I know — to my recollection, was that I know other things about this case, the lead-in to that was in the context of the comment about the breathalyzer.

The prosecutor's statement, then, regarding information which could not be placed into evidence was offered in response to defense counsel's similar statement. Furthermore, the prosecutor's remark was an isolated one; the trial court promptly dealt with the matter and directed the jury to disregard the comment. Under these circumstances, we conclude that Bunda was not prejudiced by the prosecutor's closing argument. The trial court properly denied his motion for new trial.

AFFIRMED.