

IN THE COURT OF APPEALS OF IOWA

No. 3-058 / 92-58

FILED

MAR 30 1993

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

DAVID D. LENNIE,

Appellant.

Appeal from the Iowa District Court for Wapello County,
E. Richard Meadows, Jr., Judge.

The defendant appeals from a judgment and sentence of the district court finding him guilty of operating a motor vehicle while intoxicated in violation of Iowa Code section 321J.2 (1991). **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.**

Linda Del Gallo. State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, William H. Appel, County Attorney, and Max Ruschmeyer, Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant David D. Lennie appeals his conviction for operating a motor vehicle while intoxicated in violation of Iowa Code section 321J.2 (1991). He contends the trial court erred (1) in overruling his two challenges for cause to jurors, (2) in refusing to instruct the jury his confession had to be corroborated, and (3) in not dismissing because there was not evidence corroborating his confession. We affirm in part, reverse in part and remand for a new trial.

The Ottumwa Police Department was notified a van had crashed into a telephone pole. When the officers arrived at the scene of the accident, they found defendant talking on a pay telephone less than a block from the accident scene. There was evidence defendant was under the influence of intoxicating beverages at the time, and subsequent tests confirmed that fact.

The first question is whether the trial court erred in not striking two jurors for cause. Defendant used two of his allotted peremptory strikes to remove these two jurors from the panel and the record he made reflects this prevented him from removing two other jurors from the panel with his peremptory strikes. He then moved for a mistrial that was not granted.

We review this issue for correction of errors at law. Iowa R. App. P. 4. The district court is vested with broad, but not unlimited, discretion in ruling on a

challenge for cause. See State v. Woodyard, 414 N.W.2d 654, 657 (Iowa App. 1987); State v. Hatter, 381 N.W.2d 370, 371 (Iowa App. 1985).

The voir dire was reported. Defendant sought to strike for cause juror Riedel. Riedel had been employed with the Ottumwa Police Department for nearly twenty-five years. He had retired two years earlier.

Riedel was asked by defendant's attorney:

Q. And would your position of having previously been on the police force have any effect on your being fair and impartial in this case? A. Of all the cases I have had on a O.W.I. I probably would be sided.

Q. In other words-- A. In other words, I wouldn't be impartial. Wouldn't be partial -- impartial.

Q. You would be partial to the state? A. Yeah, probably of all of the cases over the years.

Defendant then moved to strike Riedel contending he would be partial to the State. The trial court then interrogated Riedel.

THE COURT: Mr. Riedel, have you formed or expressed such an opinion or an opinion as to the guilt or innocence of Mr. Lennie? A. No, Your Honor, I haven't.

THE COURT: And do you think that you could sit and listen to the evidence as it comes in through the witness stand and judge that evidence objectively? A. I think--yes, I think I could.

THE COURT: And based upon that evidence and based upon the instructions that the Court will provide you, do you think that you could apply that evidence to those instructions in a fair and impartial manner? A. To be honest with you, I don't think I could. (Emphasis supplied).

THE COURT: When you say that you couldn't do that, what is it that--why not? A. Well, of all of the cases that I have had, that I have been involved in and see how the trials come out, I always found myself real discouraged with the Court because of how they come out after being

there, being with the person and the panel of the case. And of course, the reasons for the Court dismissing the charges was probably legitimate. I always felt deep down inside they were wrong and I think that kind of sticks with you as a police officer.

* * *

THE COURT: . . . I'm going to instruct you as to what the law is. Do you think you could follow the instructions? A. Yes.

* * *

THE COURT: Mr. Riedel have you formed or expressed an opinion as to the guilt or innocence of Mr. Lennie. A. I have not.

* * *

A. For O.W.I. charges I have always been, you know, felt my experience in handling those cases and being in with the cases that I felt that I probably would be always against the person who was intoxicated. But the way the Judge put it, I stick by what I said to the judge.

The State first contends the challenge was not specific enough to alert the trial court to the basis for the strike. While the objection was not artfully crafted, there is little question in our minds from reading the record that defendant's attorney's concern was the witness would be partial to the State. All of his proffered questions pointed in that direction and defendant's attorney objected on that basis. Apparently the objection was equally as obvious to the trial court because the trial court asked defendant if he were challenging the juror on the basis he would be partial to the State, and defendant's attorney responded in the affirmative. The trial court was alerted to defendant's challenge.

The State, while admitting Riedel initially expressed partiality for the State, argues this initial expression of partiality was negated by Riedel's answering the trial court's question that he had not formed an opinion and would wait until he heard all of the evidence before rendering an opinion.

Riedel clearly indicated he had notions about innocence and guilt in OMVI's and he, as a police officer, had been frustrated when charges did not result in convictions. Riedel's initial reaction was he could not be impartial. Only after questioning by the court did Riedel temper his opinion.

Trial courts should use the utmost caution in overruling challenges for cause in criminal cases when there appears to be a fair question as to their soundness. State v. Beckwith, 242 Iowa 228, 238, 46 N.W.2d 20, 26 (1951); Woodyard, 414 N.W.2d at 657.

A prospective juror is usually not an even match for the attorneys in an examination of this sort, and too often the pulling and hauling which ensues results in an expression from the confused prospective juror that he or she had an opinion which would affect his or her verdict, and a counter-expression that it would not. It is from the whole examination that the final conclusion must be reached; the sum of the answers made must be evaluated and the real state of mind of the juror determined. Beckwith, 242 Iowa at 237, 46 N.W.2d at 25.

We find the trial court abused its discretion in not excusing Riedel for cause after defendant's attorney elicited from him facts establishing his partiality. Examining the voir dire of Riedel in its entirety, we find a fair question existed as to the soundness of allowing Riedel to serve on defendant's jury in light of his testimony that he would tend to side with the State. See State v. Williams, 285 N.W.2d 248, 267 (Iowa 1979) cert. denied, 446 U.S. 921, 100 S. Ct. 1859, 64 L. Ed. 2d 277 (1980).

A second prospective juror that defendant challenged asserted her personal conviction that people should not drink and drive would "win out" over an instruction it was only illegal to drive while intoxicated. She said her personal conviction would probably win out even though she could not be absolutely sure of the outcome until the time came to make the final decision. In Beckwith, 242 Iowa at 238-39, 46 N.W.2d at 26, the court said, "Although a ruling may be technically right, if it must be so doubtful to raise a fair question as to his correctness, it is far better to give the accused the benefit of the doubt, to the end that he (or she) and all other men (and women) may be satisfied that his (or her) rights have not been invaded." Confidence in the fairness and impartiality of each member of a jury is of the greatest importance to the welfare of the state. Beckwith, 242 Iowa at 239, 46 N.W.2d at 25. This juror too should have been excused for cause.

Defendant's next challenge is the trial court abused its discretion in not giving the following instruction:

There is testimony that the Defendant admitted to having operated the motor vehicle. If you find that such an admission was made, you are instructed that it will not, in and of, itself; warrant, conviction. There must be other proof that the defendant operated the motor vehicle.

Iowa Rule of Criminal Procedure 20(4) provides the confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense. Corroboration need not be strong, but it must confirm some material fact connecting the defendant with the crime. State v. White, 319 N.W.2d 213, 214 (Iowa 1982); State v. Origer, 418 N.W.2d 368, 370-71 (Iowa App. 1987).

The focal issue was whether defendant was driving the van. When questioned, defendant admitted he was driving the van. The instruction should have been given.

The State advances that even if the requested instruction should have been given, any error from the trial court's failure to give the instruction was harmless. Because we have ordered a new trial on other grounds, we need not determine if defendant was prejudiced by the failure to give the instruction.

We disagree with defendant's last contention there was not evidence to corroborate his confession in the record. Defendant was found near the van and had been drinking; the person who called in the accident report said the driver of

the van had gone to the area where defendant was found making a telephone call; defendant had some injuries that were consistent with having been in the crash; and at defendant's request he was taken to the hospital by ambulance. We affirm the trial court on this issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.