IN THE COURT OF APPEALS OF IOWA

No. 0-710 / 99-1774
Filed February 7, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LYNN ANTHONY ROLING,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Defendant appeals following his conviction for operating while intoxicated and failure to yield. He contends the court erred in: (1) submitting to the jury the question of actual intoxication; (2) allowing the State to introduce his medical records; (3) forcing him to assert the patient-doctor privilege in open court; (4) refusing to allow him to offer a can of brake fluid into evidence; (5) allowing unqualified expert testimony; and (6) denying certain rebuttal testimony. He also asserts prosecutorial misconduct requires a reversal. **AFFIRMED.**

Joseph J. Bitter of the Bitter Law Offices, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Fred H. McCaw, County Attorney, and Michael Whalen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan, J., and Honsell, S.**

**Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

SACKET, C.J.

Defendant-Appellant, Lynn Anthony Roling, appeals from his conviction for operating while intoxicated and failure to yield in violation of Iowa Code sections 321J.2(1)(a)(b) and 321.298. Defendant contends the district court erred in: (1) submitting to the jury the question of actual intoxication; (2) allowing the State to introduce his medical records; (3) forcing him to assert the patient-doctor privilege in open court; (4) refusing to allow him to offer a can of brake fluid into evidence; (5) allowing unqualified expert testimony; (6) denying certain rebuttal testimony. Defendant also asserts prosecutorial misconduct warrants reversal. We affirm.

Defendant was charged following a three-vehicle accident where the pickup he was driving crossed the centerline sideswiping a passenger car and forcing it off the road. Defendant next collided nearly head-on with a limousine.

A trooper at the scene noted defendant smelled of an alcoholic beverage, was stumbling around, had poor balance and his eyes were bloodshot and watery. Defendant was not asked to perform field sobriety tests because of concerns for parties injured in the accident.

A deputy sheriff who first had contact with defendant in the emergency room asked defendant if he had been drinking. Defendant said he had six to eight beers before the accident. The deputy smelled a strong odor of an alcoholic beverage coming from defendant's person. The deputy commenced the implied consent procedures under Iowa Code section 321J.6. Defendant consented to having a blood specimen tested. The laboratory analysis of defendant's blood specimen drawn on the night of the accident indicated a .141 level per grams per deciliter.

A jury found the defendant guilty of operating while intoxicated and failure to yield one-half of the roadway. Defendant was tried under alternative theories of operating a vehicle while under the influence of alcohol or operating a vehicle while having a blood alcohol count exceeding .10. Defendant correctly asserts that if the evidence is insufficient to support one alternative it will result in reversal even if the other alternative is clearly established. *See State v. Hagnefe*, 557 N.W.2d 871, 876 (Iowa 1996). Defendant contends the trial court should not have submitted to the jury the question of his actual intoxication. However, his challenge has no basis as there is substantial evidence to support both theories.

We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4; *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999). We uphold a finding of guilt if "substantial evidence" supports the verdict. *Pace*, 602 N.W.2d at 768. "Substantial evidence" is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt. *Id.* We review the facts in the light most favorable to the State. *Id.* Furthermore, we consider not only evidence that supports the verdict, but all reasonable inferences that could be derived from the evidence. *Id.*

The offense of operating while intoxicated consists of two essential elements: (1) the operation of a motor vehicle (2) while under the influence of alcohol. Iowa Code § 321J.2. Defendant contends the evidence presented by the State was insufficient to prove intoxication. Defendant contends the State failed to offer expert witness testimony on the issue of intoxication.

The operation of a motor vehicle by a defendant charged with operating while intoxicated may be established by circumstantial evidence as well as direct

evidence. *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996). Circumstantial and direct evidence are equally probative. Iowa R. App. P. 14(f)(16).

The State introduced substantial evidence to support a finding defendant was intoxicated. First, the defendant was driving on the wrong side of the road. *See State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992) (holding the defendant's manner of driving is relevant evidence to be considered in determining whether he or she was under the influence of alcohol). Second, there was testimony defendant had bloodshot and watery eyes and smelled of an alcoholic beverage. *See State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981) (holding the smell of alcohol and bloodshot, watery eyes evidence (combined with proof of driving) sufficient to support a finding of probable cause in a drunk driving context). Third, defendant was stumbling and exhibiting poor balance. Fourth, defendant admitted to consuming six to eight beers the evening of the accident.

A jury is not required to accept or give effect to testimony which it finds to be unreliable, although it may be uncontradicted. *Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978). In addition, "[w]e continue to adhere to the rule that juries are free to accept part of a witness's testimony and reject other portions thereof." *State v. Vargason*, 462 N.W.2d 718, 720 (Iowa App.1990).

Considering the record in the light most favorable to the State, there is substantial evidence from which a jury can conclude the defendant was driving under the influence at the time of the accident. The trial court did not err in submitting to the jury the charge of operating a vehicle while under the influence of alcohol.

At trial the State argued defendant's medical records were admissible to impeach his testimony that he only had six or eight beers during the evening hours before the accident. The district court in admitting the medical records said they were admitted not to prove the defendant's blood alcohol was at a certain level, but rather because the medical records contained evidence differing from the defendant's testimony as to his sobriety.

Iowa Code section 622.10 provides in relevant part:

> A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any *confidential communication* properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

Iowa Code § 622.10 (1997) (emphasis added). Essentially section 622.10 prohibits attorneys, doctors, nurses, or clerks from disclosing, in testimony, any confidential communications obtained because of that person's employment and entrusted to the physician in his or her professional capacity. *State v. Henneberry*, 558 N.W.2d 708, 709 (Iowa 1997); *State v. Deases*, 518 N.W.2d 784, 787 (Iowa 1984).

We review the district court's interpretation of section 622.10 for errors of law. *Chung v. Legacy Corp.*, 548 N.W.2d 147, 149 (Iowa 1996); *Deases*, 518 N.W.2d at 787. The statute has been interpreted liberally to accomplish its goal of fostering candid communications between doctor and patient. *Chung*, 548 N.W.2d at 149; *see also State v. Tornquist*, 254 Iowa 1135, 1154, 120 N.W.2d

483, 494 (1963); *Newman v. Blom*, 249 Iowa 836, 844, 89 N.W.2d 349, 355 (1958).

Three elements must be established in order for the physician/patient privilege to be applicable: (1) the relationship of doctor-patient; (2) the acquisition of the information or knowledge during this relationship; and (3) the necessity of the information to enable the physician to treat the patient skillfully. *Henneberry*, 558 N.W.2d at 709. The defendant established these elements.

The State on appeal, recognizing that in *Chung* the court held the mere denial of an element of the State's case does not place the defendant's medical condition in issue, now argues the evidence is admissible because the defendant opened the door to the evidence. The State argues this happened when defendant testified he was seeking medical help for sleep apnea,[1] and he was unaware of the condition before the accident. The State cites no authority to support its position, but rather argues the privilege should be waived whenever a defendant puts his medical condition in issue as a defense to a charged crime.

The medical privilege is not designed to facilitate the fact-finding process; rather it exists to promote an interest in protecting certain communications from disclosure that may otherwise be admissible. *See Chung*, 548 N.W.2d at 148 (citing 7 James A. Adams & Kasey W. Kincaid, Iowa Practice: Evidence § 501.1, at 186 (1988)). Section 622.10 is intended to promote uninhibited and full communication between a patient and his doctor so the doctor will obtain the information necessary to competently diagnose and treat the patient. *Deases*, 518 N.W.2d at 787; *State v. Bedel*, 193 N.W.2d 121, 124 (Iowa 1971).

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[1] The cessation of breathing during sleep. Patients with central sleep apnea may exhibit excessive daytime sleepiness. Taber's Cyclopedic Medical Dictionary 1774 (18th ed. 1997).

Section 622.10 does provide, " . . . [t]he prohibition does not apply . . . in a *civil action* in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim . . ." (emphasis added). Yet there is an absence of any similar language concerning a criminal trial. We therefore agree with the defendant that the district court erred in allowing the admission of his medical records.

The State also argues that even if the records were improperly admitted the defendant was not prejudiced because the observations of the people at the accident scene coupled with the admissible blood test results of .141 establish defendant's guilt. If the State believes this evidence so clearly supports a finding of guilt, it is difficult to discern why the prosecutor sought to introduce medical records when the issue of whether they were admissible was questionable. That said, we must agree with the State's argument that no prejudice has been show by the admission of the records. The defendant does not claim in his brief that the records disproved his claim of suffering from sleep apnea. He only claims prejudice from the fact the blood test in the hospital records shows a blood alcohol content of 1.5 when the admissible blood test showed it to be .141, which is well above the 1.0. Defendant has failed to show he was prejudiced by the admission of the record.

The defendant next contends the district court erred in not allowing him to admit a can of brake fluid similar to fluid spilled on the defendant at the time of the accident and further in denying him the right to make an offer of proof. Defendant advances the can of brake fluid was relevant and probative evidence. His contention is that those testifying they smelled alcohol on his person may instead have smelled brake fluid.

The State contends the trial court acted within its discretion when it chose not to admit the brake fluid or even allow the defense counsel to make an offer of proof. The State argues offering the can into evidence (1) would have been more prejudicial than probative; (2) the odor coming directly from the can may not have simulated the conditions at the time of the accident; (3) the amount of brake fluid that spilled on the defendant is not known nor is how its dispersal upon the defendant affected the smell of the fluid.

We agree with the defendant the district court should have allowed defendant to make an offer of proof. A district court's refusal to allow counsel to make an offer of proof is disapproved. *See State v. Harrington*, 349 N.W.2d 758, 760 (Iowa 1984) (*rev'd on other grounds, Harrington v. State of Iowa*. 109 F.3d 1275 (8th Cir. 1997)). The purpose of an offer of proof is to give the trial court a more adequate basis for its evidentiary ruling and to make a meaningful record for appellate review since a reviewing court cannot predicate error upon speculation as to answers which would have been given to questions had objections thereto not been sustained. *State v. Ritchison*, 223 N.W.2d 207, 212-13 (Iowa 1974). It is recognized that endless or frivolous proffers can be disruptive and can interrupt the orderly process of a trial. *See Harrington*, 349 N.W.2d at 760. However, a proffer should never be absolutely prohibited. *Id.* Because the purposes of an offer of proof are so important it is held they are necessary to preserve error. *See State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982). A trial court's refusal to permit the making of an offer of proof is usually error. *State v. Lange*; 531 N.W.2d 108, 114 (Iowa 1995); *see also State v. Cook*, 330 N.W.2d 306, 313 (Iowa 1983); *Parrish v. Denato*, 262 N.W.2d 281, 286 (Iowa 1978). However, if on review we find we are able to determine what the

contents of the offer of proof would have been we can treat the record then made as the missing offer of proof. *Harrington,* 349 N.W.2d at 760.

The record is sufficient for us to understand the offer of proof. We therefore proceed to determine whether the district court abused its discretion in refusing its admission.

On evidentiary issues we review for an abuse of discretion. *State v. Aricivia*, 495 N.W.2d 364, 367 (Iowa App.1992). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The test for admission of such evidence is two-fold: (1) the evidence must be relevant, and (2) if the evidence is relevant the trial court must determine whether the probative value of the exhibits outweighs the prejudice which would be caused by their admission into evidence. *State v. Oliver*, 341 N.W.2d 25, 33 (Iowa 1983).

The evidence did not show the amount of brake fluid on defendant's person nor that it would have simulated the condition the night of the accident. We cannot say the district court abused its discretion in not admitting the evidence.

Defendant next contends the trial court improperly allowed expert testimony from unqualified witnesses. Issues involving the admission of expert testimony are generally within the trial court's discretion. *State v. Rains*, 574 N.W.2d 904, 916 (Iowa 1998). We review for errors of law and the trial court's decision will not be overturned unless there has been an abuse of discretion. *See State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). This is a difficult

standard to meet. *Id.* Iowa Rule of Evidence 702 sets the standard for admission of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa courts have a liberal tradition in the admission of opinion evidence under this rule. *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 886 (Iowa 1994); *State v. Barrett*, 445 N.W.2d 749, 751 (Iowa 1989). "The trend of our cases . . . has been toward broadening the scope of admissibility of expert testimony." *State v. Klindt*, 389 N.W.2d 670, 674 (Iowa 1986).

The trial court did not abuse its discretion in allowing the testimony of the witnesses who testified to the training, experience and education and qualified them as experts in their fields. Defendant's contentions regarding the admissibility of their testimony is without merit.

We have considered the other issues raised by defendant and find them without merit. The conviction of the defendant is affirmed.

AFFIRMED.