IN THE COURT OF APPEALS OF IOWA

000483

No. 7-277 / 96-0691

STATE OF IOWA,

Appellee,

vs.

BARRY RANDALL NEIBERGER,

Appellant.

FILED
SEP 24 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Sac County, Gary L. McMinimee, Judge.

Barry Neiberger appeals the judgment and sentence entered upon his convictions of operating while intoxicated and providing false information in violation of Iowa Code sections 321J.21 and 718.6 (1995). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Pamela K. Dettman, County Attorney, for appellee.

Considered by Sackett, P J., and Huitink and Streit, JJ.

PER CURIAM.

Defendant-appellant Barry Randall Neiberger was found near a car that had been driven in the ditch. Defendant told officers his wife had been driving the car. He was charged and convicted of operating while intoxicated and providing false information in violation of Iowa Code sections 321J.21 and 718.6 (1995). He appeals contending the trial court abused its discretion in allowing evidence he had been driving without a license and his license had been revoked. We affirm.

Defendant testified in his own defense. He stated his memory of the evening of the accident was not complete, but he was certain he was not driving. On cross-examination he was asked if he had been driving and he might not have remembered. He answered he gets paranoid when he is drinking and he does not drive because he is paranoid. The State asked why he gets paranoid and, over defendant's objection, the trial court ruled defendant opened the door and allowed evidence that defendant was driving without a license, he was revoked from driving, and he had ended up getting in more trouble.

Defendant contends the trial court abused its discretion in allowing the evidence of prior crimes he had committed. We review for an abuse of discretion. *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994); *State v. Teeters*, 487 N.W.2d 346, 349 (Iowa 1992); *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). The State contends error was not preserved.

Defendant made a motion in limine and the parties agreed not to mention defendant had been "revoked for an OWI offense or for an OWI arrest." The evidence was objected to both as irrelevant and as the subject addressed in the motion in limine. The trial court was adequately advised and had an opportunity to rule on the issue raised on appeal. Error was preserved.

The trial court justified admission of the evidence on the ground that the door was opened by defendant's answer. The State does not justify the admission of evidence on this ground. The door was not opened by answers elicited by the prosecutor on cross-examination. *State v. Jones*, 471 N.W.2d 833, 835 (Iowa 1991). For all of that to happen would allow the introduction of otherwise inadmissible evidence when an opponent has opened the door. *Id.*

Iowa Rule of Evidence 404 provides that evidence of bad character or other bad acts can be admitted only in carefully circumscribed situations. The rule provides in pertinent part:

> a. Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose that he acted in conformity therewith on a particular occasion, except:
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> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
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> . . . .
>
> b. Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The questions the trial court must answer before admitting evidence of other crimes is whether the evidence is relevant and does not create unfair prejudice. *See Liggins*, 524 N.W.2d at 188; *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). The trial court did not make this analysis.

The State contends the evidence was relevant because defendant's memory problems were part of his defense. We fail to see that the questioned testimony was relevant to this issue. Defendant contends the evidence was prejudicial; the State contends it was not.

There is overwhelming evidence of defendant's guilt. We find any error in questioning by the prosecutor would not have changed the result. We affirm.

AFFIRMED.