FILED
APR 2 0 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**STATE OF IOWA,** )

Plaintiff-Appellee, )

vs. )

**URBAN H. POLKING,** )

Defendant-Appellant. )

Filed April 20, 1988

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Appeal from the Iowa District Court for Carroll County (No. 29837) - Allan L. Goode, District Associate Judge.

Defendant appeals from his conviction, following a jury trial, for operating a motor vehicle while intoxicated, first offense. **AFFIRMED.**

James Furey, Carroll, for the defendant-appellant.

Thomas J. Miller, Attorney General, and Ted Metier, Assistant Attorney General, for the plaintiff-appellee.

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

**HAYDEN, J.** 279

Defendant, Urban Polking, appeals his conviction for operating a motor vehicle while intoxicated (OWI), first offense. He asserts the trial court erred in a number of its evidentiary rulings. Polking also contends he was denied a fair trial by prejudicial prosecutorial misconduct and ineffective assistance of counsel. We affirm.

At approximately 11:20 p.m. on May 18, 1986, Polking was stopped in Carroll, Iowa by Officer Dan Schaffer. Schaffer had observed Polking erratically negotiating a number of turns. Polking had made a few very wide, sweeping turns, causing his car on at least one occasion to swing over the center line of the road. He also made at least one very sharp turn, despite swinging his car out very wide initially. After stopping Polking, Schaffer radioed for assistance and Officer Dale Buck proceeded to the scene. The officers testified Polking's complexion was pale, his eyes were watery, and his balance was uncertain. He staggered, was disoriented, and there was a strong odor of alcohol on his breath. Schaffer administered two field sobriety tests, both of which Polking was unable to perform. Polking declined to do any other field sobriety tests. Polking was then placed under arrest. Thereafter, he was convicted of operating a motor vehicle while intoxicated, first offense, and this appeal followed.

**I. Evidentiary Rulings.** We first address the evidentiary rulings challenged by Polking. He asserts his doctor-patient privilege was violated by the testimony of the State's medical expert, Dr. Carroll. Polking also contends the trial court erred by allegedly allowing Dr. Carroll and Officer Schaffer to testify regarding legal standards and questions of law. Polking's final evidentiary challenge is the trial court erred by allowing Officer Buck to characterize his movements

as those of an intoxicated person, thereby allegedly invading the province of the jury.

At trial, Dr. Carroll testified regarding the affect of alcohol upon the human body at various levels of alcohol concentration in the blood. He also gave his opinion as to the approximate blood alcohol level an individual would have who exhibited the outward appearances related by the State in its hypothetical question. The information in the hypothetical question corresponded to previous testimony describing Polking's appearance. Dr. Carroll opined those outward appearances would correspond to a blood alcohol level between one hundred and three hundred milligrams of alcohol per one hundred milliliters of blood. He concluded, in response to another hypothetical question, this level of intoxication would not be consistent with an individual who had consumed only six beers in six hours. Polking testified he consumed only six beers the entire evening.

Polking contends on appeal the testimony of Dr. Carroll violated his doctor-patient privilege. Dr. Carroll had once attended Polking in the hospital when Dr. Jensen, Polking's doctor and Dr. Carroll's colleague, was out of town. Polking discussed with Dr. Carroll the facts of this case and the possibility of receiving alcohol abuse counseling at the hospital.

Three elements must be established for the doctor-patient privilege to be applicable: (1) the relationship of doctor-patient; (2) the acquisition during this relationship of the information or knowledge being disclosed; and (3) the necessity of the information to enable the physician to treat the patient skillfully. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981); State v. More, 382 N.W.2d 718, 720 (Iowa App. 1985). We do not address the first and third elements for we are not persuaded the information imparted by Dr. Carroll at trial was ob-

tained in the course of his professional relationship with Polking. At no point in his testimony did Dr. Carroll mention his discussion with Polking regarding alcohol abuse counseling. In fact, Dr. Carroll never even referred to Polking. Dr. Carroll's testimony was confined to a discussion of the affect of alcohol upon the human body and his expert opinion regarding the approximate blood alcohol level of an individual exhibiting certain hypothetical appearances. Also, he testified whether that blood alcohol level was consistent with the consumption of six beers in six hours. We conclude this testimony did not disclose privileged doctor-patient relationship.

Polking also contends Dr. Carroll was erroneously allowed to testify that one hundred milligrams of alcohol per one hundred milliliters of blood was the legal definition of "under the influence." Polking did not, however, preserve this alleged error by objection at trial, so we do not address it. State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978).

Polking's next evidentiary challenge is to the testimony of Officer Schaffer regarding whether it was the policy of the Carroll County Attorney's office to prosecute an individual for OWI where he did not have a blood alcohol level in excess of one hundred. Polking contends Schaffer's answer constituted a declaration on a question of law. We disagree. Schaffer was merely asked a question of fact about the county attorney's policy to clarify the distinction between charging and prosecuting someone for OWI. This distinction was drawn to explain Schaffer's statement to Polking at the scene that he was charged with OWI regardless of whether he submitted to a breath-intoxilyzer test. Schaffer's answer did not impliedly render an opinion as to Polking's guilt or innocence because the county attorney decided to prosecute.

Polking's final evidentiary challenge is to the testimony of Officer Buck, who characterized Polking's movements that evening as those of an intoxicated person. Polking contends this characterization invaded the province of the jury.

However, the receipt of opinion evidence rests largely in the discretion of the trial court and its ruling will not be disturbed absent manifest abuse of that discretion. Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977). The trial court noted that "enough foundation has been laid in the record to justify the giving of opinion with respect to intoxication or sobriety based on his observations, training and experience." The court concluded the characterization of Polking's movements was permissible where the witness was qualified to render such an opinion. We find the trial court did not abuse its discretion by allowing this testimony.

**II. Prosecutorial Misconduct.** Polking asserts the prosecutor committed prejudicial misconduct on several occasions by attempting to inquire into prior instances when Polking was allegedly intoxicated. On each occasion Polking's trial counsel objected to the question and his objection was sustained. Polking contends the repeated inquiries into this forbidden area constituted reversible error, even though the objections were sustained.

Our review is governed by the following:

> A showing of prosecutorial misconduct alone will not warrant a new trial. Defendant must show he was so prejudiced by the misconduct he was denied a fair trial. In addition, trial court has broad discretion to determine whether defendant has suffered such prejudice. On review we reverse only when the trial court has abused its discretion. Moreover, we note trial court is in the better position to determine if prejudice resulted from the prosecutor's conduct because that court observed the alleged misconduct and the jury's reaction.

State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986) (citations omitted). Moreover, the mere asking of questions is ordinarily not prejudicial. State v. Gilroy, 313 N.W.2d 513, 519 (Iowa 1981).

Our review of the record persuades us Polking has not shown he was so prejudiced by the unsuccessful attempts of the prosecutor to inquire into his past drinking that he was denied a fair trial. All of Polking's objections were sustained and, on at least one occasion, the jury was admonished to disregard an answer relating to the witness's prior knowledge of Polking's sobriety. Generally, an improper statement is not unduly prejudicial when the trial court admonishes the jury to disregard it. State v. Williams, 315 N.W.2d 45, 55-56 (Iowa 1982). Lack of prejudice is also shown by the fact Polking himself testified on direct examination about his past intoxication. We conclude the trial court did not abuse its discretion by denying Polking's motion for a new trial due to prosecutorial misconduct.

III. **Ineffective Assistance of Counsel.** Polking asserts his trial counsel was ineffective in several instances by his acts or omissions regarding the examination of certain witnesses and the seating of one juror.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for a postconviction proceeding so the facts may be fully developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney an opportunity to explain his conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

Polking's complaints against his trial counsel deal primarily with matters of trial strategy and professional judgment. Trial counsel has not had the opportunity to explain the judgment and strategy behind his decisions challenged here. We conclude there is an inadequate record for us to adjudicate Polking's claims without counsel's explanation for his conduct.

We affirm his conviction. Defendant's ineffective assistance of counsel claim is preserved for later proceedings.

**AFFIRMED.**