IN THE COURT OF APPEALS OF IOWA

No. 1-258 / 90-1128

FILED
AUG 27 1991
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

GILBERT NORLIN,

Appellant.

604

Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

Norlin appeals from his conviction, following a jury trial, for operating while intoxicated, third offense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Brian K. Sissel, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and James P. Ward, Assistant County Attorney, for appellee.

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

OXBERGER, C.J.

Gilbert Norlin was arrested for operating while intoxicated. He declined chemical testing, but police officers reported their visual observations showed much evidence of intoxication. Norlin claimed he drank only nonalcoholic beer before his arrest, and he explained the odor of alcohol on his person by claiming nonalcoholic beer has an odor similar to alcohol. He also claimed his appearance of intoxication, and his poor performance on field sobriety tests, could be explained by a variety of ailments, physical impairments, or other factors. For instance, he contended his sibilant speech was caused by his dentures, his balance trouble resulted from gout in his legs, and that his excessively slow driving occurred because he was looking for a friend who was on foot.

A jury found Norlin guilty of operating while intoxicated, third offense. Norlin has appealed from the resulting conviction.

Norlin contends the district court abused its discretion by allowing the jury to take into the jury room an exhibit that had allegedly been altered since its introduction into evidence. The exhibit was an empty can formerly containing nonalcoholic beer. Norlin had introduced this can into evidence shortly after it had been emptied; his purpose apparently was to demonstrate the odor of nonalcoholic beer. He argues by the time the can was

taken into the jury room, it had been empty so long that any odor would have dissipated.

Norlin also contends three of the district court's instructions unduly emphasized evidence favorable to the State. He complains about the following instructions:

No. 14:

> The defendant was asked to give a breath sample so it could be analyzed to determine the percent of alcohol in his blood. The defendant refused.
>
> A person is not required to give a sample of any bodily substance; however, you may consider a refusal in reaching your verdict.

No. 15:

> The State does not need to prove how the defendant was driving. However, you may consider his manner of driving in deciding if he was under the influence of alcohol.

No. 16:

> You are instructed that in many, if not most cases such as this, there is no eyewitness who testifies on behalf of the State that he saw the defendant drink any alcoholic beverages prior to the time in question. While such evidence would be admissible, if available, it is not necessary that the State introduce such evidence, if there is other evidence of defendant's condition which you deem sufficient to convince you beyond a reasonable doubt that the defendant was under the influence at the time of the alleged offense.
>
> The testimony as to the quantity of such beverage consumed, if any, is one of the items of evidence which you may consider, placing upon the same such weight as you think it entitled.

Norlin argues these instructions gave undue emphasis to his refusal of a breath test, to his driving performance, and

to the fact the State did not need to introduce eyewitness testimony about his alcohol consumption.

When considering the proper submission of exhibits to the jury, we review for an abuse of discretion. State v. Blyth, 226 N.W.2d 250,272 (Iowa 1975). The district court has considerable discretion in determining whether to send exhibits to the jury. U.S. v. Robinson, 774 F.2d. 261 (8th Cir. 1985). As a general rule, submission of exhibits to the jury is a matter resting in the trial court's sound discretion. State v. Shea, 218 N.W.2d 610, 615 (1974). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

We first consider whether the trial court erred by allowing the jury to take into the jury room the empty can of nonalcoholic beer. Upon reviewing the record, this court finds no basis to assert the trial court's conduct in allowing this exhibit to be sent to the jury was clearly untenable or unreasonable. The exhibit had been admitted into evidence during the trial. The exhibit in question was a can of nonalcoholic beer that had been opened and emptied on the first day of a two-day trial.

The can was not presented to the jury for close

examination until counsel's closing argument, approximately thirty hours later. Norlin argues the exhibit was altered due to the time which had passed between the publication to the jury and the next day when it was again allowed to go to the jury room. He asserts the lapse of time caused a diminished odor of the product. Because the can had already been open for thirty hours when it was first presented to the jury, this court finds no reason to believe the odor of the exhibit would have significantly changed by the next day. At any rate, we find nothing in the record to establish that any alteration in the exhibit took place. We find no abuse of discretion.

Norlin next argues the trial court erred in submitting three jury instructions which unduly emphasize critical evidence favorable to the State. We disagree.

Our courts have long held it is error to favor one party over another by slanted or superfluous instructions. The trial court has a duty to ensure the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983). Thus, the court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Id. The trial court also has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d at 234.

Nevertheless, the supreme court has consistently and frequently held that "[e]ven correct statements of law, if repeated to the point of undue emphasis, may constitute reversible error." Clinton Land Co., 340 N.W.2d at 234 (citing Eickelberg v. Deere & Co., 276 N.W.2d 442, 447 (Iowa 1979)); accord Andrews v. Struble, 178 N.W.2d 391, 400 (Iowa 1970).

This "undue emphasis" rule is traceable to a concern that the instructions fairly and fully give the jury the general rule of law which they must apply in the case. See Kelly v. Rock Island & P. Ry., 138 Iowa 273, 277-78, 114 N.W. 536, 538 (1908); see also Vance v. Grohe, 223 Iowa 1109, 1118, 274 N.W. 902, 906 (1938). The supreme court in Kelly stated:

> The office of an instruction is to state the rule of law applicable and pertinent to the matter to be determined, and not to marshal the evidence, or by special mention to give undue prominence to any particular phase or feature of the fact-case made by either party to the controversy. Nor can the court be expected to give express or special warning against every possible mistake or misapprehension into which the jury may fall in the discharge of its functions. Something must be left to the intelligent apprehension and application by the jurors themselves of the general rules stated in the court's instructions.

138 Iowa at 277-78, 114 N.W. at 538.

Upon review of the trial court's instructions, we find no undue emphasis which would constitute reversible error. We affirm the trial court's instructions.

AFFIRMED.