IN THE COURT OF APPEALS OF IOWA

No. 1-379 / 90-1178

FILED
OCT 29 1991
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

MONTE DEAN NEUBAUER,

Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Ralph F. McCartney, Judge.

Neubauer appeals from his conviction, following a jury trial, for homicide by vehicle. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha Boesen, Assistant Attorney General, Paul L. Martin, County Attorney, and Steven D. Tynan, Assistant County Attorney, for appellee.

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

OXBERGER, C.J.

A car driven by Monte Neubauer crashed into a bridge abutment. Neubauer's passenger, Jody Detra, was killed in the crash.

Neubauer was charged with homicide by vehicle, a violation of Iowa Code section 707.6A. He was charged with both of the alternative statutory means of committing that offense, intoxication and recklessness. A jury found him guilty of the crime charged. In response to a special interrogatory, the jury found he was guilty under either the intoxication alternative or the recklessness alternative. Neubauer has appealed from his conviction for homicide by vehicle.

Neubauer contends the district court erred and denied him due process by refusing to let him reopen the record for surrebuttal testimony. The State presented rebuttal testimony from the two brothers of the victim, Jody Detra. The brothers testified that at the hospital on the night of the accident, Neubauer's mother had approached them and stated that she had begged Neubauer not to leave home because both he and Jody Detra were too drunk to drive.

After this testimony, Neubauer sought to present his parents as surrebuttal witnesses to deny that the mother had made any such comment about his intoxication. He contends the district court, by refusing to let him do this, denied his due process right to present evidence and

his sixth amendment right to compulsory process and confrontation of witnesses.

The State responds, among other things, that the evidentiary ruling caused Neubauer no prejudice for several reasons: (1) Neubauer's mother had already testified, in cross-examination by the State prior to the Detra brothers' testimony, that she made no comment at the hospital about Neubauer's intoxication, (2) the court had read a stipulation to the jury that Neubauer's father would testify to the same effect if called, and (3) the proposed surrebuttal evidence was relevant only to the intoxication alternative of the crime charged; because Neubauer was found guilty under the recklessness alternative as well as the intoxication alternative, his conviction could stand regardless of any evidence regarding intoxication.

REFUSAL TO REOPEN THE CASE: Neubauer asserts the trial court's decision not to reopen the case violated his constitutional right to present evidence and his sixth amendment right to confrontation and compulsory process. We disagree. The determination to reopen the record is within the discretion of the court. State v. Moreland, 201 N.W.2d 713, 714 (Iowa 1972); State v. Mason, 203 N.W.2d 292, 296 (Iowa 1972). A denial of a reopening is harmless where the evidence is repetitive and would merely emphasize evidence already before the jury. 23A C.J.S. Criminal Law § 1223, at 103 (1989)(additional evidence properly disallowed where cumulative).

The trial court noted Neubauer's mother had already testified regarding whether she did or did not make statements to anyone else at the hospital that both were too drunk to drive. The trial court determined any further testimony by her on surrebuttal would be duplication, and cumulative of what she had already said. We agree. We find nothing in the record which indicates any more evidence would have been added by her testimony, other than the reassertion of her denial having made the statements. The trial court reopened the evidence and read a stipulation to the jury which provided:

> One, that if called upon to testify, Marvin Neubauer, the father of the Defendant, would testify that he was present at St. Joseph Mercy Hospital emergency room on the night of November 19, 1989, when conversations were alleged to have taken place between Ramona Neubauer and Mark Detra and Troy Monahan.
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> Two, that Marvin Neubauer would further testify that he was present with his wife Ramona Neubauer at all times while the two of them were at St. Joseph Mercy Hospital emergency room on November 19, 1989.
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> Three, that Marvin Neubauer would further testify that he did not hear Ramona Neubauer say to Mark Detra or Troy Monahan that she thought that Monte Dean Neubauer was drunk or under the influence of alcohol when Monte Dean Neubauer left his parents' home earlier that evening, as alleged by Mark Detra and Troy Monahan, the brother and stepbrother of Jody Detra, respectively.

We find this stipulation adequately provided for the defendant's father's testimony.

In addition, Neubauer was found guilty of committing the crime under the recklessness alternative as well as the intoxication alternative. Were the court to have reopened

the case, allowing the testimony about the intoxication, Neubauer would still be guilty of homicide by vehicle under the recklessness alternative. State v. Taylor, 452 N.W.2d 605, 607 (Iowa 1990). We find no merit to Neubauer's argument otherwise. We affirm the trial court.

AFFIRMED.