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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

266

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
ROBERT EDWIN GESLING,	)	8-484 87-1670
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Washington County (No. CR 2048), Max H. Ruschmeyer, Judge.

Defendant appeals his conviction, following a jury trial, for driving while intoxicated, second offense. **REVERSED AND REMANDED.**

Jay T. Schweitzer & Wink, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coates, Assistant Attorney General; Gerald N. Partridge, County Attorney; and Barbara Edmondson, Assistant County Attorney, for plaintiff-appellee

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J. 267

Defendant Robert Edwin Gesling was convicted of driving while intoxicated in violation of Iowa Code section 321J.2 (1987), second offense. He contends the trial court erred: (1) by refusing to admit his hospital records, and (2) permitting the State to question him and one of his witnesses about their prior convictions for operating a motor vehicle while intoxicated.

Defendant lost control of the pickup truck he was driving and drove into a ditch where the truck overturned. Defendant was taken from the scene of the accident by ambulance to a hospital. After an initial examination, a blood sample was requested. Defendant signed an implied consent form. A sample was then taken.

The case was tried to a jury. At trial defendant contended he suffered an epileptic seizure which caused him to lose control of his vehicle. Defendant testified he has blacked out on two other occasions and is now taking medication to prevent further seizures.

I.

Defendant sought to admit his hospital records to support his contention the accident was the result of an epileptic seizure. The records were not admitted. The director of medical records from the admitting hospital was called to lay a foundation for admission of the records.

Iowa Rule of Evidence 803(6) states:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, as person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian, or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in his paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (Emphasis supplied).

We look at whether there was any proper basis for the trial court's ruling. See State v. McCowen, 297 N.W.2d 226, 227 (Iowa 1980); State v. Nawlin, 244 N.W.2d 596, 600 (Iowa 1976). The State noted defendant established the registered nurses at the hospital prepare these particular records, the records are made contemporaneously to the time of admission, the records are kept in the course of a regularly conducted business activity, and it is the regular practice of the hospital to make these records. There was insufficient foundation the clinic records were made by, or from information transmitted by, a person with knowledge of the events recorded. The director of medical records was never asked any questions pertaining to whether

the record entries were made by health care practitioners who had dealt with defendant and would have had sufficient knowledge to transmit information about him.

The foundation elements which must be proved prior to admission of the evidence under the business records exception are as follows:

> (1) That it is a business record;
> (2) That it was made at or near the time of an act;
> (3) That it was made by, or from information transmitted by, a person with knowledge;
> (4) That it was kept in the course of a regularly conducted business activity;
> (5) That it was the regular practice of that business activity to make such a business record.

Beachel v. Long, 420 N.W.2d 482, 484 (Iowa App. 1988).

There was no evidence the information was transferred by a person with knowledge and the requisite foundation was not established. Beachel, 420 N.W.2d at 484-85.

II.

Defendant next claims the district court erred in allowing the State to impeach defendant and one of his witnesses regarding their prior operating a motor vehicle while intoxicated convictions. Defendant objected to the cross-examination.

Iowa Rule of Evidence 609(a) states:

> **Impeachment by evidence of conviction of crime.**
> (a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime involving dishonesty or false statement shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime

> constituted a felony, aggravated misdemeanor, or other crime punishable by imprisonment in excess of one year pursuant to the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect. (emphasis supplied).

While recognizing the evidence is not admissible under this rule, the State contends the defendant opened the door to impeachment regarding his first operating while intoxicated conviction, because the defendant testified on direct examination as follows:

> Q. Bob, you have already been convicted of a crime for this incident; haven't you? A. Yes.
>
> Q. What crime is that? A. Operating a motor vehicle while intoxicated.
>
> Q. No. This crime. You have been convicted of a crime for this; haven't you already? A. Yeah. Failure to have my vehicle under control.

This testimony does not relate to the offense the State used to impeach defendant. We find the trial court erred in allowing the impeachment. Impeachment using an operating while intoxicated conviction is not appropriate as the offense does not involve an element of dishonesty as required in Iowa Rule of Evidence 609(a). See also State v. Zaehringer, 325 N.W.2d 754, 756 (Iowa 1982) (traffic violation is not a crime of dishonesty and should not be allowed for impeachment purposes).

One of defendant's witnesses who testified defendant was sober prior to the accident had been convicted of operating a motor vehicle while intoxicated. The trial

court allowed the State to impeach his testimony with that offense. The State contends the witness's statements were based on his own experiences with alcohol and therefore the door was again opened regarding his conviction. We disagree. The witness's opinion was based on what he observed of defendant the day of the accident. The witness's testimony did not open the door to question him about his conviction.

We reverse and remand for a new trial.

REVERSED AND REMANDED.