IN THE COURT OF APPEALS OF IOWA

No. 0-382 / 89-1412

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CLERK SUPREME COURT

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**STATE OF IOWA,**

Appellee,

vs.

**GERALD DEAN JOHNSON,**

Appellant.

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Appeal from the Iowa District Court for Dallas County, Harry Perkins, Judge.

Defendant appeals his conviction and sentence, following a jury trial, for driving while his license was suspended. **REVERSED.**

Linda Del Gallo, Acting State Appellate Defender, and Ahmet S. Gonlubol, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie A. Halligan, Assistant Attorney General, and Constance Welu, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

**OXBERGER, C.J.**

Late one Saturday night, a Perry police officer observed a car which was usually driven by a person named Ed Barker. Because the officer had seen Barker earlier in the evening and believed him to have been intoxicated at that time, the officer followed the car. When the car parked, the officer also parked across the street. From that vantage point the officer saw Barker emerge from the passenger side of the vehicle. Another man emerged from the driver's side of the car; the officer testified that he identified this man as the defendant, Gerald Johnson.

After concluding that Johnson was the driver of the car, the officer received an unrelated emergency call and departed. He later ran a computer check on Johnson and discovered that Johnson's driver's license was suspended.

Johnson was then arrested for driving while his license was suspended, a violation of Iowa Code section 321J.21. He denied having been the driver of the car in question; he asserted that the officer had mistakenly identified the driver due to poor visibility and an inadequate opportunity to view the driver's face.

A jury found Johnson guilty of driving while his license was suspended. The court later sentenced him to incarceration for 365 days. Johnson has appealed from his conviction and sentence.

At trial, Johnson testified he had not been the driver of the Barker car, that he had not been in the Barker car at all, and he had been elsewhere on the night in question. He did not testify on direct examination concerning intoxication. Upon cross-examination, the prosecutor asked Johnson the following questions:

> Q. About how often do you use intoxicating beverages? A. Not very often. I go in every night to shoot -- I go in there to shoot pool and visit friends. I don't go in there very often unless I see somebody I do know. I visit with them. But I usually -- Saturday night when I come in town I usually spend the night with my -- see my cousin so I can see my cousin so I can see my daughter in the mornings on Sunday.
>
> Q. So you don't generally see your daughter -- you come to Perry on Saturday night and then see your daughter in the morning? A. Yes, I do.
>
> Q. And when you're in Perry on Saturday night you're usually in a bar, aren't you? A. No. Absolutely not. I do go to a bar but -- I ain't going to deny that I don't go to the bar, no. I mean, it's not an every Saturday night affair is what I mean.
>
> Q. Is it your testimony that you do not use intoxicating beverages with any frequency? A. No.
>
> Q. How often do you drink?
>
> MR. BYERS: Objection, your Honor. I don't see the relevance of his drinking habits to this charge.
>
> THE COURT: Would you give me some idea where you're going with this evidence.
>
> MRS. WELU: Yes, your Honor. The defendant I believe is a frequent user of intoxicating beverages, and it would go to his credibility, his memory and his recall as to that evening. And this evidence is relevant to the jury so they can determine whether or not they should believe his testimony over that of Officer Moffett's.
>
> THE COURT: that objection is overruled. You may inquire on that area then for that limited purpose.

MRS. WELU: Thank you, Your Honor.

Q. (By Mrs. Welu) Have you ever been intoxicated? A. Yes I have.
Q. How often do you become intoxicated? A. Not that often. It's been quite a while.
Q. When is the last time you were intoxicated? A. I'd say maybe four months ago.
Q. And would you become intoxicated more than two or three times a month would you say? A. No.
Q. More than once a month? A. Maybe.

MRS. WELU: I have no further questions, your Honor.

THE COURT: Mr. Byers.

MR. BYERS: Nothing further, Your Honor.

Johnson contends the district court erred by allowing the prosecutor to cross-examine him about his drinking habits. He contends these questions and answers were irrelevant, and their probative value was outweighed by the danger of unfair prejudice.

Iowa Rule of Evidence 404 provides as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

In the case at bar the defendant did not introduce any evidence concerning his sobriety. His sole defense was he was not driving the vehicle. Consequently, the State cannot claim the evidence concerning defendant's trait for insobriety was offered in rebuttal.

The State claimed at trial that the evidence was offered to show:

> The defendant I believe is a frequent user of intoxicating beverages, and it would go to his credibility, his memory, and his recall as to that evening. And this evidence is relevant to the jury so they can determine whether or not they should believe his testimony over that of Officer Moffet's.

The State did not seek to show the defendant's memory was impaired on this occasion to such an extent he could not remember whether he was driving the vehicle.

The State did not seek to show that on the night in question the defendant was too intoxicated to know whether he was driving a vehicle. The State claimed they were attempting to show that because he drank on other occasions his ability to recall and remember were impaired. However, after the objection was overruled, the State did not pursue this line of questioning. We find the sole purpose of the question of defendant's prior use of intoxicating beverages was as the State asserted: "And this evidence is relevant to the jury so they can determine whether or not they should believe his testimony over that of Officer Moffet."

In State v. Nebinger, 412 N.W. 2d 180, 186 (Iowa App. 1987) we said: "The purpose of the rule [404] is to exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question."

Clearly the evidence of defendant's use of intoxicating beverages on occasions prior to the night he is charged is

offered to show he is a bad person and thus is likely to have committed the crime in question.

The State offered only one witness, officer Moffet, to establish its case against the defendant. Therefore the sole question for the jurors to resolve was whether they believed the defendant or officer Moffet. The State's effort to present the defendant as a bad guy because he was a habitual user of intoxicating beverages was very influential in determining the defendant's guilt.

We find the admission of defendant's past drinking habits to be prejudicial error. We reverse and remand for a new trial without such evidence.

**REVERSED.**