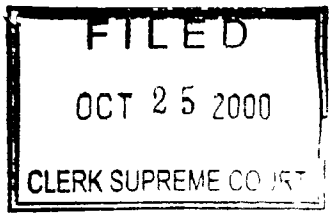
IN THE COURT OF APPEALS OF IOWA

No. 0-379 / 98-2014
Filed October 25, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JAMES DOWNS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of homicide by vehicle in violation of Iowa Code section 707.6A(1)(b) (1997), involuntary manslaughter in violation of section 707.5 (1997), and failure to remain at the scene of an accident and provide information and aid in violation of sections 321.261(2), 321.263, and 321.261(3) (1997). **AFFIRMED.**

Lori Holm, Des Moines, and Christopher A. Kragnes, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Odell McGhee, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Michael Downs appeals from the judgment and sentence entered upon a jury verdict finding him guilty of homicide by vehicle in violation of Iowa Code section 707.6A(1)(b) (1997), involuntary manslaughter in violation of section 707.5, and failure to remain at the scene of an accident and provide information and aid in violation of sections 321.261(2), 321.263, and 321.261(3). He contends: (1) the district court's failure to grant his motion to suppress pretrial statements denied him his rights to counsel and against self-incrimination, (2) the district court's failure to grant his motion in limine denied him his right to be free of unduly prejudicial evidence, (3) there was insufficient evidence to support his convictions, and (4) Iowa Code section 910.3B is unconstitutional in that it constitutes an excessive fine and amounts to cruel and unusual punishment, violates his due process and equal protection rights, and subjects him to double jeopardy. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS. At approximately 6:00 p.m. on November 29, 1997, Charles and Julie Schlomer were southbound on Highway 65. As they approached the intersection of Highway 65 and Lincoln Street Southeast in Bondurant, Iowa, in the west lane heading south, Charles Schlomer observed a vehicle in the northbound turn lane. The vehicle, driven by defendant, Michael Downs (Downs), proceeded across Mr. Schlomer's path. Mr. Schlomer applied his brakes, but was unable to stop his vehicle before broadsiding the vehicle driven by Downs. The Schlomer's vehicle ended up on the west shoulder of the southbound lane facing north. Downs's vehicle came to a stop in the ditch on the west side of the road, facing west. Officers

investigating the accident observed no physical evidence at the scene to suggest the car driven by Downs had attempted to stop. Skid marks indicated the car driven by Schlomer did attempt to stop.

It was thirty-nine degrees, raining, and the roads were wet the evening of the crash. It was dark at the time of the collision. No large lights light the intersection. A yield sign is posted for drivers turning left from northbound Highway 65 onto Lincoln Street Southeast. A videotape of the scene revealed a glare on the road from the rain and vehicle headlights the evening of the crash. The headlights of oncoming traffic from the north blend with lights from a residential area nearby.

Emergency personnel, including Iowa State Patrol officers, arrived at the scene within minutes. Officers Douglas Cutts and Blaine Camp arrived at the scene and observed Downs's vehicle, a large Chrysler, in the west ditch with heavy damage to the passenger side. Downs's wife Eunice, a passenger in the vehicle, was still inside. As Officer Cutts approached the vehicle to assist Eunice, a voice from behind him, who he later identified as Downs, asked Officer Cutts if he would take care of Eunice, because Downs had to use the restroom. Officer Cutts advised Downs ambulances were on the way, and assisted Eunice until medical personnel arrived a short time later. During his brief encounter with Downs, Officer Cutts could not smell alcohol on the breath of defendant. He did not observe any evidence of drinking in or around Downs' vehicle. A videotape of the scene showed Downs walking up the bank of the ditch without slipping or falling.

Officers at the scene attempted to locate Downs. After looking around the area without success, including a nearby convenience store and storage buildings, officers widened their search. Meanwhile, emergency personnel removed Eunice from the vehicle and transported her to Methodist Hospital, where she died at 7:48 p.m. of multiple thoracic and abdominal injuries sustained in the accident.

A cab driver picked up Downs at Bosselman's Truck stop, in Altoona, Iowa, sometime after the accident. He was soaking wet when she picked him up. The cab driver followed Downs's specific directions and took him to a trailer court on Bloomfield Road. Downs did not appear drunk to the cab driver, and she did not smell alcohol in the cab. He sat in the back seat of the cab, behind the front passenger seat. Downs stood outside the cab when he paid the cab driver with a $20 bill.

Officers arrived at the trailer court on Bloomfield Road at approximately 10:00 p.m. Trooper Wellner observed Downs walking toward his trailer at approximately 11:30 p.m. He approached Downs and asked if he knew anything about a motor vehicle accident earlier in the evening. Downs told Trooper Wellner he did not. After dispatching Officer Cutts to the scene to identify Downs, Trooper Wellner informed Downs he needed to talk to Downs about some "serious business," and therefore needed to read him his *Miranda* rights. Trooper Wellner recited from memory the *Miranda* warning. Downs acknowledged he understood his rights. While speaking with Downs, Trooper Wellner noticed an alcohol-type odor on Downs's breath. He asked Downs if he had been drinking. Downs told the officer he had not. Trooper Wellner noticed a

red blotch on Downs's face and asked if he was hurt. Downs responded he was not. The officer informed Downs his wife had been killed in a traffic accident. Downs responded "Oh, no, you're kidding." The officer handcuffed Downs. Downs stated he wanted to see a lawyer right away.

At 11:52 p.m., Trooper Wellner informed Downs he would be asking him to provide a body specimen. Downs stated he would not do so without talking to a lawyer. At 11:55 p.m., officers transported Downs to the Iowa State Patrol district office. Officers provided Downs with a phone book to try and locate an attorney. After Downs spoke with his mother on the phone, Trooper Wellner asked him if he had an attorney he wanted to call. Downs replied, "I'll give you a body specimen if you want. It doesn't matter anyway, Eunice is gone." Trooper Wellner invoked implied consent and requested a urine specimen from Downs. At 12:58 a.m. on November 30, 1997, Downs provided the urine specimen. The officer took the specimen to the Iowa Division of Criminal Investigation (DCI) laboratory in Des Moines for analysis.

DCI toxicologist and laboratory administrator, Michael Rehberg, tested the urine sample and determined it contained .021 grams per sixty-seven milliliters of alcohol. Several months later, Rehberg was asked to calculate Downs's level of intoxication at the time of the accident.[1] He considered the time of the test, the

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[1] Trooper Wellner called Rehberg on about December 30, 1997, and asked if Rehberg could calculate the blood alcohol level at the time of the accident. Rehberg told Wellner he would need more information to give him a more accurate finding. According to Wellner, "he basically wanted to know how much the person had taken into his body over that time versus how much had been excreted out of his body." Wellner did not have that information. Rehberg testified he did not recall the conversation with Wellner. Rehberg testified he performed the back calculation on or about April 24, 1998, before being deposed by Downs's attorney.

time of the crash, and Downs's statement to officers he did not drink during the intervening period. Given these factors, and the average metabolic rate for alcohol, Rehberg opined Downs's blood alcohol level was .12 at the time of the crash.

The county attorney filed a trial information on January 9, 1998, charging defendant with (I) homicide by vehicle, in violation of Iowa Code section 707.6A(1)(b); (II) involuntary manslaughter, in violation of Iowa Code section 707.5; (III) failure to remain at the scene of an accident and to provide information and aid, in violation of Iowa Code sections 321.261(2), 321.263, and 321.261(3); and (IV) operating a motor vehicle while license is under suspension, in violation of Iowa Code section 321J.32(1).[2] An amended information, containing the same charges, was filed April 27, 1998.

On August 24, 1998, a jury returned guilty verdicts on Counts I, II and III. The court sentenced Downs to imprisonment for a period not to exceed ten years on the homicide by vehicle charge (Count I), and imprisonment for a period not to exceed two years on the failure to remain at the scene of an accident and provide information and aid charge (Count III), and ordered the sentences to run concurrently.[3] The court ordered Downs to make restitution, pursuant to Iowa Code section 910.3B, in the amount of $150,000, to the estate of Eunice Downs for having caused her death in a felonious manner. Downs appeals.

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[2] Count IV was severed from the other three counts for trial.

[3] The sentencing court merged Count II, involuntary manslaughter, with the homicide by vehicle charge, and did not enter judgment or sentence Downs on Count II.

II. MOTION TO SUPPRESS. We review de novo defendant's claim his constitutional rights were violated. *State v. Godbersen*, 493 N.W.2d 852, 854 (Iowa 1992). We make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello*, 602 N.W.2d 190, 195 (Iowa App. 1999). We consider both the evidence from the suppression hearing and that introduced at trial. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997).

A. Statement. Downs argues the district court's failure to grant his motion to suppress a statement made by him to an officer denied Downs his constitutional rights to counsel and against self-incrimination. We disagree.

We have a dual test in determining the admissibility of inculpatory statements by a criminal defendant. *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989). First, we ascertain whether or not *Miranda* warnings are required and if so, whether they were properly given. *Id.* Second, we determine whether the statement is voluntary and satisfies due process. *Id.* The State must prove, by a preponderance of the evidence, constitutional rights were knowingly waived and statements of an inculpatory nature were voluntarily given. *State v. Washburne*, 574 N.W.2d 261, 265 (Iowa 1997); *State v. Thai*, 575 N.W.2d 521, 524 (Iowa App. 1997).

(1) Miranda Warnings. In *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966), the Supreme Court mandated during custodial interrogation an accused be advised of certain constitutional rights. A defendant may waive these rights, however, provided the waiver was made voluntarily, knowingly, and intelligently. *Id.* A *Miranda* warning

is not triggered, however, unless there is both custody and interrogation. *Davis*, 446 N.W.2d at 788. Therefore, we must determine if Downs was in custody at the time he told Trooper Wellner he had not been drinking.[4]

Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any way. *State v. Pierson*, 554 N.W.2d 555, 560 (Iowa App. 1996). The custody determination depends on the objective circumstances of the interrogation, not on subjective views harbored either by the officer or the person being questioned. *Countryman*, 572 N.W.2d at 557. The ultimate inquiry is whether there is an arrest or a restraint on freedom of movement of a degree associated with an arrest. *Pierson*, 554 N.W.2d at 560. A four-factor test guides us in determining whether there has been such a restriction on a person's freedom as to render him "in custody": (1) the language used to summon the person for questioning; (2) the purpose, place and manner of interrogation; (3) the extent to which a person is confronted with evidence of his or her guilt; and (4) whether the person is free to leave the place of questioning. *Astello*, 602 N.W.2d at 195.

Trooper Wellner approached Downs as he walked around the trailer park off Bloomfield Road. Downs denied knowledge of an automobile accident upon preliminary questioning by Trooper Wellner. The trooper informed Downs they had some "serious business" to discuss, and informed Downs of his *Miranda* rights. Downs acknowledged understanding his rights. Trooper Wellner

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[4] The district court concluded Downs was in custody at the time he was handcuffed and placed in the patrol car, and suppressed statements made by Downs after he invoked his right to counsel. The parties have not appealed this ruling of the district court.

conducted a *Terry* pat-down search for weapons, and began asking Downs general questions about his activities that evening. Downs volunteered no information, but responded to all questions put to him by the trooper. Trooper Wellner detected a moderate odor of an alcoholic beverage, and asked Downs if he had been drinking. Downs denied drinking, being drunk, or having consumed any controlled substance.

After close examination of the record, we conclude Downs was not subject to custodial interrogation at the time he told Trooper Wellner he had not been drinking. Trooper Wellner approached Downs in a non-threatening way, near his home, and began asking questions of a general nature. Trooper Wellner did not confront Downs with evidence of his guilt during the conversation. The exchange took place before the trooper placed handcuffs on Downs and placed Downs in the backseat of another trooper's vehicle. Downs was free to leave at the time he made the statement regarding his alcohol consumption. Because we conclude Downs was not subject to custodial interrogation at the time he told Trooper Wellner he had not been drinking, the trooper was not required to inform Downs of his *Miranda* rights.

Even if we were to conclude Downs was subject to custodial interrogation, thereby requiring *Miranda* warnings, the trooper properly administered *Miranda* warnings before Downs made the statement regarding his alcohol use. At the suppression hearing, Trooper Wellner recited from memory the *Miranda* warnings for the court, just as he had done for Downs. While the court experienced some difficulty hearing the trooper, the court commented, "He obviously knows it. It is a matter of articulation, not a matter of recollection, as I

understand it. . . ." Our review of the record indicates Trooper Wellner adequately communicated the *Miranda* warnings to Downs. *See Thai*, 575 N.W.2d at 524 ("We do not look for a set of particular words; we must simply determine whether the warning given reasonably relays to an accused his rights as required by the *Miranda* decision.").

Further, we conclude Downs knowingly, intelligently and voluntarily waived his *Miranda* rights. A waiver need not be express. *Thai*, 575 N.W.2d at 524. A voluntary decision to talk to an officer may clearly be implied from the fact he did so after being advised he was not required to do so. *Id.* Downs's decision to answer the trooper's questions implies the voluntary waiver of his *Miranda* rights.

(2) Voluntariness. Even if Downs voluntarily waived his *Miranda* rights, we must still determine whether his statement to the officer was voluntarily given. *Davis*, 446 N.W.2d at 788 (noting the difference between voluntary waivers of *Miranda* rights and voluntary statements). The State must prove by a preponderance of the evidence Downs's subsequent incriminatory statements were voluntarily given. *Pierson*, 554 N.W.2d at 561. We follow a totality of the circumstances approach in which a statement is deemed voluntary if it is "the product of an essentially free and unconstrained choice, made by the defendant whose will was not overborne or whose capacity for self-determination was not critically impaired." *State v. Smith*, 546 N.W.2d 916, 926 (Iowa 1996) (quoting *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992)).

We consider a number of different factors in making our evaluation of the voluntariness of a statement. *Smith*, 546 N.W.2d at 926. These include: defendant's age, defendant's prior experience with law enforcement, whether the

defendant was intoxicated at the time of the statement, whether the defendant was provided *Miranda* warnings, the intellectual capacity of the defendant, whether officers acted in a deceptive manner, whether the defendant appeared to understand and respond to questions, the length of time of detention and interview, the defendant's physical and emotional reaction to the interrogation, and whether the defendant was subjected to any physical punishment such as the deprivation of food or sleep. *Id.* No one factor is determinative of the voluntariness of an admission. *Pierson*, 554 N.W.2d at 561.

Downs is an adult, and familiar with the criminal justice system and law enforcement. While his breath smelled of alcohol, any impairment did not affect his ability to communicate with the trooper. Downs understood and responded to questions. The trooper did not threaten him, use force, or otherwise subject Downs to any physical punishment. The trooper gave *Miranda* warnings, which Downs acknowledged understanding. After examining the totality of the circumstances, we conclude the State sustained its burden of proof to establish Downs's statement regarding his alcohol use was made voluntarily.

We affirm the district court's denial of Downs's motion to suppress his statement regarding alcohol use.

B. Chemical Testing. Downs contends the district court erred in failing to suppress the results of a chemical test, arguing the trooper's request for a body specimen amounted to custodial interrogation. In support of his contention, Downs attempts to distinguish his case from *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. E. 2d 748 (1983), and *State v. Mannion*, 414 N.W.2d 119 (Iowa 1987), which hold a request to perform a sobriety test is not an

interrogation when the person is arrested for *driving while intoxicated. Neville*, 459 U.S. at 564 n.15, 103 S. Ct. at 923 n.15, 74 L. Ed. 2d at 759 n.15; *Mannion*, 414 N.W.2d at 122 (emphasis added). Because he was not arrested for or charged with driving while intoxicated, Downs argues the rule articulated in *Neville* and *Mannion* does not apply. We find Downs's argument without merit.

The implied consent procedure is "normally attendant to arrest and custody," and similar to a police request to submit to fingerprinting or photography. *Neville*, 459 U.S. at 564 n.15, 103 S. Ct. at 923 n.15, 74 L. Ed. 2d at 759 n.15. Police words or actions "normally attendant to arrest and custody" do not constitute interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297, 308 (1980). Therefore, the implied consent procedure does not constitute interrogation, and need not be preceded by the *Miranda* warning. *State v. Stroud*, 314 N.W.2d 437, 438 (Iowa 1982); *State v. Epperson*, 264 N.W.2d 753. 755-56 (Iowa 1978).

Further, Downs contends the reasonable grounds test of Iowa Code section 321J.6(1) was not met in this case because there was no indication at the scene of the accident that Downs had been drinking. We reject Downs's contention.

Iowa Code section 321J.6 sets forth the requirements to invoke implied consent. It authorizes a peace officer to request the withdrawal and testing of bodily substances when (1) the officer has reasonable grounds to believe the person was operating while intoxicated and (2) the person has been involved in a motor vehicle accident or collision resulting in personal injury or death. Iowa Code § 321J.6(1)(b); *State v. Satern*, 516 N.W.2d 839, 841 (Iowa 1994). The

reasonable grounds test of section 321J.6 is met when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's beliefs that an offense had been committed. *Satern*, 516 N.W.2d at 841.

Officer Cutts encountered Downs at the accident scene. During their brief encounter, the officer could not smell alcohol on Downs's breath. The officer testified, however, "we were not that close." Downs left the scene shortly after speaking with the officer, thereby denying the officer further opportunity to observe Downs. When Trooper Wellner encountered Downs several hours later, he smelled of alcohol, but denied he had been drinking. We conclude Trooper Wellner's observations and Downs's statement establish reasonable grounds for him to believe Downs operated a motor vehicle while under the influence of an alcoholic beverage.

Downs was not subject to custodial interrogation when asked to provide a body specimen. The trooper had reasonable grounds to invoke implied consent pursuant to Iowa Code section 321J.6(1)(b). Therefore, we affirm the district court's denial of defendant's motion to suppress the results of chemical testing.

III. MOTION IN LIMINE. We review Downs's challenge to the district court's evidentiary ruling for abuse of discretion. *State v. Edgerly*, 571 N.W.2d 25, 27 (Iowa App. 1997). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998).

Downs argues the district court's failure to grant his motion in limine resulted in the admission of evidence in violation of Iowa Rule of Evidence 403. Specifically, he contends the prejudicial effect of testimony by the State's expert as to the amount of alcohol Downs may have had in his system at the time of the accident outweighed its probative value, and should not have been admitted at trial.

Initially, we must address the State's assertion Downs did not preserve error on the issue he now raises. The State contends the court considered only the admissibility of the State's expert's testimony, and did not balance its probative value by the danger of unfair prejudice under Iowa Rule of Evidence 403. The court did not make a determination, nor did Downs urge it to, the evidence was probative but unduly prejudicial. Therefore, the State argues, the issue urged on appeal by Downs should be waived.

The primary purpose of a motion in limine is to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on its admissibility. *Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa App. 1997). Review of questions raised by a motion in limine generally is predicated on the record made during trial. *State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992). If the trial court's ruling is dispositive on the issue of admissibility, it is considered final for purposes of appeal and no further objection is necessary. *Ray*, 563 N.W.2d at 638.

Defendant made an extensive offer of proof at trial, during which the court heard testimony from the State's expert, Michael Rehberg, DCI toxicologist and laboratory administrator, and Downs's expert, Dr. John Vasiliades, a forensic

toxicologist with Toxicology Labs in Omaha, Nebraska. After listening to the evidence presented, the district court ruled as follows:

> The proceeding that has just been concluded...is in the nature of the type of proceeding that is contemplated by [*Williams v. Hedican*, 561 N.W.2d 817 (Iowa 1997)], which follows up on the [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)] standard in the application of [Iowa Rule of Evidence] 702. It is, in fact, a proceeding that resulted from a Motion in Limine where the Defendant seeks to exclude from evidence an opinion from Mr. Rehberg relating to the purported blood alcohol concentration in the system of Mr. Downs at the time of the collision in this case.
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> Under such circumstances, the Iowa Supreme Court notes that trial judges are the gate keepers to insure that all scientific evidence admitted is both reliable and relevant. Our rule 702 is substantially the same as that of the Federal system. We focus here on scientific knowledge.
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> . . . .
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> In short, the requirement is that an expert's testimony pertain to scientific knowledge and establish a standard of evidentiary reliability. At the outset, the trial court must determine whether the expert, in this case Mr. Rehberg, is proposing to testify as to scientific knowledge and further that it would assist the trier of fact to understand one of the points of factual contention. There must be a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.
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> . . . .
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> The Court finds that the opinion of Mr. Rehberg should be allowed. The Court notes that there is a clear disparity between experts on this issue as articulated by Dr. Vasiliades. The Court believes, however, that the threshold preliminary showing is such that the opinion should be allowed and can be then evaluated by the fact finder subject to the cross-examination of defense counsel and, if the Defendant wishes, the provision of expert testimony on his own behalf to the jury.
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> . . . .
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> The Court overrules the Defendant's Motion in Limine and will permit Mr. Rehberg to render his opinion tested by the engine of cross-examination and subject to the challenge through the expert testimony of Dr. Vasiliades.

The court clearly based its ruling on Downs's motion in limine on Iowa Rule of Evidence 702, rather than rule 403. The court considered Mr. Rehberg's

ability to testify as an expert. It did not balance the probative value of the evidence by the danger of unfair prejudice. Downs did not urge the court to make such a determination during his offer of proof. Therefore, the issue has been waived. *See State v. Riley,* 501 N.W.2d 487, 490 (Iowa 1993); *State v. Pelelo*, 247 N.W.2d 221, 226 (Iowa 1976).

Even if we were to conclude Downs has not waived his rule 403 argument, the trial court did not abuse its discretion in admitting Mr. Rehberg's testimony at trial. Iowa Rule of Evidence 401 defines "relevant evidence" as "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. 401. Relevant evidence is generally admissible. Iowa R. Evid. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Iowa R. Evid. 403. Because rule 403 allows the district court to exclude relevant testimony, the court should apply the rule sparingly. *Midwest Home Distrib., Inc. v. Domco Indus. Ltd.*, 585 N.W.2d 735, 745 (Iowa 1998).

Probative value gauges the strength and force of the relevancy of the evidence presented. *Most*, 578 N.W.2d at 253. "Unfair prejudice" is an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one. *Id.* Evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something

other than the established propositions in the case. *State v. Hardy*, 492 N.W.2d 230, 234 (Iowa App. 1992) (citing J. Weinstein & M. Berger, *Weinstein's Evidence*, 404[03] at 403-33-40). The trial court must balance the probative force of the challenged evidence against the danger of undue prejudice to determine whether evidence is admissible. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988).

Mr. Rehberg tested Downs's urine sample and determined it contained .021 grams per sixty-seven milliliters of alcohol. Mr. Rehberg opined, according to the information provided, Downs's blood alcohol level was .12 at the time of the accident. Downs presented a great deal of testimony refuting the State's method of analysis and calculations during its offer of proof. The testimony of Mr. Rehberg went to an element of the State's case, recklessness, and was therefore relevant. Given its relevance, we must determine whether the evidence is unfairly prejudicial.

Downs presented his own expert to refute the State expert's calculations, and vigorously cross-examined the State's expert. Contrary to Downs's assertions, and based on our careful review of the record, we conclude Mr. Rehberg's testimony was not based on pure speculation, unsupported assumptions, and untruthful statements. An expert's lack of absolute certainty goes to the weight of his testimony, not its admissibility. *State v. Buller*, 517 N.W.2d 711, 713 (Iowa 1994). We conclude the challenged testimony's probative value was not substantially outweighed by the danger of unfair prejudice. The district court did not abuse its discretion in admitting Mr. Rehberg's testimony.

IV. SUFFICIENCY OF THE EVIDENCE. We review Downs's challenge to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4. The standards governing a challenge to the sufficiency of the evidence are well established:

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder [sic] that the defendant is guilty beyond a reasonable doubt.

State v. Mills, 458 N.W.2d 395, 397 (Iowa App. 1990) (quoting *State v. Wheeler*, 403 N.W.2d 58, 60 (Iowa App. 1987)). The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence and "place credibility where it belongs." *Id.*

A. Homicide by Vehicle and Involuntary Manslaughter. In order to prove Downs guilty of homicide by vehicle, the State had to prove: (1) Downs operated a vehicle in a reckless manner, and (2) Downs's acts were an unintentional proximate cause of the death of Eunice Downs. In order to prove Downs guilty of involuntary manslaughter, the State had to prove: (1) Downs recklessly committed the crime of making an illegal left turn and/or committed the crime of reckless driving, and (2) when Downs committed either one of those crimes, he unintentionally caused the death of Eunice Downs. To prove Downs

guilty of reckless driving, the State had to prove (1) Downs was driving a motor vehicle (2) in a reckless manner.

Downs argues there was not substantial credible evidence presented to the jury to permit a finding Downs operated his vehicle in a reckless manner in relation to either the homicide by vehicle count or the involuntary manslaughter count. Specifically, Downs contends (1) the State did not provide direct evidence to support its allegation Downs had a blood alcohol content of .12 at the time of the accident, and therefore acted in a reckless manner, and (2) the State failed to present evidence to indicate reckless driving on the part of Downs.

Viewing the evidence in the light most favorable to the State, the jury could have found Downs guilty beyond a reasonable doubt of homicide by vehicle and involuntary manslaughter. The State need not prove Downs's guilt on direct evidence alone. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16); *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996); *State v. Speaks*, 576 N.W.2d 629, 632 (Iowa App. 1998). The court instructed the jury on recklessness as follows:

> A person is "reckless" or acts "recklessly" in the operation of his motor vehicle when he willfully or wantonly disregards the safety of persons or property. It is more than a lack of reasonable care which may cause intentional death. Recklessness is conduct which is consciously and intentionally done with willful disregard of the consequences, and involving such a high degree of danger that the actor knows or should reasonably foresee that harm to another will flow from the act. Though recklessness is willful, it is not intentional in the sense that harm is intended to result.
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> Willfully or wantonly means a conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others.
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> A mere violation of a rule of the road, in and of itself, does not mean that a person is operating a motor vehicle in a reckless manner, even though a person died as a result.

> If a person operates a motor vehicle while under the influence of an alcoholic beverage or with any measurable amount of marijuana in the person that may, in and of itself, constitute recklessness.
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> A person is "under the influence" when one or more of the following is true:
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> 1. His reason or mental ability has been affected.
> 2. His judgement [sic] is impaired.
> 3. His emotions are visibly excited.
> 4. He has, to any extent, lost control of bodily actions or motions.

Downs made an improper left-hand turn in front of an oncoming car. There was no indication Downs made any attempt to stop. Downs left the scene shortly after the accident and was found near his home several hours later. When questioned by a trooper, Downs denied involvement in an accident earlier in the evening and told the trooper he had not been drinking. A urine specimen obtained from Downs contained .021 grams per sixty-seven milliliters of alcohol. Mr. Rehberg determined Downs's blood alcohol level at the time of the crash was .12. At trial, Downs extensively cross-examined Mr. Rehberg, and presented his own expert witness to refute Mr. Rehberg's testimony. The jury, however, was free to believe Mr. Rehberg's testimony and give weight to the State's evidence "as in its judgment such evidence should receive." *Thornton*, 498 N.W.2d at 296. We conclude the State presented substantial evidence of Downs's recklessness, such that the jury could have concluded Downs was guilty beyond a reasonable doubt of homicide by vehicle and involuntary manslaughter.

B. Failure to Remain at the Scene of an Accident and Provide Information and Aid. In order to prove Downs guilty of failure to remain at the scene of an accident and provide information and aid, the State had to prove: (1) Downs was the driver of a vehicle involved in an accident that resulted in

injury or death of a person, (2) Downs failed to immediately stop at the scene of the accident or as close as possible to the scene, (3) Downs failed to remain at the scene of the accident and provide his name, address, and vehicle registration number and display his motor vehicle license, and (4) Downs failed to render reasonable assistance to the injured person. Downs challenges the State's evidence as to elements (2) and (4).

Downs's vehicle stopped in a nearby ditch after being struck by an oncoming car. Downs did not voluntarily stop his vehicle to render assistance. Downs remained at the scene long enough to ask an officer if he would take care of his wife because he had to use the restroom. After this brief exchange, Downs disappeared from the scene. He took a cab to his home, where he was found several hours later. The record does not support Downs's contention he remained at the scene and attempted to assist his wife. We conclude the State presented substantial evidence to support Downs's conviction of failure to remain at the scene of an accident and provide information and aid.[5]

V. RESTITUTION. We review Downs's constitutional claims de novo. *State v. Hamrick*, 595 N.W.2d 492, 493 (Iowa 1999). Downs claims the statutorily mandated $150,000 restitution in Iowa Code section 910.3B constitutes an excessive fine and amounts to cruel and unusual punishment, in violation of the Eighth Amendment of the United States Constitution. Further, Downs argues, the statute violates his due process and equal protection rights,

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[5] Because we conclude Downs's insufficient evidence arguments fail on the merits, we will not address the State's contention Downs failed to preserve error when he did not specifically state what was lacking in the State's case as to the involuntary manslaughter charge and the failure to remain at the scene of an accident and render information and aid charge.

and subjects him to double jeopardy, in violation of the United States and Iowa Constitutions. He also claims section 910.3B prevents him from entering an *Alford* plea.

A. Excessive Fine. A recent decision of the Iowa Supreme Court guides our resolution of this issue. After considering the nature of the offense, the resulting harm, and the great deference afforded the legislature in determining penalties for a given crime, our supreme court recently determined section 910.3B does not on its face violate the Excessive Fines Clause of the Iowa and United States Constitutions. *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000). The court did not decide whether any specific circumstances of the case before it would render the restitution award as applied violative of the Excessive Fines Clause, but indicated, "any case-specific analysis would primarily focus on the amount of the punishment as it relates to the particular circumstances of the offense." *Id.* (citing *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314, 329 (1998)). Given the severity of the crimes of which the jury convicted Downs, we conclude the amount of restitution imposed by the district court bears a reasonable relationship to the circumstances of the offense. *See State v. Klawonn*, 609 N.W.2d 515, 518-19 (Iowa 2000) ($150,000 restitution award not grossly disproportionate to the gravity of the offense of involuntary manslaughter involving the reckless operation of a motor vehicle).

B. Double Jeopardy. The *Izzolena* court rejected the defendant's challenge to section 910.3B on double jeopardy grounds. *Izzolena*, 609 N.W.2d at 551-52. The court determined the restitution award was not imposed in a subsequent proceeding, but rather as a function of the original sentencing

process. *Id.* at 552. Thus, the Double Jeopardy Clause was not implicated. *Id.* Downs's double jeopardy claim is without merit.

C. Due Process. Downs claims section 910.3B violates his procedural due process rights because it fails to provide a defendant an opportunity to be heard in regard to the amount of the fine or restitution. Our supreme court has determined otherwise. *Id.* at 552-53. The court balanced (1) the private interest affected, namely, the property interest in the offender's assets and financial future, (2) the risk of erroneous deprivation and probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest. *Id.* at 552. It concluded:

> [T]he risk of erroneous deprivation of this interest through the available procedures is virtually non-existent. In order for this award to be imposed upon an individual, guilt beyond a reasonable doubt must be shown at trial, or a plea of guilty must be accepted for the underlying felonious offense. Additionally, the commission of the offense must have been the proximate cause of the victim's death. And finally, the defendant is afforded the opportunity for a hearing once the court issues the restitution order, at any time during the pendency of the order. *See* Iowa Code § 910.7 (1997). [Footnote omitted.] Adding additional or substitute procedures to the process would not provide any additional safeguards to the defendant, as sufficient procedure with respect to the imposition of the award are currently in place.
>
> Finally, the government's interest in the process is viewed in light of the public interest. [Citation omitted.] This includes the administrative burden and other societal costs associated with requiring an evidentiary hearing as a matter of right in all cases. [Citation omitted.] The most obvious burden would be the increased number of hearings. Furthermore, even if a pre-imposition hearing was provided, defendants would also be entitled to a subsequent 910.7 hearing. A pre-imposition hearing would also have little or no effect on the outcome because the award under section 910.3B includes a mandatory minimum level.

Id. at 553. We reject Downs's procedural due process argument.

Finally, Downs claims the portion of section 910.3B which precludes him from denying the elements of the offense in any subsequent action effectively denies his opportunity to enter an *Alford* plea. Our supreme court recently rejected a similar argument. *Klawonn*, 609 N.W.2d at 520-21. Downs claim is without merit.

D. Equal Protection. Downs argues section 910.3B violates his equal protection rights in that it strips exemptions provided for other judgment debtors and imposes punitive conditions of repayment not imposed on other judgment debtors. Specifically, Downs states section 910.3B precludes him from discharging the debt in bankruptcy and does not indicate his personal property or other personality usually exempt from execution of judgment is protected.

Litigants cannot challenge the constitutionality of a statute unless they can show they have been injured by it. *Norland v. Grinnell Mut. Reins. Co.*, 578 N.W.2d 239, 241 (Iowa 1998). Generally, a party may not assert the rights of others not before the court. *Krull v. Thermogas Co., Div. of Mapco Gas Prods., Inc.*, 522 N.W.2d 607, 614 (Iowa 1994).

The record is silent on Downs's status as a judgment debtor. Downs has not shown he has been injured by this provision of the statute. Therefore, we will not address the merits of his equal protection argument.

VI. CONCLUSION. The district court did not err in its denial of Downs's motion to suppress his statement regarding his use of alcohol and the results of chemical testing. Even if Downs had not waived his rule 403 argument, the challenged testimony's probative value was not substantially outweighed by the danger of unfair prejudice. The State presented sufficient evidence to support

Downs's conviction of the crimes for which he was charged. We reject Downs's constitutional arguments with regard to restitution based on recent decisions of the Iowa Supreme Court.

AFFIRMED.